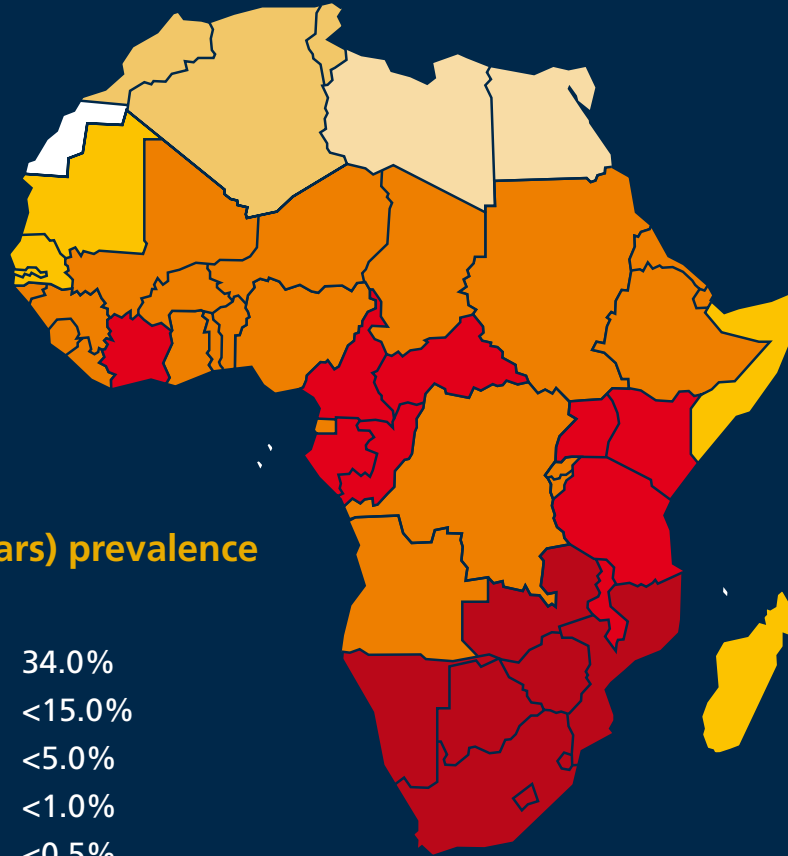
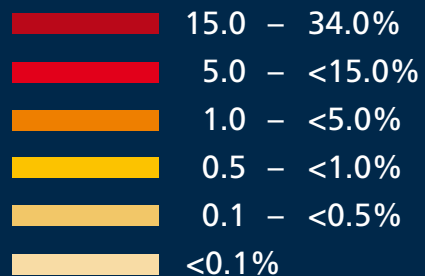


Supporting the response
to the HIV epidemic in
Eastern and Southern
Africa through the
international human
rights framework



The HIV epidemic in Eastern and Southern Africa

Adult (15-49 years) prevalence % in 2005



Number of children (0-17 years) orphaned by AIDS in selected countries in 2005

Angola	160 000
Botswana	120 000
Burundi	120 000
DRC	680 000
Kenya	1 100 000
Malawi	550 000
Mozambique	510 000
Rwanda	210 000
South Africa	1 200 000
Uganda	1 000 000
Tanzania	1 100 000
Zambia	710 000
Zimbabwe	1 100 000



Source: UNAIDS, 2006 report on the global AIDS epidemic



Human rights and human rights law

Human rights

Universal – birthright of all human beings

Inherent dignity and equal worth of all human beings

Inalienable, indivisible and interdependent

Human rights law

Performance standards for duty-bearers at all levels of society, but especially organs of the state

Grants justiciable legal guarantees to every individual as a rights-holder

Serves as a basis for accountability

Codified in international, regional and national legal systems





HIV and human rights

**International
human rights
law norms**

Treaties (with general comments)

