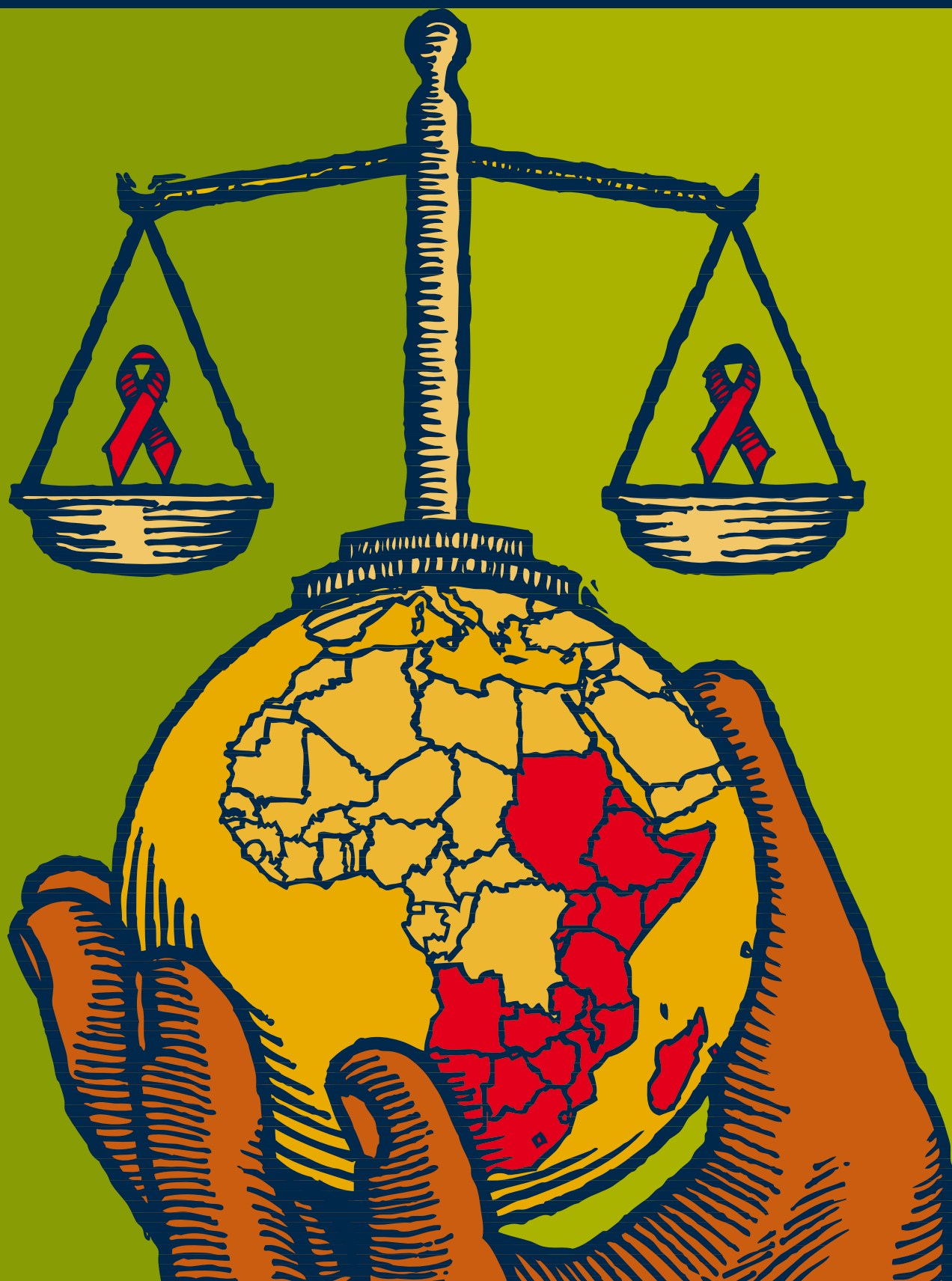


# Guide to an effective human rights response to the HIV epidemic

Using international human rights law to shape national law in Eastern and Southern Africa





*Guide to an effective human rights response to the HIV epidemic: Using international law to shape national law in Eastern and Southern Africa*

Commissioned by UNDP, Regional Service Centre for Eastern and Southern Africa.

Researched by the AIDS and Human Rights Research Unit, a collaboration between the Centre for the Study of AIDS and Centre for Human Rights, University of Pretoria.

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# Foreword: Domestication of human rights frameworks into national HIV policy and legislation



*We, the global community, are almost three decades into the HIV epidemic and today there is indisputable evidence that the destructive force of the HIV and AIDS epidemic is fuelled by a wide range of human rights violations. Contemporary development practitioners agree that the inadequate realization of human rights accelerates the spread of HIV and worsens the impact of AIDS in the world. Hence a strengthened and coherent human rights based response to the epidemic will go a long way towards increasing social cohesion and the community's ability to respond to the epidemic in our midst.*

Based on feedback from a set of stakeholder consultations involving diverse groups of people, including parliamentarians from 22 countries in Eastern and Southern Africa, UNDP's HIV and AIDS Team located at the Regional Service Centre in Johannesburg, South Africa, identified the need to develop advocacy and information material on human rights based responses to HIV in the region. The initiative culminated in the development of a set of tools designed to support policy and legislative review and reform. These include:

1 *A Guide to an effective human rights response to the HIV epidemic:* The *Guide* gives information on using the frameworks of international human rights law as the basis for shaping national laws addressing HIV in Eastern and Southern Africa. The *Guide* will assist stakeholders to develop strategies to strengthen national law in ways

that uphold the human rights of people living with HIV.

- 2 *A checklist of human rights obligations to effectively address HIV and AIDS in Eastern and Southern Africa:* This tool will assist government and civil society to assess and inform policy from the context of human rights obligations as they relate to HIV.
- 3 *A PowerPoint cum Flip Chart presentation:* Change agents and advocacy groups can use these communication tools to enhance the capacity of their constituencies to understand the obligations of states and suggest possible steps towards domestication of international human rights frameworks.
- 4 *A Compendium and CD-ROM of key documents relating to human rights and HIV in Eastern and*

*Southern Africa:* These tools provide a comprehensive and accessible catalogue of international, regional and national human rights documents in a single source. They aim to inform the response of stakeholders, in particular when reviewing and drafting legislation and policy, and when interpreting laws. The Compendium is the printed version, and the CD-ROM the electronic version.

It is envisaged that the tools would strengthen the capacity of stakeholders in Eastern and Southern Africa to advocate for a human rights-based response to HIV. The tools also provide guidelines to facilitate the evaluation and strengthening of policy and legislation.

It should be stressed that these are not 'one size fits all' tools. Although differences between countries are taken into account, universal obligations form the pivots of the position. Those making use of the tools at the national level will, no doubt, be in the best position to incorporate local features into their responses. The information has been captured at a given point in time and may have evolved in the passing months.

Strengthening the capacity and commitment of states to respect, protect and promote human rights is of course a central strategy of all development and public health efforts, not just the response to HIV. The severity, consequences and complexities of the HIV epidemic make human rights efforts all the more important. How can countries go beyond necessary but insufficient biomedical responses to the epidemic to address the fundamental social issues that drive new infections and undermine care,

treatment and impact mitigation? How can countries ensure that responses to crises like gender based violence and its association to HIV are effective rather than counter-productive? Only a human rights framework can respond to these challenges, and we hope that the tools will assist a cross section of stakeholders to understand and promote such an approach.

We believe that tools of this nature are rarely complete in themselves and need to supplement existing tools and efforts on the ground. We look forward to feedback and advice which will enable the tools to remain contextual and evolve over time to appropriately address the changing nature of the epidemic and our responses to it.

