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Addressing Human Rights Concerns Raised by Mandatory HIV Testing of Pregnant Women through the Protocol to the African Charter on the Rights of Women

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Abstract

This article considers the importance of preventing mother to child transmission of HIV in Africa. It argues, however, that any approach to achieving this aim must be consistent with respect for human rights. In particular, it argues that mandatory HIV testing of pregnant women violates their rights to autonomy, health and reproductive care, and non-discrimination, all guaranteed in the Protocol to the African Charter on the Rights of Women and other international and regional human rights instruments. It concludes by arguing that respect for women's human rights should form the fulcrum for any call for mandatory or routine HIV testing of pregnant women in Africa.

INTRODUCTION

The HIV/AIDS pandemic has continued to devastate humanity worldwide. At the end of 2006 it was estimated that about 39.5 million adults and children worldwide were living with HIV/AIDS, about 2.3 million more than in 2004.[1] In the same year there were about 4.5 million new HIV infections, about 400,000 more than in 2004. Women constitute nearly half of total infections worldwide. In sub-Saharan Africa, where the impact of the epidemic is most felt, women are disproportionately affected: it is estimated that women constitute about 13.3 million of the about 25 million (63 per cent of the global figure) adults living with HIV/AIDS on the continent, that is almost 60 per cent of the infection rate.[2] There were about 2.8 million new infections and close to 2.2 million deaths (representing 72 per cent of global deaths) caused by HIV/AIDS related illness in the region.[3]

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1 Joint United Nations Programme on HIV/AIDS (''UNAIDS'') *AIDS Epidemic Report* (2006, UNAIDS) at 3.

2 Ibid.

3 Id at 6.

Millions of young people are becoming sexually active each day with no access to HIV prevention services. Three-quarters of all 15 to 24 year-olds living with HIV in sub-Sahara Africa are female.[4] The prevalence of HIV infection among young women in this region is four times that of young men. In some countries of the region such as Swaziland, over 40 per cent of women attending antenatal clinics were found to be HIV positive, while in other parts of southern Africa about one in five of pregnant women is said to be HIV positive.[5] South Africa, with about 6 million people living with HIV, has one of the largest numbers of HIV positive people in the world. While sub-Saharan Africa remains the epicentre of the epidemic, southern Africa is the red spot of the region. This sub region accounts for 32 per cent of the global HIV infection rate and about 34 per cent of HIV/AIDS related deaths globally. In Zimbabwe, where there have been signs of a decreasing epidemic, one in five adults is still said to be living with HIV/AIDS in the country. In actual fact, life expectancy in women is put at 34 years while that of men is put at 37 years, among the lowest in the world.[6]

In many African countries, access to treatment and care for people living with HIV/AIDS remains a great challenge. Of the approximately 4.6 million people in need of treatment, only about 23 per cent of them are receiving it in the region.[7] Hindrances to access to treatment are many, including low political commitment, stigmatization and discrimination, unavailability of antiretroviral therapy and unwillingness of people to go for testing. There is evidence to show that the rate of mother-to-child transmission in a country such as Nigeria has gone up in recent years as the number of HIV positive women has increased.[8] In a desperate bid to increase HIV testing among pregnant women in the region, various approaches have been adopted including subjecting women to mandatory or routine HIV testing. These approaches often pay little attention to the human rights implications which may arise from their implementation.

This article considers the importance of preventing mother-to-child transmission of HIV in Africa. It argues, however, that any approach to achieving this aim must be consistent with respect for human rights. In particular, it argues that testing pregnant women for HIV without informed and voluntary consent violates their rights to autonomy, health and reproductive care, and non-discrimination, which are all guaranteed in the Protocol to the African Charter on the Rights of Women (''Women's Protocol'')[9] and other international and regional human rights instruments. It further examines the clamour for routine HIV testing of pregnant women to scale-up interventions to prevent mother to child transmission

4 Ibid.
5 Ibid.
6 Id at 11.
7 Ibid.
8 Ibid.
9 Adopted by the 2nd ordinary session of the African Union Assembly in 2003 in Maputo CAB/LEG/66.6 (2003); entered into force 25 November 2005.

of HIV (''PMTCT''); it points out that, if routine testing is properly implemented - paying attention to the human rights of pregnant women, it has the potential to act as a catalyst to improve HIV testing and prevent further infections in the region. It concludes by arguing that human rights concerns surrounding mandatory testing for pregnant women far outweigh the benefits. It similarly posits that respect for women's human rights should form the fulcrum for any call for routine HIV testing for pregnant women in Africa.

THE SIGNIFICANCE OF PREVENTING MOTHER TO CHILD TRANSMISSION OF HIV

As new opportunities exist to increase access to HIV treatment in the world, there is a renewed effort to prevent mother-to-child transmission of the epidemic. The major cause of HIV transmission amongst children occurs during pregnancy, delivery or breast-feeding. The situation is aggravated when the woman's viral load is very high or the baby is exposed to the mother's infected body fluids during birth.[10] Where infection to the baby does not occur during pregnancy or delivery, studies have shown that the baby has 5–20 per cent chance of acquiring the virus if breastfed.[11]

It has been found that maternal HIV transmission directly increases child morbidity and mortality where antenatal HIV prevalence rates are high.[12] Similarly, increased child mortality may result from the impact of HIV-related morbidity on service delivery.[13] This scenario has led to a call for HIV testing for pregnant women by way of mandatory or routine HIV testing. Mandatory testing is often described as a form of testing that occurs as a condition for other events, such as getting employment, immigrating to another country, getting married or accessing medical treatment. With regard to mandatory HIV testing for pregnant women, such a test is often made a condition precedent for these women receiving care, thus overriding the need for their consent. Routine HIV testing on the other hand means that HIV testing is made part of the patient's treatment, unless he or she declines to be tested or ''opts out''. Unlike in the case of mandatory HIV testing, routine HIV testing seems to have regard to a patient's rights. Both forms of testing, however, differ from the well accepted approach of voluntary counselling and testing (''VCT''), also known as the 3Cs or ''opt in'', which emphasizes pre and post test counselling, informed consent and confidentially of test results.

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10 V Leroy et al ''Maternal plasma viral load, zidovudine, and mother-to-child transmission of HIV-1 in Africa: DITRAME ANRS 049a trial'' (2001) 15 *AIDS* 517 at 520.

11 World Health Organization (''WHO'') *Antiretroviral Drugs for Treating Pregnant Women and Preventing Infection in Infants: Guidelines on Care, Treatment and Support for Women Living with HIV/AIDS and their Children in Resource-Constrained Settings* (2004, WHO) at 4.

12 C Luo ''Strategies for prevention of mother to child transmission of HIV'' (2000) 8 *Reproductive Health Matters* 144 at 144.

