



Cover photograph: IOM/MPW Photography project 2008 – Mpho Seleka



Researcher: George Mukundi Wachira, Coordinator, Migrants Rights Monitoring Project, Forced Migration Studies Programme, University of Witwatersrand, South Africa

Advice and assistance: Jude Padayachy (National Statistics Bureau, Seychelles); Paola Pace (IOM Geneva); Reiko Matsuyama (IOM Pretoria); Katharina Schnöring (IOM Angola); Stuart Simpson (IOM Mozambique); Joyce Siveregi and Yvonne Masvora (IOM Zimbabwe)





ii



TABLE OF CONTENTS

EXECUTIVE SUMMARY	2
LIST OF ACRONYMS	4
1 INTRODUCTION	5
1.1 Constitutional Rights Relevant to Migrants' Right to Health	5
1.2 International and Regional Human Rights Treaties Relevant to Migrants' Right to Health	9
2 COUNTRY STUDIES	11
2.1 Angola	11
2.2 Botswana	12
2.3 Democratic Republic of Congo	13
2.4 Lesotho	14
2.5 Madagascar	14
2.6 Malawi	15
2.7 Mauritius	16
2.8 Mozambique	17
2.9 Namibia	18
2.10 Seychelles	19
2.11 South Africa	19
2.12 Swaziland	21
2.13 Tanzania	22
2.14 Zambia	22
2.15 Zimbabwe	23
3. CONCLUSION	24
ANNEX 1	
Summary Table of Domestic Legal Framework Relevant to Migrants' Right to Health in Southern Africa	25
ANNEX 2	
Summary Table of International Instruments Relevant to Migrants' Right to Health in Southern Africa	33
REFERENCES	43

EXECUTIVE SUMMARY

The right to the highest attainable standard of health, also known as the right to health, is not only the right to health care, but the right to underlying determinants of health such as safe drinking water, adequate sanitation and housing, education, and health related information.

Health services should be *available* in sufficient quantity, *accessible* (physical, economic and information accessibility) to everyone without discrimination, *acceptable* (respectful of medical ethics and cultural appropriateness), scientifically and medically appropriate and *of good quality*. Core obligations of the right to health, as determined by the Committee on Economic, Social and Cultural Rights' General Comment No. 14 on Article 12 of the Covenant,¹ include the obligation to ensure access to health facilities, goods and services to everyone, including non nationals and vulnerable groups without discrimination.

Access to health care is vital to all human beings resident in any state regardless of their immigration status.² This review examines the legal framework related to migrants' right to health services, in each Southern African Development Community (SADC) Member State, with the focus on documented and undocumented international migrants, asylum seekers and refugees. The aim of the review is to provide reference information on the extent to which SADC Member States avail health services to migrants in their legal framework, and it is hoped that this survey will be a useful quick reference tool for government officials, migrants and service providers in SADC states in protecting and promoting migrants' right to health.

The review reveals that the law in all the SADC member states contains either expressly or implied provisions that guarantee migrants rights to health. While in some states, the law is more direct than others in its protection of migrant rights to health, it has emerged that an interpretation of the domestic law in consonance with the States' international legal obligations accords migrants right to health.

1 See [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)

2 See UN HCHR & WHO 'The Right to Health' Fact Sheet No 31 sourced at <<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>> accessed 22 January 2008.

CONSTITUTIONAL RIGHTS RELEVANT TO MIGRANTS' RIGHT TO HEALTH

In all SADC Member States, the Constitution is the supreme law of the land. Accordingly, a brief analysis of some of the cross cutting constitutional rights that apply to all the countries, namely Right to Life and Equality and Non-Discrimination Provisions is essential.

First, the right to life is 'the most fundamental of all human rights, the supreme human right',³ and when a State does not recognise expressly the right to health, the duty of the State to ensure an adequate access to essential care can be deducted by its obligation towards the right to life. Second, equality and non-discrimination provisions enshrined in all the SADC countries' constitutions provide a constitutional basis for migrants to assert their right to access health services that is available to citizens of their countries of residence.

INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES RELEVANT TO MIGRANTS' RIGHT TO HEALTH

There are various international and regional human rights treaties relevant to migrants' right to health. The **International Covenant on Civil and Political Rights (ICCPR)**⁴ and the **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**,⁵ both of which have been ratified by most SADC Member States, prohibits discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The **African Charter on Human and Peoples' Rights** which have been ratified by all SADC Member States, similarly

3 See *S v Makwanyane* 1995 (3) SA 391 (CC) para 217; see also Yoram D 1981. The right to life, physical integrity and liberty in Louis H (ed) The International Bill of Rights: The Covenant on Civil and Political Rights. New York: Columbia University Press. p 114.

4 International Covenant on Civil and Political Rights (ICCPR) 1966, adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, U.N. Doc. A/6316.

5 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, adopted by U.N. General Assembly resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969.

prohibits discrimination on the basis of various grounds, including race, ethnic origin, language, social status and other status.⁶ Of significant importance, the Charter provides that every individual have the right to enjoy the best attainable state of physical and mental health, and that State Parties shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The **Convention Relating to the Status of Refugees⁷** which has also been ratified by all SADC member states apart from Mauritius contains important international standards and norms that apply to refugees. The Convention obliges state parties not to discriminate against refugees on the basis of religion, race or country of origin.⁸

With regard to access to health services for migrants without discrimination, the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)** is unequivocal.⁹ The Convention provides for the right to equal treatment

⁶ See arts 2, 3 & 19 African Charter.

⁷ United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

⁸ Art 3 United Nations Convention relating to the Status of Refugees.

⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003. (Convention on Migrant Workers)

regarding access to social and health services for regular migrant workers and members of their family and nationals.

Lastly, the **International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰** expressly provides for the right to health for all - it recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', and calls on state parties to take appropriate measures that among others include 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases.'¹¹ The Committee on Economic Social and Cultural Rights (CESCR), which monitors the implementation of the Covenant, has reiterated that "health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."¹²

¹⁰ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

¹¹ Ibid, arts 12(2)(c) (d).

¹² See UN Committee on Economic Social and Cultural Rights, The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4, CESCR General Comment 14 (General Comments) para 1.

LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACRC	African Charter on the Rights and Welfare of the Child
AHRLR	African Human Rights Law Reports
AIDS	Acquired Immunodeficiency Syndrome
AIR	All India Reports
ART	Anti Retroviral Treatment
BCLR	Butterworth's Constitutional Law Reports
BWHC	High Court of Botswana
CC	Constitutional Court of South Africa
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic Social and Cultural Rights
CHRLD	Commonwealth Human Rights Law Digest
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
HIV	Human Immunodeficiency Virus
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IOM	International Organization for Migration
MLJ	Malayan Law Journal-Malaysia
NGO	Non Governmental Organization
OUA	Organisation of African Unity
SA	South Africa
SADC	Southern African Development Community
SALR	South Africa Law Reports
SCA	Supreme Court of Appeal of South Africa
SERAC	Social and Economics Rights Action Centre- A Nigerian based NGO
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

The right to the highest attainable standard of health, also known as the right to health, is not only the right to health care, but the right to underlying determinants of health such as safe drinking water, adequate sanitation and housing, education, and health related information.

Access to health care is vital to all human beings resident in any state regardless of their immigration status.¹³ This review examines the legal framework related to migrants' right to health services, in each Southern African Development Community (SADC) Member State. The aim of the review is to provide reference information on the extent to which SADC Member States avail health services to migrants in their legal framework. Such information is useful to: (1) Government agencies, including health care providers who have the primary duty to uphold their legal framework; (2) Migrants, as a source of basic reference when seeking to espouse their right to health; and (3) Human rights and development practitioners as a useful resource to lobby governments to ensure conformity of state laws to international standards and norms relative to migrants' right to health services. The focus of the desk review is on documented and undocumented international migrants, asylum seekers and refugees. Wherever possible, the study indicates where the law only makes provision for access to relevant rights to specific groups, namely documented migrants and/or refugees.

1.1 CONSTITUTIONAL RIGHTS RELEVANT TO MIGRANTS' RIGHT TO HEALTH

In all SADC Member States, the Constitution is the supreme law of the land. Accordingly, a brief analysis of some of the cross cutting constitutional rights that apply to all the countries is necessary in order to avoid repetition in each of the states under review. This is also an imperative given the fact that while in some countries the right to health is constitutionally enshrined, in others it is absent. Where a direct link to the right to health, is not found, the alternative is to rely on a progressive interpretation of other related provisions of the constitutions.

¹³ See Office of the United Nations High Commissioner for Human Rights & World Health Organization 'The Right to Health' Fact Sheet No 31 sourced at <<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>> accessed 22 January 2008.

Admittedly, such an interpretation does not automatically guarantee access to health services; the onus of such an exercise lies in the hands of courts and, importantly, in submissions by claimants to these rights. The right to life and the equality and non-discrimination provisions enshrined in constitutions may indirectly provide the basis for migrants' protection of the right to health.

International jurisprudence emanating from interpretation of international standards that most of the countries under review have ratified links the right to life to the right to health.¹⁴

Health services should be *available* in sufficient quantity, *accessible* (physical, economic and information accessibility) to everyone without discrimination, *acceptable* (respectful of medical ethics and cultural appropriateness), scientifically and medically appropriate and *of good quality*. Core obligations of the right to health, as determined by the Committee on Economic, Social and Cultural Rights' General Comment No. 14 on Article 12 of the Covenant,¹⁵ include the obligation to ensure access to health facilities, good and services to everyone, including non nationals and vulnerable groups without discrimination.

Non discrimination is, in fact, among the obligations of immediate effect the right to health imposes. Core obligations are subject to neither progressive realisation nor resource availability. The right to health is overall subject to progressive realisation and resource availability. Nonetheless, governments must take deliberate, concrete and targeted steps to ensure the progressive realisation of the right. If there is no progress, the government of that country has to provide a rational and objective explanation on the reasons.

When a State does not recognise expressly the right to health, the duty of the State to ensure an adequate access to essential care can be deducted by its obligation towards the right to life. When the State recognises it, general and specific obligations come directly from the right to health.

¹⁴ See for example Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev. 6 of 12 May 2003, p. 128; see art 6 ICCPR; see also at the African Commission on Human and Peoples Rights in Social and Economics Rights Action Centre (SERAC) and another v Nigeria (2001) AHRLR 60 (ACHPR 2001), 260 para 67; para 70 (SERAC case).

¹⁵ See [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)

Equally, comparable domestic jurisprudence also point to the need to uphold the right to life which demand that states adopt positive obligations for all its inhabitants in a bid to respect and promote fundamental human rights of all.¹⁶ Furthermore, on the basis of equality provisions, states are called upon to treat all who live in them, without discrimination. A brief review of each of the rights that could be linked to the right to access health services for migrants follows.

1.1.1 Right to Life Provisions

The right to life is 'the most fundamental of all human rights, the supreme human right'.¹⁷ Although the protection of the right to life in five SADC states' constitutions - Botswana, Mauritius, Swaziland, Zambia and Zimbabwe - is formulated as a negative obligation,¹⁸ comparable jurisprudence from the region, notably South Africa, have held that to uphold the right to life the state is also obliged to take positive measures to guarantee that right.¹⁹ Such positive measures include provision of socio-economic rights that are crucial for human survival, which inevitably include access to health services.

Some of the international and regional human rights monitoring mechanisms of treaties ratified by member states have called upon member states to interpret the right to life positively.²⁰ The Human Rights Committee (HRC) has, for instance, noted that 'the right to life has

been too often narrowly interpreted ... [T]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.²¹ The African Commission has also found a link between socio economic rights, the rights to life and dignity, which are protected by the African Charter on Human and Peoples Rights.²²

Comparable domestic jurisprudence have also linked realisation of socio economic rights to the right to life. The South African Constitutional Court has linked the realization of socio-economic rights to the right to life.²³ While the issue in contention was access to social assistance for migrants who had acquired permanent residence in South Africa, the court linked the denial of social assistance to those migrants to a violation of their right to life, dignity and equality.²⁴ According to the Court 'society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational'.²⁵ Access to health services for migrants especially in emergency circumstances irrespective of their immigration status hinges directly on their right to life and dignity and would require similar interpretation.