*Jeffrey O'Malley*  
*Director, HIV/AIDS Practice*  
*UNDP*

# Acronyms and abbreviations

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<b>AIDS</b>	Acquired Immunodeficiency Syndrome
<b>APRM</b>	African Peer Review Mechanism
<b>ARVs</b>	Antiretrovirals
<b>AU</b>	African Union
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>CRC</b>	Convention on the Rights of the Child
<b>DPSP</b>	Directive Principles of State Policy
<b>EAC</b>	East African Community
<b>GIPA</b>	Greater Involvement of People Living with HIV
<b>HIV</b>	Human Immunodeficiency Virus
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IGAD</b>	Inter-Governmental Authority on Development
<b>ILO</b>	International Labour Organisation
<b>MDGs</b>	Millennium Development Goals
<b>NEPAD</b>	New Partnership for Africa's Development
<b>NGOs</b>	Non-governmental Organisations
<b>OHCHR</b>	Office of the High Commissioner for Human Rights (UN)
<b>RECs</b>	Regional Economic Communities
<b>SADC</b>	Southern African Development Community
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UN</b>	United Nations
<b>UNAIDS</b>	Joint United Nations Programme on HIV/AIDS
<b>UNDP</b>	United Nations Development Programme
<b>WTO</b>	World Trade Organisation

# Glossary of terms

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Some important terms used in this *Guide* are listed and explained below.

**Accession** – When a state that has not signed a treaty expresses its consent to become a party to that treaty. Accession has the same legal effect as ratification.

**Case law** – The body of law made by judges through legal decisions, in which legislation has been interpreted.

**Compulsory licence** – The licence granted when a state forces the holder of a patent to grant use of that patent to the state or to others. Compulsory licensing promotes access to generic medicines through local production by allowing a government agency or a private company to manufacture pharmaceutical products without the patent holder's consent and usually at a lower cost. Compulsory licensing has been applied to antiretroviral drugs used to treat people living with HIV.

**Concluding observations** – Observations issued by a treaty body after it considers a state's report. Concluding observations refer both to positive aspects of a state's implementation of the treaty and areas where the treaty body recommends that a state takes further action.

**Constitution** – An overarching law that defines the fundamental political principles and establishes the structure, procedures, powers and duties of a government. Most national constitutions also guarantee specified human rights.

**Declaration** – A document that reflects the commitment made by states to address certain issues. A declaration is not legally binding on a state.

**Domestication** – The process of transforming or incorporating international laws into national legal systems.

**Directive Principles of State Policy (DPSP)** – Constitutional guidelines that guide the actions of a government but are not enforceable in a court of law.

**Dualism** – A country that is 'dualist' is required to adapt national legislation to apply international treaties at the national level.

**Epidemic** – A disease that grows in a human population at a very rapid rate.

**General comments** – A treaty body's interpretation of human rights provisions, thematic issues, or its methods of work. General comments are often written in an attempt to clarify the reporting duties of state parties regarding certain provisions. They also suggest approaches to implementing treaty provisions. General comments are sometimes, as in the case of CEDAW, called general recommendations.

**Human rights-based approach** – A framework for human development that is based on international human rights standards. It promotes and protects human rights.

**Individual complaint** – A communication sent to a treaty body by an individual who believes that the state has violated his or her rights.

**Instrument** – Any type of international document.

**International law** – International law consists of rules and principles that regulate the relations between states and other actors of the international community, at sub-regional, regional or global levels.

**Justiciable right** – A right that can be claimed before a court of law, rather than by way of an administrative process. If the court finds that such a right has been violated, it can order a remedy, such as release from detention or compensation.

**Legislation** – Law that has been enacted by a legislative body or another governing body. The term may refer to a single law or the collective body of enacted law. The term ‘statute’ is also used to refer to a single law.

**Monism** – A country that is ‘monist’ is not required to adapt national legislation for international law to become applicable at country level. Rather, the international law becomes part of domestic law when the international law is ratified.

**Overdue state report** – A state report that was not submitted to the treaty body within the time period required.

**Pandemic** – An epidemic that is prevalent throughout an entire country, continent or the whole world.

**Prevalence** – Refers to the proportion of individuals in a population having a disease. Prevalence is a statistical concept and is based on the number of cases of a disease that are present in a particular population at a given time. It conveys information about how widespread the disease is.

**Protocol** – An international agreement that adds to an existing international instrument.

**Ratification** – A formal action under international law that makes a state a party to a particular treaty and indicates a state’s consent to be bound by that treaty.

**State party** – A state that has become bound to a particular treaty, either by way of accession or ratification of that treaty.

**Signature** – An act that indicates a state’s intention to be bound by a treaty at a later date. It is an early step on the way to a state’s ratification of the treaty.

**State report** – A document prepared by a state, as required by a treaty, showing its implementation of that particular treaty. Sometimes, civil society organisations produce ‘shadow reports’ for a particular treaty, especially if they do not agree with the state report or wish to highlight some issue.

**Treaty** – An agreement under international law that is made by states. Treaties are also referred to as conventions, international agreements, protocols, covenants, and charters.

**Treaty body** – A committee of independent experts appointed to monitor states’ implementation of core international human rights treaties. They are called treaty bodies because each committee is created in accordance with the provisions of the treaty that they oversee.



# A. Introduction to the *Guide*

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*Section A identifies the aim of the Guide and provides a summary of its contents.*

***Over the last three decades, the HIV epidemic in sub-Saharan Africa has impacted upon the health of millions of people, substantially worsened the quality of life of families and communities and damaged the social fabric in many countries.***

Human rights are inextricably linked with the spread and impact of HIV on individuals and communities around the world. The spread of HIV and its impact are exacerbated in situations where human rights are not respected, protected and promoted. In these situations, people living with HIV are often too scared to come forward for help because of fear of stigma and other negative outcomes of disclosure. In some cases, vulnerable groups such as women, children and those who are already marginalised in society, such as people involved in commercial sex or men who have sex with men, are at a higher risk of exposure to HIV. This is so because they have a lower status in some societies and do not feel safe in coming forward to access services or assistance. People living with HIV continue to face various human rights violations such as discrimination in the workplace, threats and violence. Thus, the HIV epidemic causes human rights violations and at the same time is driven by human rights violations.

The link between human rights and HIV is further apparent in the disproportionate incidence and spread of HIV among populations living in poverty.

Poverty results in the violation of people's socio-economic rights. The overwhelming burden of the epidemic today is borne by low- and middle-income countries. AIDS and poverty are now mutually reinforcing negative forces in many of these countries. Most states are committed to ensuring human rights for their people. They have ratified global and regional treaties to show their commitment; this is a very important step in 'making rights real' for ordinary people. Another important step is to make international law part of national laws.

However, research shows that domestication is often not undertaken for various reasons, including a lack of awareness of human rights obligations on the part of key government officials.

## **Aim of the *Guide***

The aim of this *Guide* is to provide information to government officials and other agents of change in Eastern and Southern African states to:

- raise awareness of international norms relating to HIV and AIDS, and
- develop strategies to implement the law in ways that uphold the human rights of people living with HIV.

The *Guide* provides information about relevant human rights documents, the obligations that arise from those documents and the steps required for their implementation. It also draws lessons from the progress of some of the countries in the region and sketches the status of international and national

law in these countries as of 1 July 2007. The focus is on 24 countries in Eastern and Southern Africa: Angola, Botswana, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

The *Guide* could be useful to judges and parliamentarians, national AIDS programme representatives, members of national human rights institutions, law commissions, and civil society groups.



## Using the sections of the *Guide*

**Part B** of the *Guide* provides basic background information on the HIV epidemic.

**Part C** illustrates the linkages between HIV and vulnerable groups.

**Part D** explains the meaning and significance of a human rights-based approach.

**Part E** explains the role of international human rights law and clarifies some related key concepts.

The *Guide* examines the state's obligations with respect to the HIV epidemic that arise from international human rights law at three levels:

- **Part F** introduces the global human rights system as it has developed under the United Nations (UN).
- **Part G** discusses state obligations under the African regional system, developed under the African Union (AU).
- **Part H** briefly refers to sub-regional legal orders and their potential impact on the HIV epidemic and state law.

**Part I** focuses on the national level, where states can adopt laws in accordance with their international human rights commitments.

**Part J** offers a summary and highlights some important recommendations.

**Part K** refers to other tools that will further equip users of the *Guide* in their efforts to adopt and implement laws to address the HIV epidemic.