13 Id at 147.

Serious concerns have been raised over the poor or low uptake of HIV testing in regions worst affected by the epidemic. For instance, in sub-Saharan Africa surveys have revealed that just about 12 per cent of men and 10 per cent of women have been tested for HIV and obtained their results.[14] This has made it difficult for intervention programmes including provision of antiretroviral treatment for PMTCT to succeed in this region. Hence, there is a renewed call to jettison the VCT approach in favour of more ''realistic'' mandatory HIV testing for pregnant women. Even though this proposition seems to contradict recognized human rights values of respecting human dignity, it is justified on the ground that, of the two competing interests (dignity of the mother and life of the unborn child), preserving the life of the unborn child outweighs respect for the woman's right to dignity.

It is estimated that each year close to 500,000 children below the age of 15 are being infected with HIV/AIDS. Most of these infections occur in developing countries and about 90 per cent of them are as a result of mother to child transmission during pregnancy, labour and delivery, or breastfeeding.[15] It is observed that, without interventions, there is a 20–45 per cent chance that a baby born to an HIV-infected mother will become infected.[16] This certainly is a cause for concern and seems to reinvigorate the call for mandatory HIV testing to enable more pregnant women to ascertain their status and commence treatment to prevent transmission to their unborn children. Supporting this view, De Cock et al[17] have argued that, in the light of the devastating effect of the epidemic on Africa, the time has come for the world to re-emphasize public health principles which promote the communal good over individual rights.

Furthermore, it has been argued that, for HIV/AIDS prevention strategies to succeed in the worst affected regions, less emphasis should be placed on consent and information for individuals before testing.[18] This reasoning seems to tally with the utilitarian school of thought, which emphasizes the greatest amount of happiness for the greatest number. In other words, the utilitarian holds the view that, for any public policy to be regarded as good, it must satisfy the interest of the majority and not simply a few people. That is, communal good must override the individual interest.

Kirby[19] has, however, observed that, even in the wake of a promising increase in access to cheaper antiretroviral drugs (''ARVs'') for poor

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14 UNAIDS/WHO *Guidance on Provider Initiated HIV Testing and Counseling in Health Care Facilities* (2007, UNAIDS/WHO) at 5.

15 See ''Preventing mother to child transmission worldwide'' available at: <http// www.avert.org/children.htm> (last accessed 19 May 2007).

16 KM De Cock et al ''Prevention of mother to child HIV transmission in resource poor countries: translating research into policy and practice'' (2000) 283 *Journal of American Medical Association* 1175 at 1175.

17 KM De Cock et al ''A serostatus-based approach to HIV/AIDS prevention and care in Africa'' (2003) 362 *The Lancet* 1847 at 1848.

18 Ibid.

19 MD Kirby ''Never ending paradoxes of HIV/AIDS and human rights'' (2004) 4 *African Human Rights Journal* 163 at 167.

populations in Africa, such scaling up of treatment can only be successful if the circumstances are sensitive to the fundamental considerations that are at stake. These considerations include sustainability of treatment, elimination of stigma and discrimination associated with the epidemic through appropriate laws and policies, availability of necessary infrastructures and so on.

A study has shown that a woman who is aware of her HIV status can use ARVs (zidovudine or nevirapine) to reduce the chances of her transmitting the virus to her unborn child by 70 per cent.[20] The challenge, however, for most African countries is the ability to make these drugs available and affordable to their citizens. As at the end of 2005, it was estimated that on average only about 11 per cent of pregnant women in need of PMTCT treatment were receiving it in sub-Saharan Africa, the region worst affected by HIV/AIDS.[21]

The South African Constitutional Court held in the *Treatment Action Campaign* case[22] that government policy denying availability of nevirapine to public health institutions, amounted to a violation of the right to health of the citizens, guaranteed under section 27 of the constitution. The court further held that such negative attitudes from government are contrary to the right of children guaranteed under section 28 of the same constitution.

It is estimated that about 90 per cent of people who require HIV treatment in a country such as Nigeria are not receiving it.[23] In attempting to address the challenges posed by access to life-saving medications to prevent mother-to-child transmission, it becomes very important to balance the need to prevent harm to the unborn child with the need to respect the woman's human rights.

HUMAN RIGHTS IMPLICATIONS OF MANDATORY HIV TESTING FOR PREGNANT WOMEN

The coming into effect of the Women's Protocol in Africa in November 2005[24] marked a new dawn in the protection of women's rights in Africa. Before then, the African Charter on Human and Peoples' Rights ("African Charter"),[25] the principal human rights treaty in Africa, contained various provisions which could be indirectly interpreted to protect women's rights.

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20 R Sperling et al "Maternal viral load zidovudine treatment and the risk of transmission of human immunodeficiency virus type 1 from mother to infant" (1996) 335 *New England Journal of Medicine* 1621.

21 WHO "Towards universal access scaling up priority HIV/AIDS in the health sector" (April 2007) available at: <http://www.searo.who.int/en/Section10/Section18/Section2008_13202.htm> (last accessed 14 August 2007).

22 *Minister of Health v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC).

23 UNAIDS *AIDS Epidemic Update* (2005, UNAIDS) at 30.

24 Women's Protocol, above at note 9.

25 African Charter on Human and Peoples' Rights: Organisation of African Unity ("OAU") doc CAB/LEG/67/3/Rev 5, adopted by the OAU 27 June 1981, entered into force 21 October 1986.

Some of these provisions have been criticized as being inadequate to protect women in Africa.[26] However, the Women's Protocol now contains copious provisions that are unique, radical and directly address the human rights of women.[27] These provisions of the Women's Protocol can be used to advance women's human rights especially in the context of HIV/AIDS. This section of this article examines the link between public health and human rights, and further highlights the human rights that may be affected by mandatory or routine HIV testing for pregnant women.

Public health and human rights

It is generally agreed that public health and human rights are interrelated. Thus, a public health policy may have serious implications for human rights and violations of human rights may result in public health problems. In actual fact, Mann et al reason that every public health policy, no matter how good it may seem, is potentially a threat to the enjoyment of human rights.[28] Although it is admitted that in some situations a public health policy may limit the enjoyment of human rights, these are always subject to the close scrutiny of human rights law. Thus, limiting human rights will only be allowed in accordance with the Siracusa Principles.[29] Under these principles, it was agreed that human rights are generally not absolute and that, in some situations, rights may be restricted in the interests of society. However, this will only occur where the limitation accords with the law, serves a legitimate public interest, is essentially necessary in a democratic society, and is not arbitrary, unreasonable or discriminatory, and where less intrusive means cannot be used to reach the goal.

In addition to the above, rights may be restricted to "secure due recognition and respect for the rights and freedoms of others; meet the just requirements of morality, public order, and the general welfare; and in times of emergency, when there are threats to the vital interests of the nation."[30] But in restricting human rights it is important to note that certain rights are non-derogable. These include rights to life, dignity, freedom from torture and freedom from discrimination.