Such an interpretation would particularly be useful in SADC Member States whose constitutions do not expressly provide for socio-economic rights in their Bill of Rights.²⁶ Indeed, where the right to health for all is not expressly stipulated in the Constitution of a SADC Member State (this includes Botswana, Zambia, Zimbabwe, Swaziland, Namibia, and Mauritius), the right to life presents one of the most realistic avenues

16 See for instance the cases of *Paschim Banga Khet Mazdoor Samitty v State of West Bengal* AIR 1996 SC 2426 (India); *Olga Tellis. Bombay Municipal Corporation* 1985, 3 SCC 545 (India); *Khosa & 2 others v Minister of Social Development & 2 others* 2004(6) SA 505 (CC) para 41, 44, 52, 80, and 82(South Africa); *S v Makwanyane* 1995 (3) SA 391 (CC) para 217 (South Africa); *Ain O Salish Kendro (ASK) & others v Government of Bangladesh & Others*, Writ Petition No 3034 of 1999, (1999) 2 CHRLD (Bangladesh); *Kerajaan Negeri Johor & Another v Adong bin Kuwau & Others* [1998] 2 MLJ 158, (1998) 2 CHRLD 281 (Malaysia).

17 See *S v Makwanyane* 1995 (3) SA 391 (CC) para 217; see also Yoram D 1981. *The right to life, physical integrity and liberty* in Louis H (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press. p 114.

18 The wording of the provision on the right to life in the following SADC countries is in the form of a negative obligation not to take someone's life, beyond established parameters of the law. See for example the Constitutions of Botswana (sec 4); Mauritius (sec 4); Swaziland (sec 15); Zambia (sec 12); and Zimbabwe (sec 12).

19 *S v Makwanyane* paras 117; 353.

20 All the SADC member states are parties to at least two of these instruments, namely the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.

21 Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev.6 of 12 May 2003, p. 128; see art 6 ICCPR.

22 See *Social and Economics Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), 260 para 64-66; arts 4 and 5 African Charter on Human and Peoples' Rights (African Charter) adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (1981).

23 See *Khosa & 2 others v Minister of Social Development & 2 others* 2004(6) SA 505 (CC) paras 41, 44, 52, 80, and 82.

24 *Ibid*, paras 41, 44, 52, 80, and 82.

25 *Ibid*, para 52.

26 In SADC such countries include: Botswana, Zambia, Zimbabwe, Swaziland, Namibia, and Mauritius.

for progressive interpretation likely to yield meaningful protection of the right to health of migrants.

However, it is important to note that general access to health services for migrants as is the case with realisation of most other socio economic rights by nationals is dependent on available resources. In other words, states are only obliged to progressively realise these rights.²⁷ However, in emergency situations and/or in circumstances where the failure to protect the right to access health services would violate the right to life, states have an obligation to respect and protect all who live in them without discrimination.²⁸ Furthermore, as discussed previously, non-discrimination is among the obligations of immediate effect when it relates to right to life. A positive interpretation of the right to life would include the right to adequate basic healthcare which is necessary to better and prolong the lives all human beings. Accordingly, denying access to necessary medical care to anyone, including migrants, suffering from a disease, shortens their life-span and ultimately deprives them of their right to life.²⁹

1.1.2 Equality and Non-Discrimination Provisions

Equality and non-discrimination provisions enshrined in all the SADC countries' constitutions provide, at least in theory, a constitutional basis for migrants to assert

their right to access health services that is available to citizens of their countries of residence. However, the language of the constitutions of Angola³⁰, Madagascar,³¹ and Mozambique³² restrict the application of the non-discrimination provisions to their citizens. Non-discrimination and equality provisions in the rest of the SADC Member States apply to all who live in them. Although the constitutions of Mauritius, Zambia and Zimbabwe, prohibit discrimination of everyone, they also legitimize laws that makes certain exemptions to non-citizens.³³ However, it is instructive that relative to the right to access health services, there is no express law in these three states that validates discrimination of migrants to access health services.³⁴

The international instruments prohibiting discrimination include the **International Covenant on Civil and Political Rights (ICCPR)**³⁵ and the **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**,³⁶ both of which have been ratified by most SADC Member States.³⁷ Article 2(1) of the ICCPR stipulates that '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

27 On states duties to realize the right to health see Ngwena C & Cook R. 2005. Right concerning health in Brand D & Heyns C (eds) Socio economic rights in South Africa. Pretoria: Pretoria University Press. p 107-125; Generally on positive state duties relative to socio economic rights see SERAC case above para 44-47; see discussion of implementation socio-economic rights under the African Charter on Human and Peoples' Rights in Odinkalu CA. 2002. Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights in Evans M & Murray R (eds) The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000. Cambridge: Cambridge Press. p 178-209; For a detailed discussion on socio economic rights especially in the South African context see Liebenberg S. 2003. The interpretation of socio economic rights in Woolman S et al (eds) Constitutional Law of South Africa: Cape Town: Juta & Co. 33:1-66; see also the South African Court jurisprudence in Government of the Republic of South Africa v Grootboom 2001(1) SA 46 (CC); Soobramoney v Minister of Health, Kwa Zulu Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

28 See the Committee on Economic, Social and Cultural Rights, The nature of States parties obligations (Article 2, para. 1), 14/12/90. CESCR General Comment 3, 5th Session 1990, para. 12; See also Brand D. 2005. Textual basis: The rights and related provisions in Brand D and Heyns C (eds) supra note 14. p 4.

29 Aids and Human Rights Research Unit. 2007. Southern African Country Reports on HIV/AIDS and the Law. Pretoria: Pretoria University Law Press. p 362.

30 See sec 18, Angola Constitution.

31 See sec 8, Madagascar Constitution.

32 See sec 66, Mozambique Constitution.

33 Please note however that the prohibition of discrimination does not preclude any differentiated treatment and measures being taken to address the specific needs of (particular) migrating persons. Differentiated treatment and measures may indeed not only be justified but required. The principle of non-discrimination does, however, require that any differentiation in treatment must be based on objective and reasonable criteria intended to rectify an imbalance within society. Migration and the Right to health. A Review of International Law, IOM, forthcoming in 2009.

34 Zimbabwe however expressly mentions in its constitution sec 23(3) (c) that restriction of access to public services to persons who are non citizens or permanent residents.

35 International Covenant on Civil and Political Rights (ICCPR) 1966, adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, U.N. Doc. A/6316.

36 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, adopted by U.N. General Assembly resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969.

37 Angola is the only country in SADC that has not ratified the ICERD and Swaziland is the only country in SADC that has not ratified the ICCPR.

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.³⁸ Further, article 26 of the Covenant guarantees equal protection before the law.³⁹ The African Charter on Human and Peoples' Rights similarly prohibits discrimination on the basis of various grounds, including race, ethnic origin, language, social status and other status.⁴⁰ Of significant importance to migrants' rights to health in SADC member states, is the fact that all the countries under review have ratified this treaty. Article 16 of the African Charter provides that:

(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2). States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The **Convention Relating to the Status of Refugees⁴¹ which has also been ratified by all SADC member states apart from Mauritius contains important international standards and norms that apply to refugees. The Convention obliges state parties not to discriminate against refugees on the basis of religion, race or country of origin.⁴² The OAU**

Convention Governing the Specific Aspects of Refugee Problems in Africa⁴³ which has also been ratified by all SADC member states apart from Madagascar⁴⁴ and Mauritius similarly calls on state parties to apply the provisions of the Convention without discrimination.⁴⁵

With regard to access to health services for migrants without discrimination, the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)** is unequivocal.⁴⁶ The Convention provides for the right to equal treatment regarding access to social and health services for regular migrant workers and members of their family and nationals. Further, Article 28 recognizes the right to emergency medical treatment for all migrant workers and members of their families even if their stay or employment is irregular.⁴⁷ In recognising only necessary emergency medical treatment, the Convention fails to guarantee access to preventive medical treatment, such as early diagnosis and medical follow-up as well as to palliative health services. Emergency health care represents, nevertheless, a minimum standard for those migrants in an irregular situation.. Additionally, there are examples of States that comply with their obligation to ensure equitable access to preventive, curative and palliative health services of appropriate quality for all those residing in their territory.⁴⁸

38 See also HRC General Comment No. 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para 18 describing discrimination as '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 equal footing, of all rights and freedoms.'

39 Art 26 ICCPR '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.'

40 See arts 2, 3 & 19 African Charter.

41 United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

42 Art 3 United Nations Convention relating to the Status of Refugees.

43 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974 (Africa Refugee Convention)

44 Signed the Africa Refugee Convention on 10/09/1969 but not yet ratified.

33 See art 4 Africa Refugee Convention.

46 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003. (Convention on Migrant Workers)

47 See art 28 Convention on Migrant Workers.

48 Migration and the Right to Health. A Review of International Law, loc. cit. n 21.

Although among SADC member states, only Seychelles is party to the ICRMW, the Convention reflects the international standard that should apply to all migrant workers and members of their families with regard to the right to health.

1.2 INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES RELEVANT TO MIGRANTS' RIGHT TO HEALTH

Apart from the international and regional instruments noted in the discussion above, there are a number of other international and regional instruments, which although not directly targeting migrants, do accord rights for all to access health services. The **International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁹ which has been ratified by all the SADC member states apart from, Botswana, Mozambique, South Africa and Swaziland, expressly provides for the right to health for all. Article 12 of that Covenant recognizes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The Covenant calls on state parties to take appropriate measures that among others include 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases;(d) and the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.⁵⁰**

The Committee on Economic Social and Cultural Rights (CESCR), which monitors the implementation of the Covenant, has reiterated that "health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."⁵¹ While General Comments unlike treaties are not legally binding on states, they elaborate and spell out, the effect and relevance of treaties.⁵²

49 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

50 Ibid, arts 12(20) (c) (d).

51 See UN Committee on Economic Social and Cultural Rights, The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4, CESCR General Comment 14 (General Comments) para 1.

52 See Tomuschat, C. 2003. Human Rights Between Idealism and Realism. Oxford: Oxford University Press. p 154.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵³ also includes provisions that apply to migrant women's access to health services. All SADC member states are parties to that Convention. Article 12 of CEDAW calls on state parties to 'take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning'. The Africa Regional Protocol on the Rights of Women in Africa⁵⁴ equally calls on all state parties to 'ensure that the right to health of women, including sexual and reproductive health is respected and promoted'.⁵⁵ All SADC member states have ratified that Protocol apart from Botswana, DRC, Madagascar, Mauritius and Swaziland.

The African Charter on the Rights and Welfare of the Child (ACRC)⁵⁶ is another treaty that accords all children including migrant children the right to health. Article 14 of the ACRC provides that 'every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health'. All SADC member states are parties to the ACRC apart from the DRC, Swaziland and Zambia. The ACRC echoes a similar provision in the **Convention on the Rights of the Child (CRC).⁵⁷**

53 Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

54 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000), entered into force Nov. 25, 2005.

55 Ibid, art 14.

56 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

57 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.

10 INTRODUCTION

From the foregoing provisions of international and regional treaties- most of which SADC member states are bound to adhere by virtue of having ratified them- it is arguable that migrants who are resident in SADC states have the right to health. Indeed, ratification of international and regional treaties by states invites certain obligations, even if they have not been domesticated by national law.⁵⁸

58 See the Botswana case of Attorney General v Dow 1964 6 BCLR 1 Per Ammisah JP at p 27-30 and Aguda JA at p 43-47; Communication 147/95 and 149/96, Sir Dawda K Jawara v the Gambia, 13th Annual Activity Report: 1999-2000, para 46; Communication 137/94, 139/94, 154/96 and 161/97, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa and Civil Liberties Organisation v Nigeria 12th Annual Activity Report 1998-1999(Ken Saro Wiwa case) para 113; See also Dugard J. 1992. International Law a South African Perspective. Capetown: Juta. p 266; See also Harris D.J. 1991. Cases and Materials on International Law. London: Sweet and Maxwell. p 747.

It is also important to note that three SADC member states (DRC, Madagascar and Mozambique) have adopted the monist approach to international treaties they have ratified. That means that international treaties they have ratified become part of national law and can automatically be invoked in court as a source of domestic law. The rest of the SADC countries have adopted a dualist approach to international treaties they have ratified. Under that system treaties ratified by the state do not form part of domestic law directly. Accordingly they do not have automatic force of law and cannot be enforced in a court of law until an appropriate national legislation has been enacted giving them such effect.

2 COUNTRY STUDIES

This section briefly traces some of the relevant constitutional, legislative and international standards that are applicable in each SADC member state relative to migrants' right to health. It examines the available sources of law of each SADC member state and where possible existing literature on its application. The information presented in this survey for each state may therefore differ, depending on the public availability of the sources of the law. The legal position stated in this review is as of 31 December 2008.

