HIV/AIDS and human rights

Promoting human rights through the ILO Code of Practice on HIV/AIDS and the world of work

by

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**Preface**

The ILO’s Programme on HIV/AIDS (ILO/AIDS) was created following a Resolution adopted by the International Labour Conference in June 2000, requesting the Director-General to increase the capacity and competence of the ILO to address HIV/AIDS and its impact in the world of work. The Resolution noted that HIV/AIDS represents a real threat to ILO’s primary objective and in particular its legitimate concern to protect the rights of working men and women affected by the epidemic. It also recognized that the ILO’s core mandate, tripartite structure and decent work agenda give it the right, the responsibility and the means to respond effectively to the epidemic.

The ILO estimates that over 25 million workers worldwide are infected with HIV, and millions more are affected by the epidemic, including the tragic situation of children orphaned by AIDS. Prevention of the further spread of the epidemic is essential, as are measures to mitigate its impact, including the provision of care and support. Neither prevention nor care, however, is effective in settings where the rights of workers and individuals are not respected. More specifically, there is need for an ethical and human rights-based legal and policy framework to combat problems relating to discrimination in the workplace. For this reason, and because the promotion of rights is fundamental to its mandate, the ILO takes a rights-based approach to HIV/AIDS. This means applying human rights principles in the development of responses to the epidemic and respecting the rights of those infected and affected by HIV/AIDS.

This paper by Marie-Claude Chartier, a staff member of ILO/AIDS, explains the important connections between human rights and the HIV/AIDS epidemic, and examines relevant international instruments in the context of HIV/AIDS prevention, treatment, care and support in the workplace. It then takes a detailed look at the *ILO Code of Practice on HIV/AIDS and the world of work*, and at the human rights it promotes. The paper is particularly useful in that it covers a range of instruments and their application to the specific needs and circumstances of the world of work. It thus helps to provide a sound legal and policy framework for workplace action against HIV/AIDS.

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Introduction

On 21 May 2001 a Tripartite Meeting of Experts on HIV/AIDS and the World of Work, bringing together government, employer and worker specialists from all regions of the world, adopted the ILO Code of Practice on HIV/AIDS and the world of work. This Code was drawn up in direct response to the need, expressed by the tripartite ILO constituents, for advice concerning action to be undertaken in the world of work with a view to reducing the impact of HIV/AIDS on individuals, enterprises and communities.

HIV/AIDS affects the most productive segment of the labour force, reduces earnings, and causes declining productivity in many countries through increasing labour costs and the loss of skills and experience. In addition, the epidemic threatens fundamental rights at work and strikes hardest at vulnerable groups including women and children, thereby increasing existing gender inequalities and exacerbating the problem of child labour. The ILO is directly concerned by the issue, which is a threat to decent work in the full sense of the term. ¹ In 1988, the ILO and the WHO adopted a joint Statement from the Consultation on AIDS and the workplace (1988) which underlined the necessity of protecting human rights and dignity in the fight against the pandemic. International labour Conventions and Recommendations, as well as the ILO Declaration on Fundamental Principles and Rights at Work, create a legal and ethical framework for the protection of workers affected by the AIDS virus. However, none of these instruments is a specific response to the epidemic so ILO constituents requested, at the International Labour Conference in June 2000, that the Organization should intensify its involvement in the struggle against AIDS. They adopted a resolution which recommended the creation of an ILO programme on HIV/AIDS and the development of international guidelines to deal with HIV/AIDS and the world of work: the Programme was established in November 2000 and the Code formally adopted by the ILO Governing Body in June 2001. The implementation of the Code forms the basis of all the Programme activities - namely advocacy, advisory services and technical cooperation - and is part of the ongoing response of the international community. It was launched at the United Nations General Assembly Special Session dedicated to HIV/AIDS in June 2001.

Ever since the outbreak of the epidemic, the United Nations, the specialized agencies, and NGOs have strongly advocated respect for human rights as the cornerstone of the struggle against HIV/AIDS. This arose from a desire to put an end to the widespread stigmatization and rejection of infected persons and from the understanding that effective prevention can only take place in a context where these rights are respected. The purpose of the present document is to present a brief analysis of the important role which can be played by the ILO Code of Practice on HIV/AIDS and the world of work in the protection of fundamental rights. The first part of the text deals with the application of rights in the context of HIV/AIDS, and the second part presents the contents of the Code and a brief analysis of the specific rights which it seeks to promote.

1. HIV/AIDS and human rights

This section deals with the importance of fundamental rights in the response to HIV/AIDS. We shall see that States are obliged to promote and protect these rights, and that this obligation can only be curtailed in very narrowly defined circumstances. It concludes by analyzing certain international instruments which deal explicitly with issues related to HIV/AIDS. Particular attention will be paid to the International Guidelines on HIV/AIDS and Human Rights which aim to translate international human rights norms into concrete measures applicable in the HIV/AIDS context.

1.1 The relevance of human rights

Several fundamental rights are threatened in the context of HIV/AIDS, including the right to non-discrimination, the right to privacy, the right to appropriate protection in social security and the right to work. The protection of fundamental rights must constitute an integral part of the fight against HIV/AIDS if the epidemic is to be overcome. This is explained by the existence of undeniable links between human rights and the HIV/AIDS problem. These links have been clearly established in a report presented by the Secretary-General to the Human Rights Commission in 1995:

In the first instance, failure to protect human rights increases the risk of transmission of the disease. Prevention of transmission is a complex and delicate process of education and behaviour change regarding intimate and sometimes illicit behaviour. Prevention of transmission depends on people coming forward to learn how to avoid infection, how to practise safe sex, and how and why they should act responsibly. Coercive measures, such as mandatory screening, lack of confidentiality and segregation, drive people away from prevention education and health-care services and subvert this process of behavioural change.

