



Discrimination, HIV/AIDS and International Law in Rwanda

A Case Study of Life Insurance Contracts

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1. Introduction

1.1 The situation of HIV / AIDS in Rwanda

The HIV/AIDS epidemic is a national problem in Rwanda: in 2005, the prevalence rate was 3% of the total population, in urban areas this figure was as high as 7.7% whereas in rural areas it was 2.3%.¹ However, the level of knowledge about the transmission and the impact of this disease is still insufficient:² only 53.6% of women and 57.6% of men have been trained and educated properly to understand what HIV/AIDS is and how to manage it. Given this situation, the Rwandan Government has taken several actions: it has established education and prevention programmes, including mother-to-child transmission, as well as free HIV testing. However, many problems related to HIV/AIDS are still present in the country, including stigmatization issues faced by people living with the virus.

Moreover, Jonathan Mann, former director of the Global Programme against AIDS for the World Health Organization, has identified three stages of the HIV/AIDS epidemic: the epidemic of HIV transmission, the epidemic of AIDS, and the epidemic of stigma and discrimination against people living with HIV/AIDS.³ This phenomenon leads to many social and legal issues in daily life, however the present memorandum will specifically study one of them: the life insurance sector in relation to HIV. Indeed, a person living with the virus may be denied a life insurance policy on the basis of his or her health status. Therefore, it is pertinent to ask, first, whether such a situation is consistent with international human rights law, and secondly, whether it can be morally justified in a society committed to respecting these rights.

1.2 Basic principles of life insurance policies

First of all, it is important to understand that the economic principle of insurance is similar to a pooling of risks, meaning that it is the customers who subscribe to an insurance policy that pay collectively, through their contributions, for the cost of an individualized risk

¹ National AIDS Control Commission – Rwanda, The current HIV epidemiological situation in Rwanda, online : CNLS <http://www.cnls.gov.rw/vih_sida_rwanda_en.php>.

² African Commission on Human and Peoples' Rights, *The 9th and 10th Periodic Report of the Republic of Rwanda under the African Charter on Human and People's Rights*, at §204, online : ACHPR <<http://www.achpr.org>>.

³ USAID, *Rompres le cycle: Stigmatisation, discrimination, auto-stigmatisation et VIH*, online : AIDSLEX <www.aidslex.org> at 3.

materializing.⁴ A life insurance contract is a promise made by an insurer who agrees to pay a beneficiary, designated by the insured, a fixed sum in exchange for a premium. The fulfillment of the insurer's obligation depends on the length of the insured person's life.⁵ The premium varies according to the personal level of risk. Therefore, when the insurer calculates the premium, he is obliged to take into account general factors having an influence on mortality rate (age, sex, profession, climate), and specific factors such as the health status and personal and familial precedents.⁶ These elements will vary in accordance with the conditions of the contract and the subscriber's risk of death, which, in turn, will affect the premiums to be paid.

A person's health status and, consequently, his or her HIV status, are an integral part of the criteria for determining the individual risk rate. Determining the health status is necessary for the candidate's assessment according to risk levels; each level of risk corresponding to a certain rating.⁷ It is generally accepted that insurance companies are allowed to assess the risk and even to exclude people because of their health.⁸ It should also be noted that in order to protect themselves against potential lawsuits from individuals rejected for these reasons, the insurers of a number of African and European countries, such as South Africa and France, have asked that the Insurance Code state that the insurance operations are not subject to the laws prohibiting discrimination.⁹ For Non-Governmental Organisations (NGOs) and experts observing this phenomenon, it is clear that the differentiation is part of the life insurance contract (as it is for disability insurance or health insurance), because the underlying economic principles of an individual insurance policy eventually lead to the categorization of future policy holders.¹⁰

⁴ Conseil national du SIDA (France), *Assurance et VIH/SIDA Pour une assurabilité élargie des personnes et une confidentialité renforcée des données de santé*, Report (September 1999), online : La documentation française <<http://lesrapports.ladocumentationfrancaise.fr/BRP/024000632/0000.pdf>> at 31 [Conseil national du SIDA].

⁵ Yvonne Lambert-Faivre, *Droit des assurances*, 11th ed., Paris, Précis Dalloz, 2001, at 719.

⁶ Danièle Lochak, "Loi du marché et discrimination (deuxième partie) : la loi du marché pousse irrésistiblement à la discrimination" (November 2009), online: Collectif Les mots sont importants <<http://www.lmsi.net/spip.php?article954>> [Lochak].

⁷ *Conseil national du SIDA, supra* note 4, at 31.

⁸ Translated from French : Sida info services, « Droit-banque/assurance », online : Sida info service <<http://www.sida-info-service.org/spip.php?article2304>> (*Référence juridique en France*: article. L. 113-2 du Code des assurances).

⁹ *Ibid.*

¹⁰ Lochak, *supra* note 6.

1.3 Presentation of the memorandum

This memorandum will therefore examine whether international law offers protection to people living with HIV/AIDS when they are subject to differential treatment such as the denial of a life insurance policy. The analysis will be divided into three parts. In the first part, it identifies the concepts associated with discrimination according to the relevant international and regional human rights instruments. Secondly, the memorandum analyzes the State's international obligations regarding human rights in order to determine whether any of these are at stake in the present situation. Finally, the memorandum looks at how the State can fulfill its obligations, depending on the nature of the discrimination suffered.

In the annexes to this memorandum, you will find additional documentation related to the issues addressed therein : recommendations (Appendix 1) for both the Rwandan State and the Legal Aid Clinic of the National University of Rwanda, a table summarizing the elements of the different concepts of discrimination (Appendix 2) and information on possible remedies (Appendix 3).

2. The Principle of non-discrimination

2.1 Under international and regional human rights law

The Republic of Rwanda has proven to be a committed actor with regard to international human rights: in 1975, it acceded to the two major United Nations human rights treaties, the *International Covenant on Civil and Political Rights* (ICCPR)¹¹ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).¹² It is also a State party to the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹³ the *Convention on the Elimination of All Forms of Discrimination against Women*,¹⁴ and the *Convention on the Rights of the Child*.¹⁵ On the regional level, Rwanda has

¹¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

¹² International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3.

¹³ International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195.

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13.

¹⁵ Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

ratified a number of instruments, such as the *African Charter on Human and Peoples' Rights*¹⁶ (ACHPR) and the *African Charter on the Rights and Welfare of the Child*.¹⁷

For the purposes of this memorandum, the analysis of the principle of non-discrimination will be based on two specific instruments: the *International Covenant on Civil and Political Rights* as part of the universal system, and the *African Charter on Human and Peoples' Rights* as part of the African regional regime.