As a desk-top survey, whose focus is only on the legal provisions, its scope is limited in that it may not necessarily reflect the situation on the ground, but rather on what the law provides.

2.1 ANGOLA

2.1.1 Constitutional provisions

Angola's Constitution was adopted on 11 November 1975. It contains a Bill of Rights- fundamental rights and duties.⁵⁹ Article 47 of the Constitution of the Republic of Angola provides for the right to health but its application is limited to citizens. However, it is important to note that refugees in Angola are entitled to health assistance in accordance with legislation.⁶⁰ Application of the non-discrimination clause is equally limited to Angolan citizens.⁶¹ Accordingly, migrants in Angola particularly those who can not afford to access private health care, would have to rely on the provisions of article 22 on the right to life to make a case for protection of their right to access health services. It is important to note that the Constitution of Angola provides that interpretation of the Angolan Bill of Rights should be in accord with norms and standards of international law.⁶² According to article 21 of the Constitution:

(1) The fundamental rights provided for in the present Law shall not exclude others stemming from the laws and applicable rules of international law.

(2) Constitutional and legal norms related to fundamental rights shall be interpreted and incorporated in keeping with The Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and other international instruments to which Angola has adhered.

(3) In the assessment of disputes by Angolan courts, those international instruments shall apply even where not invoked by the parties.

As discussed in the previous general section on the right to life and non discrimination, international standards prohibit discrimination on the basis of national or social origin.⁶³

2.1.2 Legislation

By virtue of article 8 of the **Refugee Status Law of Angola**, refugees are entitled to access public health services.⁶⁴ In terms of legislation, Angola does not exclude provision of health services to refugees including those with HIV and Aids and mental disabilities.⁶⁵ In 2007, Angola adopted the **Act on Legal Regime of Foreign Citizens**,⁶⁶ which regulates the legal status of foreign citizens in the Republic of Angola. That law applies to all foreigners in Angola apart from diplomats whose status is regulated by the Vienna Convention on Diplomatic Relations and Consular Relations.⁶⁷ In terms of the Act on Legal Regime of Foreign Citizens, 'foreign citizens residing or present in the Republic of Angola enjoy the same rights and guarantees, and are subject to the same duties, as Angolan citizens, except for political rights and

59 See Part II Angola Constitution; Arts 18-52.

60 See Law No. 8/1990 of 26 May 1990, Law on Refugee Status [Angola]. 26 May 1990, available online in UNHCR Refworld at <<http://www.unhcr.org/refworld/docid/3ae6b4df8.html>> accessed 18 January 2009 art 8: Refugees shall be entitled to engage in gainful activities and shall have the right to education and health assistance.

61 Art 18 Angola Constitution.

62 Art 21 Angola Constitution.

63 See art 26 ICCPR; See also arts 2 & 3 ACHPR.

64 See art 8 Law on Refugee Status Law No 8 of 1990.

65 Ibid art 7-The Act acknowledges that even mentally handicapped people accompany refugees are entitled to the rights envisaged in the Act; See also Law 8/04 on HIV and AIDs (2004) cited in United Nations Development Programme. 2006. A review of regional and national human rights based HIV and AIDs policies and frameworks in Eastern and Southern Africa. p23.

66 Act on Legal Regime of Foreign Citizens Act No 2 of 2007.

67 See art 2 Act on Legal Regime of Foreign Citizens Act No 2 of 2007.

other rights and duties that are clearly reserved by law for Angolan citizens.⁶⁸ As noted earlier, while the constitution limits the enjoyment of the right to access public health services to Angolan citizens,⁶⁹ legislation provides for the right of refugees to access health services.

It is of significant importance to migrants in Angola that the Constitution and all other laws shall be interpreted in accordance with norms and standards of international law.⁷⁰ That means that all foreigners can claim the right to access health services to preserve the right to life, particularly in emergency medical situations as is provided for under Angola's Constitution and international instruments it has ratified.⁷¹ Additionally legislation unequivocally protects the 'rights of all persons living with HIV, including the right to free public health care, and confidentiality in the health care system.'⁷² Such persons may include migrants.

2.1.3 Ratified international instruments

Angola has ratified the following relevant international and regional instruments: International Covenant on Civil and Political Rights,⁷³ First Optional Protocol to the ICCPR,⁷⁴ International Covenant on Economic, Social and Cultural Rights,⁷⁵ UN Convention Relating to the Status of Refugees,⁷⁶ African Charter on Human and Peoples' Rights,⁷⁷ and the OAU Refugee Convention.⁷⁸ As discussed in the

68 See art 3(1) Act on Legal Regime of Foreign Citizens Act No 2 of 2007.

69 Sec 47, Angola Constitution.

70 See sec 2.1.1 Angola Constitution.

71 See sec 21 Angola Constitution; See also the international instruments that Angola has ratified in sec 2.1.3 of this report especially the African Charter on Human and Peoples Rights (section 16) which obliges state parties to guarantee all individuals the right to enjoy the best attainable state of physical and mental health.

72 See Law 8/04 on HIV and AIDS (2004) cited in United Nations Development Programme. 2006. A review of regional and national human rights based HIV and AIDS policies and frameworks in Eastern and Southern Africa. p 23.

73 Ratified on 10/01/1992.

74 Ratified on 10/01/1992.

75 Ratified on 10/01/1992.

76 Ratified on 23/06/1981.

77 Ratified on 02/03/1990.

78 Ratified on 30/04/1981.

previous section, the norms and standards enumerated in these international standards shall apply during the interpretation of Angola's Bill of Rights and adjudication of disputes in courts of law.⁷⁹ Accordingly, and in conformity with those standards which guarantee the right to access health services for all especially in emergency situations, Angola's legal framework recognizes the right of migrants to access health services.

2.2 BOTSWANA

2.2.1 Constitutional provisions

The Constitution of Botswana entrenches a Bill of Rights, whose provisions are enforceable in the High Court.⁸⁰ While the Constitution does not expressly provide for the right to health, a liberal and progressive interpretation of other relevant provisions, would accord those who live in Botswana including migrants the right to access health services. Indeed, the language of the Botswana Bill of Rights does not discriminate or differentiate between citizens and any other person in Botswana in the enjoyment of the rights enshrined in the Constitution.⁸¹ These rights include protection of the right to life,⁸² protection from inhuman treatment,⁸³ and protection from discrimination.⁸⁴

2.2.2 Legislation

Although Botswana's **Public Health Act**⁸⁵ 'does not expressly provide for the right of access to health care, it places, an obligation on the Ministry responsible for health to 'carry out activities that could contribute to the realisation of the right to health.'⁸⁶ Given that Botswana does not discriminate against all those who live in it, in terms of enjoyment of fundamental human rights, save for political rights, migrants are in theory equally entitled to benefit from the activities of the Health Ministry on provision of health services.⁸⁷

79 Sec 21 Angola Constitution.

80 Sec 18, Botswana Constitution.

81 Ibid sec 3.

82 Ibid sec

83 Ibid sec 7.

84 Ibid sec3).

85 Public Health Act 44 of 1971

86 Aids and Human Rights Research Unit supra note 16. p 12.

87 See sec 3 Botswana Constitution.

2.2.3 Ratified international instruments

Botswana like most other SADC states that adopted the common law legal system has a dualist approach to international instruments that it has ratified.⁸⁸ That means that international law instruments ratified by Botswana 'do not form part of its domestic law unless they are incorporated through national legislation.'⁸⁹ However, while provisions of international instruments that have not been domesticated in Botswana cannot be directly enforced, increasingly Botswana courts have given regard to applicable international norms and standards invoked before them.⁹⁰ Such instruments may be used by the courts for purposes of interpretation and have persuasive value as is the case with international and comparative jurisprudence.⁹¹ Therefore, while a migrant whose rights to access health services may not lodge a case solely on the basis of international standards ratified by Botswana, they are relevant in support of an argument that Botswana should uphold its domestic legal framework in line with its international law commitments.

Some of the international standards that Botswana has ratified that are relevant for migrants' access to health services include: International Covenant on Civil and Political Rights;⁹² International Convention on the Elimination of All Forms of Racial Discrimination;⁹³ Convention Relating to the Status of Refugees;⁹⁴ African Charter on Human and Peoples' Rights;⁹⁵ OAU Refugee Convention⁹⁶ and SADC Protocol on Health.⁹⁷ Botswana had not domesticated any of these human rights instruments as of 2008.

88 See Heyns C (ed), 2004. *Human Rights Law in Africa*. Leiden/Boston: Martinus Nijhoff Publishers. p 904; That position was reaffirmed by the courts in *Attorney General v Dow* (1992) BLR 119 (CA) at 153-154.

89 As above.

90 See for instance the extensive references to international standards by the Court in *Sesana and others v Attorney General* (52/2002) [2006] BWHC 1.

91 See *Sesana and others v Attorney General* (52/2002) [2006] BWHC 1; See also *Attorney General v Dow* (1992) BLR 119 (CA) at 154; *Petrus v the State* (1984) BLR 14 (CA) at 37.

92 Ratified on 08/08/2000.

93 Ratified on 20/12/1974.

94 Ratified on 06/01/1969.

95 Ratified on 17/07/1986.

96 Ratified on 04/05/1995.

97 Ratified on 09/02/2000.

2.3 DEMOCRATIC REPUBLIC OF CONGO

2.3.1 Constitutional provisions

The Democratic Republic of Congo adopted a new Constitution through a referendum in 2006. It is a generally progressive Constitution that incorporates socio-economic rights in its Bill of Rights. Apart from political rights whose enjoyment is limited to Congolese citizens, most other rights in the Bill of Rights including the right to health can be enjoyed by all including migrants.⁹⁸ The Constitution also provides for the right to life,⁹⁹ human dignity,¹⁰⁰ and non discrimination¹⁰¹ which could be interpreted to accord migrants the right to access health services in the DRC in compliance with DRC's international law commitments.

2.3.2 Legislation

At the time of this survey, there was limited information available on the legislation in the DRC that grants migrants access to health services or generally on access to health rights. This is recognized as a limitation to this survey.

2.3.3 Ratified international instruments

The DRC has ratified the following international instruments and being a monist state their provisions would be directly invoked and applicable in resolution of disputes and enforcement of fundamental human rights in courts of law: International Covenant on Civil and Political Rights,¹⁰² First Optional Protocol to the ICCPR,¹⁰³ International Covenant on Economic, Social and Cultural Rights,¹⁰⁴ International Convention on the Elimination of All Forms of Racial Discrimination,¹⁰⁵ UN Convention Relating to the Status of Refugees,¹⁰⁶ African Charter on Human and Peoples' Rights,¹⁰⁷ and the OAU Refugee Convention.¹⁰⁸

98 See art 11, Constitution of the Democratic Republic of Congo, 2006. The author acknowledges translation of relevant sections of the DRC Constitution from French to English by Clement Mavungu, PHD candidate in law at the University of Witwatersrand.

99 Ibid art 16(2).

100 Ibid art 16(1)

101 Ibid art 11.

102 Ratified on 01/11/1976.

103 Ratified on 01/11/1976.

104 Ratified on 01/11/1976.

105 Ratified on 21/04/1976.

106 Ratified on 19/07/1965.

107 Ratified on 20/07/1987.

108 Ratified on 14/02/1973.

2.4 LESOTHO

2.4.1 Constitutional provisions

Chapter 2 of the Constitution of Lesotho¹⁰⁹ provides for the Bill of Rights which is limited to civil and political rights. Socio economic rights which are enshrined in chapter 2 of the Constitution are classified as principles of state policy which means that they are not enforceable by courts of law.¹¹⁰ Protection of the right to health falls in that category of non-justiciable - which means they can not be enforced in courts of law - principles of state policy and additionally its application is limited to citizens.¹¹¹ However the right to life,¹¹² freedom from discrimination¹¹³ and the right to equality before the law and equal protection of the law¹¹⁴ are all enforceable in court of law and apply to every person in Lesotho including migrants.¹¹⁵

2.4.2 Legislation

While the right to access health services in Lesotho is not a justiciable right, 'health care in public health care centres is greatly subsidised by the government, and patients are only required to pay less than 10 Maloti (about USD 1.60) to access public health care facilities in the country'.¹¹⁶ However, at the time of this review, Lesotho had not enacted any HIV/AIDS specific legislation. It is worthy of note that in terms of immigrations laws and policy, Lesotho does not discriminate against entry of migrants suspected or living with HIV/AIDS.¹¹⁷

2.4.3 Ratified international instruments

Lesotho is a party to the following relevant international and regional instruments: International Covenant on

Civil and Political Rights,¹¹⁸ First Optional Protocol to the ICCPR,¹¹⁹ International Covenant on Economic, Social and Cultural Rights,¹²⁰ International Convention on the Elimination of All Forms of Racial Discrimination,¹²¹ UN Convention Relating to the Status of Refugees,¹²² African Charter on Human and Peoples' Rights,¹²³ OAU Refugee Convention,¹²⁴ and the SADC Protocol on Health.¹²⁵ Lesotho has not domesticated any of those treaties, and as a state that follows the dualist approach to international instruments it has ratified,¹²⁶ they 'only play a persuasive role in the legal system'.¹²⁷

2.5 MADAGASCAR

2.5.1 Constitutional provisions

Article 19 of the Constitution of Madagascar¹²⁸ provides for the right to health. The language of that provision does not limit the enjoyment of that right to citizens and as such would equally apply to migrants. Such an interpretation can be inferred from the fact that certain rights, especially political rights,¹²⁹ are expressly limited to citizens, which is not the case for the right to health. The Constitution of Madagascar does not have an express provision for the right to life, but could be implied from the protection of the integrity and dignity of the person.¹³⁰ Ironically, article 8 on the right to non-discrimination only expressly mentions nationals as being equal under the law, which seems to contradict article 7 which provides for equal application of the law for all.