Secondly, individuals and groups in society who are disadvantaged and/or do not enjoy the full exercise of their rights are particularly vulnerable to infection as they have limited or no access to HIV/AIDS-related education, prevention and health-care programmes. Such groups include women, children, minorities, migrants, indigenous peoples, men having sex with men, commercial sex workers and injecting drug users. These groups may have neither the information they need nor the ability to act on it so as to avoid infection. Infection among such groups rapidly diffuses to society at large.

Finally, discrimination against and stigmatization of persons already affected by HIV/AIDS (those infected, suspected of infection and their families and associates) greatly magnifies the tragic impact the disease has on their lives. Such discrimination is widespread. It not only violates the rights of those

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Protection of human rights in the HIV/AIDS context is therefore essential, not only on account of the very nature of the rights themselves, which exist to preserve the human dignity of infected persons, but also because the protection of those rights is a necessary part of the fight against the epidemic.

1.2 States’ obligation to respect and protect human rights

Whatever their political, economic or cultural system, States are under the obligation to promote and protect all universally recognized fundamental rights and individual freedoms, in accordance with international human rights instruments. Prominent among these instruments adopted by the UN are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of the Child. Furthermore, the Declaration of Commitment on HIV/AIDS, adopted on 26 June 2001 by the General Assembly of the United Nations, constitutes a worldwide commitment to a redoubling of national, regional and international efforts in the fight against the epidemic on all fronts, especially in the field of human rights. In particular, the Declaration commits States to enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV/AIDS and members of vulnerable groups, and to ensure that they can exercise their fundamental rights to the full. Much stress is also laid on the implementation of national strategies which “promote the advancement of women and women’s full enjoyment of all human rights”.

Several ILO Conventions and Recommendations can also be invoked, with respect to ratifying countries, in the fight against human rights violations in the HIV/AIDS context. Although there are no Conventions or Recommendations dealing specifically with HIV/AIDS, there are several which deal with protection against employment and occupational discrimination, with social protection, with the prevention of accidents at work and with the adaptation of the work environment for workers affected by ill-health.

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4 Even though it is not a treaty, the Declaration is binding on all members of the United Nations as customary law. In addition, the mentioned Conventions have been widely ratified.

5 Articles 13, 37 and 58

6 See especially Sections 59-61

7 The following Conventions are of particular relevance: Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Occupational Safety and Health Convention, 1981 (No. 155); Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No 159); Occupational Health Services Convention, 1985 (No. 161). For further information on international conventions and how they can be used in the HIV/AIDS context, see: Hodges-Aeberhard, J.: "Policy and legal issues relating to HIV/AIDS and the world of work" (ILO, Geneva, 1999).
It must also be emphasized that the ILO Declaration on Fundamental Principles and Rights at Work states that in deciding freely to join the ILO all member States thereby endorse the principles and fundamental rights enshrined in the ILO Constitution and the Philadelphia Declaration, even if they have not ratified the fundamental Conventions regarding these rights.

1.3 Possible restrictions on human rights

The Universal Declaration of Human Rights allows States to impose restrictions on certain rights, but only in clearly defined circumstances. These circumstances would be defined as a legitimate concern such as public health, the rights of others, public morality, or public order and general welfare in a democratic society, and the restrictions must be kept to a minimum.  

Public health is the most frequently cited reason when States and individuals impose restrictions on human rights in the HIV/AIDS context. However, these restrictions are often not justifiable under international human rights law. This applies, for example, when compulsory HIV screening is conducted at the workplace and infected persons are unable to obtain or are excluded from employment. Compulsory screening does not help in the fight against AIDS. On the contrary, it is perfectly possible for people who are HIV-positive to remain in good health for several years despite their infection. Furthermore, in the overwhelming majority of professions, their presence at work does not place other people at risk of infection. Employers and fellow workers need have no fear of infection from passing, routine contact with people who are HIV-positive. Shaking someone’s hand, coughing, sneezing, using a public phone, opening a door, sharing food or cutlery, drinking from water fountains, using toilets or showers – none of these can lead to the transmission of the virus. In contrast, compulsory HIV screening creates a climate of fear and hostility in the population and contributes to the propagation of the epidemic. In these circumstances people who are HIV positive, fearing loss of their job or stigmatization, are more likely to hide their condition and to transmit the virus to others. It is preferable to approach the reduction of the impact of the epidemic through prevention measures such as education programs, and the promotion of voluntary and confidential HIV testing, accompanied by prior and subsequent counseling. The international guidelines on HIV/AIDS and human rights stipulate the following in this respect:

8 The exercise of certain rights cannot be limited under any circumstances. These include the right to life, the right not to be subjected to torture, the right not to be held in slavery or servitude, protection against imprisonment of debtors, the right not to be subjected to retrospective penal legislation, the right to the recognition of juridical personality, the right to freedom of thought, conscience and religion. For further details see the International Guidelines on HIV/AIDS and human rights: , paragraph 82 (see note 2 above).