2.1.1 The International Covenant on Civil and Political Rights

Discrimination will generally occur when an individual does not have access to equality of treatment or to equality before the law because he or she belongs to a specific group.¹⁸ This concept is reflected in articles 2 and 26 of the ICCPR, which pertain to the principle of non-discrimination:

Art. 2. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Art. 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

One of the commonalities of these provisions is that they enumerate various grounds upon which discrimination is prohibited. Moreover, these enumerations are non-exhaustive, as evidenced by the expressions "such as" and "other status". In other words, a violation of articles 2 or 26 of the ICCPR may occur, based on grounds other than those expressly listed in these provisions.

With regard to HIV/AIDS, the United Nations Commission on Human Rights in 1999 declared, that:

Discrimination on the basis of HIV or AIDS status, actual or presumed, is prohibited by existing international human rights

¹⁶ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [ACHPR]

¹⁷ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁸ M. Sorensen, as cited by E. W. Vierdag, *The concept of discrimination in international law. With special reference to human rights* (The Hague, Nijhoff, 1973) at 52.

standards, and that the term "**or other status**" in non-discrimination provisions in international human rights texts should **be interpreted to cover health status, including HIV/AIDS**.¹⁹ (Emphasis added).

It is important to note that articles 2 and 26 of the ICCPR do not have the same scope. Article 2 is "accessory", which means that it has to be linked to another right protected by the Covenant.²⁰ In contrast, article 26 deals directly with the concept of equality before the law and the principle of non-discrimination. It is therefore considered as providing an "autonomous" right, which means that it forbids "discrimination in law or in fact in any field regulated and protected by public authorities".²¹ It does not depend on the violation of another right, as does article 2, which was confirmed by the Human Rights Committee in the *Broeks and Zwaan-de-Vries* cases.²²

Thus, the Human Rights Committee has clearly defined the term "discrimination" under the ICCPR as follows:

[T]he term "discrimination" as used in the Covenant should be understood to imply any **distinction, exclusion, restriction or preference** which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the **purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms**.²³ (Emphasis added).

However, legally speaking, a distinction must be made between a "differential treatment" and a "discriminatory treatment". In this respect, the Human Rights Committee has stated that a differentiation is acceptable if it is **reasonable, objective**, and if it aims to achieve a purpose which is **legitimate** under the Covenant.²⁴

Furthermore, the Committee on Economic, Social and Cultural Rights, basing itself on the concept of discrimination in article 2 (2) of the ICESCR, which is substantially the same as in article 2 of the ICCPR, has stated that "there must be a **clear and reasonable relationship**

¹⁹ *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, CHR Res. E/CN.4/RES/1999/49.

²⁰ Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (Kehl, Strasbourg, Arlington, N.P. Engel, 1993) at 473 [*Nowak 1st Ed.*].

²¹ General Comment No. 18: Non-discrimination, Human Rights Committee, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), §12 [*General Comment No. 18*].

²² *Broeks c. Pays-Bas*, 9 avril 1987, Communication No. 172/1984, Doc. NU CCPR/C/OP/2; *Zwaan-de Vries c. Pays-Bas*, 9 avril 1987, Communication No. 182/1984, Doc. NU CCPR/C/OP/2, as cited by *Nowak 1st Ed.*, *supra* note 20 at 466.

²³ *General Comment No. 18*, *supra* note 21 at §7.

²⁴ *Ibid.*, §13.

of **proportionality** between the aim sought to be realized and the measures or omissions and their effects".²⁵ (Emphasis added).

2.1.2 The African Charter on Human and Peoples' Rights

The principle of non-discrimination is laid down in articles 2 and 28 of the ACHPR:

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 2 establishes the principle of non-discrimination as "accessory", meaning that it must be linked to the other articles of the African Charter, and the list of prohibited grounds contained therein is non-exhaustive. With regard to article 28, it is important to understand the concept of "duties" of individuals within the Charter in order to analyze the scope of this provision. It is a concept that is specific to the African system²⁶ and it reflects African values, where individuals have duties towards their community. However, the Charter's section on "duties" serves to promote good conduct in general and can therefore not be interpreted as having a restrictive effect.²⁷

Moreover, article 3 of the ACHPR deals specifically with the principle of equality before the law, which complements the prohibition of discrimination, and "guarantees fair and just treatment of individuals within a legal system of a given country".²⁸ It is an autonomous right, as mentioned above. The African Commission on Human and Peoples' Rights has explained the significance of the principle of equality as follows:

²⁵ General Comment No. 20, on non-discrimination in economic, social and cultural rights, Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/GC/20 at §13 [*General Comment No. 20*].

²⁶ « Strengthening Human Rights Mechanisms around the World [comments] », (2007) 101 Am. Soc'y Int'l L. Proc. 428 at 428.

²⁷ Rose M. D'Sa, "Human and Peoples' Rights: Distinctive Features of the African Charter" (1985) 29 Journal of African Law 72 at 77.

²⁸ *Purohit and Moore v. The Gambia*, Communication No. 241/2001, Sixteenth Activity Report, (2003) AHR LR 96 (ACHPR 2003) at § 54 [*Purohit and Moore v. The Gambia*].

[it] means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights.²⁹

In defining the concept of discrimination, the African Commission on Human and Peoples' Rights has based itself on the United Nations human rights system. In the case of *Purohit and Moore v. The Gambia*, the Commission noted that "discrimination" meant "any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights".³⁰ This interpretation is in line with article 60 of the African Charter which states that the Commission can use and base itself on international human rights law, including provisions of instruments "adopted by the United Nations".³¹

2.2 The different categories of discrimination

It has been established that differential treatment based on a prohibited ground expressly listed in international or regional human rights instruments amounts to "discrimination" in the legal sense. This is also the case with "other situations" that are not enumerated, such as HIV or AIDS status. However, it has been recognized that under certain conditions, differential treatment can be considered acceptable under international law. In order for it to be permissible, such differentiation must be objective, reasonable and proportionate. In other words, it must be considered as a legitimate and acceptable treatment in a free and democratic society. Only the legislator or the judiciary have the ability to limit the scope of the right to non-discrimination.

Based on the relevant academic literature and judicial decisions, the concept of discrimination can be broken down into three categories, namely "direct" and "indirect" discrimination, as well as "systemic" discrimination, which often overlaps with one or both of the two previous categories. The following sections of the memorandum will define these types of discrimination. Also, Appendix 2 of the memorandum contains a table summarizing the elements of these different concepts.

²⁹ African Commission of Human and Peoples' Rights, Communication No: 211/98 - Legal Resources Foundation v. Zambia, decision taken at the 29th Ordinary Session held in Tripoli, Libya, from 23 April to 7 May 2001, para. 63.

³⁰ *Purohit and Moore v. The Gambia*, *supra* note 28.

³¹ ACHPR, *supra* note 17, at art.60

2.2.1 Direct discrimination

Basing itself on article 2(2) of the ICESCR, the Committee on Economic, Social and Cultural Rights³² has stated that "direct" discrimination exists when a person or a group is treated less favourably in a similar situation, based on a specifically prohibited ground. This phenomenon occurs when an act or omission is explicitly intended to distinguish and to exclude a certain category of people. As a result, these people will be treated differently and will suffer a disadvantage, which will amount to "direct" discrimination. This would be the case, for example, if a public agency, such as a Ministry, refused to hire someone based on racial motives and not according to their skills. The discrimination is "direct" since the distinction is explicitly based on a prohibited ground under international law.