109 Constitution of Lesotho, 2003.

110 See sec 25 Lesotho Constitution.

111 See art 27 Lesotho Constitution.

112 See art 5 Lesotho Constitution.

113 See art 18 Lesotho Constitution.

114 See art 19 Lesotho Constitution.

115 See art 4 Lesotho Constitution.

116 Aids and Human Rights Research Unit supra note 16, p 74.

117 Ibid p74.

118 Ratified on 09/09/1992.

119 Ratified on 07/09/2000.

120 Ratified on 09/09/1992.

121 Ratified on 04/11/1971.

122 Ratified on 14/05/1981.

123 Ratified on 10/02/1992.

124 Ratified on 18/11/1988.

125 Ratified on 31/07/2001.

126 See Heyns C. 2004. p 1206.

127 Aids and Human Rights Research Unit supra note 16, p 44

128 Constitution of Madagascar 1992.

129 Ibid, art 12, 14 and 15.

130 See art 17 Constitution of Madagascar.

2.5.2 Legislation

Madagascar has enacted a law that 'addresses issues of stigmatisation and discrimination against people living with HIV'.¹³¹ While that law does not address rights to access health services for all in Madagascar one can infer from the provisions of that law that one would not be discriminated against in seeking to access essential medicines and treatment irrespective of their legal status in the country.¹³² In other words, all persons infected or living with HIV/AIDS in Madagascar would not be discriminated against based on their immigration status. This is because although the Constitution limits the application of the non-discrimination provision to citizens, it is arguable that given Madagascar's monist approach to international standards as is discussed below, a consistent interpretation of the Constitutional Bill of Rights, guarantees equal treatment of all in accordance with the law. That means that migrants would be equally entitled to protection of the law as stipulated in article 7 of the Constitution and enjoys similar rights as citizens, such as access to health.

2.5.3 Ratified international instruments

Madagascar is a monist state and party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,¹³³ First Optional Protocol to the ICCPR,¹³⁴ International Covenant on Economic, Social and Cultural Rights,¹³⁵ International Convention on the Elimination of All Forms of Racial Discrimination,¹³⁶ UN Convention Relating to the Status of Refugees,¹³⁷ and the African Charter on Human and Peoples' Rights,¹³⁸ Although Madagascar has signed the OAU Refugee Convention,¹³⁹ it is yet to ratify that Convention. Once these instruments are published in the official gazette, these norms and standards have

legal force in the courts of law of Madagascar. According to the Preamble of the Constitution, international instruments ratified by Madagascar are an integral part of the Country's laws.

2.6 MALAWI

2.6.1 Constitutional provisions

Provision of 'adequate health care, commensurate with the health needs of Malawian society and international standards on health care' is not a justiciable right but a principle of state policy.¹⁴⁰ Although principles of state policy in Malawi are not legally enforceable, court of law shall be 'entitled to have regard to them in interpreting the Constitution'.¹⁴¹ Accordingly, migrants' rights to access health services in Malawi, as is that of nationals depend on available resources through a progressive realization of the right.¹⁴² Malawi's Constitution also provides for the right to life for all,¹⁴³ and equality.¹⁴⁴ These rights can be enforced in a competent court of law,¹⁴⁵ or secure assistance for such enforcement from the ombudsman and the Malawi Human Rights Commission.¹⁴⁶ The constitutional equality provisions in Malawi expressly lists nationality as one of the prohibited ground for discrimination, further buttressing the argument that all migrants in Malawi are entitled to equal protection of the law as are citizens.¹⁴⁷

2.6.2 Legislation

Although the Malawi Constitution provides for non-discrimination, the **Immigration Act** prohibits entry into Malawi of certain categories of persons who are regarded as prohibited immigrants.¹⁴⁸ In terms of the Act, prohibited immigrants include person who are infected,

131 See Law 2005-040 on the Fight against HIV/AIDS and the Protection of Rights of People Living with HIV (2005) sourced at <http://www.chr.up.ac.za/undp/domestic/docs/legislation_04.PDF> accessed 18 February 2009.

132 Ibid art 1, 2, 7, 12, 14, 25, 26, and 28.

133 Ratified on 21/06/1971.

134 Ratified on 21/06/1971.

135 Ratified on 22/09/1971.

136 Ratified on 22/09/1971.

137 Ratified on 18/12/1967.

138 Ratified on 09/03/1992.

139 Signed on 10/09/1969.

140 See art 13 (c) Malawi Constitution of 1995; See also art 14.

141 See art 14 Malawi Constitution.

142 See Ibid, art 13.

143 Ibid, art 16.

144 Ibid art 20

145 Ibid, art 46(2) (a).

146 Ibid art 46 (2) 9 (b).

147 Ibid art 20.

148 See art 4 of the Immigration Act [Malawi]. 1964, available online in UNHCR Refworld at <<http://www.unhcr.org/refworld/docid/3ae6b4f58.html>> accessed 18 January 2009.

afflicted with or suffering from a prescribed disease.¹⁴⁹ The list of prescribed diseases includes tuberculosis, gonorrhoea and syphilis.¹⁵⁰ Although HIV/AIDS is not expressly mentioned, as one of the prescribed diseases some of these ailments are related to HIV/AIDS and could therefore in effect exclude from Malawi migrants living with HIV.¹⁵¹ The Immigration Act additionally provides that an immigrant may be deported in the interests of, among others, public health.¹⁵²

While those provisions govern entry and exit of migrants into Malawi, the exclusion from Malawi of certain migrants on health status may impact upon access to health services of resident migrants. In other words, the fact that a migrant can be deported on the basis of her/his health status may mean that migrants would avoid accessing health services to avoid being detected and declared prohibited migrants. However, it is important to note that Malawi courts of law have declared that discrimination on the basis of one's HIV status is a violation of one's human rights and inconsistent with the Constitution's values and norms.¹⁵³ On that basis migrants who are resident in Malawi can arguably make a case for constitutional protection from discrimination on the basis of their health status. HIV/AIDS is linked to one's health status and given that courts have declared discrimination on the basis of HIV/AIDS as discriminatory, a comparable argument could be made to prevent deportation of a migrant on the basis of their health status.

2.6.3 Ratified international instruments

Malawi is a party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,¹⁵⁴ First Optional Protocol to the ICCPR,¹⁵⁵ International Covenant on Economic, Social

and Cultural Rights,¹⁵⁶ International Convention on the Elimination of All Forms of Racial Discrimination,¹⁵⁷ UN Convention Relating to the Status of Refugees,¹⁵⁸ African Charter on Human and Peoples' Rights,¹⁵⁹ OAU Refugee Convention,¹⁶⁰ and the SADC Protocol on Health.¹⁶¹ Like states in the region whose legal system is influenced by common law, Malawi is dualist with respect to international instruments it has ratified.¹⁶² Although Malawi has not domesticated most of the listed international instruments - apart from the UN and OAU Refugees Conventions¹⁶³ - the norms and standards from treaties that Malawi has ratified, are accorded due consideration in interpreting the Constitution by courts of law.¹⁶⁴

2.7 MAURITIUS

2.7.1 Constitutional provisions

The Constitution of Mauritius¹⁶⁵ does not expressly provide for the right to health. However, it does provide for the right to life¹⁶⁶ albeit formulated as a negative obligation - protection from intentional deprivation of life. Although section 16 of the Constitution prohibits against discrimination, it legitimizes enactment of a law that may discriminate against non-citizens.¹⁶⁷ Such laws have been enacted in Mauritius in particular the Immigration Act which exempts certain prohibited

149 See art 4(1) (e) Malawi Immigration Act.

150 See sec 11 of the Immigration Regulations in Malawi [Malawi] 1968, available online in UNHCR Refworld at <<http://www.unhcr.org/refworld/docid/3ae6b4f6c.html>> accessed 18 January 2009.

151 Aids and Human Rights Research Unit supra note 16. p 122.

152 See art 39 (2) (b) Malawi Immigration Act

153 See *Neffie Mangani v Register Trustees of Malamulo Hospital*, 5. High Court of Malawi, Principal Registry, Civil Cause No 193 of 1991- cited and discussed in *Aids and Human Rights Research Unit supra note 16. p 95.*

154 Ratified on 22/12/1993.

155 Ratified on 11/06/1996.

156 Ratified on 22/12/1993.

157 Ratified on 11/06/1996.

158 Ratified on 10/12/1987.

159 Ratified on 17/11/1989.

160 Ratified on 04/11/1987.

161 Ratified on 07/11/2000.

162 See se 211(1) of the Constitution of Malawi.

163 Heyns C. 2004. p 1247; See Malawi Refugee Act Cap 15.04 of 1989.

164 See sec 11(2) (c), 13(k) and 44 (2) Malawi Constitution; See for example reference to the application of international standards in Malawi in *Thandiwe Okeke v The Minister of Home Affairs* (Misc civil application no 73 of 1997) decided on 8 July 2001 in High Court of Malawi cited in *Aids and Human Rights Research Unit supra note 16. p 80.*

165 Constitution of Mauritius of 1968.

166 *Ibid*, sec 4 of the Constitution.

167 *Ibid* sec 16 (4) (b).

persons from entering Mauritius and accessing public services.^{168,169}

2.7.2 Legislation

Section 8 of the Immigration Act of Mauritius lists certain categories of peoples as prohibited immigrants which include:

(a) persons who appear to the immigration officer to be suffering from any physical or mental infirmity and who are likely to be a charge on public funds;

(b) persons afflicted with any infectious or contagious disease;

(c) persons who are dumb, blind or otherwise physically defective or physically handicapped and who are likely to be a charge on public funds;

In seeking to exclude that category of migrants mainly on the grounds that they are likely to be a burden to the tax payer, Mauritius seeks to limit access to public services to a category of persons it considers prohibited immigrants. However, Mauritius **HIV and AIDS Act of 2006**¹⁷⁰ does not discriminate against any person living with HIV who may seek voluntary counseling or testing. Although the Act does not expressly provide for treatment and access to essential medicines, it makes provision for testing and counseling which is available for all. Indeed, the Act obliges the state to make available facilities in such public hospitals and other public health institutions as he may designate for HIV testing in respect

of persons who request an HIV test for themselves.¹⁷¹ One can therefore infer that while Mauritius does not expressly provide for access to health services for all in its constitution or legislation, in terms of the law, one cannot be discriminated against on the basis of their HIV status irrespective of immigration status.

2.7.3 Ratified international instruments

Mauritius is a dualist state and as such international treaties it has ratified are not enforceable by courts of law unless incorporated in domestic law.¹⁷² The state is party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,¹⁷³ First Optional Protocol to the ICCPR,¹⁷⁴ International Covenant on Economic, Social and Cultural Rights,¹⁷⁵ International Convention on the Elimination of All Forms of Racial Discrimination,¹⁷⁶ and the African Charter on Human and Peoples' Rights.¹⁷⁷ Mauritius has signed but not yet ratified the OAU Refugee Convention.¹⁷⁸ It is worthy to note that the international standards and norms that Mauritius has ratified while not directly enforceable in courts of law are particularly important having persuasive influence in the interpretation of the Bill of Rights in tandem with Mauritius international law obligations.