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26 See for example M Ssenyonjo "Culture and human rights of women in Africa: Between light and shadow" (2007) 1 *Journal of African Law* 39 at 44. See particularly R Murray "A feminist perspective on reform of the African human rights system" (2001) 2 *African Human Rights Law Journal* 205; see also CR Welch Jr "Human rights and African women: a comparison of protection under two major treaties" (1993) *Human Rights Quarterly* 548.

27 See M Baderin "Recent Development in the African regional human rights system" (2005) *Human Rights Law Review* 117.

28 JM Mann et al (eds) *Health and Human Rights: A Reader* (1999, Routledge) at 1.

29 United Nations Economic and Social Council (1985) "The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights" UN Doc ECN/4/1985/4Annex.

30 See art 4 of the International Covenant on Civil and Political Rights ("ICCPR"), General Assembly res 2200A (XXI), UN GAOR, 21st session, UN doc A/6316 (1966).

Perhaps proponents of mandatory HIV testing for pregnant women may argue that it serves a legitimate public interest as pregnant women are able to determine their status on time and thus prevent transmission to their unborn children. This no doubt ultimately leads to preservation of lives. But can this aim not be achieved through other means that respect the rights of pregnant women? Women are generally willing to do anything to protect their unborn children, especially when the pregnancy is intended and to be carried to term.[31] Experience has shown that, where women are properly counselled and well informed of the benefits of HIV testing during their antenatal care, they are more likely to cooperate than if they are coerced into HIV testing.

Childress et al have proposed five ''justificatory conditions'', which must be taken into consideration in addressing the impacts of public health policies on human rights.[32] These are effectiveness, proportionality, necessity, least infringement and public justification. Under effectiveness, any public health policy, which may impact on human rights, must be ascertained to be truly protective of public health. Proportionality relates to the fact that the benefits to be derived from the proposed public health policy must outweigh its implications for deprivation of rights. Necessity demands that a proposed public health policy, which may infringe a general moral consideration, could be a strong reason for seeking an alternative to such a policy. Even if a public health policy is effective, proportionate and necessary, it is the duty of policy makers to seek to minimize the infringement of human rights by reason of such policy. Where public health policies infringe on multiple human rights, it becomes imperative that policy makers should justify to the public the reasons why such policies should still be pursued despite their negative consequences for human rights.

Applying this framework to the issue of mandatory HIV testing for pregnant women in Africa will tend to reveal serious implications of this policy for the enjoyment of women's recognized human rights. However, as stated earlier, in view of the poor response to HIV testing in regions such as Africa worst affected by the epidemic, it becomes necessary to take decisive steps with a view to improving uptake of HIV testing. Nevertheless, it is arguable whether adopting a policy of mandatory HIV testing for pregnant women will justify the resulting violations of human rights. Besides, the effectiveness of such a policy is doubtful as, in the long run, pregnant women may avoid seeking medical attention in hospitals for fear of being tested for HIV, thereby putting their lives and those of their unborn children in danger. On the other hand, restricting an individual's movement (itself a violation of human rights), such as during the avian-flu

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31 WHO ''Effect of breastfeeding on mortality among HIV-infected women'' 2001, available at: <http://www.who.int/child-adolescent-health/New_Publications/NUTRITION/Effect_of_Breastfeeding_on_Mortality.htm> (last accessed 5 August 2007).

32 JF Childress et al ''Public health ethics mapping the terrain'' (2002) 302 *The Journal of Law, Medicine and Ethics* 170 at 173.

attack, may be argued to be justified in view of its deadly nature. While one may agree that HIV is a potential threat to lives, especially in sub-Saharan Africa, its mode of transmission and degree of threat to lives when compared with avian-flu differ greatly. Moreover, HIV is now more or less a manageable chronic disease while avian-flu remains a deadly ailment.

A policy of mandatory HIV testing targeting pregnant women will result in violations of fundamental human rights recognized in numerous international and regional human rights instruments. In particular, the rights to personal autonomy, non-discrimination and right to health and reproductive care will be affected. The impact of this policy on these rights is discussed below.

Right to autonomy

The concept of autonomy in relation to the right to health implies that an individual has the right to make decisions concerning his or her body without coercion or violence. In other words, it is the freedom of an individual to be free from non-consensual medical treatment or experimentation.[33]

Autonomy in the context of health also implies that informed consent must be obtained before medical treatment. Although autonomy is not mentioned directly in the Women's Protocol or most human rights instruments, it should be noted that the right to autonomy is intrinsically linked to other human rights such as liberty, privacy, dignity, security of person and bodily integrity.[34] Under article 9 of the International Covenant on Civil and Political Rights (''ICCPR''),[35] it is provided that everyone shall be entitled to the right of liberty and security of person. That article further provides that no-one shall be deprived of his or her liberty except as stipulated by law.

Although this provision can be invoked indirectly to apply to women, it does not specifically address the needs of women. The Convention on the Elimination of All Forms of Discrimination against Women (''CEDAW'')[36] also does not have a specific article on women's human dignity, although its preamble does give recognition to this right. This lacuna has now been filled by the Women's Protocol in its article 3. That article provides that every woman shall have the right to dignity inherent in a human being, and to the recognition and protection of her human and legal rights. In a more radical and progressive manner, the Women's Protocol declares that ''Every woman shall have the right to respect as a person and to the free

33 UN Committee on Economic, Social and Cultural Rights ''The right to the highest attainable standard of health'' general comment no 14, UN doc E/C/12/2000/4.

34 C Shalev ''Rights to sexual and reproductive health: The International Conference on Population and Development and the Convention on the Elimination of All Forms of Discrimination against Women'' (2000) 4 *Health and Human Right* 36 at 46.

35 ICCPR, General Assembly res 2200, UN GAOR, supp No 16 at 52, UN doc A/6316 (1966), 999 UNTS 171, 174 (entered into force 23 March 1976).

36 GA Res 54/180 UN GAOR 34th session supp no 46 UN Doc A/34/46 1980.

development of her personality''. It enjoins states parties to implement appropriate measures to prohibit exploitation or degradation of women.[37] Also, article 5 of the African Charter provides that every individual shall have the right to the respect of the dignity inherent in a human being.