2.2.2 Indirect discrimination

"Indirect" discrimination is not explicitly aimed at a person or a group, but still has negative effects on them. Discriminatory laws or practices are normally not intended or designed to be discriminatory. Rather, they follow standards or habits that appear to be neutral on the surface and do not discriminate in their formulation, but the effects they bring about result in disproportionate disadvantages for a particular group.³³ A manifestation of such "indirect" discrimination is common in employment cases which impose height and weight criteria. For instance, for jobs with physical aspects, such as service in the Armed Forces, the State could be tempted to require a certain height requirement. Nevertheless, this is indirectly discriminatory, since even though no group is specifically targeted, women are generally shorter than men. This would lead to their under-representation in these professions.

2.2.3 Systemic discrimination

The Committee on Economic, Social and Cultural Rights has stated that that when discrimination is global, persistent and uncontested, as well as directed against a specific group and deeply rooted in the social and institutional structure, it may be regarded as "systemic".³⁴ In other words, situations of "systemic" discrimination are characterized by a combination of legal rules or policies, and cultural practices and attitudes, which are present in public and private spheres of life. Taken together, these elements create disadvantages for certain groups, while privileging other groups. Considering its broad scope, "systemic" discrimination may be associated with both "direct" and "indirect" discrimination, as the case

³² *General Comment No. 20, supra* note 25, at §12.

³³ *Ibid.*

³⁴ *Ibid.*

may be. It can therefore be regarded as a kind of synthesis of the two other types of discriminations described above.³⁵

In order to detect whether discrimination is "systemic", a determination should be made as to the existence of a widespread phenomenon rather than individual cases of discrimination. For instance, Gunnar Myrdal relies upon the principle of accumulation³⁶ in order to explain the extent of "systemic" discrimination which develops in all spheres of life, public and private, and in all structural levels of society. He explains this phenomenon based on the fact that a disadvantage in one area will cause a disadvantage in a related field, and so on, leading to a situation where an individual or group will be permanently confronted with discrimination. It is therefore a widespread phenomenon, and may even be self-perpetuating.³⁷

Despite the above discussion, one should not confuse "systemic" discrimination with "indirect" discrimination.³⁸ Because it is not always easy to demonstrate its widespread or global aspect, "systemic" discrimination is often mistakenly described as "indirect" discrimination which is implicitly aimed at a part of the population.

To sum up, "systemic" discrimination is most often a system based on certain presuppositions, mostly implicit, regarding various groups and including a set of customs that perpetuate a situation of inequality towards members of these groups at all levels of society.³⁹

2.3 The international obligations of the State concerning human rights

As a result of the ratification of international instruments, a State becomes bound by various obligations. Obviously, a State cannot simply show good will or accept some vague principles at the international level. Rather, it is legally obligated to give effect to its international obligations at the domestic level. In short, Rwanda is bound by three inter-related obligations that stem from it having ratified various international human rights

³⁵ Paivi Gynter, "On the doctrine of systemic discrimination and its usability in the field of education" (2003) 10 Int'l J. on Minority & Group Rts 45, at 46 [Gynter].

³⁶ As cited by Gynter, *supra* note 35 at 46.

³⁷ *Ibid.*

³⁸ Rainer Knopff, « Prohibiting systemic discrimination : policy development or discontinuity? » (1985-1986) 50 Sask. L. Rev 121, at 122.

³⁹ Marie-Josée Legault, « La situation des groupes cibles sur le marché du travail, au Québec et au Canada ». In *Équité en emploi - équité salariale*. (Québec, Télé-université, 2002) at 34.

instruments, namely the obligation (1) to respect, (2) to protect, and (3) to fulfill its international commitments.

The **obligation to respect** implies a negative obligation on behalf of the State. In other words, the State must not intervene or interfere, directly or indirectly, with the enjoyment of protected rights.⁴⁰ The **obligation to protect** imposes a positive obligation. It requires actions by the State to prevent third parties from interfering in any way with the exercise or the enjoyment of human rights. The meaning of "third parties" has been repeatedly understood as applying to State agents (from any State whatsoever) as well as private individuals or entities.⁴¹ Governments thus have an obligation to ensure that a corporation, an individual or a group of individuals does not deprive others of their conferred rights.⁴² Therefore, the State must establish appropriate legislative, administrative, fiscal or other measures in order to build a national framework within which human rights are applicable and effective. It must also improve the justiciability of human rights by providing remedies.⁴³

The **obligation to fulfil** is closely related to that of protection and requires action in three areas, namely, facilitating the enjoyment of rights, promoting them by informing and educating the population, as well as ensuring that the principles set forth in the international Conventions are effective through targeted and adapted measures. The State must also establish mechanisms to regularly monitor the implementation of human rights.⁴⁴ In the *Ogoni v. Nigeria* case,⁴⁵ the African Commission recognized that these three underlying actions of the obligation to fulfil also applied to the rights guaranteed under the African Charter.

Moreover, the Committee on Economic, Social and Cultural Rights, in its General Comment No. 3, pertaining to the nature of the obligations of States parties to the ICESCR, referred to "obligations of conduct and obligations of result".⁴⁶ With regard to "obligations of

⁴⁰ General Comment No. 15, on the right to water (art.11 and 12), Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/15 at §21 [General Comment No. 15].

⁴¹ General Comment No. 31, the nature of States parties' obligations (eightyth session), U.N. Doc. HRI/GEN/1/Rev.7 (2004).

⁴² *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res. 36/55, UN GAOR (1981), articles 2 and 4.

⁴³ *General Comment No. 20, supra* note 25.

⁴⁴ *General Comment No. 15, supra* note 40 at §25.

⁴⁵ *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, ACHPR, October 27th 2001, Communication No. 155/96.

⁴⁶ General Comment No. 3, on the nature of States parties' obligations (art.2 (1)), Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/3.

result", the Committee indicated that a State could not fulfil its duties under international law by merely adopting legal measures. Furthermore, in its General Comment No. 20, the Committee concluded that, in addition to refraining from taking any discriminatory measures, States parties to the ICESCR had to take concrete, deliberate and targeted actions to end discrimination.⁴⁷ Moreover, States parties had to evaluate regularly whether the chosen measures were effective in practice.⁴⁸ These requirements have also been confirmed by the commitments States made in 1995 at the World Summit for Social Development through the Copenhagen Programme of Action. Through this document, States declared that in order to eliminate human rights violations, they not only had to enact laws to protect individuals against any form of discrimination at all levels of society, but they also had to enforce and carry out periodic checks of both official policies and domestic laws, in accordance with international law.⁴⁹

3. The obligation to protect

Given the fact that insurance companies are private entities, this section will examine situations in which a discriminatory action originates from a third party and occurs in the private sector. The analysis will be based on the international **obligation to protect**, which is relevant with regard to human rights violations by non-State actors.