9 Ibid. paragraph 83

10 In about 50% of cases, there is a period of 10 years between infection and the appearance of the first opportunistic infections which characterize AIDS. UNAIDS: AIDS and HIV infection, information for United Nations employees and their families (Geneva, 1999), p. 29.

11 Exceptions include professions where there is a risk of contact with blood or other human organic liquids, such as health and laboratory workers. The risk is low but real. In these professions extra measures must be taken to ensure that workers are properly familiar of the universal precautions and of procedures to be followed in case of workplace accidents, so that universal precautions are always taken and the necessary equipment is available for that purpose. For further information on the universal precautions, see Appendix 2 of the ILO Code of Practice.
The right to privacy is known to have been restricted through mandatory testing and the publication of HIV status and the right to liberty of the person is violated when HIV is used to justify deprivation of liberty or segregation. Although such measures may be effective in the case of diseases which are contagious by casual contact and susceptible to cure, they are ineffective with regard to HIV/AIDS since HIV is not casually transmitted. In addition, such coercive measures are not the least restrictive measures possible and are often imposed discriminatorily against already vulnerable groups. Finally, and as stated above, these coercive measures drive people away from prevention and care programmes, thereby limiting the effectiveness of public health outreach.\textsuperscript{12}

1.4 Other international instruments

The Human Rights Commission and the Sub-Commission on the Promotion and Protection of Human Rights are the main United Nations agencies responsible for overseeing the application of fundamental rights in the HIV/AIDS context.

In the early 1990s, the Sub-Commission appointed one of its experts as Special Rapporteur to study the question of discrimination against infected persons and persons living with HIV/AIDS. The Rapporteur presented a series of reports between 1990 and 1993\textsuperscript{13} which emphasized the need for education programmes, accompanied by appropriate legal protection, so as to create a favourable climate for the respect of human rights. The Sub-Commission has also, since 1989, adopted several resolutions on the subject of discrimination against persons living with HIV/AIDS.\textsuperscript{14}

For its part, the Human Rights Commission has also adopted numerous resolutions confirming the prohibition, under international law of human rights, of discrimination based on real or supposed HIV status, and restating that provisions concerning discrimination in international instruments on human rights must be interpreted as including discrimination based on a person’s state of health such as their HIV/AIDS status.\textsuperscript{15} These resolutions invite States to undertake the necessary measures to do away with this type of discrimination, to guarantee full exercise on the part of HIV/AIDS sufferers of all civil, political, economic, social and cultural rights; to guarantee access to medication; and to involve community organizations, NGOs and HIV/AIDS sufferers themselves in policy-making for the struggle against AIDS.

On 3 March 1995 the Commission on Human Rights adopted Resolution 1995/44, requesting the High Commissioner and UNAIDS\textsuperscript{16} to draw up guidelines on

\textsuperscript{12} International Guidelines on HIV/AIDS and Human Rights, op. cit. note 2, paragraph 83.
\textsuperscript{16} This task was entrusted to the Centre for Human Rights, in cooperation with the joint and co-sponsored United Nations programme on HIV/AIDS, non-governmental agencies and other actors in the field. The guidelines had been considered for the first time at the first International Consultation on AIDS and Human Rights, organized
promoting and protecting respect for human rights in the context of HIV/AIDS. The International Guidelines on HIV/AIDS and Human Rights were subsequently adopted in September 1996. These Guidelines define with greater precision the mechanisms of application of human rights in the HIV/AIDS context and provide examples of concrete measures for the attention of States and other social actors. If they are to be effectively applied, it is essential that they should be widely disseminated at national and local level, and that they should become the subject of dialogue with a wide range of people affected by the issues. In this connection, the tripartite nature of the ILO offers a very useful vehicle for reaching the population as a whole, since it provides a channel to employers and workers through local actors directly involved in the defence of their interests. The ILO has in any case committed itself to the promotion of the Guidelines and its Code of Practice on HIV/AIDS and the world of work is without any doubt an ideal tool for achieving this aim.


19 The guidelines are drawn up principally with States in mind, but also for other users: intergovernmental bodies, NGOs, networks of people living with HIV/AIDS, community organizations, groups involved in the ethical, legal and human rights issues arising in the HIV/AIDS context, AIDS sufferers’ support groups and anti-AIDS action groups.

20 See the Report submitted by the ILO to the Commission on Human Rights at its 57th Session on the steps taken by the ILO to promote the application of the International Guidelines on HIV/AIDS and Human Rights. Agenda item 14 (d) : Specific groups and individuals: the protection of human rights in the context of HIV/AIDS, Geneva, 11 April 2001.
2. The ILO Code of Practice on HIV/AIDS and the world of work

The ILO Code of Practice on HIV/AIDS and the world of work is an extremely important document because it is the first international instrument on HIV/AIDS specifically related to the world of work. One of its underlying principles is the recognition of HIV/AIDS as a workplace issue. This is because workers account for three quarters of adults living with HIV, and also because of the role which falls to the partners in the world of work in the global effort to counteract the spread of the epidemic and its effects. Below we will show how the Code can promote human rights in the workplace in accordance with the International Guidelines on HIV/AIDS and Human Rights. To this end, we will first deal with the Code’s aims, field of application and structure, and then conclude with a brief analysis of the human rights it seeks to promote.