According to Margalit, dignity, unlike honour, is not a positional good. It is supposed to be accorded to everybody, by virtue of the most universal common denominator of being human.[38] When a woman is made to undergo a test against her wish, her humanity is debased and her dignity as a human being is eroded. This right, as protected under article 3 of the Women's Protocol, presupposes that conducting any medical test on a woman without her consent infringes on her right to security of person and may well breed violence against the woman. Indeed, the language of the Women's Protocol is designed to protect women from any act that may result in violence against them. Experience has shown that, in some situations, women who have undergone HIV testing often face adverse consequences which may include denial of medical care or even a violent reaction from their husbands.[39] The African Commission on Human and Peoples' Rights has held that exposing a person to ''suffering and indignity'' amounts to a violation of the right to dignity guaranteed under article 5 of the African Charter.[40]

As Shalev observes, ''the right to autonomy in making health decisions and in particular sexual and reproductive decisions derives from the fundamental human right to liberty''.[41] Also, as noted by Berlin, it is not merely ''freedom from but freedom to'', in other words: one is entitled to the recognition of one's capacity as a human being to exercise choice in the shaping of one's life.[42] In the context of HIV/AIDS, a critical opposition to involuntary HIV testing is the fact that a positive result may expose the patient to stigma and discrimination, denial of access to health care and other services.[43]

Proponents of mandatory HIV testing have often argued that such a policy in areas with a high prevalence rate, as in Africa, is justifiable as it protects both the lives of the mother and the unborn child. It is further argued that there is a legal obligation on the state to preserve lives when the need arises, particularly in view of the devastating effect of the HIV epidemic in Africa. This is based on the fact that the state has a great interest in the lives of its citizens. But can the state claim to have a better

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37 Art 3 of the Women's Protocol, above at note 9.

38 A Margalit *The Ethics of Memory* (2003, Harvard University Press) at 220.

39 UNAIDS, United Nations Population Fund (''UNFPA'') and United Nations Development Fund for Women (''UNIFEM'') *Women and HIV/AIDS: Confronting the Crisis* (2004, UNAIDS, UNFPA and UNIFEM) at 27.

40 *John K Modise v Botswana* Communication 97/93, 1997.

41 Shalev ''Rights to sexual and reproductive health'', above at note 34 at 46.

42 I Berlin ''Two concepts of liberty'' in I Berlin (ed) *Four Essays on Liberty* (1969 Oxford University Press) 118 at 123.

43 RJ Cook et al *Reproductive Health and Human Rights: Integrating Medicines, Ethics and Law* (2003, Clarendon Press) at 168.

interest in the life of an unborn child than that of the mother? At least in one case, the European Commission has held that a putative father of an unborn child has no better interest in the life of the foetus than the woman who carries the pregnancy so as to prevent the woman aborting the foetus.[44] It would appear that this reasoning supports the assertion that a state can have no greater interest in the life of an unborn child than that of a pregnant woman.[45] This decision would seem to confirm that compelling pregnant women to undergo HIV testing with the excuse of preserving the life of the unborn child will amount to unwarranted interference in the rights of a woman.

Schuklenk and Kleinsmidt[46] have argued that a pregnant woman who has chosen to carry a pregnancy to term has a moral obligation to ensure that no harm is done to the child. This moral obligation, they argue, makes it imperative for a pregnant woman to submit herself to mandatory HIV testing. Indeed situations have often arisen where the courts of law have been called upon to resolve conflicts between the autonomy of a woman and the prevention of harm to an unborn child. In some of these cases, the courts have often shown greater respect for the right of a woman. For instance, the Canadian Supreme Court in the case of *Winnipeg Child and Family Services v DFG*[47] has held that the forcible treatment of a pregnant woman for the purpose of preventing harm to the unborn child violated the autonomy of the woman. In that case, a woman who was addicted to glue sniffing was five months pregnant with her fourth child. She had already given birth to two children who suffered from abnormalities due to her addiction. Upon her fourth pregnancy, an application was sought to detain her in a health centre for the purpose of managing her pregnancy and preventing the unborn child from harm. It was held by the lower court that such a confinement did not violate the woman's right of autonomy as it was in the best interests of the unborn child. However, on appeal, the Canadian Supreme Court held that the foetus did not have legal status at law and, as such, the pregnant woman could not be forced to undergo any treatment in order to protect the foetus. In arriving at this decision the court stated that:

> "The pregnant woman and her unborn child are one and to make orders protecting fetuses would radically impinge on the fundamental liberties of the mother, both as to lifestyle choices and how and as to where she chooses to live and be... The invasion of liberty involved in making court orders affecting the unborn child is far greater than the invasion of liberty involved in court orders relating to born children."[48]

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44 *Paton v United Kingdom* (1980) 3 ECHR 408.

45 Cook et al *Reproductive Health and Human Rights,* above at note 43 at 178.

46 U Schuklenk and A Kleinsmidt "Rethinking mandatory HIV testing during pregnancy in areas with high HIV prevalence rates: ethical and policy issues" (2007) 97 *American Journal of Public Health* 1179 at 1181.

47 3 SCR (1997) 925.

48 Id at para 55.

This decision of the court clearly demonstrates that a court of law may not be willing to entertain undue interference in a woman's right to autonomy either by the state or by any of its agents based on the moral ground of preventing harm to the unborn child.

Besides, the claim to preserve life of the unborn at the expense of right to autonomy of the pregnant woman is not supportable under international human rights law. It has often been recognized that the right to life in most human rights instruments is conferred on a human being and not an unborn child. For instance, in *H v Norway,*[49] the European Commission held that the termination of a 14 week old pregnancy which was potentially injurious to the health of a woman did not violate the right to life guaranteed under article 2 of the European Convention. However, the Commission did observe that, in certain circumstances, perhaps during the last stage of pregnancy, the right of an unborn child may be protected. The South African court[50] has similarly refused to hold that a provision of the Choice on Termination of Pregnancy Act of 1998, which permits a pregnant woman to undergo an abortion after 12 weeks, violates the right to life guaranteed under section 11 of the constitution, as the unborn child is not covered by this provision of the constitution. While it is noted here that most of the cases cited above deal mainly with termination of pregnancy, there is no reason why the human rights principles enunciated by the courts in these cases should not apply to safeguard a woman's right to make a choice with regard to her treatment and be free from coercive medical treatment in the context of HIV.

Most of the studies in Africa have revealed that women attending antenatal care do not receive proper information nor are they even informed before they are tested for HIV.[51] Mandatory HIV testing often denies patients the opportunity of pre and post test counselling, a very crucial aspect of the HIV/AIDS prevention programme.

Further supporting the argument above, the UN General Assembly, in its resolution on the rights of persons with mental illness, has explained that consent to medical treatment must be obtained freely without threat or improper inducement. It explained further that, for consent to be deemed to have been given for a treatment, it must be provided with ''adequate and understandable information''.[52] Although this resolution specifically relates to persons with mental illness, it can be argued that the principle stated here can similarly apply to pregnant women seeking treatment. Similarly, the Federation of Gynaecology and Obstetrics (''FIGO'') has recently emphasized the need for health care providers to respect women's

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49 (1992) 73 DR155.

50 See *Christian Lawyers Association v Minister of Health* (1998) 4 SA 1113.

51 See C Reis et al ''Discriminatory attitudes and practices by health care workers towards patients with HIV/AIDS in Nigeria'' (2005) 2 *Plos Med* e246 0743 at 0747.