Declarations and similar documents

**Human rights
obligations**

Respect: Obligation not to infringe on the rights

Protect: Ensure protection against violations from others

Promote: Create enabling environment for the rights to be enjoyed

Fulfil: Provide for the actual enjoyment of the right by people





Linkages between HIV and human rights: HIV is a gendered and human rights issue

Human rights violations lead to spread of HIV



Human rights violations

- Stigma, discrimination
- Marginalisation and denial of health and other services based on HIV status

HIV infection

- Those at risk of HIV unable to protect themselves and others
- Effective HIV prevention, treatment and care services are undermined



HIV leads to human rights violations



Human rights and HIV

Human rights under threat in the context of HIV

- Calls for a return to ‘**traditional public health response**’
 - Routine testing
 - Compulsory disclosure / shared confidentiality
 - Criminalisation of HIV transmission
- Coercive measures lead to symbolic actions and **Highly Ineffective Laws (HIL)**
- Coercion will have very limited success to address root causes
- **Individual autonomy** is the basis of a **human rights-based approach**





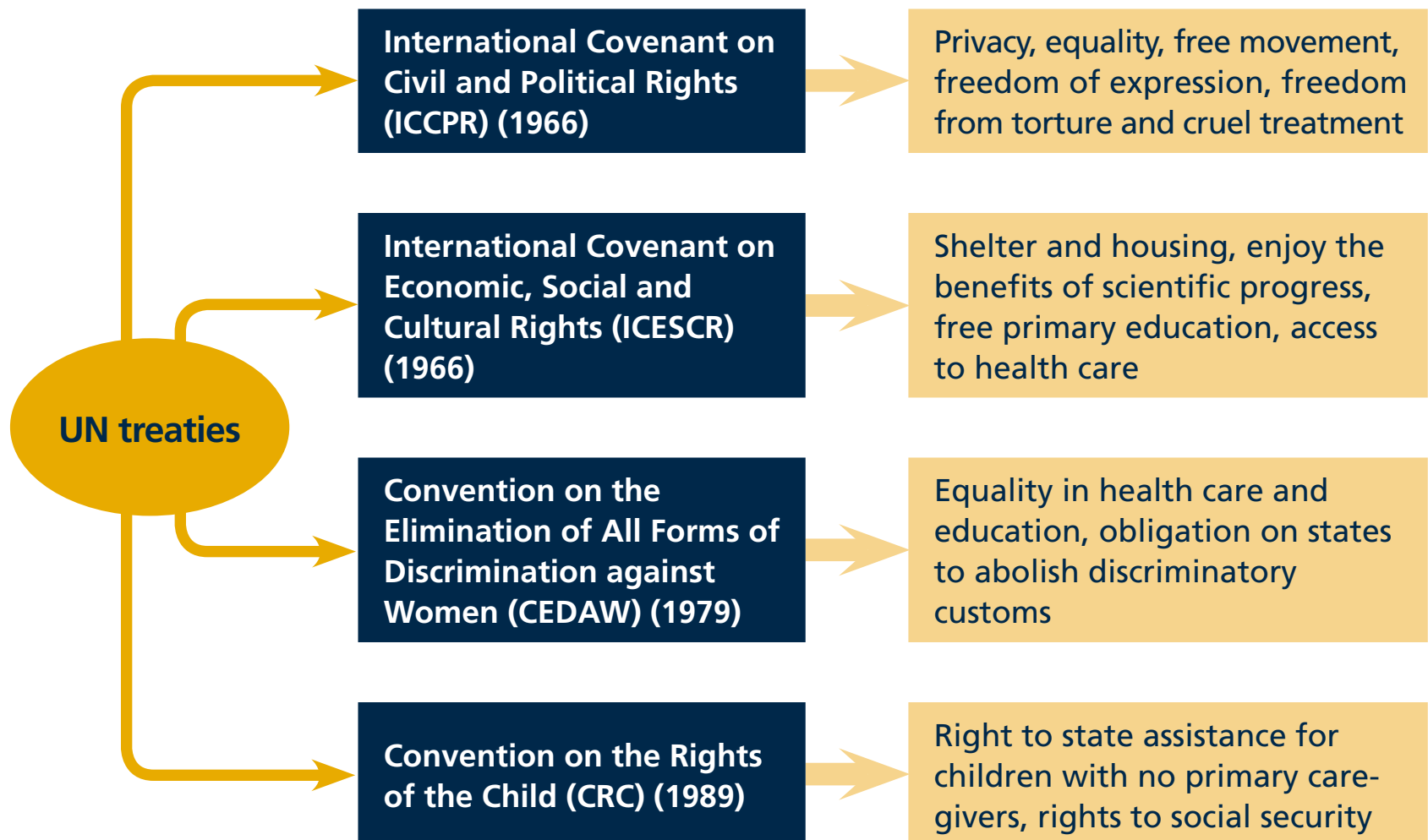
An overview of the three levels of international human rights