2.1 Aims, scope and structure of the Code

The Code provides guidelines for policy development at national, sector and enterprise levels and for the creation of workplace programmes. It covers prevention of HIV/AIDS; mitigation of its impact; care and support of workers infected and affected by the virus; and elimination of stigma and discrimination on the basis of real or perceived HIV status. The Code applies to all employers and workers (including applicants for work) in the public and private sectors; and all aspects of work, formal and informal. Adherence to the principles contained in the Code is voluntary and, unlike International labour Conventions, does not carry legal obligations. It is therefore a flexible instrument which can be adapted to suit the characteristics of a particular country or workplace, including the needs of both high prevalence countries, where care and treatment are increasingly important issues, and countries where the main need is for prevention.

Unlike most other international instruments, which only address States, the Code also sets out the responsibilities of the social partners, and an entire chapter is devoted to guidance for governments, employers and workers and their organizations with respect to their rights and responsibilities. The Code is itself the outcome of a social dialogue process, reflecting a consensus based on tripartite consultations and discussions.

The Code is based on ten fundamental principles:

- Non-discrimination
- Recognition of HIV/AIDS as a workplace issue
- Gender equality
- Healthy work environment
- Social dialogue

21 Section 4.1
22 Section 1
23 Section 3.1
24 Section 2
25 Chapter 5.
• Non-requirement of screening for purposes of exclusion from work or work processes
• Confidentiality
• Continuation of employment relationship
• Prevention
• Care and support

These principles are closely related to a number of human rights and the Code gives detailed advice on how to apply them concretely in the workplace. The next section analyses these rights and explains how the Code provides guidance for their application.

2.2 Human rights contained in the Code

2.2.1 The right to non-discrimination and equality before the law

It is widely recognized that all forms of discrimination based on HIV status are prohibited by international human rights law. As explained below, the Commission on Human Rights has confirmed that the prohibition of discrimination includes discrimination based on HIV status; numerous resolutions of the United Nations and other international bodies have ceaselessly insisted on the principle of non-discrimination in the HIV/AIDS context.

Non-discrimination is a basic principle of the Code and can be found in several of its provisions, such as that against discrimination in access to employment and the preservation of the continuation of the employment relationship; access to benefits from social security programmes and occupational schemes, as well as in working conditions such as remuneration, reasonable workplace conditions, and opportunities for transfer and promotion. The Code stipulates that:

In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.

Discrimination is used in this Code in accordance with the definition given in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), to include HIV:

26 Articles 2 and 7 of the Universal Declaration of Human Rights; Articles 2.2 and 3 of the International Covenant on Civil and Political Rights, Articles 2, 3 and 26 of the International Covenant on Economic, Social and Cultural Rights, Article 2 of the International Convention on the Rights of the Child.
27 Sections 4.8 and 8.1; see Section 2.2.3 of the present document on the right to work.
28 Sections 4.10, 9.5, 9.6 and 5.1 f). See also Section 2.2.5 of the present document on the right to social security.
29 Section 9.1
30 Section 4.2
31 The definition also includes sexual orientation. See Section 3.2 of the Code.
any distinction, exclusion or preference made on the basis of real or perceived HIV status, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.\textsuperscript{32}

The Code lists a series of actions which governments and social partners can undertake in order to remove stigmatization and discrimination based on HIV status. It recommends that governments, in consultation with the social partners and experts in the field of HIV/AIDS, should provide the relevant regulatory framework and, where necessary, revise labour laws and other legislation.\textsuperscript{33} For their part, workers and their representatives should consult with their employers on the implementation of an appropriate policy for their workplace, designed to prevent the spread of the infection and protect all workers from discrimination related to HIV/AIDS.\textsuperscript{34} Employers should not require HIV/AIDS screening or testing\textsuperscript{35} and should ensure that work is performed free of discrimination or stigmatization based on HIV status.\textsuperscript{36} They should also take disciplinary proceedings against any employee who practises such discrimination or who violates the workplace policy on HIV/AIDS.\textsuperscript{37} Workers’ representatives should bring cases of HIV-related discrimination at their workplaces to the attention of the appropriate legal authorities.\textsuperscript{38} The Code also deals with the involvement of the social partners in education programmes, especially those designed to prevent discrimination.\textsuperscript{39}

No treatment of the issue of discrimination in the HIV/AIDS context is complete without consideration of discrimination practised against women. Equality between men and women is a fundamental principle of the Code\textsuperscript{40} and gender issues are addressed in every chapter. \textit{De facto} and \textit{de jure} discrimination against women renders them particularly vulnerable to HIV/AIDS. The subordination of women within the family and in public life is one of the principal causes of the rapid spread of infection in many parts of the world. Innumerable women are in a situation of economic dependence and sexual subordination in their marriage or their relationships and are therefore not in a position to negotiate safer sexual relations.\textsuperscript{41} In this respect, the Code highlights the need to recognize that HIV/AIDS has different effects on men and women, and states that more equal gender relations and the empowerment of women are vital to successfully prevent the spread of HIV infection and enable women

\textsuperscript{32} Convention n° 111 does not prohibit explicitly discrimination based on real or perceived HIV status but article 1 (1)(b) of the Convention permits ratifying States to add, after consulting representative workers’ and employers’ organizations, additional grounds. The Committee of Experts on the Application of Conventions and Recommendations has recommended, and the ILO Governing Body has been discussing, an additional Protocol to Convention n° 111 to include, among other grounds “state of health” and “disability”, which in turn would cover HIV/AIDS.