2.8 MOZAMBIQUE

2.8.1 Constitutional provisions

Mozambique's Bill of Rights provides for the right to health but limits its application to citizens.¹⁷⁹ The right to life¹⁸⁰ is equally limited to citizens as is the non-discrimination clause.¹⁸¹

¹⁶⁸ See sec 8 of the Immigration Act of Mauritius.

¹⁶⁹ Migrating persons' have no general recognized right to enter a country. However, states must exercise their sovereign powers to deny entry to or exclude migrating persons in a manner consistent with international law and fundamental human rights, including the principle of non-discrimination. This principle requires states not to treat persons intending to enter or reside on their territory differently solely due to their health status unless there is an objective and reasonable basis for doing so. (...) In order to conform with international human rights law, entry and residence restrictions based on health status should be applied on an individual basis, taking into account the real effect of excluding the applicant on public health grounds and the cost treatment would impose on the host state. Arguably, such restrictions on human rights would be objective and reasonable and would not be disproportionate and arbitrary as prohibited under the Siracusa Principles. Migration and the Right to Health. A Review of International Law, loc. cit. n. 21.

¹⁷⁰ Mauritius HIV and AIDs Act No. 31 of 2006.

¹⁷¹ Ibid sec 5.

¹⁷² Heyns C. 2004. p 1314.

¹⁷³ Ratified on 12/12/1973.

¹⁷⁴ Ratified on 12/12/1973.

¹⁷⁵ Ratified on 12/12/1973.

¹⁷⁶ Ratified on 30/05/1972.

¹⁷⁷ Ratified on 17/11/1989.

¹⁷⁸ Signed on 10/09/1969.

¹⁷⁹ See sec 54 and 94 Constitution of Mozambique of 1990. The 2004 amendments to the Constitution retained the limitations of the enjoyment of these rights to citizens; see Aids and Human Rights Research Unit supra note 16. p 142.

¹⁸⁰ See sec 70 Constitution of Mozambique.

¹⁸¹ Ibid sec 66.

2.8.2 Legislation

Mozambique's immigration laws do not place prohibitions of entry to migrants living or affected with HIV/AIDS.¹⁸² Additionally as is the case in practice with access to other health services,¹⁸³ migrants suffering from HIV/AIDS can access the public health system.¹⁸⁴ Indeed as mentioned earlier, according to information supplied by government officials in Mozambique, migrants like citizens have rights to access public health services.¹⁸⁵

2.8.3 Ratified international instruments

Mozambique is a monist state which means that the treaties it has ratified are part of its domestic law, hence enforceable once they are published on the official gazette.¹⁸⁶ It is party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,¹⁸⁷ International Convention on the Elimination of All Forms of Racial Discrimination,¹⁸⁸ UN Convention Relating to the Status of Refugees,¹⁸⁹ African Charter on Human and Peoples' Rights,¹⁹⁰ and the OAU Refugee Convention.¹⁹¹

2.9 NAMIBIA

2.9.1 Constitutional provisions

The right to health, in Namibia's Constitution is not a justiciable right but rather a principle of state policy.¹⁹² The Bill of Rights contains the right to life¹⁹³ and non-discrimination¹⁹⁴ which are enforceable in a court of

law. Importantly, article 144 of the Constitution states that 'the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'¹⁹⁵

2.9.2 Legislation

Section 39(2) of the Immigration Control Act of Namibia¹⁹⁶ prohibits entry into Namibia of among others 'persons who are infected or afflicted with a contagious disease or is a carrier of such a virus or disease'. However, in practice migrants are not required to provide test results of their affliction to these diseases including HIV/AIDS and there has not been a reported incidence of migrants being barred from entering Namibia on the basis of their health status.¹⁹⁷ Accordingly, given that in practice migrants are able to enter Namibia, who may be afflicted with certain health conditions, on the basis of the non discrimination constitutional provisions, they would be entitled to access health services.

2.9.3 Ratified international instruments

Namibia is dualist and party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,¹⁹⁸ First Optional Protocol to the ICCPR,¹⁹⁹ International Covenant on Economic, Social and Cultural Rights,²⁰⁰ International Convention on the Elimination of All Forms of Racial Discrimination,²⁰¹ UN Convention Relating to the Status of Refugees,²⁰² African Charter on Human and Peoples'

182 Aids and Human Rights Research Unit supra note 16. p 158.

183 Supra note 169.

184 Ibid.

185 Ibid.

186 Heyns C. 2004. p 1340; See also Aids and Human Rights Research Unit supra note 16. p 138.

187 Ratified on 21/07/1993.

188 Ratified on 18/04/1983.

189 Ratified on 16/12/1983.

190 Ratified on 22/02/1989.

191 Ratified on 22/02/1989.

192 See art 95 (j) Constitution of Namibia of 1990.

193 See art 6 Constitution of Namibia of 1990.

194 See art 10 Constitution of Namibia.

195 On article 144, Professor Nico Horn of the University of Namibia states, 'while this does not mean that international instruments ratified by Namibia can be enforced in courts of law, until they are domesticated, it has led to persuasive reliance on international and comparative foreign jurisprudence' (See Horn N, 'Namibia' in Heyns C. 2004. p 1357).

196 Immigration Control Act, 1993 [Namibia]. 29 July 1994, available online in UNHCR Refworld at: <<http://www.unhcr.org/refworld/docid/3ae6b4fb0.html>> accessed 18 January 2009.

197 Aids and Human Rights Research Unit supra note 16. p 198.

198 Ratified on 28/11/1994.

199 Ratified on 28/11/1994.

200 Ratified on 28/11/1994.

201 Ratified on 11/11/1982.

202 Ratified on 17/02/1995.

Rights,²⁰³ and the SADC Protocol on Health.²⁰⁴ As discussed under Constitutional provisions, Namibia's Constitution expressly states that international treaties which the state has ratified forms part of the country's laws. Accordingly they have persuasive interpretation value in adjudication of disputes in courts of law and while redressing human rights violations for all who reside in Namibia.

2.10 SEYCHELLES

2.10.1 Constitutional provisions

Section 29 of the Constitution of Seychelles guarantees the right to health care but limits its application to citizens. However, the right to life²⁰⁵ is accorded to everyone as is the right to equal protection of the law.²⁰⁶ Anyone whose fundamental human rights have been breached may seek recourse through an application in the Constitutional Court of Seychelles.²⁰⁷ The Constitution further provides that in interpreting the Bill of Rights the courts shall ensure it is consistent with Seychelles international law obligations and take judicial notice of relevant international and comparative domestic jurisprudence of other democratic states and nations.²⁰⁸

2.10.2 Legislation

Seychelles laws and policy on health reflect the Constitutional guarantees which limit their application to citizens.²⁰⁹ According to the Seychelles Government web portal the Ministry of Health 'aims to provide affordable, accessible and high standard of health care services to the people of Seychelles at all times. Every citizen has the right to protection to health and to the enjoyment of the highest attainable standard of physical and mental health. In addition the ministry ensures that the health care services should be accessible to all

203 Ratified on 30/07/1992.

204 Ratified on 10/07/2000.

205 See sec 15 Constitution of Seychelles of 1993.

206 Ibid sec 27.

207 Ibid sec 46.

208 Ibid sec 48.

209 See the official website of the Seychelles Ministry of Health <<http://www.moh.gov.sc/fronpage.htm>> accessed 17 February 2009.

Seychellois and should be based on the need and not ability to pay.²¹⁰

2.10.3 Ratified international instruments

Seychelles is the only SADC member state that is party to the Convention on the Rights of Migrant Workers and the members of their families.²¹¹ Article 28 of that Convention provides that 'migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment'. Accordingly, all migrants in Seychelles are entitled to access health services without discrimination.

It has also ratified the International Covenant on Civil and Political Rights,²¹² First Optional Protocol to the ICCPR,²¹³ International Covenant on Economic, Social and Cultural Rights,²¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination,²¹⁵ UN Convention Relating to the Status of Refugees,²¹⁶ African Charter on Human and Peoples' Rights,²¹⁷ and the OAU Refugee Convention.²¹⁸

2.11 SOUTH AFRICA

2.11.1 Constitutional provisions

The South African Constitution guarantees everyone 'access to health care services'.²¹⁹ The Constitution obliges the 'state to take reasonable legislative and other measures within its available resources, to

210 See <<http://www.gov.sc/GovernmentAgencies/Ministry/minhealth.aspx>> accessed 17 February 2009.

211 As above.

212 Ratified on 05/05/1992.

213 Ratified on 05/05/1992.

214 Ratified on 05/05/1992.

215 Ratified on 07/03/1978.

216 Ratified on 23/04/1980.

217 Ratified on 13/04/1992.

218 Ratified on 11/09/1980.

219 See article 27(1) South Africa Constitution of 1996.

achieve the progressive realization of each of these rights.²²⁰ It further categorically states that 'no one may be refused emergency medical treatment.'²²¹ The right to access health services for all in South Africa has been elaborated and given content by the South African Constitutional Court.²²²

In terms of South African law and jurisprudence all South African residents including migrants are therefore entitled to access health care services. Indeed, the National Department of Health (NDoH) has clarified that 'refugees and asylum seekers—with or without a permit—should be assessed according to the current means test as applied to South African citizens when accessing public healthcare.'²²³ Further in 2006, it issued a memo clarifying that possession of a South African identity document is not a prerequisite for eligibility for ART, and in September 2007 issued a directive stating that refugees and asylum seekers, with or without a permit, should have equal access to antiretroviral treatment (ART) at all public health providers.²²⁴ Moreover in April 2008, a letter from the Gauteng Department of Health addressed to all hospital CEOs, district family physicians and district managers, clarified that South African identity documents are not required for health care, including ART.

However, in practice, 'ambiguity persists within the public system on refugees' and asylum seekers' rights to access healthcare in general and anti-retroviral treatment (ART) in particular.'²²⁵ For example, according

to research by the Forced Migrations Studies Programme at the University of Witwatersrand:

- Public clinics and hospitals in South Africa are not implementing the Department of Health directive to provide ART to non-citizens, but are referring non-citizen patients to NGO health providers, thereby creating a dual healthcare system;
- Refugees and asylum seekers report being unable to access ART because they do not have green, bar-coded ID documents. This is a violation of law. Many non-nationals are also referred out of the public sector to NGOs to access ART, despite a directive from the NDoH to the contrary.²²⁶

2.11.2 Legislation

The National Health Act of 2003 seeks to 'protect, respect, promote and fulfil the rights of the people of South Africa to the progressive realisation of the constitutional right to access health care services, including reproductive health care.'²²⁷ The Act enumerates the rights of patients who inevitably include migrants.²²⁸ Some of the rights relevant to migrants include the right not to be refused emergency medical treatment. The South African Refugee Act²²⁹ equally provides that refugees are entitled to full legal protection which includes the rights set out in the Bill of Rights.²³⁰ The Occupational Health and Safety Act²³¹ protects workers some of whom include migrants by demanding that employers provide safe and healthy working conditions and to ensure protection from any hazards in the workplace.

South African Immigration Act bars entry, grant of temporary and permanent residence permits to prohibited persons.²³² Persons living with HIV are not expressly mentioned as prohibited persons. However the fear of denial of a residence permit based on

220 As above section, 27(2).

221 As above section 27(3).

222 See the cases of *Government of RSA and others v Grootboom and Others* 2001 1 SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC); *E N and Others v Government of RSA and Others* 2007 1 BCLR 84 (D). For a brief expose of the three cases see Ngwenya C and Cook R. 2005, p 125-143

223 BI 4/29 REFUG/ASYL 8 2007, 19 September 2007 cited in report by the Consortium for Refugees and Migrants in South Africa, 'Protecting Refugees, Asylum Seekers and Immigrants in South Africa' 2008 sourced at <<http://migration.org.za/uploads/docs/Cormsa08-Final.pdf>> accessed 20 January 2009 (CORMSA Report), 40.

224 See Report by the Consortium for Refugees and Migrants in South Africa, 'Protecting Refugees, Asylum Seekers and Immigrants in South Africa' 2008 sourced at <<http://migration.org.za/uploads/docs/Cormsa08-Final.pdf>> accessed 20 January 2009 (CORMSA Report), 40.

225 Ibid.

226 Ibid p40-42.

227 See The National Health Act No 61 of 2003.

228 Ibid Chapter II.

229 Refugee Act No 130 of 1998.

230 Ibid sec 27(b).

231 Occupational Health and Safety Act 85 of 1993.

232 See sec 29(1) (a) Immigration Act 13 of 2002 states that those infected with infectious diseases as prescribed from time to time do not qualify for a temporary or a permanent residency permit.