Level	Organisation/agency	Documents
Global level	United Nations (UN)	Common documents: Can be adopted within all these organisations <ul style="list-style-type: none"> • Treaties (binding documents) • Resolutions and similar documents (non binding documents)
	International Labour Organisation (ILO)	
	World Trade Organisation (WTO)	
Regional level	African Union (AU)	Specific documents: Can be adopted or issued by specific organs within some (not all) of these organisations <ul style="list-style-type: none"> • General comments • Concluding observations
Sub-regional level	Common Market of Eastern and Southern Africa (COMESA)	
	East African Community (EAC)	
	Intergovernmental Authority on Development (IGAD)	
	Southern African Development Community (SADC)	



Human rights standards at the global level

UN treaties





Human rights standards at the global level

UN general comments (issued by treaty bodies to elaborate upon treaty provisions)

- **General comment 3** (2003) on the CRC: HIV/AIDS and the Rights of the Child

In the context of HIV and AIDS, states have to

- Respect children's rights - no mandatory HIV testing
- Protect children's rights - no exploitation of trial participants by pharmaceutical companies in HIV trials
- Fulfill children's rights - make resources available to prevent HIV transmission from mother to child

- **General comment 14** (2000) on the ICESCR

The right to health contains the following elements

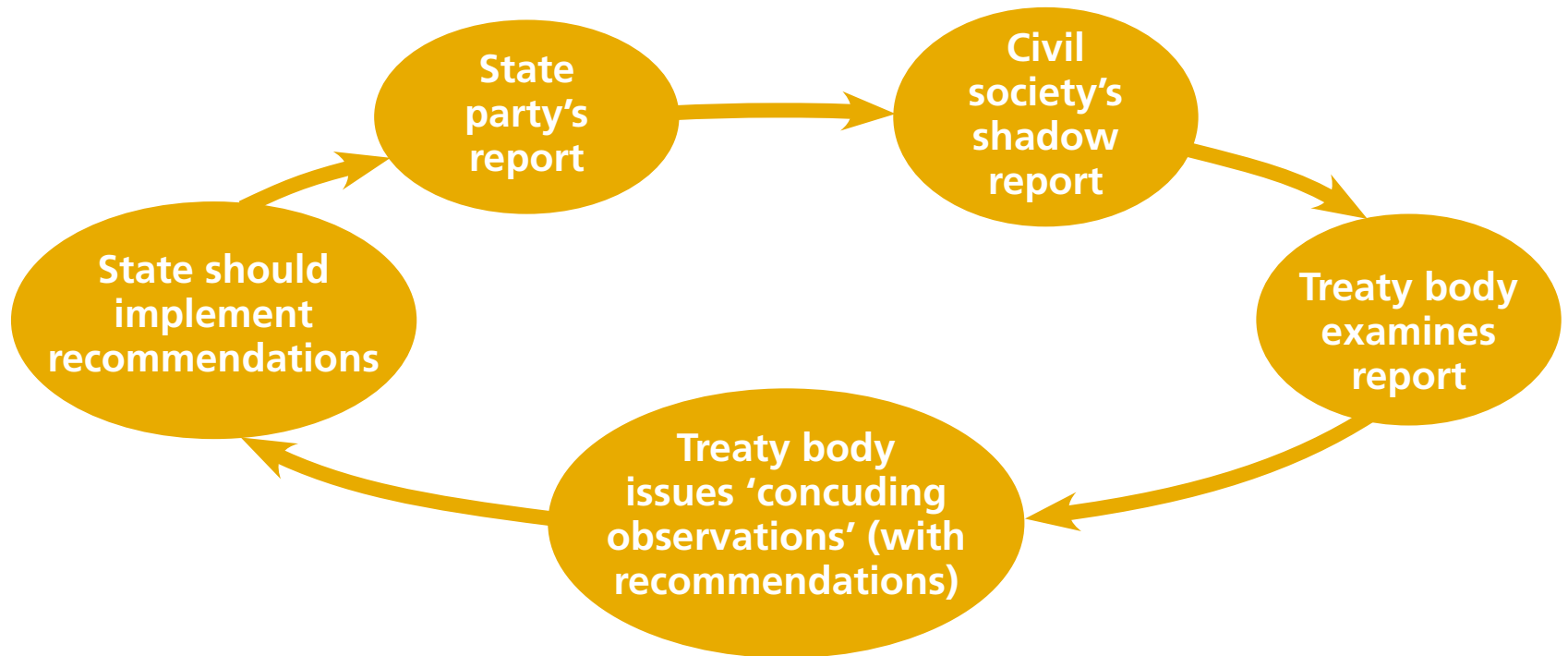
- **Availability:** Functioning public health and health care facilities, goods and services, as well as programmes, must be available in sufficient quantity
- **Accessibility:** Health facilities, goods and services must be accessible to everyone without discrimination
- **Acceptability:** All health facilities, goods and services must be respectful of medical ethics and culturally appropriate
- **Quality:** All health facilities, goods and services must be scientifically and medically appropriate and of good quality





Human rights standards at the global level

- Process of state reporting



- **Concluding observations of the Committee on Economic, Social and Cultural Rights on Zambia:**

“...the Committee is **deeply concerned** about the high incidence of child-headed households, a phenomenon ...linked to the HIV/AIDS pandemic...The Committee **recommends** that the **state party intensify its efforts** to control the spread of HIV/AIDS”