\textsuperscript{33} Section 5.1 j). Furthermore the competent authorities should supply technical information and advice to employers and workers concerning the most effective way of complying with legislation and regulations applicable to HIV/AIDS and the world of work. They should strengthen enforcement structures and procedures, such as factory/labour inspectorates and labour courts and tribunals. Section 5.1 k)

\textsuperscript{34} Sections 5.2 a), 5.3, and 5.3 f)

\textsuperscript{35} For more details, see section 2.2.4 of the present document on the right to privacy.

\textsuperscript{36} Section 5.2 e)

\textsuperscript{37} Sections 5.2 f) and 5.2. g)

\textsuperscript{38} Section 5.3 g)

\textsuperscript{39} See section 2.2.8 of the present document on the right to education.

\textsuperscript{40} Section 4.3

\textsuperscript{41} For further information on the causes of vulnerability among men and women, see Appendix 1 of the Code on the sexual dimension of HIV/AIDS and Section 3.2 on the definitions of the terms sex and gender.
to cope with HIV/AIDS. The Code argues for an integration of gender relations in research, in education and training programmes, in counselling, in guidance provided before and after HIV voluntary tests are taken, and in employee assistance programmes.

Special attention is also paid in the Code to other groups who suffer discrimination and are therefore at greater risk of infection, including homosexual men and members of ethnic minorities. The Code includes an indicative list of factors that increase the risk of infection for certain groups of workers. It calls upon governments and the social partners to take measures to identify groups of workers who are vulnerable to infection, to identify factors which increase the risk of infection among them, and to adopt strategies to overcome the risk. Among other things, they should ensure that appropriate prevention and training programmes are in place for these workers.

2.2.2 The right to freedom of association and assembly

The right to freedom of association and assembly is protected by international law, especially by two fundamental and widely ratified ILO Conventions.

Although the Code contains no provisions relating specifically to freedom of association and assembly, it sets social dialogue as a fundamental principle, which is impossible without these two elements. On this subject, it mentions:

The successful implementation of an HIV/AIDS policy and programme requires cooperation and trust between employers, workers and their representatives and government, where appropriate, with the active involvement of workers infected and affected by HIV/AIDS.

The Code repeatedly emphasizes the importance of the involvement of the social partners in the planning of all activities concerning the protection of workers from HIV/AIDS, whether in the fields of prevention, education, training or care and support. It encourages negotiation of working conditions at the national, sectoral and regional levels.

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42 Section 4.3
43 Section 5.1 g)
44 Sections 6.2 c), 6.3 and 7.2
45 Section 9.2
46 Section 8.4
47 Section 9.8
48 For further details see Appendix 1 of the Code on factors increasing the risk of infection.
49 Sections 5.1 q) and 5.3.1
50 Sections 5.1 q), 7 and 7.2
51 Articles 20 and 23.4 of the Universal Declaration on Human Rights; Article 8 of the International Covenant on Economic, Social and Cultural Rights; Articles 21 and 22 of the International Covenant on Civil and Political Rights; Article 15 of the International Convention on the Rights of the Child.
52 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949. (No. 98).
53 Section 4.5
54 Section 5.1 b) and c)
55 See in particular Chapters 6 and 7 on workers’ education and the training of the stakeholders, and Chapter 9 on care and support.
workplace/enterprise levels, and urges governments to recognize the importance of the world of work in national HIV/AIDS programmes, for example by ensuring that the composition of national AIDS councils includes representatives of employers, workers, people living with HIV/AIDS and of ministries responsible for labour and social matters.

### 2.2.3 The right to work

The right to work is protected by international human rights law instruments. The International Guidelines on HIV/AIDS and Human Rights state that:

> The right to work entails the right of every person to access to employment without any precondition except the necessary occupational qualifications. This right is violated when an applicant or employee is required to undergo mandatory testing for HIV and is refused employment or dismissed or refused access to employee benefits on the grounds of a positive result. States should ensure that persons with HIV/AIDS are allowed to work as long as they can carry out the functions of the job.

And on this subject the Code establishes that:

> HIV infection is not a cause for termination of employment. As with many other conditions, persons with HIV-related illnesses should be able to work for as long as medically fit in available, appropriate work.

In order to enable workers living with HIV or suffering from an AIDS-related illness to keep their jobs, the Code calls upon employers to encourage persons with HIV and AIDS-related illnesses to work as long as they remain medically fit for appropriate work. They should also, in consultation with workers and their representatives, take measures to reasonably accommodate workers with AIDS-related illnesses. These could include: rearrangement of working time, special equipment, opportunities for rest breaks, time off for medical appointments, flexible sick leave, part-time work and return-to-work arrangements. Only where a worker with an AIDS-related condition is too ill to continue to work and where alternative working arrangements including extended sick leave have been exhausted, may the employment relationship cease, in which case this must occur in accordance with

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56 Section 5.2 a) and b), and Section 5.3 a) and b)
57 Section 5.1 a)
58 Article 23 of the Universal Declaration of Human Rights, Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, the Employment Policy Convention, 1964 (No. 122) and the Termination of Employment Convention, 1982 (No. 158), among others.
60 Section 4.8; see also Section 8.1
61 Section 5.2 e). Section 7.1 calls on management to be trained so that they can explain reasonable accommodations at the workplace.
62 Section 5.2 j). Section 7.3 also calls for workers’ representatives to be trained so that they can help and represent workers with AIDS-related illnesses to access reasonable accommodation when so requested.
63 Section 5.2 j)
64 Section 5.2 e)
anti-discrimination and labour laws and respect for general procedures and full benefits.65