3.1 Discrimination in the private sector

Discrimination is a polymorphous phenomenon frequently observed in the private spheres of life, such as family life, employment and housing. Situations occur in daily life where non-State actors, such as a landlord who refuses a person access to housing, or a bank who refuses to grant a loan, discriminate based on prohibited grounds according to international Conventions, including an individual's ethnicity, economic or social situation, sexual orientation, disability, or health status.⁵⁰ Thus, if the State has an obligation to take positive measures to prevent discrimination and to protect its citizens from violations by third parties,⁵¹ this raises the question of how far the obligation of the State to protect

⁴⁷ *General Comment No. 20*, *supra* note 25 at §36.

⁴⁸ *Ibid* at §12.

⁴⁹ United Nations, "Report on the World Summit for Social Development", A/CONF.166/9, online : United Nations <<http://www.un.org/documents/ga/conf166/aconf166-9fr.htm>> at § 73-74.

⁵⁰ *General Comment No. 20*, *supra* note 25 at §11.

⁵¹ Timo Makkonen, *La non-discrimination en droit international et en droit européen*, online : Institute for Human Rights, Abo Akademi University <http://iom.fi/files/legal_training/french/french_anti-discrimination_handbook_chap3.pdf> at 70.

extends to relations between private actors. At the same time, it is pertinent to examine the responsibilities of private actors under international law.⁵²

The responsibilities of private actors (legal and natural persons) with respect to human rights do not parallel those of States. Private actors have an obligation to respect national legislation. They do not have an obligation to take positive measures (as do States) in order to protect individuals against human rights violations. Neither, however, must they violate the general rules established by human rights law to protect individuals. The Committee on Economic, Social and Cultural Rights confirmed this in the context of the right to adequate food. It stated that the "private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society".⁵³ The same may apply to other rights such as the right to water, to adequate housing or to privacy. In contrast, States sign and commit themselves toward respecting international conventions for the protection of human rights, whereas the private sector's responsibilities with regard to human rights violations are somewhat more open to debate.

In this respect, the Universal Declaration of Human Rights indicates that private actors, and even society itself, have a role to play in the protection and the promotion of human rights. The Declaration's preamble states that every individual and every organ of society shall strive to: "to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance".⁵⁴ Although the Declaration is not legally binding, it was accepted by Rwanda when this country was admitted to the United Nations in 1962.⁵⁵ Moreover, according to article 60 of the African Charter, the Declaration may be used to interpret international law. Thus, it may be concluded that the protection of human rights is a responsibility that should be shared amongst all actors, operating at all levels of society.

Nevertheless, under international law, it is the State that is ultimately liable in the case of human rights violations, even when these are committed by a private actor. This is because the State will be considered as having failed to ensure the enjoyment of these rights.

⁵² Adam McBeth, "Privatising Human Rights: What happens to the state's human rights duties when services are privatised?" (2004) 5 *Melb. J. Int'l L.* 133, at 142.

⁵³ General Comment No. 12, on the right to food (art.12), Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/GC/12 at §20.

⁵⁴ Universal Declaration of Human Rights, G.A. Res. 217A (III), Preamble, 8, U.N. Doc. A/RES/217A, (Dec. 10, 1948).

⁵⁵ Amategeko, "Universal Declaration of the Human Rights", online: Amategeko <<http://www.amategeko.net>>.

Consequently, it is in every State's interest to take measures regulating the actions of private actors in order not to be held responsible for a violation of international law.

The State thus has an **obligation to protect** the rights of individuals against any interference, be it foreign or domestic. In order for human rights to be truly protected, the State must take effective measures aimed at the implementation and promotion of these rights. Also, the obligations of private individuals, whether natural persons or legal entities, must be considered in parallel with the State's obligations, the latter having the responsibility to establish the requisite institutional and legal means that will enable the private sector to act in accordance with international human rights norms.⁵⁶

In the case of discrimination between individuals, the State's **obligation to protect** depends on the specific facts of each situation. In *Nahlik v. Austria*, the Human Rights Committee stated:

The Committee observes that under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the **public sphere** or among **private parties** in the **quasi-public** sector of, for example, employment.⁵⁷(Emphasis added).

According to Manfred Nowak, the quasi-public sector includes transportation, employment, education, restaurants, and parks; in short, "goods, services and places intended for use by the general public, and health and housing sectors".⁵⁸ The State thus has the **obligation to protect** individuals from discrimination all in these sectors. Nevertheless, based on international law, the State cannot go so far as to intervene in every case of discrimination that arises in a purely private sector, because the State would risk contravening the "right to privacy".⁵⁹

3.1.1 The insurance sector: a quasi-public sphere of society?

Hence, it is relevant to examine whether the insurance sector may be included in the concept of "quasi-public" business. International law does not provide a definite answer to this question, given the absence of any conclusive case law or legal writing on this issue. However, the issue has been addressed by national courts. For example, the Supreme Court

⁵⁶ General Comment No. 14, on the right to the highest attainable standard of health (art.12), Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/GC/14 at §42.

⁵⁷ *Franz Nahlik v. Austria*, Communication No. 608/1995, U.N. Doc. CCPR/C/57/D/608/1995 (1996), at §8.1.

⁵⁸ Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd rev. ed. (Kehl am Rhein, Engel, 2005) at 634.

⁵⁹ *Nowak 1st Ed.*, *supra* note 20 at 477-478.

of California has indicated that an insurer offers a vital service that could be qualified as "quasi-public" in cases where an individual procures an insurance policy which is not intended for commercial gain, and which aims at protecting him or her against an unforeseeable harm.⁶⁰ With regard to life insurance, such a policy is meant to protect the beneficiary from the adverse economic effects resulting from the insured's death. Thus, "the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary".⁶¹

As indicated above, it is not technically possible to hold private actors directly accountable for human rights violations. However, if the insurance sector as a whole is considered to be of a "quasi-public" nature, the State's responsibility, in the form of its **obligation to protect**, is engaged in case of human rights violations within this sector.

3.2 Systemic discrimination and HIV/AIDS

A discriminatory treatment stemming directly from public or quasi-public actors engages the State's liability and its **obligation to protect** under international law. However, the State's liability may also be engaged when the problem is rooted in society and discrimination is "systemic". As a result, the State must make sure that special measures are taken in order to provide for effective protection against discrimination.⁶² In the light of these conditions, this section will focus on the situation of people living with HIV/AIDS.