Human rights standards at the global level

UN declarations and similar documents

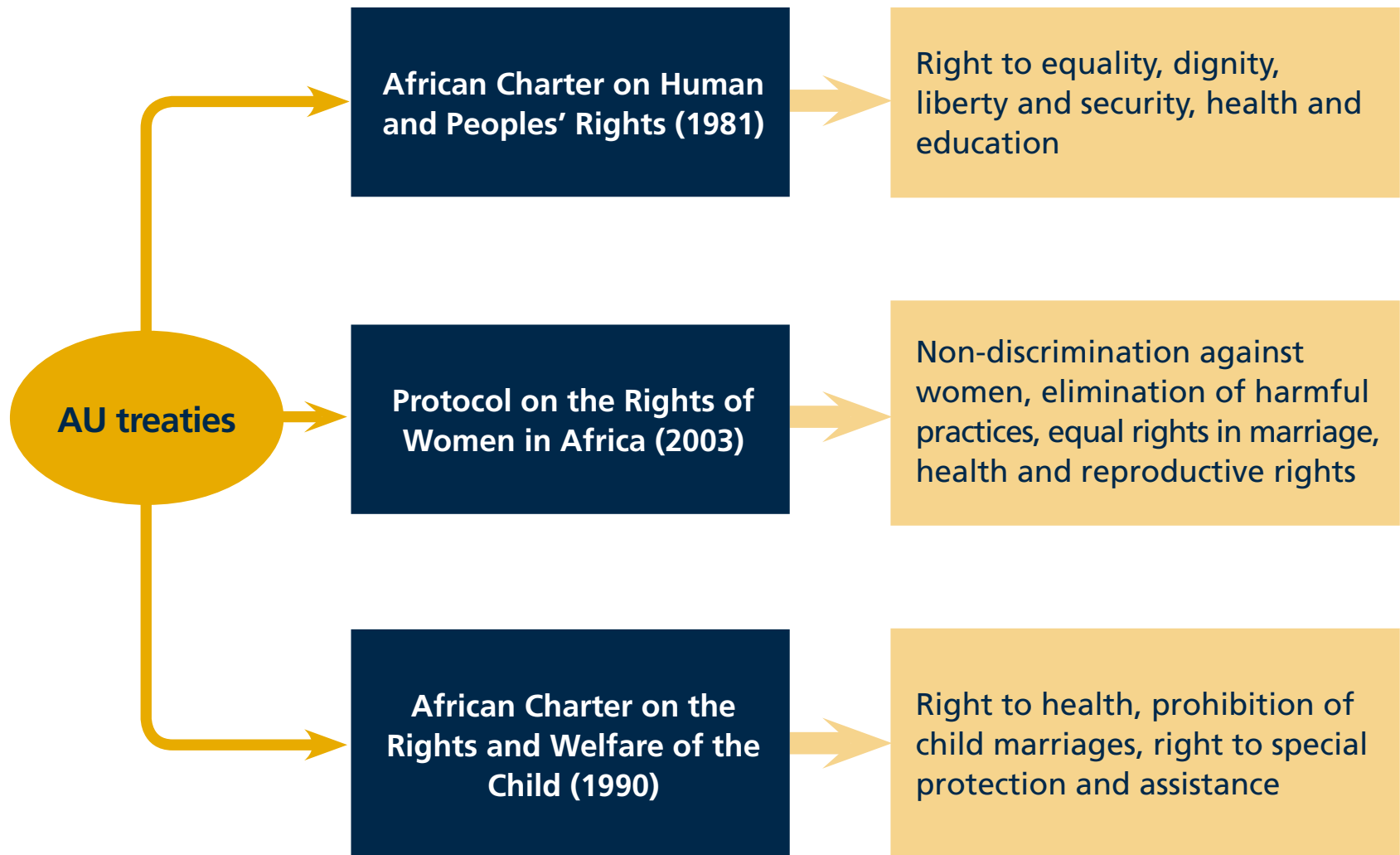
They are not strictly legally binding, but have persuasive value

- **International guidelines on HIV/AIDS and human rights (1996)**
 - Guideline 1:** Adopt multi-sectoral approaches to the HIV epidemic
 - Guideline 2:** Enable community organisations to carry out activities
 - Guideline 5:** Enact or strengthen anti-discrimination laws to protect vulnerable groups
 - Guideline 6 (revised):** Enact legislation to regulate and ensure access of HIV-related goods, services and information
 - Guideline 10:** Translate human rights principles into enforceable codes of conduct
- **UN Millennium Development Goal**
 - Goal 6:** States must halt and begin to reverse the spread of HIV by 2015
- **UN Declaration of commitment on HIV/AIDS (2001)**
 - “Realisation of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS. Respect for the rights of people living with HIV/AIDS drives an effective response.”
- **International Labour Organisation (ILO)**
 - ILO treaties provide for equality and non-discrimination in employment and fair labour practices. Example: ILO Code of Practice on HIV/AIDS and the world of work (2001)
- **World Trade Organisation (WTO)**
 - Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (while protecting patent rights, the TRIPS agreement provides for special derogatory measures to the patent regime)





Human rights standards at the regional level: the African Union





Human rights standards at the regional level: the African Union

African Union declarations and resolutions

Tunis Declaration on AIDS and the Child in Africa (1994)

- Affirms commitment of African Heads of States and Government to implement “appropriate responses to the needs of affected children covering social, legal, ethical, medical and human rights issues”