52 ''Principles for the protection of persons with mental illness and the improvement of mental health care'', General Assembly res 199 UN GAOR, 46th sess, supp N 49 at principle 11, 2, UN doc A/RES/46/119 (1992).

autonomous decision making powers with regard to medical procedures.[53] FIGO has noted that, in such situations, a woman's right must be accorded more respect than that of the foetus. It defines informed consent as ''consent obtained freely, without threats or improper inducements, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient''. Also, in addition to the development of its case law, in one of its resolutions, the African Commission similarly urged African governments to ensure that all efforts aimed at combating the HIV/AIDS epidemic in the region are respectful of human rights.[54]

Relating to women's specific health issues, as in mandatory HIV testing, the committee on CEDAW in its general recommendation 24 on Women and Health[55] observed that ''Women have the right to be fully informed by properly trained personnel of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives''. More importantly, the committee enjoins states parties to take steps to prevent unethical practices against women in health care services, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment, as they violate women's rights to informed consent and dignity.[56]

In *R v Dyment*,[57] the Canadian Supreme Court, explaining the legal implication of testing without consent, held:

> ''The use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity... [T]he protection of the *Charter* extends to prevent a police officer, an agent of the state, from taking a substance as intimately personal as a person's blood from a person who holds it subject to a duty to respect the dignity and privacy of that person.''

Right to non-discrimination

One of the areas of concern about the public health policy of mandatory HIV testing for pregnant women is that it raises a critical issue of discrimination. The right to non-discrimination is adequately guaranteed in numerous human rights instruments. Discrimination amounts to the violation of equality of a person. One may ask: Why target pregnant women

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53 International Federation of Gynecology and Obstetrics (''FIGO'') Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health 2006 *Ethical Issues in Obstetrics and Gynecology* (FIGO) at 12.

54 See res on ''The HIV/AIDS pandemic, threat against human rights and humanity'', adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya ACHPR Res.53/(XXIX)01.

55 UN GAOR, 1999, Doc A/54/38 Rev 1.

56 Ibid.

57 [1988] 2 SCR 417.

and not other people in society? This policy is under-inclusive as it mainly targets pregnant women while other people in society who could be at risk are not subjected to similar treatment. It would seem that the reason why women are the targets of this policy is to prevent transmission of HIV to their ''innocent'' unborn children, thus giving the impression that the life of an unborn child is more important than that of the woman. Indeed in many African countries where allocation of health care resources is acutely low, PMTCT programmes mainly focus on the unborn child. The result in most cases is that HIV-positive women who are excluded from treatment often die shortly after giving birth.[58] The underlying principle behind non-discrimination is that people should not be unfairly treated differently from others.

Mandatory HIV testing for pregnant women may well place an undue burden on women and further reinforce prejudices and discrimination against women in society. At least one study has shown that pregnant women who have been found to be HIV-positive have been refused admission and delivery at hospitals.[59] According to CEDAW, discrimination against women includes: ''[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.''[60]

States parties to the treaty are, therefore, enjoined to take steps and measures to eliminate discrimination against women within their territories. Reaffirming the language of CEDAW, the Women's Protocol requires states to remove practices that discriminate against women and urges states parties to take all appropriate steps to eliminate social and cultural patterns and practices that are discriminatory to women.[61] It defines discrimination against women widely to include: ''Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their mental status, of human rights and fundamental freedoms in all spheres of life.''[62]

The Women's Protocol does not, however, limit discrimination to ''exclusion or restriction'' alone as adopted by CEDAW; rather it has broadened the scope to include ''differential treatment'' in ''all spheres of life''. This is highly remarkable as it does not leave room for states to hide

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58 UNAIDS, UNFPA and UNIFEM *Women and HIV/AIDS: Confronting the Crisis*, above at note 39 at 27.

59 Panos and United Nations Children's Fund (''UNICEF'') ''HIV/AIDS and prevention of mother to child transmission of: A pilot study in Zambia, India, Ukraine and Burkina Faso'' (2001) available at <http://www.unicef.org/evaldatabase/index_ 14340.html> (last accessed 30 May 2007).

60 CEDAW, above at note 36, art 1.

61 See art 2 of the Women's Protocol, above at note 9, which drew its inspiration from art 2 of CEDAW.

62 See art 1 of the Women's Protocol, above at note 9.

under any form of disguise in failing to protect women from discrimination within their domains. Invoking the language of the Women's Protocol, therefore, mandatory HIV testing targeted at pregnant women alone will no doubt amount to "differential treatment" and thus result in discrimination against women. The Human Rights Committee[63] has explained that "Non discrimination together with equality before the law and equal protection of the law without discrimination constitutes a basic and general principle relating to the protection of human rights". Although not all discrimination amounts to violation of rights, adverse discrimination, which occurs when a person is being treated unfairly, is unjustifiable at law.[64] It is recognized under international law that discrimination is a breach of governmental obligation.[65] Therefore, any policy, such as mandatory HIV testing targeting pregnant women, can amount to a state's breach of its duty to prevent discrimination against women. Article 2 of the African Charter provides that everyone is equal before the law and that no-one should be discriminated against on grounds such as gender, religion, political belief or other status. Article 3 similarly guarantees every individual the right to equality and equal protection of the law. Explaining the importance of these provisions, the African Commission in *Purohit and Moore v The Gambia*[66] reasoned as follows:

> "Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the rights provided under the African Charter."[67]

Even if the policy were to be made applicable to men, it is still doubtful if it will become less discriminatory as such. For, although it may appear on the surface to apply to all, in actual practice women will bear the brunt of it more than men. It is a well known truth that women in Africa are more likely than men to seek medical attention and therefore be more affected by this policy. In the case of pregnant women, the situation becomes more precarious as a policy of mandatory HIV testing may well be deter them

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63 General comments of the Human Rights Committee on the Non-Discrimination Clauses of the ICCPR (adopted 9 November 1989). See also J Möller "Article 7" in A Eide et al (eds) *The Universal Declaration of Human Rights: A Commentary* (1992, Scandinavian University Press) 115.

64 S Gruskin and D Tarantola "Health and human rights" in R Detels and R Beaglehole (eds) *Oxford Textbook on Public Health* (2001, Oxford University Press) 311 at 314.

65 RB Bilder "An overview of international human rights law" in H Hannum (ed) *Guide to International Human Rights Practice* (1992, University of Pennsylvania Press) 3 at 5–10.

66 Communication 241/2001 decided at the 33rd ordinary session of the African Commission held on 15–29 May 2003 in Niamey, Niger.