## B. Background: The HIV epidemic

*Section B provides basic facts about HIV and AIDS and gives an overview of the situation in the region.*

### Some basic facts about HIV and AIDS

- HIV is an acronym for **H**uman **I**mmunodeficiency **V**irus.
- HIV attacks the cells of the immune system, leaving the body vulnerable to infections.
- HIV can be transmitted through unprotected sexual intercourse (sex without a condom), needle-sharing, blood transfusions, and from mother to child before, during or after birth. In sub-Saharan Africa, the main route of transmission is unprotected sex between men and women.
- As HIV infection advances, a person's immune system becomes weaker. At the end stage of this process, the person is said to have AIDS. AIDS refers to a set of symptoms and infections that indicate an advanced stage of HIV infection.
- AIDS is an acronym for **A**cquired **I**mmunodeficiency **S**ndrome.
- Certain drugs known as antiretrovirals (ARVs) may be used to treat a person living with HIV. These drugs often prolong life but do not cure HIV or AIDS.
- Additionally, the onset of AIDS can be delayed with a holistic approach to wellness, which includes a healthy diet, regular exercise and stress relief. With such interventions, a person living with HIV can be well and productive for a long time.

Since 1981, when it was first 'discovered', HIV has rapidly spread from only a few isolated locations to every country in the world. According to the UNAIDS *AIDS Epidemic Update of 2006*, approximately 39.5 million people were living with HIV in 2006 and 2.9 million people died of AIDS worldwide in the same year.

The HIV epidemic has had a dramatic effect on sub-Saharan Africa, and in particular on Eastern and Southern Africa, where the majority of people with HIV in the world live. It has resulted in a

decrease of the development gains made in the past decades. For example, the epidemic has caused a decline in the life expectancy of people, an increase in health care costs, a decrease in productivity and an increase in the number of orphans and vulnerable children in communities. While some countries in Eastern and Southern Africa report a decline or levelling of HIV prevalence, countries in Southern Africa still have a very high prevalence compared to the rest of the world.

The following table shows HIV prevalence for adults aged 15-49 years in various countries in Eastern and Southern Africa.<sup>1</sup>

**Table 1: HIV prevalence in the region, 2006**

Country	HIV prevalence among adults aged 15-49 years
Angola	3.7%
<b>Botswana</b>	<b>24.1%</b>
Burundi	3.3%
Comoros	> 0.1%
Djibouti	3.1%
Eritrea	2.4%
Ethiopia	2.2%
Kenya	6.1%
<b>Lesotho</b>	<b>23.2%</b>
Madagascar	0.5%
<b>Malawi</b>	<b>14.1%</b>
Mauritius	0.6%
<b>Mozambique</b>	<b>16.1%</b>
<b>Namibia</b>	<b>19.6%</b>
Rwanda	3.1%
Seychelles	Not available
Somalia	0.9%
<b>South Africa</b>	<b>18.8%</b>
Sudan	1.6%
<b>Swaziland</b>	<b>33.4%</b>
Tanzania	6.5%
Uganda	6.7%
<b>Zambia</b>	<b>17.0%</b>
<b>Zimbabwe</b>	<b>20.1%</b>

As illustrated in Table 1, in nine Southern African countries at least 14% of adults aged 15 to 49 years are currently living with HIV. This is a cause for concern.

1 Data from UNAIDS 2006 Report on the Global AIDS Epidemic, 2006. Available at [http://www.unaids.org/en/HIV\\_data/2006GlobalReport/default.asp](http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp).

## C. The link between human rights and the HIV epidemic

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*Section C illustrates the links between human rights and HIV. It especially focuses on the situation of vulnerable and marginalised groups whose exposure to HIV is heightened as a result of human rights violations.*

Unlike many other public health emergencies in the history of humanity, the response to the AIDS pandemic has incorporated human rights analyses or approaches. The human rights approach is based on the idea that the traditional bio-medical approach to public health emergencies, is in itself inadequate to comprehensively address the myriad socio-cultural and economic aspects of the epidemic. In addition, the emphasis on the rights of people living with HIV or vulnerable to HIV infection is deemed a fundamental element of the response to HIV.

However, calls for the end of “AIDS exceptionalism”<sup>2</sup> have recently coincided with a questioning of the efficacy of the human rights-based approach in addressing the epidemic. Critics of the human rights-based approach argue that the failure, thus far, to respond effectively to HIV should lead to a shift of paradigm towards the application of a public health-centred approach to HIV.<sup>3</sup>

With the rapidly increasing inequalities in the world, particularly in countries most affected by HIV, now more than ever, the inextricable links between hu-

man rights and HIV cannot be denied nor underestimated. The failure to respect, protect, promote and fulfil human rights fuels the spread, and exacerbates the impact of, HIV. Similarly, HIV can lead to violation of human rights through the infringement or denial of the rights of people living with HIV.

Protecting and promoting human rights are critical to the response to HIV for at least three reasons:<sup>4</sup>

### Violations of human rights increase vulnerability to HIV

Certain groups are more vulnerable to HIV infection because they are unable to realise their civil, political, economic, social and cultural rights. For example, individuals who are denied the right to freedom of association and access to information may be precluded from discussing issues related to HIV, participating in AIDS service organisations and self-help groups, and taking other preventive measures to protect themselves from HIV infection. Similarly, individuals who are denied services or are marginalised due to their national origin such as refugees

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2 See Bayer R ‘Public health policy and the AIDS pandemic: An end to AIDS exceptionalism’ (1991) *New England Journal of Medicine* 324 1500-04.

3 De Cock K et al ‘Shadow on the continent: public health and HIV/AIDS in Africa in the 21st century’ (2002) *The Lancet* 360 67-72.

4 The following exploration of the links between HIV and human rights is adapted from UNHCHR ‘Introduction to HIV/AIDS and Human Rights’. Available at <http://www.ohchr.org/english/issues/hiv/introhiv.htm>.

or migrants might not be able to access relevant prevention, treatment or care services. Women, and particularly young women, are more vulnerable to infection if they are disempowered or lack access to information, education and services necessary to ensure sexual and reproductive health and prevention of infection. Societal conditions such as violence against women, lack of education, harmful cultural practices and restrictions on property and inheritance still exist, exacerbating inequalities, which in turn fuel the epidemic. The inequalities mean that women do not have access to power and property, the ability to negotiate (safe) sex or control over their own bodies. This lack of equality exposes them to HIV. People living in poverty often are unable to access HIV care and treatment, including antiretrovirals and other medications for opportunistic infections.

## Stigma and discrimination lead to human rights violations

The rights of people living with HIV are often violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the consequential violation of other rights. Stigmatisation and discrimination may obstruct their access to treatment and may affect their employment, housing and other rights. This, in turn, contributes to the vulnerability of others to infection, since HIV-related stigma and discrimination discourages individuals infected with and affected by HIV from contacting health and social services or disclosing their status. The result is that those most needing information, education and counselling will not benefit even where such services are available.

## Violations of human rights impede an effective response

Strategies to respond to the AIDS epidemic are hampered in an environment where human rights are not respected. For example, discrimination against and stigmatisation of vulnerable groups such as injecting drug users, sex workers and men who have sex with men drives these communities underground. This inhibits the ability to reach these populations with prevention efforts, and thus increases their vulnerability to HIV. Again, the failure to provide access to education and information about HIV and AIDS, or treatment, care and support services to groups such as asylum seekers, migrants, refugees, internally displaced persons and prisoners may further fuel the AIDS epidemic. The provision of prevention, treatment, care and support services for all is fundamental for an effective response to HIV, which is hampered if human rights are not respected.

The use of human rights law and the enforcement of human rights, therefore, are critical to limit the spread of HIV. If implemented properly, law can play a significant role in protecting, promoting and fulfilling human rights. Conceding and eroding the human rights of those living with, affected by, or made vulnerable to infection with HIV will further marginalise those individuals and drive the epidemic to new heights. The realisation of gender equality should be a key factor in strategies that aim to reduce vulnerability to HIV infection. To inhibit the spread of the epidemic, HIV programming should address the socio-economic realities and socio-cultural norms as they relate to women, children, and marginalised groups.

## D. The human rights-based approach

*Section D describes the human rights-based approach and the relationship between the human rights-based approach and people living with HIV and other vulnerable groups.*

Through the protection and promotion of human rights of all people, including vulnerable and marginalised groups, governments can make an impact on the spread of HIV. A human rights-based approach is a useful framework for responding to HIV.

- Participation and inclusion
- Accountability and the rule of law.

These principles are described in more detail in the box below.<sup>5</sup>

### What is a human rights-based approach?

A human rights-based approach is widely considered to be an essential and effective response to the HIV epidemic. This approach is also likely to have a positive impact since it works to reduce discrimination and stigma, leading to improved access to care and treatment and encouraging people to obtain information on how to protect themselves and others from HIV exposure.