Abuja Declaration (2001)

- 15% of government budget to be devoted to healthcare
- Africa’s Common Position to the UN General Assembly Special Session on AIDS (2006)
- 80% ARV coverage by 2010

Brazzaville Commitment on Scaling Up Towards Universal Access to HIV and AIDS Prevention, Treatment, Care and Support in Africa by 2010 (2006)

- Declares that **barriers to achieving universal access** include: “widespread stigma and discrimination against people living with HIV and marginalized groups, including orphans, migrants and sex workers, compounded by **weak legal frameworks to enforce basic rights.**”





Human rights standards at the regional level: the African Union

African Commission of Human and Peoples' Rights

- Receives individual and state complaints on human rights issues including HIV
- Receives state reports and make recommendations on better implementation of human rights by states
- Its work is to be supplemented by the newly created **African Human Rights Court**

New Partnership for Africa's Development (NEPAD) and African Peer Review Mechanism (APRM)

- Scrutiny by peers
- Direct reference to HIV and AIDS in, for example, the Rwanda Country Review Report





Domestication of international law

Link between international and national law: It makes international law part of national legal system

Two approaches to domestication of international law

Monist (international law directly part of national law)

Article 9(4) of the Constitution of Ethiopia: "All international agreements ratified by Ethiopia **are an integral part of the law of the land**".

Dualist (international law needs incorporation to become part of national law)

Article 111B(c) of the Constitution of Zimbabwe: "Any treaty or agreement acceded to ... shall **not form part of the law of Zimbabwe** unless it has been **incorporated into the law** by or under an Act of Parliament."





Actions for effective domestication of international human rights: States must

1. Ensure constitutional protection of human rights including for PLHIV
2. Adopt relevant legislation in line with international law
3. Rely on case law to protect human rights
4. Establish appropriate institutions
5. Ensure education, sensitisation and partnership
6. Ensure that law is accessible to all ('legal capital')
7. Make use of TRIPS flexibilities





Ensure constitutional protection of human rights including for PLHIV

Constitutional provisions	Equality and non-discrimination	Article 22 of the Constitution of Burundi "No one may be subject to discrimination because of their origin, race, sex ... or because they are suffering from HIV/AIDS or any other incurable disease".
	Gender equality	Article 33 of the Constitution of Uganda "Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution."
	Socio-economic rights	Article 27 (a) of the Constitution of South Africa "Everyone has the right to have access to health care services, including reproductive health care."
Judicial activism to realise constitutional entitlements	Interpreting DPSP Judges may 'elevate' DPSPs to inform judicial guarantees	Indian Supreme Court, <i>Tellis v Bombay Municipality</i> : Case was decided on the basis of the 'right to life' read with the 'right to livelihood' in the DPSP in the Indian Constitution.
	Realise socio-economic rights	The 'right to life' can be interpreted to include 'right to livelihood'. The 'protection against torture and inhumane treatment' can be interpreted to include the provision of ARV medicines to sentenced prisoners.





Adopt appropriate legislation

Type of legislation	HIV specific legislation	<ul style="list-style-type: none"> Angola: Law 8/04 on HIV and AIDS (2004) Kenya: HIV and AIDS Prevention and Control Act 14 of 2006 Mauritius: HIV and AIDS Act 31 of 2006
	HIV-related issues in various pieces of legislation	<ul style="list-style-type: none"> Lesotho: Labour Code (Amendment) Act no 5 of 2006 Djibouti: Law 48 on the Orientation of Health Policy (1999)
Legislative provisions	Equality and non-discrimination	<ul style="list-style-type: none"> Burundi: Law 1/018 (2005) on the Legal Protection of People Living with HIV/AIDS (creates obligation for public authorities to respond to HIV-related discrimination)
	Employment	<ul style="list-style-type: none"> Article 31 (a) of Kenya HIV and AIDS Prevention and Control Act 14 of 2006 No person shall be denied access to any employment for which he is qualified.
	Customary practices	<ul style="list-style-type: none"> Uganda: Domestic Relations Bill of 2003 (prohibits female genital mutilation and criminalises widow inheritance) Eritrea: Female Circumcision Abolition Proclamation 158 of 2007 abolishes female circumcision