67 Id at para 49.

from seeking medical attention. The consequences could be very grave in a region like Africa, where the maternal mortality rate is unacceptably high. Creating a barrier to treatment and care for an already disadvantaged group in society such as women will further jeopardize their health condition. Experience has shown that uninformed health care providers fearful of HIV/AIDS often violate patients' rights to non-discrimination. Some examples of these violations include denial of care and drugs to HIV-positive patients, unreasonable delays in providing consultation or care, neglectful treatment, and insults from health care providers towards persons living with HIV/AIDS.[68]

Women living with HIV/AIDS, in particular those who are pregnant, are likely to be exposed to discrimination by health care providers in Africa when they are tested without their informed consent. As a woman in Nigeria recounts, ''I had registered for antenatal in a private hospital. I was told to do an HIV test as part of the routine test, I refused and they bluntly told me they cannot take the delivery if I do not take the test''.[69] It has also been found that close to 60 per cent of health care providers believed that people living with HIV/AIDS should be isolated from others in a health care setting.[70] In some extreme situations, HIV-positive women have suffered from violent acts, been rejected by families, shunned by friends, abandoned by husbands and sometimes killed.[71] These sorts of negative reactions to HIV-positive women violate their right to equality.[72]

The Women's Protocol has called on states to take positive and cogent steps, which may include enactment and effective implementation of appropriate legislation, or regulatory measures to address practices which endanger the health and general well-being of women. At the Grand Bay Declaration, African governments were urged to eliminate all forms of discrimination against women and children, including HIV/AIDS related discrimination.[73]

Consensus statements reached at both the International Conference on Population and Development[74] and the Fourth World Conference on Women affirmed that women's human rights include ''rights to have control over their sexuality including their sexual and reproductive health

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68 See Panos and UNICEF ''HIV/AIDS and prevention of mother to child transmission'', above at note 59.

69 Center for the Right to Health (''CRH'') *Human Rights and HIV/AIDS Experiences of People Living With HIV/AIDS in Nigeria* (2001 CRH) at 22.

70 Reis et al ''Discriminatory attitudes and practices'', above at note 51 at 0747.

71 UNIFEM *Turning the Tide, CEDAW and the Gender Dimension of HIV/AIDS Pandemic* (2001 UNIFEM) at 9.

72 See for example the South African case of *Hoffman v South African Airways (SAA)* 2000 11 BCLR 1235 (CC) para 27.

73 The first OAU ministerial conference on human rights held on 12–16 April 1999 at Grand Bay, Mauritius.

74 *Report of the International Conference on Population and Development* 7 UN Doc A/CONF.171/13 (1994).

free from discrimination, coercion and violence''.[75] The United Nations General Assembly's Declaration of Commitment on HIV/AIDS suggested that a gender sensitive approach should be adopted to address the HIV/AIDS pandemic.[76] It specifically urges states to eliminate all forms of discrimination against women in their societies, with a view to reducing women's vulnerability to HIV/AIDS. At the regional level, the African Union noted with concern in the Maputo Declaration that women and children are worst affected by the epidemic in the region, so it resolved to ''redouble efforts in giving particular attention to women and young people's participation and access to information, life skills and services.''[77] A year later, African leaders reiterated this call for a gender sensitive approach to combating the HIV/AIDS epidemic in the region, when they agreed to ''accelerate implementation of gender specific economic, social and legal measures aimed at combating HIV/AIDS pandemic...and ensure that treatment and social services...'' are made available to women in the region.[78] While it is admitted that these statements, resolutions and declarations are not legally binding on African governments, they no doubt represent international and regional consensus on specific issues and establish governmental commitments on those issues.

Right to health and reproductive care

One other noticeable consequence of mandatory HIV testing for pregnant women is that it denies them the enjoyment of their right to health and reproductive care. Studies have shown that most pregnant women who are forced to undergo HIV testing are often denied treatment or proper medical care. Others who refuse to submit to a mandatory test face the same consequences. About 50 per cent of health care workers surveyed indicated that people infected with HIV/AIDS could not be provided with treatment in their facilities.[79] A denial of treatment based on HIV status, whether actual or perceived, is a violation of fundamental rights recognized in various human rights instruments.

The right to health is guaranteed in numerous international and regional human rights instruments. However, the most authoritative provision on this is article 12 of the International Covenant on Economic, Social and Cultural Rights (''ICESCR'').[80] It provides that states parties to the covenant shall recognize everyone's right to the enjoyment of the highest attainable standard of physical and mental health. It further stipulates the

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75 Held in Beijing on 15 September 1995 A/CONF.177/20.

76 UN General Assembly special session on HIV/AIDS res A/S-26/L2 June 2001 para 15.

77 Maputo declaration on malaria, HIV/AIDS, tuberculosis and other related diseases, Assembly/AU/Decl. 6(II) 2003.

78 Solemn Declaration of Gender Equity in Africa, adopted by the AU Assembly of Heads of State and Government in Addis Ababa, Ethiopia, July 2004 para 1.

79 Reis et al ''Discriminatory attitudes and practices'', above at note 51 at 0747.

80 Adopted 16 December 1966; General Assembly res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

determinants essential for the enjoyment of the right to health. The committee responsible for the implementation of the covenant noted in its general comment 14 that the right to health is linked to other rights, such as the rights to life, non-discrimination, dignity, equality, liberty etc.[81] It further observed that health care services should be guaranteed for all on a non-discriminatory basis, taking into account the situation of vulnerable and marginalized members of society such as women and people living with HIV/AIDS.[82] According to the committee, health care services should be made available, accessible, acceptable and of good quality to all. It states further: ''The right to health must be understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health''.[83]

The ICESCR has been criticised for being gender neutral and, in short, male oriented in its use of language.[84] To redeem this situation, article 12 of the CEDAW[85] guarantees the right to access health care for women on an equal basis with men. The convention additionally guarantees women's right to ''appropriate services in connection with pregnancy''.[86] The committee on CEDAW noted in its general recommendation 24 on Women and Health[87] that states are obliged to ensure that policies and laws facilitate equal access to health care for women in a non-discriminatory manner.

At the regional level, article 16 of the African Charter[88] states that everyone has the right to enjoy the best attainable state of physical and mental health. The African Commission on Human and Peoples' Rights held in the *Purohit* case[89] that ''enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realization of all the other fundamental human rights and freedoms''. The Commission stated further that this right includes the right to health facilities, with access to goods and services to be guaranteed to all without discrimination of any kind. Similarly, in the *SERAC*[90] case, the Commission found the Nigerian government to be in violation of the rights to health, clean environment, life, among others, under the African Charter when multinational oil companies caused oil pollution in Ogoniland.

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81 General comment 14 ''The right to the highest attainable standard of health'', above at note 33 at para 3.

82 Id at para 12.

83 Ibid.

84 A Chapman ''Monitoring women's right to health'' (1995) 44 *The American University Law Review* 1157 at 1173.

85 CEDAW, above at note 36.

86 Ibid.

87 General recommendation 24 ''Women and health'', above at note 55.

88 African Charter on Human and Peoples' Rights, above at note 25.

89 Communication 241/2001 decided at the 33rd ordinary session of the African Commission held on 15–29 May 2003 in Niamey, Niger.