“infectious diseases as prescribed from time to time” may prompt certain migrants to continue living as undocumented migrants with attendant consequences of serious limitation to access services from public service providers unaware/ignorant of the right of all to access health services.

2.11.3 Ratified international instruments

South Africa follows a dualist approach to international treaties it has ratified. Article 231 of South Africa’s Constitution provides for the process of international treaties acquiring the force of law in South Africa. Apart from self executing treaties, and customary international law,²³³ international standards would have to be domesticated to be enforceable in courts of law.²³⁴ However, it is instructive that South Africa’s Constitution obliges courts of law to consider international law when interpreting the Bill of Rights.²³⁵ The South African Constitutional Court in *S v Makwanyane* held that ‘in the context of section 35(1) (South African Constitution), public international law would include non-binding as well as binding law.’²³⁶

South Africa is a party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,²³⁷ International Convention on the Elimination of All Forms of Racial Discrimination,²³⁸ UN Convention Relating to the Status of Refugees,²³⁹ African Charter on Human and Peoples’ Rights,²⁴⁰ OAU Refugee Convention,²⁴¹ and the SADC Protocol on Health.²⁴² South Africa has signed but not ratified the International Covenant on Economic, Social and Cultural Rights.²⁴³

233 See sec 232 Constitution of South Africa

234 Ibid sec 231.

235 Ibid sec 39(1).

236 *S v Makwanyane* para 35; see also Dugard J. 1995. International law and the “Final” Constitution’. *South African Journal on Human Rights*. 11(2). p 242.

237 Ratified on 10/12/1998.

238 Ratified on 10/12/1998.

239 Ratified on 12/01/1996.

240 Ratified on 09/07/1996.

241 Ratified on 15/12/1995.

242 Ratified on 04/07/2000.

243 Signed on 3/10/1994.

2.12 SWAZILAND

2.12.1 Constitutional provisions

The right to health under the Constitution of Swaziland²⁴⁴ is not a justiciable right but a principle of state policy.²⁴⁵ The state is obliged to ‘take all practical measures to ensure the provision of basic health care services to the population.’²⁴⁶ In theory a progressive interpretation of the right to life²⁴⁷ and non discrimination²⁴⁸ would accord migrants in Swaziland a right to access health services especially in emergency medical situations. Swaziland’s Bill of Rights is enforceable at the High Court.²⁴⁹

2.12.2 Legislation

Section 13 (b) of the Refugees Control Order of Swaziland²⁵⁰ empowers the Deputy Prime Minister to make rules that among others provides for the ‘reception, treatment, health and well-being of refugees’. The purposes of that Act is to ‘establish better control of refugees entering Swaziland.’²⁵¹ Although that Act regulates entry of refugees into Swaziland, the Constitution as discussed earlier - prohibits discrimination. Migrants are therefore arguably legally entitled to access health services, especially in emergency medical conditions.

2.12.3 Ratified international instruments

Swaziland is a dualist state and party to the following relevant international and regional instruments: International Convention on the Elimination of All Forms of Racial Discrimination,²⁵² UN Convention Relating to the Status of Refugees,²⁵³ African Charter on Human and

244 Constitution of Swaziland of 2005.

245 See sec 60 (8) Constitution of Swaziland.

246 Ibid.

247 Ibid sec 15 (1).

248 Ibid sec 20.

249 Ibid sec 35(1).

250 See sec 13 (b) The Refugees Control Order, 1978 [Swaziland]. 14 April 1978, available online in UNHCR Refworld at: <<http://www.unhcr.org/refworld/docid/3ae6b50a14.html>> accessed 18 January 2009.

251 Ibid preamble.

252 Ratified on 07/04/1969.

253 Ratified on 14/02/2000.

Peoples' Rights,²⁵⁴ and the OAU Refugee Convention.²⁵⁵ Like other dualist SADC member states while these standards are not directly legally enforceable in courts of law they have persuasive value in the interpretation of the Bill of Rights.

2.13 TANZANIA

2.13.1 Constitutional provisions

The right to access health services may be construed from one of the directive principles of state policy found in section 11(1) of the Constitution of Tanzania.²⁵⁶ While not justiciable, the principle calls on the state to 'make appropriate provisions for the realisation of a person's right to work, to self education and social welfare at times of old age, sickness or disability and in other cases of incapacity, without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood'.²⁵⁷ Although a strict reading of the Constitution does not expressly mention health, the call on the state to provide for social welfare in the event of infirmity and ensure persons earn a livelihood, should apply to all residents of Tanzania without discrimination. Indeed one of the enforceable rights in the Constitution provides for non-discrimination, on the grounds that 'all human beings are born free and equal'.²⁵⁸ Section 14 of the Constitution further provides that 'every person has the right to live and to the protection of his life by the society in accordance with the law'.

2.13.2 Legislation

The Tanzania Refugee Act,²⁵⁹ like the Refugees Control Order of Swaziland empowers the Minister to make rules that regulate 'the reception, transfer, residence, settlements, treatment, health and well-being of asylum seeker or refugee'. Although legislation in Tanzania does not expressly provide for access to health services for migrants when read together with the Constitutional

provisions, migrants may find recourse and protection of that right and in particular the right to life and non discrimination as argued above.

2.13.3 Ratified international instruments

Tanzania is a dualist state and party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,²⁶⁰ International Covenant on Economic, Social and Cultural Rights,²⁶¹ International Convention on the Elimination of All Forms of Racial Discrimination,²⁶² UN Convention Relating to the Status of Refugees,²⁶³ African Charter on Human and Peoples' Rights,²⁶⁴ and the OAU Refugee Convention.²⁶⁵ Like other dualist SADC member states while these standards are not directly legally enforceable in courts of law they have persuasive value in the interpretation of the Bill of Rights.

2.14 ZAMBIA

2.14.1 Constitutional provisions

Article 112(d) of the Zambian Constitution entrenches directive principles of state policy which include a non-justiciable²⁶⁶ right to 'adequate medical and health facilities' for all.²⁶⁷ The Constitution also makes provision for the right to life²⁶⁸ and non-discrimination²⁶⁹ which are enforceable at the High Court.²⁷⁰ A limitation of personal liberties by the Constitution that could affect migrants' access to health services in Zambia is the provision that personal liberty can legitimately be deprived 'for the purpose of preventing the spread of an infectious or contagious disease'.²⁷¹

254 Ratified on 15/09/1995.

255 Ratified on 16/01/1989.

256 Constitution of the Republic of Tanzania of 1997.

257 Sec 11(1) Constitution of Tanzania.

258 Sec 12 Constitution of Tanzania.

259 See sec 18(1) (b) Refugees Act, 1998 [United Republic of Tanzania]. 9. 15 April 1999, available online in UNHCR Refworld at: <<http://www.unhcr.org/refworld/docid/3ae6b50bf.html>> accessed 18 January 2009.

260 Ratified on 11/06/1976.

261 Ratified on 11/06/1976.

262 Ratified on 27/10/1972.

263 Ratified on 12/05/1964.

264 Ratified on 18/02/1984.

265 Ratified on 10/01/1975.

266 See sec 111 Constitution of Zambia of 1991.

267 Ibid sec 11 Constitution of Zambia.

268 Sec 12, Constitution of Zambia.

269 Ibid sec 23.

270 Ibid sec 28.

271 Ibid sec 13 (g).

2.14.2 Legislation

The Zambia Public Health Act²⁷² provides for the realization of the right to health for all. However, according to Research from Aids and Human Rights Research Unit, University of Pretoria, there have been cases whereby refugees and migrants are restricted from accessing public health services in Zambia.²⁷³

2.14.3 Ratified international instruments

Zambia is a dualist state and party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,²⁷⁴ First Optional Protocol to the ICCPR,²⁷⁵ International Covenant on Economic, Social and Cultural Rights,²⁷⁶ International Convention on the Elimination of All Forms of Racial Discrimination,²⁷⁷ UN Convention Relating to the Status of Refugees,²⁷⁸ African Charter on Human and Peoples' Rights,²⁷⁹ and the OAU Refugee Convention.²⁸⁰ Like other dualist SADC member states while these standards are not directly legally enforceable in courts of law they have persuasive value in the interpretation of the Bill of Rights.

2.15.2 Legislation

The Zimbabwe Public Health Act²⁸³ classifies certain diseases as infectious. The right to liberty of persons suffering from such diseases may be constrained. However, it is important to note that the Prevention of Discrimination Act expressly prohibits against discrimination to anyone on the basis of their nationality.²⁸⁴ Such provisions read together with the Constitution gives at least a legal basis for migrants to seek protection of their rights to access health services in Zimbabwe.

2.15.3 Ratified international instruments

Zimbabwe is a dualist state and party to the following relevant international and regional instruments: International Covenant on Civil and Political Rights,²⁸⁵ International Covenant on Economic, Social and Cultural Rights,²⁸⁶ International Convention on the Elimination of All Forms of Racial Discrimination,²⁸⁷ UN Convention Relating to the Status of Refugees,²⁸⁸ African Charter on Human and Peoples' Rights,²⁸⁹ OAU Refugee Convention,²⁹⁰ and the SADC Protocol on Health.²⁹¹ Like other dualist SADC states while these standards are not directly legally enforceable in courts of law they have persuasive value in the interpretation of the Bill of Rights.

2.15 ZIMBABWE

2.15.1 Constitutional provisions

The right to health is not enshrined in Zimbabwe's Constitution. The Bill of Rights does make provisions for the right to life²⁸¹ and non-discrimination²⁸² which in theory has the potential through a progressive interpretation to ensure migrants access to health services in Zimbabwe.

272 Zambia Public Health Act, Cap 295.

273 Aids and Human Rights Research Unit supra note 16. p 346.

274 Ratified on 10/04/1984.

275 Ratified on 10/04/1984.

276 Ratified on 10/04/1984.

277 Ratified on 04/02/1972.

278 Ratified on 24/09/1969.

279 Ratified on 10/01/1984.

280 Ratified on 30/07/1973.

281 See sec 12 Zimbabwe Constitution of 1979.

282 Ibid sec 23.

283 Public Health Act 19 of 1924 (cap 15: 09).

284 The Prevention of Discrimination Act 19 of 1998.

285 Ratified on 13/05/1991.

286 Ratified on 13/05/1991.

287 Ratified on 13/05/1991.

288 Ratified on 25/08/1981.

289 Ratified on 13/05/1986.

290 Ratified on 28/09/1985.

291 Ratified on 13/05/2004.

3 CONCLUSION

This survey reveals that the law in all the SADC member states contains either expressly or implied provisions that guarantee migrants rights to health. While in some states, the law is more direct than others in its protection of migrant rights to health, it has emerged that an interpretation of the domestic law in consonance with the states international legal obligations accords migrants right to health.

The survey has also highlighted the need for states to adopt and or amend their laws to conform their national law to international instruments which they have ratified. That is particularly necessary for dualist states where such standards do not have the force of law unless they have been domesticated

and can thus be invoked in courts of law with equal legal force as is domestic legislation.

It is hoped that this survey will be a useful quick reference tool for government officials, migrants and service providers in SADC states in protecting and promoting migrant right to health. It is also a useful resource for comparative purposes, for purposes of law reform in any of the SADC member states. However, it would be useful to undertake an in-depth follow up study that would, among others, examine what the law provides and the situation in practice. Such a study would seek to examine the extent to which the law is implemented thereby identify gaps and any inconsistency if at all of the law and practice.