The human rights-based approach is one in which human rights principles guide all programming phases. The main principles include:

- Universality and inalienability
- Indivisibility
- Interdependence and inter-relatedness
- Non-discrimination and equality

#### **Universality and inalienability:**

Human rights are universal and inalienable. This means that all people everywhere in the world are entitled to them and they cannot be given away. As stated in Article 1 of the Universal Declaration of Human Rights, 'All human beings are born free and equal in dignity and rights'.

#### **Indivisibility:**

Human rights, regardless of whether they are civil, cultural, economic, political or social rights, are inherent to the dignity of every person. Consequently, all rights have equal status.

#### **Interdependence and inter-relatedness:**

Human rights are interdependent and inter-related. The realisation of one right often depends, wholly or in part, on the realisation of other rights.

<sup>5</sup> See also the UN document entitled *Common Understanding on a Human Rights Based Approach to Development Cooperation*, available on the website [www.unescobkk.org](http://www.unescobkk.org).



### Equality and non-discrimination:

All individuals are equal and are entitled to their human rights without discrimination of any kind. Discrimination should not be based on race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status.

### Participation and inclusion:

Every person is entitled to participate actively, freely and meaningfully in, contribute to, and enjoy civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised.

### Accountability and rule of law:

States as duty-bearers are answerable for their (non) observance of human rights. They are supposed to comply with the legal norms and standards enshrined in human rights instruments. When they fail to do so, 'rights-holders' (i.e. citizens) are entitled to institute proceedings for appropriate remedies before a competent court or other adjudicator in accordance with rules and procedures provided by law.

The essential feature of the human rights-based approach is its focus on empowering people – especially the most vulnerable and marginalised – with the knowledge and resources to understand, claim and realise their rights. These people are known as 'rights-holders'.

At the same time, the approach works to empower the 'duty-bearers' to understand their roles and

responsibilities in upholding human rights. It is often due to a lack of understanding that government officials are unable to respect, protect, promote and fulfil human rights obligations and the human rights-based approach attempts to provide that understanding.

A human rights-based approach implies a people-centred approach. Empowering individuals and communities to assert their rights is essential. At the same time, the primary goals are to ensure that the duty-bearers are cognisant of their responsibilities, and importantly, have the capacity to fulfil their obligations. Thus, both rights-holders and duty-bearers are involved in all stages of the realisation of the rights-based approach.

## Enforcing human rights law

There is a distinction between human rights as moral ideals and as enforceable legal claims. When it comes to enforceable human rights law, rights-holders are legally entitled to assert and claim their rights, and duty-bearers are capacitated to respect, protect and promote those rights.

**Rights-holders** can have claims against others for the fulfilment of their rights. They can claim these rights against the duty-bearers who are obliged to uphold their rights. Rights-holders should ensure that the enjoyment of their rights still respect the rights of others.

**Duty-bearers** are those against whom claims are made. Under most treaties and constitutions,

governments are duty-bearers. It is often the case that duty-bearers do not have the capacity to uphold the rights of the rights-holders. An essential component of the human rights-based approach is focused on building the capacity – whether human, financial or other – of duty-bearers so that they are able to protect and promote the rights of the people they serve.

A human rights-based approach converts needs into **justiciable rights**. A right is justiciable if it can be presented to and resolved by a court of law, rather than by way of an administrative process. If the court finds that such a right has been violated, it can order a remedy for the violation. Justiciable human rights may be found in a constitution or in national legislation. Thus, the rights-driven approach creates obligations that are enforceable and people can be held accountable for non-performance. For this reason, a rights-based approach is desirable when dealing with HIV-related human rights violations.

A human rights-based approach:

- changes needs into rights;
- changes policies into legislation; and
- changes informal discretion into accountability.

Under the human rights-based approach, states have four main obligations – to respect, protect, fulfil and promote human rights:

- **Respect** means that states should refrain from violations of rights.
- **Protect** means that states should prevent vio-

lations of rights by non-state actors.

- **Fulfil** means that states should take all appropriate measures towards realising rights, such as the allocation of resources.
- **Promote** means that states should raise awareness of rights.

The language of human rights extends beyond the courts. Human rights provide moral authority that may be used in many ways, such as to lobby for reform or to mobilise and strengthen social movements. The human rights-based approach can also be used to monitor progress and assist governments to achieve their own goals with respect to development.

## The human rights-based approach and vulnerable groups

Human rights principles play an important role in responding to HIV and AIDS. Respect for human rights helps prevent HIV infection, reduce the impact of HIV and AIDS and break the cycle of vulnerability.

The human rights-based framework attempts to protect all people, with an additional focus on those who need special attention, such as children, women and other vulnerable groups. It attempts to create an environment conducive for everyone to come forward without fear of discrimination.

The onus is on all people to take responsibility for their own health and well-being. In the absence of coercion or unequal power relations, this would be easy. Everyone would be able to negotiate sex and condom use. This, unfortunately, is not the case in many countries in the world.

In implementing the equality and non-discrimination principle, the human rights-based approach focuses on individuals who are most marginalised or most vulnerable to human rights violations. Within the context of HIV and AIDS, the focus is on the unequal treatment of women as well as other vulnerable groups.

A human rights-based approach provides a means of addressing the root causes of material need and disadvantage, rather than the symptoms and consequences of infection. For example, individuals with HIV may be stigmatised because they are associated with already stigmatised groups such as homosexuals, sex workers, migrants, asylum seekers and refugees. Using the law to address discrimination against vulnerable groups is an important step towards eradicating the stigma.

In order to better understand the importance and means of protecting the rights of people living with HIV and other vulnerable groups, it is necessary to examine international and regional human rights law. When states become party to these laws, it is commendable, because they are, in most cases, creating obligations for themselves for which they will be held accountable.

# E. An introduction to the international human rights system

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*Section E clarifies some concepts that are frequently used in discussions about international law.*

International law consists of rules and principles that regulate the relations between states and other actors of the international community, at sub-regional, regional or global levels.

International human rights are found in legally and morally binding documents (or instruments). Legally binding instruments are treaties, laws and the decisions of courts. Morally binding documents arise from declarations, statements, policies and ethical guidelines adopted within international organisations to which a state is a member. These documents have strong persuasive force even though they are not legally binding.

## Treaties

When states agree to the terms of legally binding treaties, they undertake to implement and uphold the rights contained in those treaties. The agreement is completed through a process of signature and ratification or accession.

**Signature** of a treaty indicates the state's intention to be bound in the future. It does not lead to binding obligations under international law.

**Ratification** of a treaty, however, makes a state a party to the treaty that has been ratified. It is a formal

action under international law and indicates a state's consent to be bound by that treaty. Ratification occurs when a state deposits an instrument of ratification with the UN or AU.<sup>6</sup>

States can ratify treaties with reservations, which means that they can decide not to be bound by certain provisions of the treaty, either indefinitely or for a certain time period.

**Accession** has the same effect as ratification. Treaties are acceded to when signature and ratification take place at the same time.

## Treaty bodies

The implementation of obligations under a particular treaty is monitored by a corresponding treaty body within the UN system, or the African Commission on Human and Peoples' Rights (African Commission), or the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee) in the African human rights system.

Treaty bodies consist of independent experts who assess state performance and compliance with treaties. These bodies perform their role mainly

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<sup>6</sup> Information about treaties that states have ratified is provided on the websites [www.ohchr.org](http://www.ohchr.org) and [www.africa-union.org](http://www.africa-union.org).

by examining state reports and complaints that are brought by individuals against states.<sup>7</sup>

## General comments

Treaty bodies supplement treaties by adopting general comments, which give more detail about treaty provisions. For example, general comments may clarify the effect of a particular treaty on the HIV epidemic. Unlike treaty provisions, general comments are not binding. However, they are authoritative interpretations by the treaty body and provide clarity on the states' obligations under the treaty they are dealing with. It is important for states to review general comments if they want to fully understand their obligations under the treaties in question.

## State reports

States that have ratified treaties are required to submit regular reports on their progress in implementing the treaty's provisions at country level.