90 *Social and Economic Rights Action Center (SERAC) and Another v Government of Nigeria* (2001) AHLR 60.

Article 14 of the Women's Protocol[91] contains important provisions relevant in advancing the sexual and reproductive health of women. Article 14 is very instructive on this issue: states are required to "ensure that the right to health of women, including sexual and reproductive health of women, is respected and promoted". This important article further provides that states should respect and promote a woman's right to control her fertility, decide the number and spacing of her children, choose any method of contraception, protect herself from sexually transmitted infections including HIV/AIDS, undergo legal abortion in certain situations and control her family planning. Similarly, the provision enjoins states parties to take appropriate measures to "provide adequate, affordable and accessible health services, including information, education and communication programs to women especially those in rural areas". By these unique and radical provisions, the Women's Protocol has become a pace-setter under international human rights law, as the first treaty that clearly recognizes women's reproductive health as a human right and contains specific provisions on women's protection in the context of HIV/AIDS.

As part of women's right to health and reproductive care on a non-discriminatory basis, pregnant women infected or affected by HIV/AIDS should have access to comprehensive PMTCT treatment in Africa. Rather than the policy of mandatory HIV testing for these women, emphasis should be placed on other approaches that respect the rights of pregnant women, such as providing proper counselling and ensuring that women willingly submit themselves for HIV testing. Despite its challenges, an important objective of VCT is to identify which pregnant women are HIV-positive so that they can receive a short course of ARVs to prevent transmitting HIV to their infants. HIV counselling and testing also offer an opportunity to promote HIV prevention, encourage serostatus disclosure, and foster couple communication on HIV and PMTCT.[92] This will help to obviate the need for mandatory testing. Moreover, it will provide pregnant women with adequate information with regard to their health needs in a more acceptable way.

An alternative argument to this, however, contends that a policy of mandatory HIV testing for pregnant women would serve the interests of pregnant women better, as they would be able to detect the infection early and thus commence the necessary treatment. This would not only advance the health of pregnant women but also that of their unborn children. In other words, it is believed that the human rights of the child can only be served by compromising the mother's rights to liberty and security of person that allow her to reject testing. It is further contended that such limitation of rights may be justified under article 4 of the ICCPR since a

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91 Women's Protocol, above at note 9.

92 Population Council "HIV voluntary counseling and testing: An essential component in preventing mother-to-child transmission of HIV" (2003, Horizon) available at <http://www.popcouncil.org/Horizons/resum/pmtctvct.html> (last accessed 24 August 2007).

pregnant woman owes her unborn child a duty of care and protection.[93] This point is often hinged on the fact that access to ARVs to prevent maternal transmission of HIV now exists to a large extent in most regions worst affected by the epidemic. However, as already stated, there is no legal basis for restricting a woman's rights in a bid to prevent harm to her unborn child. In fact, as shown from the decision of the Canadian Supreme Court in the *Winnipeg Child and Family Services* case,[94] such a restriction cannot be justified under the law.

It must be noted that the PMTCT programme in many African countries is presently riddled with problems. For instance, in Nigeria at the end of 2004 there were about 11 centres where comprehensive PMTCT programmes existed.[95] Many of the institutions providing the services were tertiary health centres located in urban areas far away from rural areas, thereby cutting off women in rural areas who may need these services more than their urban counterparts. Of the women needing ARV in the country, fewer than 1 per cent currently have access.[96] It is further noted that most PMTCT programmes in Africa focus on preventing the unborn baby from infection, whereas proper treatment is not provided to the pregnant woman. Some feminist authors have criticized this approach, which tends to neglect the health needs of women. For instance, Berer argues that such an approach is unfair to women since it more or less amounts to using women's bodies to deliver preventive treatment to infants.[97] Although efforts are currently being made to incorporate women into PMTCT programmes through what is known as PMTCT–Plus, very few women are being reached by this initiative. It must be recalled that African leaders in the Abuja Declaration in 2001[98] affirmed that priority must be given to providing access to HIV treatment particularly with regard to PMTCT in all African countries, so as to help stem the spread of the epidemic and save lives of those already infected, especially women and children. In order to achieve this, African governments resolved to commit at least 15 per cent of their annual budgetary allocations to health care services in their countries. This call was similarly re-echoed at Maputo in 2003, where African governments agreed to pursue opportunities to scale-up HIV treatment in the region, particularly for women and children and other vulnerable groups ''in conformity with the principles of equal access and

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93 Cook et al *Reproductive Health and Human Rights,* above at note 43 at 168.

94 See note 47 above.

95 IF Adewole et al ''Prevention of mother to child transmission of HIV'' in O Adeyi et al (eds) *AIDS in Nigeria: A Nation in Threshold* (2006, Harvard Center for Population and Development Studies) 349 at 373.

96 Id at 369.

97 M Berer ''Reducing perinatal HIV transmission in developing countries through antenatal and delivery care and breast feeding supporting child survival'' (1999) 77 *Bull World Health Organ* 871 at 875.

98 ''Tuberculosis and other related infectious diseases'' (paper at African Summit on HIV/AIDS, Abuja, Nigeria, 24–27 April 2001) OAU/SPS/ABUJA/3.

gender equity".[99] Sadly, not many countries in the region have lived up to these promises.

In Botswana, where universal free access to HIV treatment exists, it has been observed that there is a low uptake of treatment perhaps due to the unwillingness of people to test for HIV, born out of a fear of stigma and discrimination. Because of these challenges faced by PMTCT programmes in Africa, routine HIV testing for all pregnant women is being adopted to ensure uptake in HIV testing by pregnant women and reduce incidence of mother to child transmission of HIV. Botswana became the first country in Africa to adopt this option when its universal free HIV treatment programme was frustrated by people's unwillingness to go for voluntary testing. Since people did not know their status, they could not know whether or not they should access treatment available at no cost. Soon after this, in 2004, routine HIV testing received the blessing of the World Health Organization ("WHO") which recommended routine HIV testing in certain circumstances and for certain reasons.[100] Many other African countries have since adopted this option. Unlike voluntary counselling and testing (where women are offered an HIV test and must choose whether they think it is worth accepting or not), in routine HIV testing every woman is told that HIV testing is a standard part of antenatal care, but she can opt out if she wants to. It is believed that removing the special status that is often given to HIV testing helps to make it more acceptable.

If the "justificatory conditions" proposed by Childress et al above were to be applied to routine HIV testing, the result might well be different from that of mandatory HIV testing. Unlike the latter, routine HIV testing often recognizes a woman's right to opt out of the procedure if she so desires. In other words, it is less infringing on human rights, while also serving as a good public health decision as more and more pregnant women will find out their status early enough and thus be able to prevent harm to their unborn children. Overall routine HIV testing, if properly implemented, could potentially serve the interests of the general public, as infection rates would probably reduce, as people who have been tested would be likely to have access to treatment and care, thereby improving the quality of their lives. This could be particularly true in countries where universal access to HIV treatment and care exist.