2.2.4. **The right to privacy**

The right to privacy is widely recognized in human rights law.66 This right encompasses obligations to respect physical privacy, including the obligation to seek informed consent to HIV testing, and to respect confidentiality of all information relating to a person's HIV status.67

The Code contains an entire chapter on the HIV test68 and states, as a fundamental principle, that “HIV screening69 should not be required of job applicants or persons in employment”.70 The Code envisages three situations in which HIV testing in the workplace may occur: in the context of an epidemiological study, after occupational exposure, or at workers’ request and with their informed consent.72 The Code recommends voluntary HIV testing as the gateway to care and support.74 However, whatever the circumstances, the Code establishes specific rules to ensure that tests are performed by suitably qualified personnel with adherence to strict confidentiality and disclosure requirements. In this way, persons wishing to take a test will need have no fear that their HIV status will be revealed without their consent, exposing them to discrimination and stigmatization.75 The Code also states that HIV testing should not be required as a condition of eligibility for national social security schemes, general insurance policies, occupational schemes and health insurance.76

With respect to confidentiality of HIV/AIDS data, the Code states the following fundamental principle:

*There is no justification for asking job applicants or workers to disclose HIV-related personal information. Nor should co-workers be obliged to reveal such*  

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65 Ibid.
66 Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, and Article 16 of the International Convention on the Rights of the Child. The Occupational Health Services Recommendation, 1985 (No. 171) likewise recommends that provisions should be adopted to protect the privacy of the workers and to ensure that health surveillance is not used for discriminatory purposes or in any other manner prejudicial to their interests. The WHO/ILO Statement from the Consultation on AIDS and the workplace (Geneva, 27-29 June 1988), promotes the right of all workers to medical confidentiality with respect to all medical data, including HIV/AIDS-related information.
68 Chapter 8.
69 Screening is defined in Section 3.2 as ‘measures whether direct (HIV testing), indirect (assessment of risk-taking behaviour) or asking questions about tests already taken or about medication’.
70 Section 4.6. Section 5.2 c) states that employers should not require HIV/AIDS screening or testing, and Section 8.1 further states that any routine medical testing, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing.
71 Section 8.3
72 Section 8.5
73 Section 8.4
74 In this connection, it recommends that social partners should encourage support and access to confidential, voluntary counselling and testing. Sections 5.2 l) and 5.3 m)
75 For further details see the International Guidelines on HIV/AIDS and Human Rights, op.cit. note 2, paragraph 97.
76 Section 8.2
personal information about fellow workers. Access to personal data relating to a worker’s HIV status should be bound by the rules of confidentiality consistent with the ILO’s Code of Practice on the Protection of Workers’ Personal Data, 1997.77

HIV/AIDS-related information consists of information relating to counselling, care, treatment and receipt of benefits.78 Confidentiality rules are addressed to governments, private insurance companies, employers, and trustees and administrators of social security programmes and occupational schemes.79 The Code states that access to medical data should be allowed only in accordance with the Occupational Health Services Recommendation, 1985 (No. 171). The Code stipulates, more specifically, that employers must ensure that HIV/AIDS-related information is kept exclusively in medical files and that workers’ organizations should not have access to personnel data relating to a worker’s HIV status.80

### 2.2.5 The right to social security

The right to social protection is a fundamental human right recognized in various international instruments.81 Article 25 of the Universal Declaration on Human Rights states as follows:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

At its 89th (2001) Session, the International Labour Conference emphasized the importance of adequate social security systems to respond to the needs of persons affected by HIV/AIDS and their families.82 Persons living with HIV/AIDS are often forced to leave work, become isolated in their communities, and thus suffer a reduction in their income-earning capacity. In the absence of adequate systems of public support, especially in the least developed countries, the resultant costs of sickness can lead families into extreme poverty. Care and support for persons affected by HIV/AIDS are a fundamental principle of the Code. Apart from the workers’ health protection measures83, the Code recommends that governments, employers and workers’ organizations should take all steps necessary to ensure that workers with HIV/AIDS and their families are not excluded from the full protection and benefits of

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77 Section 4.7  
78 Section 9.7 a)  
79 Section 9.7  
80 Access to information, the undertaking of trade union responsibilities, rules of confidentiality and the requirement for the concerned person’s consent must be in accordance with ILO Occupational Health Services Recommendation, 1985 (No. 171) and strictly restricted to medical personnel. See Sections 5.2.g) and 5.3.j)  
81 Articles 22 and 25 of the Universal Declaration on Human Rights; Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights; Articles 26 and 27 of the International Convention on the Rights of the Child.  
83 See Sections 2.2.6 and 2.2.7 of this document.
social security programmes and occupational schemes. It also encourages governments to support, carry out and publish the findings of research, especially into the costs of the epidemic for workplaces and social security systems, and to mobilize funds locally and internationally to undertake that research. In designing and implementing social security programmes, governments should take into account the progressive and intermittent nature of the disease and tailor schemes accordingly, for example by making benefits available as and when needed and by the expeditious treatment of claims.