Adopt appropriate legislation

Relevant Legislative provisions	Domestic violence (including marital rape)	Section 5 of the South Africa Prevention of Family Violence Act 133 of 1993 “Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife ”.
	Protection of children	Kenya: Children’s Act of 2001 Guarantees free primary school, education, and criminalises forced marriages and female genital cutting.
	Protection of vulnerable groups	Djibouti: Law 48 of 1999 Guarantees children, mothers, the physically handicapped, victims of natural disasters, and vulnerable groups generally, the right to state assistance in matters of health.
	Legislative protection of socio-economic rights	Angola: Law 8/04 on HIV and AIDS of 2004 Sets guarantees for public health care and confidentiality in the health care system.



Appropriate legislation on controversial issues

Issue	Example of current provisions	Recommendation for legislative reform
<p>Criminalisation of HIV transmission</p>	<p>The provision below is not recommended for legislative reform but reveals the current situation on this issue</p> <p>Art. 24 of Kenya: HIV and AIDS Prevention and Control Act 14 of 2006</p> <p>“(1) A person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall</p> <p>(a) take all reasonable measures and precautions to prevent the transmission of HIV to others; and...</p> <p>(2) A person who is and is aware of being infected with HIV...shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.”</p>	<ul style="list-style-type: none"> • No criminal liability unless there is proof, beyond a reasonable doubt, that the accused was aware of his/her HIV infection and was aware that the conduct of which he/she is accused posed significant risk of transmission • No criminal liability when sexual partner was aware of accused HIV-positive status, and gave a non-coerced voluntary consent • No criminal liability if the HIV-positive person took precautions to significantly reduce the risk of transmission • Only wilful, intentional transmission may be criminalised, not reckless or negligent transmission



Appropriate legislation on controversial issues

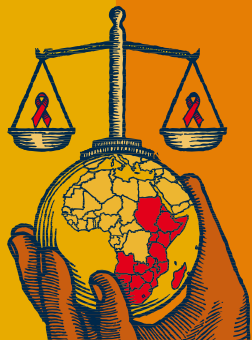
Issue	Example of current provisions	Recommendation for legislative reform
Partner/ beneficial disclosure of HIV status	<p>Human Rights and Ethical Guidelines on HIV: A Manual for Medical Practitioners of South Africa (2001)</p> <p>Medical practitioner may choose to disclose the patient's HIV status to a sexual partners only if all the following conditions are met</p> <ul style="list-style-type: none"> • The sexual partner should be a known and identified person. • The sexual partner should be at risk of being infected. • The patient should be informed beforehand that the medical practitioner is intending to breach his duty to maintain confidentiality. 	<p>International Guidelines 3(g)</p> <p>Healthcare professionals may decide, on the basis of each individual case and ethical considerations whether to disclose to sexual partners of HIV-positive patients. The following cumulative criteria must be observed</p> <ul style="list-style-type: none"> • The HIV-positive person in question has been thoroughly counselled; • Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes; • The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s); • A real risk of HIV transmission to the partner(s) exists; • The HIV-positive person is given reasonable advance notice; • The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice; and • Follow-up is provided to ensure support to those involved, as necessary.