To buttress the promising effect of this approach further, studies have shown a dramatic improvement in the uptake of treatment due to routine HIV testing. For instance, at one hospital in rural Uganda, the proportion of pregnant women with documented HIV status at discharge from the hospital more than doubled from 39 per cent to 88 per cent after routine testing was introduced.[101] When Botswana changed its testing procedure

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99 Maputo Declaration, above at note 77 at para 4.

100 S Rennie and F Behets "Desperately seeking targets: the ethics of routine HIV testing in low income countries" (2006) 84 *Bull World Health Organ* 52 at 53.

101 J Homsy et al "Routine Intrapartum HIV counseling and testing for prevention of mother-to-child transmission of HIV in a rural Ugandan hospital" (2006) 42 *Journal of Acquired Immune Deficiency Syndrome* 149 at 152.

nationwide in 2004, it immediately increased testing rates from 75 per cent to 90 per cent.[102] In a study conducted in Botswana, a majority of respondents (60 per cent) agreed that routine HIV testing results in decreased discrimination against HIV-positive people. About 55 per cent of respondents believe it reduces violence against women, while 89 per cent and 93 per cent believe it makes it easy for people to be tested and gain access to treatment respectively. On the other hand, about 43 per cent believe that routine HIV testing will cause people to avoid seeking medical attention.[103]

However, routine HIV testing raises some concerns as well. Some of the women who partake in this programme, especially the illiterate and poor, may be ''coerced'' into testing for HIV simply because others are doing it. Thus, their right to decide freely whether or not to be tested is infringed. Also, in a desperate bid to meet targets, routine HIV testing may be conducted in such a way that it pays little or no attention to patients' rights. Rennie and Behets[104] argue that this approach to testing may run into difficulties in developing countries, including the inability to inform patients properly of this model of testing and a failure to adhere to proper ethics. Also, it may lead to lack of decision making power by patients, especially in Africa where the opinion of medical personnel is accorded so much respect, leading to a situation where patients agree to be tested simply to show respect to authority. Similarly, patients are unlikely to opt out of testing for fear that their doctor may react to them negatively for doing so. Above all, this model also carries the burden of probably discriminating against women as it is targeted in many African countries at women attending antenatal care.

While it may seem necessary in the face of an overwhelming public health emergency to increase HIV testing, this should only be done in ways where individuals' rights are protected. Indeed UNAIDS/WHO,[105] realising this point, state that: ''The global scaling up of the response to AIDS, particularly in relation to HIV testing as a prerequisite to expanded access to treatment, must be grounded in sound public health practice and also respect, protection, and fulfilment of human rights standards''.

Unless proper care and attention are paid to the above mentioned statements by African governments, then we may as well end up in a free-for-all situation where respect for ethics and human rights are thrown to the wind all in the name of increasing HIV testing. This really portends grave danger for the continent.

From the point of view of mandatory HIV testing or even routine HIV testing, the emphasis seems to be on pregnancy as a condition precedent

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102 Center for Disease Control and Prevention (''CDC'') ''Introduction of routine HIV testing in prenatal care - Botswana'' (2005) 293 *The Journal of American Medical Association* 152 at 153.

103 S Weiser et al ''Routine HIV testing in Botswana: a population-based study on attitudes, practices, and human rights concerns'' (2006) 3 *Plos Med* e261 1013 at 1017.

104 Rennie and Behets ''Desperately seeking targets'', above at note 100 at 54.

105 WHO/UNAIDS *Policy Statement on HIV Testing* (2004 WHO/UNAIDS) at 3.

for providing treatment for women. Critics have questioned the rationale for making pregnancy a condition precedent for providing treatment for women rather than a gender sensitive approach aimed to providing treatment for all women infected with HIV/AIDS.[106] Perhaps with the exception of Botswana, access to HIV treatment for all and in particular pregnant women in Africa is appallingly low. A routine HIV testing programme that is not supported by universal free access to treatment will render the whole programme meaningless. Here lies a great challenge for African governments. In line with African governments' commitments under the Abuja Declaration[107] and the UN General Assembly's Declaration of Commitment, access to HIV treatment, paying attention to special needs of women, should be made available in Africa. As recently pointed out by African ministers of health at their meeting in Maputo, universal access to sexual and reproductive programmes including HIV/AIDS services in Africa will remain unattainable unless African governments keep their promises made in the Abuja Declaration in 2001.[108] The UN Committee on Economic, Social and Cultural Rights has observed that failure of a government to guarantee the right to health care services to the most vulnerable members of the society is a breach of a government's obligations under the covenant.[109] Moreover, the failure of states to take steps and measures to realise women's right to health on a non-discriminatory basis is a violation of women's rights.

CONCLUSION

It is clear from the above that mandatory HIV testing targeted at pregnant women can hardly be justified on public health grounds. The attended human rights consequences arising from this far outweigh the benefits to both women and the community at large. A public health policy which sacrifices respect for individual human rights at the altar of the common good needs to be viewed with caution. Mandatory HIV testing for pregnant women erodes their fundamental rights to self-determination and reproductive health care. More importantly, it amounts to discrimination against women since only pregnant women are the targets of such a policy.

Routine HIV testing, if properly implemented, provides great opportunity for increasing HIV testing and access to treatment and care in Africa.

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106 A Rosenfield and E Fidgor "Where is the M in MTCT? The broader issues in mother to child transmission of HIV" (2001) 91 *American Journal of Public Health* 703 at 704.

107 African Summit on HIV/AIDS "Tuberculosis and other related infectious diseases", above at note 98.

108 "Maputo plan of action for the operationalization of the continental policy framework for sexual and reproductive health and rights 2007–2010" (special session at the African Union Conference of Ministers of Health on the universal access to comprehensive sexual and reproductive health services in Africa, September 2006) Sp/MIN/CAMH/5(1).

109 General comment 14 "The right to the highest attainable standard of health", above at note 33.

However, as cautioned by UNAIDS/WHO,[110] this approach must be supplemented by other efforts, such as training health providers, tackling the problem of stigma and discrimination, and ensuring access to treatment, care and support, and above all it must be founded on respect for the fundamental rights of patients especially pregnant women. In addition, a comprehensive PMTCT programme must be made available in virtually all segments of health care institutions. For these things to happen however, governments must exhibit enough political will by making funds available. Women's reproductive health care needs have suffered from great neglect in the past; the time is now for African governments to live up to their obligations and commitments under international human rights law.

110 UNAIDS/WHO *Guidance on Provider Initiated HIV Testing and Counseling*, above at note 14 at 5.