In order to assess whether a situation of "systemic" discrimination exists, one must first verify if a specific group is concerned, and if discrimination is widespread throughout society. In the case of HIV/AIDS, for example, this would consist in stigmatization and discrimination in institutional, professional, family and communal sectors. Stigmatization is particularly significant; according to UNAIDS, it is a "'process of devaluation' of people either living with or associated with HIV and AIDS. Discrimination is the result of stigma and may be described as the unfair and unjust treatment of an individual based on his or her real or perceived HIV status".⁶³ The phenomenon of discrimination in the case of HIV/AIDS could therefore be explained by stigma that can be found in the various public and private spheres

⁶⁰ *Foley v. Interactive Data Corp.* [1988] 47 Cal.3d 654 at §685 [Foley].

⁶¹ *Ibid.*

⁶² Charles Manga Fombad, "The Constitutional Protection against Discrimination in Botswana" (2004) 53 I.C.L.Q. 139 at 157. Although the author analyzes discrimination associated with HIV/AIDS under the constitutional law of Botswana, he asserts that the measures undertaken by Botswana to counteract discrimination do not comply with international and regional law requirements.

⁶³ UNAIDS, *Reducing HIV Stigma and Discrimination: a critical part of national AIDS programmes*, online : UNAIDS <http://data.unaids.org/pub/Report/2008/jc1521_stigmatisation_en.pdf> at 9.

of life of these people. Hence, discrimination becomes widespread and unavoidable, making it "systemic".

3.2.1 Examples of discrimination /stigmatization

Discrimination against people living with HIV/AIDS may take on many forms, as illustrated by the following examples:

- In employment, there are generally five types of discriminatory situations related to HIV/AIDS: refusal to hire, dismissal, discrimination when giving promotions or in advancement opportunities,⁶⁴ mandatory testing, and exclusion from welfare and medication programmes;⁶⁵
- In health services, people may have limited access or may receive services of an inferior quality;⁶⁶
- In prisons, inmates living with HIV/AIDS may be separated from other inmates;⁶⁷
- In the context of insurance, an insurer may refuse to grant a beneficiary the life insurance payment in the case of a death linked to HIV/AIDS.⁶⁸

Stigmatization is a more general phenomenon. It is commonly caused by a lack of knowledge about the disease, mostly resulting in the fear of being infected and associating it with sexual habits seen by most as being inappropriate.⁶⁹ For instance, a woman living with HIV/AIDS could be associated with "questionable" sexual habits: "the spread of HIV infection has been associated with female sexual behaviour that is not consistent with gender norms".⁷⁰ This will have an impact on communal life, where people living with HIV/AIDS may be ostracised, rejected or violently abused.⁷¹ This kind of situation could also occur in the

⁶⁴ The Global Compact, *Dilemma: HIV/AIDS, health, privacy and non-discrimination*, online: The Global Compact <http://human-rights.unglobalcompact.org/doc/UNGC_HIVAids.pdf> at 9.

⁶⁵ UNAIDS, *HIV-related Stigmatization, Discrimination and Human Rights Violations*, online: UNAIDS <http://data.unaids.org/publications/irc-pub06/jc999-humrightsviol_en.pdf> at 9.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*; Bulletin du Réseau africain sur l'éthique, le droit et le VIH, No. 3 (June 1997), online : Réseau sénégalais droit, éthique, santé <<http://rds.refer.sn/IMG/pdf/BULLRESEAUETHIQUEPNUD03.pdf>> at 7.

⁶⁸ Rwanda Development Gateway, *AIDS victims to be protected against discrimination by law*, online : RDG <http://www.rwandagateway.org/article.php3?id_article=5007>.

⁶⁹ UNAIDS, *2008 Report on Global Epidemic*, as cited by AVERT, *HIV/AIDS Stigma*, online: AVERT <<http://www.avert.org/hiv-aids-stigma.htm>> [AVERT].

⁷⁰ Richard Parker and Peter Aggleton, "HIV/AIDS-related Stigma and Discrimination: A Conceptual Framework and an Agenda for Action", online: UNESCO <<http://hivaidsclearinghouse.unesco.org/search/resources/horizons.pdf>> at 2 [Parker/Aggleton].

⁷¹ AVERT, *supra* note 69 and Parker/Aggleton, *supra* note 70 at 7.

family context, where people may be seen as a burden, because death appears inevitable and imminent.⁷²

It is these types of situations that need to be documented in order to demonstrate the existence of "systemic" discrimination. Thus, if such a phenomenon is indeed shown to exist in Rwanda, the latter will be held liable at the international level.

3.2.2 The situation in Rwanda and East Africa

In Rwanda, and more generally the East African region, HIV/AIDS is a part of the population's daily reality, and infected people are not free from discrimination and stigmatization as described above. According to a study conducted in 2009, 74% of people in Rwanda who have experienced discrimination live with HIV/AIDS.⁷³ It appears that discrimination is not sporadic, but directly associated to one particular group in several areas of society. The study also shows that discrimination and stigma manifest themselves in numerous forms, including, being rejected from one's family, suffering physical violence, and being refused access to social services such as "family planning".

Moreover, stigmatization affects everybody, even the youngest individuals. One study has highlighted the potential role of stigma associated with HIV/AIDS, and has reported that three out of four (3/4) Rwandan children orphaned by AIDS were isolated from the community; and one out of five (1/5) was ill-treated by other children.⁷⁴ Despite numerous efforts undertaken by the Rwandan Government, many of these children still lack the support and protection needed.⁷⁵

In the context of work, it is hard to prove discrimination because employers do not directly invoke HIV/AIDS as a cause for dismissal, or for refusing to hire someone. However, certain people have claimed that they lost their jobs solely for this reason.⁷⁶ Moreover, the

⁷² Amnesty International, *Rwanda: Marked for Death*, online: Amnesty International <<http://www.amnesty.org/en/library/info/AFR47/007/2004>> at 25 [Amnesty International].

⁷³ Charles Kwizera, "Rwanda: HIV Tops Stigmatisation Index – Survey" (2009), online: All Africa <<http://allafrica.com/stories/200905270075.html>>.

⁷⁴ Tonya Renee Thurman, Snider LA, Boris NW, et al., "Barriers to the community support of orphans and vulnerable youth in Rwanda" (2008) 66(7) Soc. Sci. Med. 1557. (Research was conducted from October 2003 through August 2004 in the rural southwestern former province of Gikongoro, the poorest region in Rwanda and one of the areas most greatly affected by the genocide. The research team in Rwanda has established that the majority of 692 youths who are heads of household in one region of Rwanda feel severely marginalized from their communities: nearly half believe that 'no one cares about them' and 86% feel 'rejected by the community. Nearly 65% of these youths reported heading the household for 4 or more years, and 49% of youth aged 19-24 years had served as head of household for 6 or more years.)

⁷⁵ Lianne Brown, Tonya R. Thurman and Leslie Snider, "Strengthening the psychosocial well-being of youth-headed households in Rwanda: Baseline findings from an intervention trial" (2005) *Horizons Research Update*, Washington, D.C.: Population Council, at 1.

⁷⁶ *Amnesty International*, *supra* note 72 at 27.