SUMMARY TABLE OF DOMESTIC LEGAL FRAMEWORK RELEVANT TO MIGRANTS' RIGHT TO HEALTH IN SOUTHERN AFRICA

STATE	RELEVANT CONSTITUTIONAL PROVISIONS	LEGISLATION	CASE LAW
1 Angola	Equality/Non discrimination	Refugee laws	Law on Refugee Status Law No. 8 of 1990
	Human dignity	Immigration laws	Act on the Legal Regime of Foreign Citizens No 2 of 2007
	Life	Public Health laws	
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	Law 8/04 on HIV and AIDS (2004)
	Health		
2 Botswana	Equality/Non discrimination	Refugee laws	Refugees (Recognition and Control) Act, Cap. 25:03 of 1968 Discrimination on the basis of HIV status
	Human dignity	Immigration laws	Immigration Act 34 of 1975
	Life	Public Health laws	Public Health Act 44 of 1971 <i>Makuto v The State</i> 2000 2 BLR 131 (CA)
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	
	Health		

STATE	RELEVANT CONSTITUTIONAL PROVISIONS	LEGISLATION	CASE LAW
3 DRC	Equality/Non discrimination	Refugee specific laws	
	Human dignity	Immigration laws	
	Life	Public Health laws	
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	
	Health		
4 Lesotho	Equality/Non discrimination	Refugee laws	
	Human dignity	Immigration laws	
	Life	Public Health laws	
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	None
	Health		

STATE	RELEVANT CONSTITUTIONAL PROVISIONS	LEGISLATION	CASE LAW
5 Madagascar	Equality/Non discrimination	Refugee laws	
	Human dignity	Immigration laws	
	Life	Public Health laws	
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	Law 2005-040 on the Fight Against HIV/AIDS and the Protection of Rights of People Living with HIV (2006)
	Health		
6 Malawi	Equality/Non discrimination	Refugee laws	Access to HIV treatment
	Human dignity	Immigration laws	<i>Neffie Mangani v Registrar Trustees of Malamulo Hospital</i> , 5. High Court of Malawi, Principal Registry, Civil Cause No 193 of 1991.
	Life	Public Health laws	Public Health Act Cap 34:0 of 1948
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	None
	Health		

STATE	RELEVANT CONSTITUTIONAL PROVISIONS	LEGISLATION		CASE LAW	
7 Mauritius	Equality/Non discrimination	Refugee specific laws	Refugees (Recognition and Control) Act, 1999		
	Human dignity	Immigration laws	Immigration Act RL 3/83 of 1973 Deportation Act RL 2/501 of 1968		
	Life	Public Health laws			
	Movement	Occupational Health and Safety	The Occupational Safety and Health Act No. 28 of 2005		
	Environment	HIV/AIDS specific laws/bills HIV and AIDS Act 31 of 2006			
	Health				
		3;16			
8 Mozambique	Equality/Non discrimination	Refugee specific laws	Refugee Act No. 21 of 1991		
	Human dignity	Immigration laws			
	Life	Public Health laws			
	Movement	Occupational Health and Safety			
	Environment	HIV/AIDS specific laws/bills	-Law 5/2002 of 2002 -Ministerial Diploma 183-A/2001 of 2001		
	Health				
		37;72			
		54;94			

STATE	RELEVANT CONSTITUTIONAL PROVISIONS		LEGISLATION		CASE LAW
9 Namibia	Equality/Non discrimination	10	Refugee specific laws		
	Human dignity	8	Immigration laws	Immigration Control Act, of 1993	
	Life	6	Public Health laws		
	Movement	21	Occupational Health and Safety		
	Environment	-	HIV/AIDS specific laws/bills		
	Health	-			
10 Seychelles	Equality/Non discrimination	27	Refugee specific laws		
	Human dignity	16	Immigration laws		
	Life	15	Public Health laws		
	Movement	25	Occupational Health and Safety		
	Environment	38	HIV/AIDS specific laws/bills		
	Health	29			

STATE	RELEVANT CONSTITUTIONAL PROVISIONS	LEGISLATION	CASE LAW
11 South Africa	Equality/Non discrimination	Refugee specific laws	HIV prevention and care in prison
	Human dignity	Immigration laws	<i>Van Biljon and Others v Minister of Correctional Services and Others</i> 1997 (4) SA 441 (C) (SAHC 1997)
	Life	Public Health laws	<i>Stanfield v Minister of Correctional Services and Others</i> 2004 (4) SA 43 (C) (SAHC 2003)
	Movement	Occupational Health and Safety Act 85 of 1993 Compensation for Occupational Injuries and Diseases Act 130 of 1993 Mine Health and Safety Act 29 of 1996	<i>Magida v S</i> 2005 JOL 15294 (SASCA)
	Environment	HIV/AIDS specific laws/bills	<i>EN and Others v Government of the RSA and Others</i> 2007 (1) BCLR 84 (SAHC Durban 2006)
	Health		<i>Mazibuko v Minister of Correctional Services and Others</i> 2007 JOL 18957 (SAHC 2005 T)
			Access to health care and HIV treatment and <i>Minister of Health and Others v Treatment Action Campaign and Others</i> 2002 (5) SA 717 (SACC) <i>Government of RSA and others v Grootboom and Others</i> 2001 1 SA 46 (CC). <i>EN and Others v Government of RSA and Others</i> 2007 1 BCLR 84 (D).

STATE	RELEVANT CONSTITUTIONAL PROVISIONS	LEGISLATION	CASE LAW
12 Swaziland	Equality/Non discrimination	Refugee specific laws	Refugees Control Order, No 5 of 1978
	Human dignity	Immigration laws	
	Life	Public Health laws	
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	
	Health	-	
		20	
13 Tanzania	Equality/Non discrimination	Refugee specific laws	Refugees Act, of 1998
	Human dignity	Immigration laws	
	Life	Public Health laws	
	Movement	Occupational Health and Safety	
	Environment	HIV/AIDS specific laws/bills	HIV and AIDS (Prevention and Control Bill) 2007
	Health	11	
		-	
	12;13		
	12		
	14		
	17		

STATE	RELEVANT CONSTITUTIONAL PROVISIONS		LEGISLATION		CASE LAW
14 Zambia	Equality/Non discrimination	23	Refugee specific laws	Refugee (Control) Act, No 40 of 1970	
	Human dignity	-	Immigration laws	Immigration and Deportation Act Cap 123	
	Life	11:12	Public Health laws	Public Health Act, Cap 295 National Health Services Act, Cap 315 Public Health Act (Infectious Diseases Regulations) Cap 535	
	Movement	22	Occupational Health and Safety		
	Environment	-	HIV/AIDS specific laws/bills		
	Health	-			
15 Zimbabwe	Equality/Non discrimination	23	Refugee specific laws	Refugee Act, 1983	
	Human dignity	-	Immigration laws	Immigration Act 18 of 1979 (ch 4:02).	
	Life	12	Public Health laws	Public Health Act 19 of 1924	
	Movement	22	Occupational Health and Safety		
	Environment	-	HIV/AIDS specific laws/bills		
	Health	-			

ANNEX 2

SUMMARY TABLE OF INTERNATIONAL INSTRUMENTS RELEVANT TO MIGRANTS' RIGHT TO HEALTH IN SOUTHERN AFRICA

The main international and regional instruments relevant for migrants' right to health in SADC member states include:

UNIVERSAL DECLARATION ON HUMAN RIGHTS (UDHR)

The UDHR is a declaration adopted by the UN General Assembly in 1948 and represents the first global expression of rights to which all human beings are inherently entitled. It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws. The UDHR and the two subsequent international covenants (the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) are often called the International Bill of Human Rights.

Article 25 of the UDHR states that "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." Furthermore, the article provides for special care and assistance to mothers and children.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR is one of the two human rights treaties that are based on the Universal Declaration on Human Rights that are commonly referred to as the International Bill of Rights. The ICCPR was adopted in 1966 and contains civil and political human rights-which include but not limited to protection of life and dignity, equality in treatment in law, non-discrimination, freedom of belief, speech, association, assembly and political participation. The Covenant is monitored by the Human Rights Committee (HRC) which considers state reports, issues, general comments, and rulings on complaints with regard to alleged violations of the Covenant submitted under the Optional Protocol to the Covenant.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The ICESCR is an international treaty that recognises individuals' economic, social and cultural rights. These include the right to health and adequate standard of living. The treaty is monitored by the Committee on Economic Social and Cultural Rights (CESCR). In article 2, the Covenant calls for progressive realisation of the rights it enumerates in cognizance of the disparity of available resource in different member states. However, core obligations of the right to health, as determined by the Committee on Economic, Social and Cultural Rights' General Comment No. 14 on Article 12 of the Covenant, include the obligation to ensure access to health facilities, goods and services to everyone, including non nationals and vulnerable groups without discrimination. Non discrimination is, in fact, among the obligations of immediate effect the right to health imposes. Core obligations are subject to neither progressive realisation nor resource availability. The right to health is overall subject to progressive realisation and resource availability. Nonetheless, governments must take deliberate, concrete and targeted steps to ensure the progressive realization of the right. If there is not progress, the government of that country has to provide a rational and objective explanation on the reasons.

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICRMW)

Entered into force in 2003, the ICRMW seeks to prevent and eliminate the exploitation of migrant workers throughout the entire migration process. In particular, it seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and to discourage the employment of migrant workers in an irregular or undocumented situation. It provides a set of binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as the obligations and responsibilities on the part of sending and receiving States.

Article 28 recognises the right to emergency medical treatment for all migrant workers and members of their families even if their stay or employment is irregular. Furthermore, article 43 recognises equality of treatment with nationals of the State of employment in relation to various social services including access to social and health services.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

The ICERD is one of the main treaties committing states party to eliminate racial discrimination in all its forms. The Committee on the Elimination of Racial Discrimination (CERD) is the treaty monitoring body for the ICERD. The Convention recognizes the competence of the CERD to hear complaints from individuals about violations of the rights protected by the Convention (art 14).

CONVENTION RELATING TO THE STATUS OF REFUGEES

The 1951 Convention relating to the Status of Refugees is the key legal document in defining who is a refugee, their rights and the legal obligations of states. Furthermore, the 1967 Protocol removed geographical and temporal restrictions from the Convention. The Convention is the first comprehensive treaty that defines a refugee, and sets out the rights of refugees and the responsibilities of member states.

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples Rights is the regional treaty that obliges states parties to protect and promote the

fundamental human rights of individuals and groups in Africa. The treaty monitoring bodies for the Charter are the African Commission on Human and Peoples' Rights based in Banjul the Gambia; and the African Court on Human and Peoples' Rights based in Arusha Tanzania. It is a unique treaty that does not distinguish civil, political and socio economic as well as the right to development in a single treaty.

1969 OAU CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

This Convention is the African regional treaty on refugees. It mirrors the UN Convention Relating to the Status of Refugees but expands the definition of a refugee to include persons who have sought refuge in another country having been compelled to leave their place of habitual residence owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.

SADC PROTOCOL ON HEALTH

The Protocol is a sub-regional treaty that seeks to foster co-operation in addressing health problems and challenges facing SADC member states through effective regional collaboration and mutual support.

Below is a summary table of ratification/accession by SADC member states of these instruments:

STATE		RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS	
			Ratification / Accession date
1	Angola	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	10/01/1992
		International Covenant on Economic, Social and Cultural Rights	10/01/1992
		International Convention on the Elimination of All Forms of Racial Discrimination	-
		Convention Relating to the Status of Refugees	23/06/1981
		African Charter on Human and Peoples' Rights	02/03/1990
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	30/04/1981
		SADC Protocol on Health	-
2	Botswana	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	08/08/2000
		International Covenant on Economic, Social and Cultural Rights	-
		International Convention on the Elimination of All Forms of Racial Discrimination.	20/12/1974
		Convention Relating to the Status of Refugees	06/01/1969
		African Charter on Human and Peoples' Rights	17/07/1986
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	04/05/1995
		SADC Protocol on Health	09/02/2000

STATE	RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS		
3	DRC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	01/11/1976
		International Covenant on Economic, Social and Cultural Rights	01/11/1976
		International Convention on the Elimination of All Forms of Racial Discrimination	21/04/1976
		Convention Relating to the Status of Refugees	19/07/1965
		African Charter on Human and Peoples' Rights	20/07/1987
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	14/02/1973
		SADC Protocol on Health	
4	Lesotho	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	09/09/1992
		International Covenant on Economic, Social and Cultural Rights	09/09/1992
		International Convention on the Elimination of All Forms of Racial Discrimination	04/11/1971
		Convention Relating to the Status of Refugees	14/05/1981
		African Charter on Human and Peoples' Rights	10/02/1992
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	18/11/1988
		SADC Protocol on Health	31/07/2001

STATE		RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS	
5	Madagascar	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	21/06/1971
		International Covenant on Economic, Social and Cultural Rights	22/09/1971
		International Convention on the Elimination of All Forms of Racial Discrimination	07/02/1969
		Convention Relating to the Status of Refugees	18/12/1967
		African Charter on Human and Peoples' Rights	09/03/1992
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	- but signed 10/09/1969
		SADC Protocol on Health	
6	Malawi	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	22/12/1993
		International Covenant on Economic, Social and Cultural Rights	22/12/1993
		International Convention on the Elimination of All Forms of Racial Discrimination	11/06/1996
		Convention Relating to the Status of Refugees	10/12/1987
		African Charter on Human and Peoples' Rights	
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	04/11/1987
		SADC Protocol on Health	07/11/2000