### 2.2.6 The right to share in scientific progress and its benefits

The right to share in scientific advancement and its benefits is recognized in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights. In the words of the International Guidelines on HIV/AIDS and Human Rights:

*The right to enjoy the benefits of scientific progress and its applications is important in the context of HIV/AIDS in view of the rapid and continuing advances regarding testing, treatment therapies and the development of a vaccine. More basic scientific advances which are relevant to HIV/AIDS concern the safety of the blood supply from HIV infection and the use of universal precautions, which prevent the transmission of HIV in various settings, including health care. ... In this connection, however, developing countries experience severe resource constraints which limit not only the availability of such scientific benefits but also the availability of basic pain prophylaxis and antibiotics for the treatment of HIV-related conditions. Furthermore, disadvantaged and/or marginalized groups within societies may have no or limited access to available HIV-related treatments or to participation in clinical and vaccine development trials. Of deep concern is the need to share equitably among States and among all groups within States basic drugs and treatment, as well as the more expensive and complicated treatment therapies, where possible.*

The Code refers to the universal precautions to be adopted in the presence of blood and body fluids and contains several provisions concerning their application. At workplaces where workers are in contact with blood and other organic liquids, employers must ensure that they have a good knowledge of the universal precautions and of the procedure to be followed in case of an incident or accident.

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84 Section 9.6. Governments should ensure that benefits under national laws and regulations apply to workers with HIV/AIDS no less favourably than to workers with other serious illnesses (Section 5.1 f).
85 Section 5.1 g) and h)
86 Section 5.1 f)
87 Article 27
88 Article 15
89 Paragraph 103.
90 See Appendix 2.
91 Section 5.1 h and i). Section 7.6 is devoted to training for workers who come into contact with human blood and other body fluids, and Section 8.5 to tests and treatment after occupational exposure.
In order to assist developing countries which possess only very limited resources, the Code recommends governments to encourage initiatives aimed at supporting international campaigns to reduce the cost of, and improve access to, antiretroviral drugs.92 Other provisions of the Code relating to access to treatment and medicines are analyzed in the next section.

2.2.7 The right to health

Closely linked to access to the benefits of scientific progress, the right to the highest attainable standard of physical and mental health is recognized by various international instruments.93 To ensure the full exercise of this right, States must take measures necessary for the prevention, treatment and control of epidemic diseases and for the creation of conditions which ensure access to health services and medical attention in the event of sickness.94

The International Guidelines on HIV/AIDS and Human Rights explain the content of this right in the HIV/AIDS context:

*States should ensure the provision of appropriate HIV-related information, education and support, including access to services for sexually transmitted diseases, to the means of prevention (such as condoms and clean injection equipment) and to voluntary and confidential testing with pre- and post-test counselling, in order to enable individuals to protect themselves and others from infection. ...States should also ensure access to adequate treatment and drugs, within the overall context of their public health policies.* 95

Care and support of persons affected and infected by HIV/AIDS form part of the fundamental principles of the Code. On this subject, it states the following:

*Solidarity, care and support should guide the response to HIV/AIDS in the world of work. All workers, including workers with HIV, are entitled to affordable health services. There should be no discrimination against them and their dependants in access to and receipt of benefits from statutory social security programmes and occupational schemes.* 96

As well as provisions concerning prevention, the promotion of voluntary and confidential testing and measures to be taken in case of exposure to the virus,97 the Code contains an entire chapter on care and support for persons living with and affected by HIV.98 As a complement to all possible efforts to ensure access to health services for infected workers, the Code encourages parity of treatment with other

92 Section 5.1 p)
94 Article 12.2 c) and d) of the International Covenant on Economic, Social and Cultural Rights.
95 Paragraph 121.
96 Section 4.10
97 These provisions are the subject of other sections of the present document.
98 Chapter 9.
serious illnesses, the provision of counselling and occupational health services, linkages with self-help and community-based groups, non-discrimination in the provision of benefits under national legislation, and the adaptation of existing benefit mechanisms to the needs of workers with HIV/AIDS. The Code also mentions the possibility that certain employers may be in a position to assist their workers with access to treatment and medication. Where health services exist at the workplace these should offer, in cooperation with government and other stakeholders, the broadest range of health services possible to prevent and manage HIV/AIDS and assist workers with HIV/AIDS. These services could include the provision of antiretroviral drugs, treatment for the relief of HIV-related symptoms, nutritional counselling and supplements, stress reduction and treatment for common opportunistic infections, like STIs and tuberculosis. The Code takes account of the fact that in many cases it is not possible to provide medical or counselling services at the workplace. It therefore calls for workers to be informed about services available outside the enterprise, and underlines the advantage which such services present by reaching beyond the workers to cover their families, in particular their children. The Code also stresses the importance of exploring possibilities to extend services to workers in informal activities.

2.2.8 The right to education

Every person is entitled to education. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.

The International Guidelines on HIV/AIDS and Human Rights state:

This right includes three broad components which apply in the context of HIV/AIDS. Firstly, both children and adults have the right to receive HIV-related education, particularly regarding prevention and care...

Secondly, States should ensure that both children and adults living with HIV/AIDS are not discriminatorily denied access to education... because of their HIV status...

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99 Section 9.1
100 Sections 9.2 and 9.3
101 Section 9.4
102 Section 9.5
103 Section 9.5
104 Sections 9.3 and 5.1 m)
105 Section 9.3
106 Section 9
107 Sections 5.1 l), 5.2 m) and 5.3 k)
109 Paragraph 10.
Thirdly, States should, through education, promote understanding, respect, tolerance and non-discrimination in relation to persons living with HIV/AIDS.