Using case law to protect human rights

HIV-related issue	Case law
HIV and discrimination	<ul style="list-style-type: none">• <i>Hoffmann v South African Airways</i> 2001 (1) SA 1 (SACC 2000) The Constitutional Court of South Africa determined that the appellant's constitutional right to equality was violated when South African Airways refused to employ him on the basis of his HIV-positive status.• <i>Nanditume v Minister of Defence</i> (2002) AHRLR (NaLC 2000) The Namibian Labour Court found that HIV status alone could not be a reasonable ground for exclusion from the Namibian Defence Force (NDF). Additional tests are required to assess whether HIV-positive individuals are fit and healthy for participation in the NDF.• <i>Lemo v Northern Air Maintenance (Pty) Ltd</i> (2004) (2) BLR 317 (IC) The Botswana Industrial Court held that the dismissal of an employee on the sole account of his HIV status is tantamount to a violation of his right to dignity.
Access to HIV related treatment	<ul style="list-style-type: none">• <i>Minister of Health and Others v Treatment Action Campaign and Others</i> 2002 (5) SA 717 (SACC) Giving effect to the right to health, the Constitutional Court of South Africa ordered the government to modify its programme for the prevention of mother-to-child transmission of HIV in order to ensure that nevirapine, an antiretroviral drug, is widely available in the public health sector.





Using case law to protect human rights

HIV-related issue	Case law
HIV prevention and care in prison	<p><i>EN and Others v Government of the RSA and Others 2007 (1) BCLR 84 (SAHC Durban 2006)</i></p> <p>The Durban High Court (South Africa) held that the Westville Correctional Centre must allow all HIV-positive prisoners who meet certain criteria to access antiretroviral treatment.</p>
HIV and the family	<p><i>Midwa v Midwa 2000 (2) EA 453 (CAK 2000)</i></p> <p>The Kenya Court of Appeal stayed an execution order of the Superior Court that would have encouraged the stigmatisation of, and discrimination against, people living with HIV.</p>
HIV and testing	<p><i>Thebe v Mbewe t/a Checkpoint Laboratory Services 2000 JOL 7142 (ZS)</i></p> <p>In this case related to a wrong HIV positive diagnostic, the Zimbabwe Supreme Court held that the defendant was negligent in the collecting and labelling of the blood sample and awarded damages to the complainant.</p>



Actions for effective domestication of international human rights

Establish efficient national institutions

- National institutions coordinating national responses to HIV and AIDS (such as National AIDS Councils) should not only be established, but should also function effectively

Education, sensitisation and partnerships

For example:

- The Treatment Action Campaign (TAC) in South Africa
- The AIDS Support Organisation (TASO) in Uganda





Actions for effective domestication of international human rights

Making the law accessible for all

States should ensure

- Awareness and knowledge of rights
- Access to lawyers and legal services – legal aid and paralegals
- That standing (locus standi) is not a hurdle
- A functioning police investigation and court system
- An independent judiciary
- That delays in court processes are reduced

Using TRIPS flexibilities

- Declaration of medical emergency
- Parallel importation
- Compulsory licensing

Few states have made use of flexibilities, for example: Mozambique, Industrial Property Code, approved by Decree No. 18/99 of May 4 Article 70 – provides for Compulsory License issued





Conclusion

- HIV and AIDS have **exposed and exacerbated pre-existing human rights violations**, stigma and inequalities in the region.
- Addressing human rights violations, stigma and gender inequality will both contribute to address the immediate HIV and AIDS related issues, but also the long-standing inferiority of women.
- HIV can leave us with a **more equal, just and tolerant society** – if we focus on human rights and the disparities in our societies.
- **International law has an important role to play** in this quest – provided that international law becomes part of national law.
- Sustained improvement of national human rights situation requires the domestication of international norms.





Recommendations

States in the region should

- **Ratify** all the mentioned UN, AU and sub-regional treaties
- **Accept** the **optional complaints** mechanism to allow for individuals complaints
- **Submit** their state reports regularly
- **Domesticate** the treaty norms by adopting **laws** and programmes in line with treaty provisions
- **Ensure** that the laws are made accessible through information campaigns and legal aid
- **Mainstream gender equality** into all national laws, policies and programmes dealing with HIV and AIDS.





How to get hold of the tools

This Flipchart is part of a series of tools developed by the UNDP to improve the implementation of human rights norms in the context of HIV. For more information, or to obtain copies of this and other tools, please contact:

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