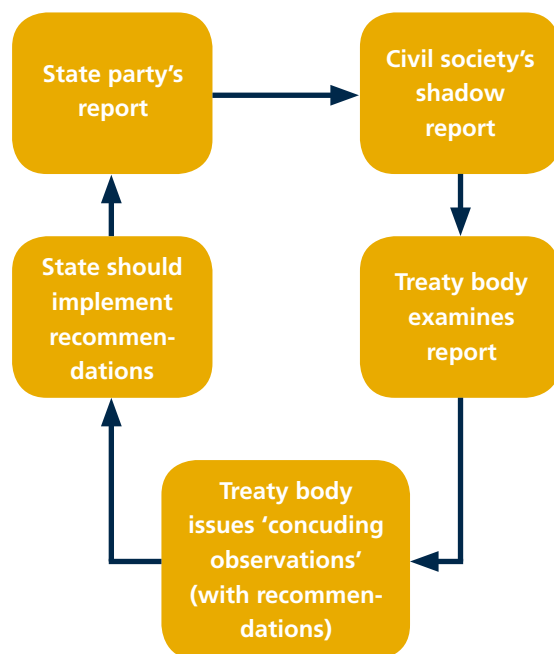
Treaty bodies examine the progress made by the states through a review of the state's reports. States are encouraged to submit detailed and timely reports and treaty bodies provide guidance on what the reports should contain.

After examining a state's report, the treaty body issues concluding observations. It acknowledges the positive steps the state has taken to implement the treaty. It also makes recommendations on how the

state can improve its adherence to the treaty. The treaty body will also request that a report-back on the implementation of its recommendations be included in subsequent state reports.

Civil society has an important role to play with respect to state reports. Non-governmental organisations (NGOs) can contribute to the preparation of the report by providing relevant information to government or highlighting specific issues of concern. NGOs can also prepare their own reports on the implementation of a treaty or on a specific issue. This alternative report prepared by NGOs is called a **shadow report**. The treaty body will usually review the shadow report and may seek clarification from the state before reaching its conclusions.

The state reporting process is continuous and it allows different role-players to contribute to the process, as illustrated in the following diagram:



7 For more information about UN treaty bodies, refer to OHCHR Fact Sheet 30 available at <http://www.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>. For more information on AU treaty bodies, [http://www.achpr.org/english/\\_info/state\\_procedure\\_en.html](http://www.achpr.org/english/_info/state_procedure_en.html) (for information on the African Commission on Human and Peoples' Rights) and <http://www.africa-union.org/child/home.htm> (African Committee on the Rights and Welfare of the Child).

## Individual complaints

Some of the treaty bodies may, under certain circumstances, receive complaints or communications from individuals who believe that the state has violated their rights. In some cases, states have to ratify optional protocols in addition to the main treaty to allow for individual complaint mechanisms to be used.

**Optional protocols** are human rights instruments that amend or supplement treaties by providing for new procedures regarding the treaties or addressing additional important areas related to the treaties.

## Domestication

The process of converting international law into national (domestic) law is often called **domestication**. This process is beneficial as it applies the standards of international human rights law to the people of that country.

Domestication is a process as illustrated in the box below.

Rights are most powerful when they are guaranteed and implemented in the national legal system. However, the norms that affect legislation at the national level are usually found in international human rights treaties. These treaties are adopted within the UN, the AU or other political bodies. These norms and the obligations that they impose, specifically in relation to HIV, are discussed in the next three sections.

### Process of domestication

**Signature** (Not binding state to treaty provisions)



**Ratification/accession** (State becomes bound)



**Legislative conversion** ('Domestication' through 'enabling legislation')



**Implementation** (in practice) **at national level**

# F. The UN human rights system and the HIV epidemic

*Section F provides an overview of the provisions related to HIV and AIDS in the UN human rights system.*

All states in Eastern and Southern Africa are members of the UN. As such, they have access to a great deal of guidance on their response to HIV and on ways to improve the conditions of people living with HIV. Some of these are discussed below.

## UN human rights treaties relevant to HIV and AIDS

Since the creation of the UN in 1945, governments have adopted numerous international human rights treaties. Since most of these treaties pre-date the discovery of HIV, there is no specific UN treaty that mentions HIV or AIDS. However, several provisions of these treaties apply to the pandemic and can be interpreted as placing obligations on states.

The following treaties contain rights that are relevant to the HIV epidemic:

### International Covenant on Civil and Political Rights (ICCPR)

**Article 17:** Everyone has the right to privacy.

**Article 26:** Everyone has the right to non-discrimination.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

**Article 11:** States must recognise the right to an

adequate standard of living, which includes adequate food, clothing, and housing.

**Article 12:** States must recognise the right to the highest attainable standard of physical and mental health, which includes the control and treatment of epidemics.

**Article 15(1)(b):** States must recognise the right to enjoy the benefits of scientific progress.

### Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

**Article 2(f):** States must undertake measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that discriminate against women.

**Article 12:** States must take measures to eliminate discrimination against women in the field of health care.

### Convention on the Rights of the Child (CRC)

**Article 20:** States must offer assistance and protection to children who are deprived of their family environment.

**Article 26:** States must recognise the right of children to benefit from social security.

**Article 28:** States must recognise the right of children to have free primary education.

It is important to remember that state obligations under these treaties only arise if the treaty has been

ratified or acceded to by the state. The following table shows the ratification status of these treaties by 24 Eastern and Southern African countries.

The table below shows that most states in Eastern and Southern Africa have ratified the UN treaties that are most relevant to HIV and AIDS.

To fulfil their commitments, some countries have introduced legal and policy reforms and programmes based on human rights principles (for example, treatment is being expanded on the basis of non-discrimination).<sup>8</sup> However, some violations of the rights at the local level indicate that there is a contradiction between international commitment and actual implementation.

**Table 2: Status of ratification of selected UN human rights treaties**

Country	Treaties ratified or acceded to			
	ICCPR	ICESCR	CEDAW	CRC
Angola	✓	✓	✓	✓
Botswana	✓	✗	✓	✓
Burundi	✓	✓	✓	✓
Comoros	✗	✗	✓	✓
Djibouti	✓	✓	✓	✓
Eritrea	✓	✓	✓	✓
Ethiopia	✓	✓	✓	✓
Kenya	✓	✓	✓	✓
Lesotho	✓	✓	✓	✓
Madagascar	✓	✓	✓	✓
Malawi	✓	✓	✓	✓
Mauritius	✓	✓	✓	✓
Mozambique	✓	✗	✓	✓
Namibia	✓	✓	✓	✓
Rwanda	✓	✓	✓	✓
Seychelles	✓	✓	✓	✓
Somalia	✓	✓	✗	✗
South Africa	✓	✗	✓	✓
Sudan	✓	✓	✗	✓
Swaziland	✓	✓	✓	✓
Tanzania	✓	✓	✓	✓
Uganda	✓	✓	✓	✓
Zambia	✓	✓	✓	✓
Zimbabwe	✓	✓	✓	✓



One of the problems of the UN human rights system is that its capabilities for enforcement are weak. Like all international law, the main means to ensure states' compliance is 'naming and shaming'. Sanctions may not be imposed against a state until that state consistently commits grave human rights violations. This weakness makes the role of the national legal system even more important.

## General comments adopted by treaty bodies in relation to HIV and AIDS

Most of the treaty bodies established under the treaties have adopted general comments that clarify states' obligations in relation to the HIV epidemic. Examples include:

- General Comment 14 on the ICESCR (The right to the best attainable standard of health)<sup>9</sup>
- General Comment 15 on CEDAW (Avoidance of discrimination against women in national strategies for the prevention and control of AIDS)<sup>10</sup>
- General Comment 24 on CEDAW (Women and health)<sup>11</sup>
- General Comment 3 on the CRC (HIV/AIDS and the rights of the child).<sup>12</sup>

General Comment 15 on CEDAW urges states to intensify efforts in disseminating information to increase public awareness of the risk of HIV infection. It stresses that programmes to prevent HIV infection should give special attention to the rights and needs of women and children. States are specifically requested to include in their state reports information

on how the pandemic is affecting women and what actions have been undertaken to address women's needs.

General Comment 3 on the CRC re-emphasises the importance of governments to respect, protect and fulfil the rights of children. For example, states are advised to 'refrain from imposing mandatory' HIV testing on children, which embodies the duty to respect the right to bodily integrity and privacy. States are also to 'ensure that children do not serve as research subjects until an intervention has already been thoroughly tested on adults', which illustrates the duty to protect children from exploitation during medical trials. It is also strongly recommended that states provide essential drugs to prevent transmission of HIV to children during birth, an example of the duty to fulfil a child's right to health.