Rwandan Association of Trauma Counsellors has noted an increase of cases of people living with HIV/AIDS, and has noted that the stigma affects people's ability to cope with their situation.⁷⁷

Several other issues have been identified in the region neighbouring Rwanda. For example, surveys have been conducted in Uganda, Tanzania, Mozambique, and in Kenya on discrimination faced by school teachers. The majority of respondents said they feared being infected with HIV/AIDS and problems were reported, for instance, in the cafeteria or when handling objects used by people living with the virus.⁷⁸ In Kenya, it has been documented that some women prefer not to go to prenatal care clinics because they do not want to undertake routine HIV testing⁷⁹ and suffer the social consequences if tested positive. This leads to the conclusion that discrimination occurs when HIV/AIDS represents an important medical problem within a society, as is the case in Rwanda and its neighbouring States.

3.2.3 Consequences

Taken together, discrimination and stigma are at the root of a negative social climate that conflicts with attempts aimed at preventing the proliferation of the virus. As a consequence, individuals are discouraged from getting tested or from searching for information on ways to protect themselves and others, which ultimately aggravates the impact of HIV/AIDS.⁸⁰ There are also economic repercussions, linked to the rights to property and to adequate housing, which affect even those who are indirectly touched by HIV/AIDS. Thus, a widow whose spouse has died of HIV/AIDS may find her property pilfered and diminished by her spouse's relatives, contributing to her poverty and jeopardizing her ability to survive.⁸¹ In the same vein, women and children living with HIV/AIDS will often be discriminated in their right to inheritance.⁸²

In the case of loss of employment, the International Labour Organization has indicated that the resulting loss of income puts victims in a precarious situation. In some developing countries, such people will likely not be able to receive medical care (antiretroviral treatment), or to provide care for their dependants (which could sometimes

⁷⁷ *Ibid.*, at 25-26.

⁷⁸ Paul Bennelle, "The impact of the AIDS epidemic on teachers in sub-Saharan Africa", online: <[http://gametlibrary.worldbank.org/FILES/671_The impact of the AIDS epidemic on teachers.pdf](http://gametlibrary.worldbank.org/FILES/671_The%20impact%20of%20the%20AIDS%20epidemic%20on%20teachers.pdf)> at 9.

⁷⁹ PlusNews, "Kenya : Fear of HIV testing keeps pregnant women at home" (2008), online: AEGIS-IRIN <<http://www.aegis.com/news/IRIN/2008/IR081026.html>>.

⁸⁰ UNAIDS, *Protocol for the identification of discrimination against people living with HIV*, online: UNAIDS <http://data.unaids.org/Publications/IRC-pub01/JC295-Protocol_en.pdf> at 6.

⁸¹ Special Rapporteur on Adequate Housing, *Women and Adequate Housing*, CHR 62nd session E/CN.4/2006/118 at §72.

⁸² AVERT, « AIDS orphans », online: AVERT <<http://www.avert.org/aidsorphans.htm>>.

lead to child labour).⁸³ Furthermore, in certain tightly knit communities, it is likely that the information related to HIV/AIDS that was behind a person's dismissal or refusal to be hired, would rapidly circulate and make it difficult for the person to find a new job. As a result, he or she will suffer even greater exclusion, both socially and economically.

Whether "direct" or "indirect", discrimination and stigma of this kind lead to a widespread pattern which, according to the definition laid out above, can be qualified as "systemic" discrimination. Such discrimination remains unchallenged as it is deeply rooted in society.

There appears to be significant documented research to the effect that many of the situations described above occur in Rwanda. This lends credence to the conclusion that people living with HIV/AIDS in Rwanda are victims of "systemic" discrimination. Accordingly, the Rwandan Government has an obligation under international law to eradicate this phenomenon. As a result, the following section will examine the measures the State should undertake in order to cease the discrimination based on HIV/AIDS.

3.3 Summary of findings

In summary, under international human rights law, only the State is subject to the legal obligations that arise from its ratification of international conventions. Therefore, it follows that an insurance company cannot be directly bound by international law, because it is not a party to such conventions. As noted above, private actors cannot be held accountable under international law. They remain under the jurisdiction of the State which is responsible for compliance with and protection of individual rights.

Moreover, international human rights law imposes upon States the obligations **to respect, to fulfill and to protect**: in the case of a violation by a third party, the obligation **to protect** comes into play. The State must take measures to ensure that individuals and other non-State actors respect the rights protected by the conventions to which the State is a party. Even if the State is required not to infringe the right to privacy, it must ensure that the human rights of individuals are protected in the public and quasi-public spheres of society. Thus, based on the reasoning adopted by the Supreme Court of California, the life-insurance industry may be considered a quasi-public service sector. Furthermore, the State has specific obligations when "systemic" discrimination is shown to exist;⁸⁴ it must take positive measures to ensure effective protection against discrimination. Given that the situation

⁸³ ILO, *Facts about HIV and Work*, online: ILO <<http://www.ilo.org/public/english/protection/trav/aids/events/ilc09fs.pdf>>.

⁸⁴ *Nowak 1st Ed.*, *supra* note 20 at 476.

prevailing in Rwanda leans towards "systemic" discrimination, the Rwandan Government, by virtue of its obligations under international human rights law, is required to adopt appropriate measures aimed at combating this phenomenon; which will be elaborated in the following section.

4. Implementation of the obligation to protect

4.1 Distinguishing between differential and discriminatory treatment

Discriminatory treatment based on HIV/AIDS in the insurance sector must be regulated by the State either because this sector is considered as quasi-public, or because the discrimination is of a "systemic" nature. In either case, the fact remains that the State must take action to comply with its **obligation to protect**.

When a person living with HIV/AIDS is denied the opportunity to acquire a life insurance policy based on his or her health status, the question arises as to whether such treatment is discriminatory or not, in the legal sense. As stated above, a differential treatment may be legitimate if the distinction is objective, reasonable and proportionate. However, in many other legal systems, if the insurer's decision is based on concrete factual grounds, it constitutes "fair discrimination",⁸⁵ or a justified differentiation. Thus, since there is a clear link between a person's health status (including HIV/AIDS) and life insurance and because the purpose of this insurance is to guarantee a sum of money in exchange for the continued life of the insured, the refusal to grant the service may be justified. However, when there is "systemic" discrimination, insurers may tend to neglect the principle of proportionality. For instance, practices based on outdated factual and scientific data can lead to exclusionary measures that do not satisfy the principle of proportionality as required by international human rights law. This particularly threatens people affected by HIV/AIDS.⁸⁶ As a result, the State should take positive measures to ensure that the differential treatment is legitimate in order to fight "systemic" discrimination.

4.2 How can the State fulfill its obligation to protect?

In the case of discriminatory treatment by an insurer in a context of "systemic" discrimination, international law provides no clear indication as to which positive measures should be taken. However, the Committee on Economic, Social and Cultural Rights, in its

⁸⁵ Sébastien Lanctôt, *L'utile et le juste de la discrimination dans la sélection, la classification et la tarification des risques assuranciers*, (PhD Thesis, McGill University, 2008) at 328.