Prevention through the provision of information and education is a fundamental principle of the Code, which contains two entire chapters on the subject. Chapter 6 is concerned with workplace and community information and education programmes, and Chapter 7 with the training of the various groups involved in the world of work: managers, peer educators, workers’ representatives, health and safety officers, and labour inspectors. Finally, the Code contains specific provisions encouraging information and education programmes, occupational training and awareness-raising among children and young people.

The Code provides guidance on a variety of strategies for prevention, which should be appropriately targeted to national conditions and culturally sensitive. It states that prevention can be furthered through changes in behaviour, knowledge, treatment and the creation of a non-discriminatory environment. Measures proposed to encourage behaviour change include, especially:

- a) provision to workers of sensitive, accurate and up-to-date education about risk reduction strategies, and, where appropriate, male and female condoms should be made available.
- b) early and effective STI and tuberculosis diagnosis, treatment and management, as well as sterile needle and syringe-exchange programmes
- c) for women workers in financial need, strategies to supplement low incomes.

The Code encourages employers, in consultation with workers and their representatives, to initiate and support programmes at their workplaces to inform, educate and train workers. Workers’ organizations should support these efforts by developing educational materials and activities appropriate for workers and their families, including regularly updated information on workers’ rights and benefits.

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110 Section 4.9
111 See Section 2.2.9 of this document on the fundamental rights of children.
112 Section 4.9
113 Section 6.5
114 To this end, the Code suggests that employers should make condoms available, as well as counselling, care, support and referral services. Where size and cost considerations make this difficult, employers and/or their organizations should seek support from government and other relevant institutions. Section 5.2 h).
115 Sections 5.1 d), 5.2 c), and 5.3 e) and h).
116 Section 5.3 c). Appendix I of the Code contains basic facts about the transmission of HIV and the impact of the epidemic on the population as a whole and the labour force in particular.
2.2.9 The fundamental rights of children

The need to provide special protection to children\textsuperscript{117} is recognized by international human rights law\textsuperscript{118}. The fundamental ILO Conventions on the elimination of child labour protect children from exploitation in the world of work.\textsuperscript{119} In addition to enjoying rights specifically recognized in several international instruments, children also benefit from most of the same human rights as adults.

The Code contains several specific provisions which protect children in the context of HIV/AIDS and the world of work. It states that, in programmes to eliminate child labour, governments should ensure that attention is paid to the impact of the epidemic on children and young persons whose parent or parents are ill or have died as a result of HIV/AIDS.\textsuperscript{120} Furthermore, employers, workers and their representatives should encourage and promote information and education programmes on prevention and management of HIV/AIDS within the local community, especially in schools,\textsuperscript{121} and should, in collaboration with government and other relevant stakeholders, collaborate in the establishment of assistance programmes for workers and members of families.\textsuperscript{122} These programmes should be particularly sensitive to the needs of children who have lost one or both parents to AIDS, and who may then drop out of school, be forced to work, and become increasingly vulnerable to sexual exploitation.\textsuperscript{123} This can be achieved by providing vocational training and apprenticeships, as well as through direct or indirect financial assistance.\textsuperscript{124}

\textsuperscript{117} The word ‘child’ is defined in accordance with Article 1 of the International Convention on the Rights of the Child as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.

\textsuperscript{118} The Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights (especially Articles 23 and 24); the International Covenant on Economic, Social and Cultural Rights (especially Article 10), the statutes and instruments pertaining to specialized agencies and organizations concerned with child welfare. See on this subject the Preamble to the International Convention on the Rights of the Child.

\textsuperscript{119} The Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182). The 113 States which have ratified Convention No. 182 are under the obligation to take immediate measures to prohibit and eliminate the worst forms of child labour, whatever is their economic situation.

\textsuperscript{120} Section 5.1 n)

\textsuperscript{121} Section 6.6

\textsuperscript{122} Section 9.8

\textsuperscript{123} Section 9.8 b)

\textsuperscript{124} Section 9.8 c)
Conclusion

As we have seen throughout this document, respect for human rights is fundamental in preventing the spread of HIV/AIDS and in lessening its impact on those already affected or infected. It is the obligation of all States, whatever their political, cultural or economic systems, to promote and protect those rights which are universally recognized as fundamental rights and individual freedoms in the instruments of international human rights law. However, few of these instruments deal explicitly with HIV/AIDS. The International Guidelines on HIV/AIDS and Human Rights have translated international human rights norms into concrete and applicable measures to be taken by governments and other partners in the fields of law, politics and administrative practice, with the intention that human rights should be respected in the HIV/AIDS context. The ILO Code of Practice on HIV/AIDS and the world of work is a further instrument for the protection of the rights of infected and affected persons, with special reference to the needs of the workplace and the broader legal and policy framework governing the world of work.

The Code’s prime merit is without doubt the fact that it exists: not only because HIV/AIDS affects workers, enterprises and governments, but also because of the role the ILO and its partners can play to strengthen national and international efforts to control the epidemic. It is a pioneering instrument and, unlike most international instruments which are addressed only to States, it is also concerned with the responsibilities of the social partners, providing them with guidelines for concrete action.

The existence of the Code is only a first step, and its value will depend on the use which is made of it. Mechanisms for its application will have to be established at national level and it will need to receive the widest possible dissemination. It is to be hoped that the exceptional quality of the partnership which prevailed during the tripartite Meeting of Experts to adopt the Code will continue during the process of implementation. For if the effects of the epidemic at the workplace are to be prevented and attenuated, governments, employers and workers and their organizations must work together in a spirit of cooperation, coordination and coherence.