## State reports

Once states have ratified various treaties, they are supposed to submit state reports that outline the progress that they have made in implementing the provisions of the treaty (see previous section). Often states are not able to submit reports when they are due, and this is attributed to various factors including:

- the complicated nature of state reports
- the number of reports that are due, often around the same time, and lack of coherence among them (even though they often cover similar matters)

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8 For more information refer to AIDS Rights Alliance for Southern Africa. HIV and Human Rights in SADC, 2006 available at <http://www.arasa.info/publications.php>.

9 Available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

10 Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

11 Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

12 Available at <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

- lack of adequate capacity to complete the reports, and
  - lack of adequate data collection systems at country level.
- Table 3 below shows the reporting status of the 24 countries in Eastern and Southern Africa. Most states have at least one overdue report.<sup>13</sup>

**Table 3: Reporting status under selected UN treaties**

Country	Treaty							
	ICCPR		ICESCR		CEDAW		CRC	
	No of reports submitted	No of reports overdue	No of reports submitted	No of reports overdue	No of reports submitted	No of reports overdue	No of reports submitted	No of reports overdue
Angola	0	2	0	3	5	0	1	0
Botswana	1	0	N/A	N/A	0	2	1	0
Burundi	3	1	0	3	1	2	1	2
Comoros	N/A	N/A	N/A	N/A	1	3	1	1
Djibouti	0	1	0	1	0	2	1	2
Eritrea	0	1	0	1	2	1	1	1
Ethiopia	0	1	0	3	5	1	3	0
Kenya	2	0	3	2	4	1	2	1
Lesotho	1	1	0	3	0	3	1	1
Madagascar	3	0	3	4	1	3	2	0
Malawi	0	1	0	3	5	0	1	2
Mauritius	4	0	1	3	5	0	2	0
Mozambique	0	1	N/A	N/A	0	3	1	2
Namibia	1	0	0	2	3	0	1	2
Rwanda	2	1	2	3	3	3	2	0
Seychelles	0	1	0	3	0	3	1	0
Somalia	0	1	0	3	N/A	N/A	N/A	N/A
South Africa	0	1	N/A	N/A	1	2	1	1
Sudan	3	0	1	1	N/A	N/A	2	0
Swaziland	0	1	0	0	0	1	1	0
Tanzania	3	1	1	4	3	2	2	0
Uganda	1	0	0	4	2	2	2	1
Zambia	2	1	2	0	4	1	1	0
Zimbabwe	1	1	1	1	1	3	1	2

N/A – not applicable

<sup>13</sup> To check a state's reporting status, including overdue reports and due dates, refer to the website of the UN Office of the High Commissioner for Human Rights at [www.ohchr.org](http://www.ohchr.org). All reports submitted and concluding observations are available.

## An example of state reporting on HIV issues

The following is an excerpt from a state report submitted by Uganda to the CRC Committee. It illustrates that reporting on matters related to HIV is important.

### Uganda's second periodic report to the Committee on the Rights of the Child (CRC/C/65/Add 33) 2004 (excerpts)

#### HIV/AIDS

163. Government, through the Uganda AIDS Commission, has developed a five-year national strategic framework for HIV/AIDS activities in Uganda 2000/01-2005/06 with the following three goals: reduction of HIV prevalence by 25% by the year 2005/06; mitigation of health and socio-economic effects of HIV/AIDS at individual, household and community levels; and strengthening the national capacity to respond to the epidemic.
164. It is estimated that about 9.5% of the country's population of 21 million are infected with HIV. Of the estimated 2 million people infected with HIV, about a quarter are women of childbearing age (15-49). About 1.1 million children (below 15) have lost one or both parents to AIDS. The HIV infection rate also varies significantly with

age. HIV prevalence is very low between ages 0-5 and 5-14, but begins to rise in the age group 15-19, particularly among girls. Young women aged 15-24 are at a higher risk of HIV infection than men. Overall, about 54% of the reported AIDS cases are females. AIDS is the fourth leading cause of death among children under 5 and is expected to increase the mortality rate significantly. Mother-to-child transmission of HIV is responsible for the HIV prevalence among children. About 15% of the children fed on breast milk of infected mothers acquire the virus (UAC, 1999).

165. HIV prevalence amongst women attending antenatal clinics in selected sites declined from 1992 till 1996, when the rates stabilised at about 10%. Data from sentinel sites indicate that the decline is particularly pronounced among urban pregnant women aged 15-19, followed by women aged 20-24. Studies on knowledge, attitudes, beliefs and practices conducted by the Ministry of Health also indicate an increase in the age at first sex, a reduction in number of casual sexual partners, and an increase in general condom use, especially between casual sexual partners.

The following excerpt illustrates concluding observations issued by the CRC Committee relating to HIV:<sup>14</sup>

14 Please note that the concluding observations are in response to Uganda's initial state report to the Committee on the Right of the Child. The previous example is an abstract from Uganda's second periodic report to the Committee on the Right of the Child.

**Concluding observations of the  
Committee on the Rights of the Child:  
Uganda (CRC/C/15/Add 80) 1997  
(excerpts)**

30. The Committee further recommends that all appropriate measures, including public information campaigns, be undertaken to prevent and combat all forms of discrimination against girls, orphans, children with disabilities, abandoned children, children born out of wedlock, and children victims of abuse and/or sexual and economic exploitation, especially those living in rural areas, with a view, *inter alia*, to facilitating their access to basic services.

32. The Committee recommends that the State party take all appropriate measures, including through international co-operation, to prevent and combat infant and child mortality and malnutrition. Further, the Committee suggests that the government strengthen its information and prevention programmes to combat HIV/AIDS, particularly to prevent the transmission to children of HIV/AIDS and other sexually transmitted diseases (STD) and to eliminate discriminatory attitudes towards children affected by or infected with HIV/AIDS. The Committee further recommends that the State party pursue and strengthen its family planning and reproductive health educational programmes, including for adolescents.

State reporting is meant to be a continuous process. It is recommended to states that they disseminate and implement concluding observations. Concluding observations are an important and often neglected component of the reporting process. The implementation of concluding observations demonstrates effective engagement with the UN treaty body system and shows the state's ongoing commitment to the realisation of human rights. The implementation of concluding observations can result in the incorporation of human rights at the national level, which can translate into protection and redress for vulnerable individuals.

## **Individual complaints and HIV**

As described previously, some of the UN treaty bodies may receive complaints or communications from individuals who believe that the state has violated their rights. In respect to the ICCPR and CEDAW, individuals may bring complaints against their states only if the states have accepted the optional protocols to the respective treaties.

The following table shows the countries in Eastern and Southern Africa that have ratified the relevant optional protocols that allow individuals in those states to submit complaints:

**Table 4: Acceptance of individual complaints procedures under UN treaties**

	Optional protocol to ICCPR	Optional protocol to CEDAW
Angola	✓	✗
Botswana	✗	✗
Burundi	✗	✓
Comoros	✗	✗
Djibout	✓	✗
Eritrea	✗	✗
Ethiopia	✗	✗
Kenya	✗	✗
Lesotho	✗	✓
Madagascar	✓	✗
Malawi	✓	✗
Mauritius	✓	✗
Mozambique	✗	✗
Namibia	✓	✓
Rwanda	✗	✗
Seychelles	✓	✗
Somalia	✗	✗
South Africa	✓	✓
Sudan	✗	✗
Swaziland	✗	✗
Tanzania	✗	✗
Uganda	✓	✗
Zambia	✓	✗
Zimbabwe	✗	✗

Ten of the 24 Eastern and Southern African states have ratified the optional protocol to the ICCPR, and four of the 24 states have ratified the optional protocol to CEDAW.

To date, no individual complaint dealing specifically with HIV or AIDS has been brought under these complaint mechanisms.

## Other relevant UN documents related to various aspects of HIV

### International Labour Organisation instruments

The International Labour Organisation (ILO), a specialised agency of the UN, seeks to set global standards for just and fair conditions in the labour market and at workplaces. The ILO attempts to create consensus on labour rights through conventions and recommendations. ILO conventions are formal, legally binding instruments that impose obligations on states in international law. Recommendations are informal, non-binding principles that provide further detailed definitions of the standards in the corresponding convention. The ILO Constitution provides a reporting system to monitor the implementation of labour standards at the national level. The 24 Eastern and Southern African states are parties to the ILO.