⁸⁶ *Ibid.*, at 329.

General Comment No. 20, indicated that "States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice".⁸⁷ To this end, States were advised to adopt "incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance".⁸⁸ Moreover, in relation to article 26 of the ICCPR, Manfred Nowak has noted that the idea of taking positive action in the case of "systemic" discrimination was discussed several times during the drafting of the ICCPR.⁸⁹ In this respect, a State may consult solutions that have been adopted in other jurisdictions or it may extend the rules which apply to the public sector to the private and quasi-public sectors.

4.3 Regulatory measures

4.3.1 Medical screening examinations

The State should address sensitive issues, such as the right of insurers to require medical screening examinations, including a blood test to detect HIV. Insurance companies providing long term individual policies (for instance life or disability insurance) have several methods for identifying the risks involved in an individual's profile. The first method requires asking the applicant to complete an information form about his or her current health status and history. However, this method is seldom used because information, such as HIV positivity, may be intentionally withheld.⁹⁰ As a matter of fact, people prefer to hide their status for fear of rejection, even if this means that they may subsequently see their contract cancelled if the information became known. The second method is increasingly common: the applicant will be required to undergo testing accompanied by medical examinations.

According to the Canadian HIV/AIDS Legal Network, human rights law requires that HIV tests, even voluntary and routine testing, include informed consent, pre- and post-test counselling, and guaranteed confidentiality of the test results.⁹¹ However, the role of insurers is not to provide a medical diagnosis, but to conduct a review of the risks attached to the health of the applicant; and this only for the purpose of granting or refusing an insurance

⁸⁷ *General Comment No. 20*, *supra* note 25 at §39.

⁸⁸ *Ibid.*

⁸⁹ *Nowak 1st Ed.*, *supra* note 20 at 476.

⁹⁰ Clem Both, "The insurance industry and AIDS, an insider's perspective" (1993) 9 S. Afr. J. on Hum. Rts. 151 at 152 [Clem Both].

⁹¹ Canadian HIV/AIDS Legal Network, *Sécurité du revenu des personnes vivants avec le VIH/SIDA au Canada*, online: AIDSLAW <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=108>>.

policy.⁹² Therefore, even if insurers deliver the test results to the applicant, whether automatically or upon request, it should be underlined that it is not their duty to accompany individuals when receiving test results.

One of the most critical problems related to testing in relation to life insurance is the lack of confidentiality of medical records possessed by the insurance companies. Sensitive information may circulate freely between departments and institutions (for instance, in communications between banks and insurers), which significantly increases the number of people who are aware about these medical records, and the likelihood of stigmatization as a result.

In conclusion, the State is technically under no obligation to prohibit HIV testing because there is a reasonable connection with the risk evaluation for life insurance. However, the State does have to regulate how these tests are conducted, and how the results are recorded and handled, in order to respect the right to privacy of individuals.

4.3.2 Complete denial of coverage

As explained above, an insurance policy is part of a pooling system where everyone pays a premium according to a risk category. In some cases, insurance companies may choose to offer extremely expensive rates to persons considered to be a "high risk",⁹³ such as the elderly or persons with chronic illnesses (like diabetes, heart disease or HIV infection). However, the majority of insurers simply draw the line in the face of such high risk scenarios, because they do not wish to increase the premiums they charge their clients, which would make them less competitive; consequently, undercutting such applications is presented as an economic necessity, driven by the law of the market.⁹⁴

Since there is no obligation on insurers to accept certain "high risk" categories, this practice is technically legal and corresponds with the normal functioning of an insurance company. However, such denials may be part of a wider context, amounting to "systemic" discrimination. As a result, the State should require insurers to adopt a method for dealing with persons living with HIV/AIDS, on a case by case basis, taking into account the chronic nature of the infection. It should be noted that thanks to current medical advances in treating the virus, HIV infection is no longer the same lethal disease that it was in the 1990s,

⁹² Amy Bucossi, "Ascertaining duty of care in the life insurance industry : a survey if insurance law and a proposal for State mandatory Disclosure legislation", Notes & comments (2001-2002) 18 N.Y.L. Sch. J. Hum. Rts. 51, at 52-53.

⁹³ *Lochak, supra* note 6.

⁹⁴ *Ibid.*

and life expectancy of patients on medication has increased significantly.⁹⁵ In this respect, HIV/AIDS can be categorized among the chronic diseases, for the purposes of an insurance policy, much like diabetes.

With regard to Rwanda, the foundations that would enable for action to be taken at the domestic level, already appear to in place. Article 4 of law n°18/1982 enables the Minister of Trade to monitor and validate all insurance fee schedules in force in Rwanda. The State is therefore in a position to negotiate a range of pricing schemes with private insurance companies for "high-risk" individuals, including persons infected with HIV. The adoption of such "additional premiums"⁹⁶ could help in the fight against "systemic" discrimination, as well as contribute to making the differential treatment proportional, in both its purpose and its effects.

In order to exercise a better control over the insurance sector, the State may also adopt a new Insurance Code at the domestic level, which would complement current laws, such as Legislative Decree No. 20/75 or Belgian law BO1930. For example, the Inter-African Conference for the Insurance Markets,⁹⁷ which is composed of thirteen States of Western and Sub-Saharan Africa, has developed a common Code for the region in order to regulate the insurance industry. This is accompanied by a manual for the control of insurance intermediaries which could be useful in developing a Code in Rwanda.⁹⁸

Nevertheless, it should be noted that insurance Codes are specific documents, and may vary from country to country, as shown by the fact that the limitation of the principle of non-discrimination based on health status is not always present. For example, in South Africa, a clause on "HIV exclusion" was inserted into insurance contracts, which allowed many people to obtain a life insurance policy. However, in cases of death due to HIV or another infectious disease, the beneficiary would be denied the sums of money owed by policy.⁹⁹ At first glance, such a system may seem positive because it allowed people living with HIV/AIDS to have access to life insurance. However, it quickly became clear that such

⁹⁵ Bruno Spire, "Problèmes cliniques et comportementaux liés à la chronicisation de la maladie" (September 2002), online: HCSP <<http://www.hcsp.fr/docspdf/adsp/adsp-40/ad402325.pdf>>.

⁹⁶ Insure.com, "The lowdown on life insurance medical exams" (mars 2008), online: Insure.com <<http://articles.moneycentral.msn.com/Insurance/InsureYourLife/TheLowdownOnLifeInsuranceMedicalExams.aspx>>.