STATE	RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS		
7	Mauritius	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.	
		International Covenant on Civil and Political Rights	12/12/1973
		International Covenant on Economic, Social and Cultural Rights	12/12/1973
		International Convention on the Elimination of All Forms of Racial Discrimination	30/05/1972
		Convention Relating to the Status of Refugees	-
		African Charter on Human and Peoples' Rights	17/11/1989
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	- but signed 10/09/1969
		SADC Protocol on Health	-
8	Mozambique	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	21/07/1993
		International Covenant on Economic, Social and Cultural Rights	-
		International Convention on the Elimination of All Forms of Racial Discrimination	18/04/1983
		Convention Relating to the Status of Refugees	16/12/1983
		African Charter on Human and Peoples' Rights	22/02/1989
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	22/02/1989
		SADC Protocol on Health	-

STATE	RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS		
9	Namibia	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	28/11/1994
		International Covenant on Economic, Social and Cultural Rights	28/11/1994
		International Convention the Elimination of All Forms of Racial Discrimination	11/11/1982
		Convention Relating to the Status of Refugees	17/02/1995
		African Charter on Human and Peoples' Rights	30/07/1992
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	-
		SADC Protocol on Health	10/07/2000
10	Seychelles	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	15/12/1994
		International Covenant on Civil and Political Rights	05/05/1992
		International Covenant on Economic, Social and Cultural Rights	05/05/1992
		International Convention on the Elimination of All Forms of Racial Discrimination	07.03/1978
		Convention Relating to the Status of Refugees	23/04/1980
		African Charter on Human and Peoples' Rights	13/04/1992
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	11/09/1980
		SADC Protocol on Health	

STATE	RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS		
11	South Africa	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	10/12/1998
		International Covenant on Economic, Social and Cultural Rights	-
		International Convention on the Elimination of All Forms of Racial Discrimination	10/12/1998
		Convention Relating to the Status of Refugees	12/01/1996
		African Charter on Human and Peoples' Rights	09/07/1996
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	15/12/1995
		SADC Protocol on Health	04/07/2000
12	Swaziland	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	-
		International Covenant on Economic, Social and Cultural Rights	-
		International Convention on the Elimination of All Forms of Racial Discrimination	07/04/1969
		Convention Relating to the Status of Refugees	14/02/2000
		African Charter on Human and Peoples' Rights	15/09/1995
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	16/01/1989
		SADC Protocol on Health	-

STATE	RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS		
13	Tanzania	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	11/06/1976
		International Covenant on Economic, Social and Cultural Rights	11/06/1976
		International Convention on the Elimination of All Forms of Racial Discrimination	27/10/1972
		Convention Relating to the Status of Refugees	12/05/1964
		African Charter on Human and Peoples' Rights	18/02/1984
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	10/01/1975
		SADC Protocol on Health	
14	Zambia	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	10/04/1984
		International Covenant on Economic, Social and Cultural Rights	10/04/1984
		International Convention on the Elimination of All Forms of Racial Discrimination	04/02/1972
		Convention Relating to the Status of Refugees	24/09/1969
		African Charter on Human and Peoples' Rights	10/01/1984
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	30/07/1973
		SADC Protocol on Health	-

	STATE	RATIFIED INTERNATIONAL AND REGIONAL INSTRUMENTS	
15	Zimbabwe	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
		International Covenant on Civil and Political Rights	13/05/1991
		International Covenant on Economic, Social and Cultural Rights	13/05/1991
		International Convention on the Elimination of All Forms of Racial Discrimination	13/05/1991
		Convention Relating to the Status of Refugees	25/08/1981
		African Charter on Human and Peoples' Rights	13/05/1986
		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.	28/09/1985
		SADC Protocol on Health	13/05/2004

REFERENCES

PRIMARY SOURCES

LEGISLATION

Angola

Act on Legal Regime of Foreign Citizens Act No 2 of 2007.

Constitution of Angola 1975.

Law 8/04 on HIV and AIDS (2004).

Law No. 8/1990 of 26 May 1990, Law on Refugee Status [Angola]. 26 May 1990, available online in UNHCR Refworld at <<http://www.unhcr.org/refworld/docid/3ae6b4df8.html>> accessed 18 January 2009.

Law on Refugee Status Law No 8 of 1990.

Botswana

Constitution of Botswana 1966.

Public Health Act 44 of 1971.

Lesotho

Constitution of Lesotho, 2003.

Madagascar

Constitution of Madagascar 1992.

Law 2005-040 on the Fight against HIV/AIDS and the Protection of Rights of People Living with HIV (2005) sourced at <http://www.chr.up.ac.za/undp/domestic/docs/legislation_04.PDF> accessed 18 February 2009.

Malawi

Constitution of Malawi 1995.

Immigration Act [Malawi]. 1964, available online in UNHCR Refworld at <<http://www.unhcr.org/refworld/docid/3ae6b4f58.html>> accessed 18 January 2009.

Immigration Regulations in Malawi [Malawi] 1968, available online in UNHCR Refworld at <<http://www.unhcr.org/refworld/docid/3ae6b4f6c.html>> accessed 18 January 2009.

Refugee Act Cap 15.04 of 1989.

Mauritius

Constitution of Mauritius of 1968.

Immigration Act of Mauritius.

Mauritius HIV and AIDS Act No. 31 of 2006.

Mozambique

Constitution of Mozambique 1990.

Namibia

Constitution of Namibia of 1990.

Immigration Control Act, 1993 [Namibia]. 29 July 1994, available online in UNHCR Refworld at: <<http://www.unhcr.org/refworld/docid/3ae6b4fb0.html>> accessed 18 January 2009.

Seychelles

Constitution of Seychelles of 1993.

South Africa

Immigration Act 13 of 2002.

Occupational Health and Safety Act 85 of 1993.

Refugee Act No 130 of 1998.

South Africa Constitution 1996.

The National Health Act No 61 of 2003.

Swaziland

Constitution of Swaziland of 2005.

The Refugees Control Order, 1978 [Swaziland]. 14 April 1978, available online in UNHCR Refworld at: <<http://www.unhcr.org/refworld/docid/3ae6b50a14.html>> accessed 18 January 2009.

Tanzania

Constitution of the Republic of Tanzania 1997.

Refugees Act, 1998 [United Republic of Tanzania]. 9. 15 April 1999, available online in UNHCR Refworld at: <<http://www.unhcr.org/refworld/docid/3ae6b50bf.html>> accessed 18 January 2009.

Zambia

Constitution of Zambia 1991.

Zambia Public Health Act, Cap 295.

Zimbabwe

Zimbabwe Constitution 1979.

The Prevention of Discrimination Act 19 of 1998.

Public Health Act 19 of 1924 (cap 15: 09).

DOMESTIC JURISPRUDENCE/CASE LAW**Bangladesh**

Ain O Salish Kendro (ASK) & others v Government of Bangladesh & Others, Writ Petition No 3034 of 1999, (1999) 2 CHRLD.

Botswana

Attorney General v Dow 1964 6 BCLR 1.

Petrus v the State (1984) BLR 14 (CA).

Sesana and others v Attorney General (52/2002) [2006] BWHC 1.

India

Olga Tellis . Bombay Municipal Corporation 1985, 3 SCC 545.

Paschim Banga Khet Mazdoor Samitty v State of West Bengal AIR 1996) SC 2426.

Malawi

Neffie Mangani v Register Trustees of Malamulo Hospital, 5. High Court of Malawi, Principal Registry, Civil Cause No 193 of 1991.

Thandiwe Okeke v The Minister of Home Affairs (Misc civil application No 73 of 1997).

Malaysia

Kerajaan Negeri Johor & another v Adong bin Kuwau & Others [1998] 2 MLJ 158, (1998) 2 CHRLD 281.

South Africa

E N and Others v Government of RSA and Others 2007 1 BCLR 84 (D).

Government of RSA and others v Grootboom and Others 2001 1 SA 46 (CC).

Government of the Republic of South Africa v Grootboom 2001(1) SA 46 (CC).

Khosa & 2 others v Minister of Social Development & 2 others 2004(6) SA 505 (CC).

Minister of Health and Others v Treatment Action Campaign and Others 2002 5 SA 721 (CC).

S v Makwanyane 1995 (3) SA 391 (CC).

Soobramoney v Minister of Health, Kwa Zulu Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

INTERNATIONAL AND REGIONAL TREATIES/INSTRUMENTS

African Charter on Human and Peoples' Rights (African Charter) adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (1981).

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974.

Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.

International Convention on the Elimination of All Forms of Racial Discrimination 1965, adopted by U.N. General Assembly resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003.

International Covenant on Civil and Political Rights (ICCPR) 1966, adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, U.N. Doc. A/6316.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000), entered into force Nov. 25, 2005.

United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, **entered into force** April 22, 1954.

International and regional jurisprudence- African commission on Human and Peoples' Rights

Communication 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa and Civil Liberties Organisation v Nigeria* 12th Annual Activity Report 1998-1999.

Communication 147/95 and 149/96, *Sir Dawda K Jawara v the Gambia*, 13th Annual Activity Report: 1999-2000.

Social and Economics Rights Action Centre (SERAC) and another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (SERAC case).

TREATY MONITORING BODIES' GENERAL COMMENTS

Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties' obligations (Article 2, para. 1), 14/12/90. CESCR, 5th Session 1990.

HRC General Comment No. 18, Non-discrimination (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev. 6 of 12 May 2003.

See UN Committee on Economic Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4, CESCR.

SECONDARY SOURCES

BOOKS AND CHAPTERS IN BOOKS

Aids and Human Rights Research Unit. 2007. *Southern African Country Reports on HIV/AIDS and the Law*. Pretoria: Pretoria University Law Press.

Brand D. 2005. Textual basis: The rights and related provisions in Brand D and Heyns C (eds) *Socio economic rights in South Africa*. Pretoria: Pretoria University Press.

Dugard J. 1992. *International Law a South African Perspective*. Capetown: Juta.

Harris D.J. 1991. *Cases and Materials on International Law*. London: Sweet and Maxwell.

Heyns C (ed), 2004. *Human Rights Law in Africa*. Leiden/Boston: Martinus Nijhoff Publishers.

Horn N. 2004. Namibia in Heyns C (ed), 2004. *Human Rights Law in Africa*. Leiden/Boston: Martinus Nijhoff Publishers.

Liebenberg S. 2003. The interpretation of socio economic rights in Woolman S et al (eds) *Constitutional Law of South Africa*: Cape Town: Juta & Co.

Ngwenya C & Cook R. 2005. Right concerning health in Danie Brand D & Heyns C (eds) *Socio economic rights in South Africa*. Pretoria: Pretoria University Press.

Odinkalu CA. 2002. Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights in Evans M & Murray R (eds) *The African Charter on Human and*

Peoples' Rights: The System in Practice, 1986-2000. Cambridge: Cambridge Press.

Tomuschat, C. 2003. *Human Rights Between Idealism and Realism*. Oxford: Oxford University Press.

Yoram D 1981. The right to life, physical integrity and liberty in Louis H (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press.

REPORTS AND FACT SHEETS

Consortium for Refugees and Migrants in South Africa. 2008. Protecting Refugees, Asylum Seekers and Immigrants in South Africa. Sourced at <<http://migration.org.za/uploads/docs/Cormsa08-Final.pdf>> accessed 20 January 2009.

Health in Ruins. 2009. Physicians for Human Rights Report on the Man-Made Health Crisis in Zimbabwe available at <<http://physiciansforhumanrights.org/library/report-2009-01-13.html>> accessed 20 January 2009.

MolatIhegi & Associates. 2005. Draft final report, consultancy to review laws and policies relating to HIV/AIDS.

Office of the United Nations High Commissioner for Human Rights & World Health Organization 'The Right to Health' Fact Sheet No 31 sourced at <<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>> accessed 22 January 2008.

United Nations Development Programme. 2006. *A review of regional and national human rights based HIV and AIDS policies and frameworks in Eastern and Southern Africa*.

Zungu-Dirway N et al (eds). 2004. An audit of HIV/AIDS policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe research paper, *Human Science Research Council*.

JOURNAL ARTICLES

Dugard J. 1995. International law and the "Final" Constitution. *South African Journal on Human Rights*. 11(2).

WEBSITES

Global Online legal sources and research <http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.htm> accessed 20 February 2009.

Official website of the Government of Seychelles <<http://www.gov.sc/GovernmentAgencies/Ministry/minhealth.aspx>> accessed 17 February 2009.

Official website of the Seychelles Ministry of Health <<http://www.moh.gov.sc/fronpage.htm>> accessed 17 February 2009.