With regard to HIV and AIDS, the most relevant ILO documents are: Convention 111 on Discrimination (Employment and Occupation) (1958); Convention 155 on Occupational Safety and Health (1981); and the Code of Practice on HIV/AIDS and the World of Work (2001).

ILO Convention 111 on Discrimination (Employment and Occupation) promotes equality of opportunity and treatment in employment and occupation. It stipulates that states should enact legislation to eliminate all discriminatory practices in the workplace, unless such practices are based on the inherent requirements of a particular job. The Convention also recommends that states adopt special measures to reasonably accommodate the particular needs

of persons living with disabilities. The 24 states in Eastern and Southern Africa have ratified ILO Convention 111.

ILO Convention 155 on Occupational Safety and Health promotes better, safer, and healthier working environments. In particular, the Convention calls on states to adopt legislation and policies to prevent accidents and injuries that are caused by working conditions or that occur in the course of work. Lesotho, Seychelles, South Africa and Zimbabwe have ratified Convention 155.

The ILO Code of Practice on HIV/AIDS and the World of Work provides guiding principles to assist policymakers, employers' and workers' organisations, and other social partners to formulate and implement appropriate workplace policies for HIV prevention and care programmes. The Code identifies key principles such as the recognition of HIV and AIDS as a workplace issue, non-discrimination in employment, gender equality, testing and confidentiality, and care and support as the basis for addressing HIV and AIDS in the workplace. The ILO Code prohibits HIV testing for recruitment, employment and insurance purposes. However, it does allow for voluntary testing, testing for epidemiological surveillance and testing after occupational exposure to HIV. The ILO Code is not open for ratification and rather provides states with a guiding framework.

### World Trade Organisation's Agreement on the Trade-Related Aspects of Intellectual Property Rights

The World Trade Organisation (WTO), not strictly speaking a specialised agency of the UN, but working in close collaboration with it, provides a forum

for international trade negotiations. Apart from the Comoros, Eritrea, Ethiopia, Somalia and Sudan, all the states included in this study are members of the WTO. One of the important WTO agreements relevant to HIV and AIDS is the Agreement on the Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). While generally protecting patents and other intellectual property rights, the TRIPS Agreement allows members to undertake measures to protect public health. This is important for the importation, manufacturing and licensing of generic medicines that are necessary in the response to HIV and AIDS.

In August 2003, the WTO agreed that countries facing public health emergencies may issue licences that allow the importation of generic medicines or compulsory licences that allow local manufacturers to produce patent-protected medicines.

In sub-Saharan Africa, a few states have taken advantage of these possibilities. For example, in 2002 the government of Zimbabwe declared HIV and AIDS an emergency and allowed a party other than the government to produce antiretroviral medicines. Mozambique and Zambia have made similar declarations.

### The International Guidelines on HIV/AIDS and Human Rights

The *International Guidelines on HIV/AIDS and Human Rights* (the *International Guidelines*) were adopted in 1996. The *International Guidelines*, published by the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the UN Office of the High Commissioner for Human Rights (OHCHR), provide

influential and strongly persuasive guidance to governments, NGOs, international organisations and others on the development of effective strategies for addressing the HIV epidemic. The *International Guidelines* specifically urge states to ensure that their laws, policies and practices comply with human rights principles.

A summary is found in the box below:<sup>15</sup>

#### The International Guidelines on HIV/AIDS and Human Rights

**Guideline 1:** States should adopt multi-sectoral approaches to establish an effective national framework for the response to the HIV epidemic.

**Guideline 2:** States should enable community organisations to carry out activities in the fields of ethics, human rights and law. States should also consult widely with such organisations in drafting all HIV policies.

**Guideline 3:** States should review and reform public health laws to adequately address the HIV epidemic.

**Guideline 4:** States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not abused in the context of the HIV epidemic.

**Guideline 5:** States should enact or strengthen anti-discrimination laws to protect vulnerable groups. States should also ensure privacy, confidentiality and ethical behaviour in research involving people.

15 The International Guidelines can be found at [http://www.ohchr.org/English/issues/hiv/docs/consolidated\\_guidelines.pdf](http://www.ohchr.org/English/issues/hiv/docs/consolidated_guidelines.pdf).

**Guideline 6 (revised):** States should enact legislation to provide for the regulation of HIV-related goods, services and information in order to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. States should ensure that all persons have access to quality goods on a sustained and equal basis. States should provide services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for the treatment of HIV and related opportunistic infections.

**Guideline 7:** States should implement legal support services to educate people who are affected by the HIV epidemic about their rights. States should also develop expertise on HIV-related legal issues and use means other than courts, such as human rights commissions, to protect the rights of people who are affected by the epidemic.

**Guideline 8:** States, together with communities, should promote an enabling and prejudice-free environment for women, children and other vulnerable groups.

**Guideline 9:** States should promote the distribution of creative education, training and media programmes that are designed to change discriminatory attitudes associated with HIV and AIDS to reflect greater understanding and acceptance.

**Guideline 10:** States should translate human

rights principles into codes of conduct, which should be accompanied by mechanisms to implement and enforce those codes.

**Guideline 11:** States should ensure monitoring and enforcement mechanisms to guarantee and protect HIV-related human rights.

**Guideline 12:** States should share experiences concerning HIV-related human rights issues at an international level and through UN agencies such as UNAIDS.

### Millennium Development Goals

The UN adopted the Millennium Development Goals (MDGs) in 2000. The MDGs are important, measurable and time-bound developmental targets covering issues such as maternal and child mortality, access to primary education and safe living environments. There are eight goals in total. Goal Six urges states to halt and reverse the spread of HIV and AIDS by 2015.<sup>16</sup>

### Declaration of Commitment on HIV and AIDS

In 2001, the UN General Assembly Special Session (UNGASS) adopted the Declaration of Commitment on HIV/AIDS, which provides for clear time-bound targets. The Declaration contains a checklist with questions that concern national compliance with the MDGs. For instance, countries are to adopt laws and regulations that protect people living with HIV and other vulnerable groups against discrimination.

16 For more information, refer to <http://www.undp.org/mdg/basics.shtml>.



## What can a state do?

This section has provided information on various UN treaties and their relevance to the response to HIV and AIDS. It is important for a state to examine what UN instruments it has ratified and whether these have been domesticated into national law. There are other things a state can do. It can engage with civil society to ensure that state reports are

accurate and submitted on time. It can disseminate information and try to implement concluding observations. And it can ratify optional protocols to allow for individual complaints.

The following box provides a checklist for government officials to obtain the maximum benefit from UN human rights treaties:

### Checklist: United Nations human rights treaties

1. Has the state ratified the relevant UN treaties (ICCPR, ICESCR, CEDAW, CRC) and ILO conventions without reservation?
2. Has the state taken steps to domesticate the relevant UN human rights treaties and ILO conventions by incorporating the treaties and conventions into its national laws?
3. Is state reporting under these treaties and ILO conventions up to date?
4. Has the government acted upon and implemented the concluding observations that are related to the HIV epidemic?
5. Has the state accepted the optional individual complaints mechanisms under the optional protocols to the ICCPR and CEDAW?
6. Has the state adopted laws and programmes in line with the *International Guidelines on HIV/AIDS and Human Rights*?
7. If the state is a member of the World Trade Organisation, has it made use of 'flexibilities' in relation to TRIPS?
8. Does the state make every effort to ensure the achievement of MDGs with specific reference to HIV and AIDS?
9. Does the state disseminate information and raise awareness about its international human rights obligations?

# G. The African human rights system and the HIV epidemic

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*Section G introduces the various AU mechanisms, including the African Peer Review Mechanism, and examines the relevant regional documents for HIV and human rights.*

A criticism of the UN's human rights instruments is that they focus too much on individual rights, without examining the rights of the collective. While reflecting the universality of human rights, the AU human rights instruments, take into account the rights of groups, as much as the rights of individuals. These instruments were developed by African states and recognise the importance of the collective in African societies.

All the states in the region are members of the AU. Similar to the UN system, the AU has various human rights documents to which states become parties.