⁹⁷ Conférence Interafricaine des Marchés d'Assurances, "Accueil et nouvelles", en ligne : CIMA <<http://www.cima-afrique.org/>>; see also <http://info.worldbank.org/etools/docs/library/157491/contractual2003/pdf/day2/ses1_moutassi.pdf>

⁹⁸ See <http://info.worldbank.org/etools/docs/library/157491/contractual2003/pdf/day2/cima_moutassi.pdf>

⁹⁹ *Clem Both, supra* note 90.

exclusion clauses opened the door to abuses by inviting similar clauses for other diseases such as hepatitis or diabetes, which obviously goes against the rationale of personal insurance. As a result, precautions should be taken when developing domestic measures in Rwanda in order to enable persons living with HIV/AIDS to get life insurance coverage.

4.4 Other measures

The efforts taken by Rwanda in the fight against discrimination are most noteworthy, particularly in the fields of racial discrimination and gender equality. However, in order to eliminate discrimination based on other prohibited grounds, the State should adopt a law targeting the issue of discrimination in general, including against persons living with HIV/AIDS, in accordance with Article 11 of the Constitution. In South Africa, for example, if discriminated against, people living with HIV and AIDS can seek redress under the Equality Act.¹⁰⁰ A similar measure in Rwanda would enable people living with HIV/AIDS to have effective remedies when faced with discrimination.

In the same vein, the State should continue on the path it has taken, that is to say, to offer informational and educational sessions about HIV/AIDS: these programmes are effective for reducing the prevalence of the virus and for eliminating stigma and discrimination. The State should also take measures of "positive discrimination" to restore equality between the victims of "systemic" discrimination and other citizens. In order to do so, it may, for instance, encourage the domestic establishment of insurance companies specializing in the field of high medical risks.¹⁰¹

5. Conclusion

Although international law does not provide clear answers to persons living with HIV/AIDS in their search for protection against discrimination in all areas, it is possible to develop tools that may improve their situation. There is still a long way to go before discrimination disappears, but by drawing on examples from other countries, and by continuing its current efforts, Rwanda can expect to see the "systemic" discrimination faced by people living with HIV/AIDS decline. As a consequence, the Government will be able to guarantee to all its citizens, without distinction, the equal enjoyment of their rights. The insurance sector is one area that remains problematic and is evolving slowly, however it is

¹⁰⁰ Khopotso Bodibe, "South Africa : Towards Reducing Stigma - Living with AIDS" (8 April 2010), online: All Africa <<http://allafrica.com/stories/201004080246.html>>.

¹⁰¹ Conseil national du SIDA (France), "Assurance et VIH/SIDA Pour une assurabilité élargie des personnes et une confidentialité renforcée des données de santé", Report (September 1999), online: La documentation française <<http://lesrapports.ladocumentationfrancaise.fr/BRP/024000632/0000.pdf>>.

possible to initiate a change in the perception of HIV and an increased awareness of the actors of the public, quasi-public and private spheres, which would then allow for a better integration of people living with HIV/AIDS in Rwandan society.

6. Appendix 1

Recommendations for the State

GENERAL

In order to fight against discrimination faced by people living with HIV/AIDS, the State should:

- Adopt specific national legislation to protect the principle of non-discrimination towards people living with HIV/AIDS, particularly by addressing the problems encountered in the private sector;
- Continue to educate the population about HIV/AIDS;
- Develop specific training programmes for officials and staff from the most sensitive fields of society, in order to address problems of stigma (judges, teachers, etc.);
- Encourage the establishment of insurance companies specializing in the field of medical high risk;
- Develop a diverse set of indicators to better detect, document and analyze "systemic discrimination". The National HIV/AIDS Control Commission could possibly play a role in this regard.

REGULATORY MEASURES

- Adopt an Insurance Code to better control the insurance sector;
- Draw inspiration from the common Code adopted by the Inter-African Conference for the Insurance Markets;
- Negotiate the establishment of "additional premiums" in insurance fee schedules for people at "high risk";
- Encourage the insurance industry to deal with cases on a case by case, taking into account the chronic nature of the infection of each applicant;
- Establish a monitoring mechanism for the medical tests required by insurers.

Recommendations for the NUR Legal Aid Clinic

- Develop a set of questions to determine whether there is a situation of discrimination, in the legal sense, in individual cases received, based on the criteria included in Appendix 2 of this report;
- Install an archive of cases of discrimination affecting people living with HIV/AIDS in order to document the existence of systemic discrimination.

7. Appendix 2

Categories of Discrimination	Elements
Direct	<ul style="list-style-type: none"> • Differential treatment • Based on a prohibited ground • Causing a disadvantage for the individual • Treatment that is NOT reasonable, objective and proportional in a democratic society
Indirect	<ul style="list-style-type: none"> • Identical treatment • Of an individual who is part of a group associated to a prohibited ground • Causing a disadvantage for the individual • Treatment that is NOT reasonable, objective and proportional in a democratic society
Systemic	<ul style="list-style-type: none"> • Generalized Discrimination (direct or indirect) • Deeply rooted in all areas of a society (community, institutions, quasi-public sector, etc.) • Causing disadvantages for a group associated to a prohibited ground

8. Appendix 3

The implementation of the State's international obligations in Rwandan domestic law and the remedies available for violations.

In July 2009, Rwanda submitted a report on its implementation of the African Charter to the African Commission on Human and Peoples' Rights. In paragraph 22, with regard to its national courts, the report clearly states that "the citizens whose rights have been violated can evoke and base their request on several instruments to which Rwanda subscribes, including, among other texts, the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)".¹⁰²

According to article 190 of the Rwandan Constitution of 2003, "treaties or agreements duly ratified or approved have, following their publication in the Official Gazette, an authority superior to that of organic and ordinary laws, depending on the application by the other parties of each agreement or treaty".¹⁰³

However, when the Committee on Human Rights examined Rwanda's report on the implementation of the ICCPR in 2007, the experts noted that the Covenant's provisions were not sufficiently known amongst the Rwandan population in general, but especially amongst judges and state authorities.¹⁰⁴ The Committee therefore recommended that Rwanda should take steps to make the Covenant known so that it can be used by various domestic authorities.

Internationally, the Committee on Human Rights is competent to receive complaints by individuals: the State must, however, have ratified the first Optional Protocol,¹⁰⁵ which is not the case for Rwanda. In the African system, the complaints mechanism is applicable to any country that has acceded to the African Charter on Human and Peoples' Rights, which Rwanda has signed on June 9, 1998 and ratified on May 6, 2003.

¹⁰² African Commission on Human and Peoples' Rights, *The 9th and 10th Periodic Report of the Republic of Rwanda under the African Charter on Human and People's Rights*, at §22, online : ACHPR <<http://www.achpr.org>>.

¹⁰³ Constitution of the Republic of Rwanda (O.G N° Special of 4 June 2003, p. 119) and its Amendments of 2nd December 2003 (O.G N° Special of 2nd December 2003) and of 8 December 2005.

¹⁰⁴ Concluding Observations of the Human Rights Committee, CCPR/C/RWA/CO/3, at §8.

¹⁰⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302.

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