In addition, the AU system allows for scrutiny of a state's human rights record when states become parties to the African Human Rights Court and the African Peer Review Mechanism (APRM).

The AU treaties, African Human Rights Court and the APRM will be discussed in detail below.

- The African Charter on Human and Peoples' Rights (African Charter)
- The Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol)
- The African Charter on the Rights and Welfare of the Child (African Children's Charter).

These treaties provide, among others, for the rights to equality, dignity, security and health. They also give a central place to the principle of the best interest of the child.

The following table shows the status of ratification of the major treaties and the submission of reports to the treaty bodies.<sup>17</sup>

## AU treaties

At the regional level there are three main binding human rights treaties that apply to the HIV epidemic:

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<sup>17</sup> The status of ratification is available from [www.africa-union.org](http://www.africa-union.org) and [www.achpr.org](http://www.achpr.org).

**Table 5: Status of ratification of AU treaties**

Country	African Charter on Human and Peoples' Rights			Protocol to the African Charter on the Rights of Women in Africa	African Charter on the Rights and Welfare of the Child
	Ratified	Number of reports submitted	Number of reports overdue	Ratified	Ratified
Angola	✓	1	3	-	✓
Botswana	✓	0	9	-	✓
Burundi	✓	1	2	-	✓
Comoros	✓	0	9	✓	✓
Djibouti	✓	0	8	✓	-
Eritrea	✓	0	3	-	✓
Ethiopia	✓	0	3	-	✓
Kenya	✓	1	0	-	✓
Lesotho	✓	1	2	✓	✓
Madagascar	✓	0	6	-	✓
Malawi	✓	0	7	✓	✓
Mauritius	✓	1	5	-	✓
Mozambique	✓	2	1	✓	✓
Namibia	✓	2	1	✓	✓
Rwanda	✓	2	1	✓	✓
Seychelles	✓	1	5	✓	✓
Somalia	✓	0	9	-	-
South Africa	✓	2	1	✓	✓
Sudan	✓	1	4	-	-
Swaziland	✓	1	2	-	-
Tanzania	✓	1	7	-	✓
Uganda	✓	1	8	-	✓
Zambia	✓	1	0	-	-
Zimbabwe	✓	3	0	-	✓

## The Women's Protocol

The Women's Protocol deals with issues such as sexual and reproductive health rights, cultural practices and violence against women. Article 6 provides that state parties must ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. States should enact appropriate national legislation to guarantee that no marriage takes place without the free and full consent of both parties. These measures are to set the minimum age of marriage for women at 18 years. Article 14(1) of the Women's Protocol provides that state's parties shall ensure that women's right to health, including sexual and reproductive health, is respected and promoted.

Article 14(1) of the Women's Protocol provides: States parties shall ensure that women's right to health, including sexual and reproductive health, is respected and promoted. This includes:

...

(d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS

(e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with international recognised standards and best practices

Since the Women's Protocol attempts to deal with the root causes of HIV in Africa, it is strongly recommended that ratification of the Women's Protocol should be a priority for states.

## State reporting

The African human rights system is modelled after the UN system, in that states are required to submit periodic reports under the African Charter, the African Children's Charter and the Women's Protocol.

**The African Commission** monitors states' compliance with the African Charter and the Women's Protocol. In their reports to the African Commission, state parties are supposed to describe the progress they have made in regard to the implementation of the treaties. After examining state reports, the African Commission issues concluding observations. In addition, the African Commission receives and has decided numerous individual complaints, although no complaints to date have dealt with HIV or AIDS.

The African human rights system has not been used to its full potential as a mechanism to address HIV and AIDS, with respect to state reporting, concluding observations and individual communications.

## The African Human Rights Court

An African Human Rights Court has recently been established under a protocol to the African Charter. It adds to the protective mandate of the African Commission, as the African Commission may refer cases to the Court on behalf of individuals or NGOs and the Court can hear cases and issue judgments. States accept the authority of the Court through ratification of the protocol to the African Charter.

Of the 24 countries in Eastern and Southern Africa, nine have ratified the Protocol establishing the African Human Rights Court: Burundi, Kenya, Lesotho,

Mauritius, Mozambique, Rwanda, South Africa, Tanzania, and Uganda.

Individuals or NGOs may approach the African Court directly, but only if a state has made a specific declaration allowing for this procedure. No state in the region has thus far made this declaration.

## New Partnership for Africa's Development and the African Peer Review Mechanism

The New Partnership for Africa's Development (NEPAD) is the economic blueprint for Africa that exists alongside the AU. NEPAD has established the African Peer Review Mechanism (APRM) to examine the governance of states that agree to be part of this procedure. The Declaration on Democracy, Political, Economic and Corporate Governance (the Governance Declaration) serves as the basis for the review process. The APRM process entails a self-assessment of a state's policies, delivery mechanisms and outcomes in key social development areas (including education and the management of HIV and other communicable diseases).

The review process is complemented by submission of such documents as a review report by an international panel of experts and a national plan of action. The documents are discussed by the APRM Forum, which consists of the participating heads of state and government.

The following 11 East African and Southern African states have accepted the APRM: Angola, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Rwanda, South Africa, Tanzania and Zimbabwe. APRM reviews of Kenya, Rwanda and South Africa have already taken place. The final country reviews

from Kenya and Rwanda have prominently featured issues dealing with HIV and AIDS. These issues were also included in submissions from civil society.

## African Union declarations

The AU has adopted several declarations on HIV and AIDS, including:

- The Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (2001)
- The Maputo Declaration on Malaria, HIV/AIDS, Tuberculosis, and Other Related Infectious Diseases (2003)
- The Solemn Declaration on Gender Equality (2004)
- The Gaborone Declaration on a Roadmap Towards Universal Access to Prevention, Treatment and Care (2005).

The most significant of the AU declarations is the Abuja Declaration, which declares that the HIV epidemic has created a state of emergency on the African continent and that efforts to fight the epidemic should be placed at the forefront of respective national development plans.

The Abuja Declaration is a non-binding instrument. However, it has strong persuasive value. States pledged that at least 15% of national annual budgets would be allotted to the improvement of the health sector. African heads of state and government also resolved to ensure equal rights for people living with HIV and AIDS. Under the Abuja Declaration, states agreed to enact legislation to protect and respect the rights of people living with and affected by HIV, and to strengthen existing legislation to address gender inequalities.

**Table 6: Spending on public health**

Country	Percentage of national budget allocated to the health sector 2004
Angola	4.4
Botswana	10.5
Burundi	2.3
Comoros	8.0
Djibouti	11.5
Eritrea	4.2
Ethiopia	9.4
Kenya	8.2
Lesotho	13.4
Madagascar	8.7
Malawi	28.8
Mauritius	9.8
Mozambique	9.1
Namibia	13.5
Rwanda	16.5
Seychelles	10.2
Somalia	Not available
South Africa	10.8
Sudan	7.2
Swaziland	11.2
Tanzania	8.5
Uganda	10.0
Zambia	12.8
Zimbabwe	8.9

Despite the Abuja Declaration, however, most states have not yet reached their goal of allocating 15 per

cent of their budgets to the health sector. Table 6 above displays the percentage of government spending on public health in Eastern and Southern African countries.<sup>18</sup>

The table suggests that, with a few exceptions, funding for public health is lacking and leaders should examine ways to generate increased resources to support key services and community efforts that tackle the spread of HIV and the impact of AIDS.

The Solemn Declaration on Gender Equality is one of the most significant commitments to the HIV epidemic by African leaders. While all provisions indirectly relate to the epidemic, African heads of state and governments agreed specifically to ‘accelerate the implementation of gender-specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic and effectively implement both Abuja and Maputo Declarations on Malaria, HIV/AIDS, Tuberculosis and Other Related Infectious Diseases’.

## What can a state do?

African commitments that relate to human rights and to the HIV epidemic are significant. Legislation needs to be developed to implement the commitments that are contained in the various treaties. One important step on the path towards action is the translation of commitments from policy to legislation, whereby governments become duty-bearers and people become rights-holders and a situation of accountability and capacity building is created.

18 Source: World Health Organisation, “Core Health Indicators”, [http://www.who.int/whosis/database/core/core\\_select\\_process.cfm?strISO3\\_select=ALL&strIndicator\\_select=nha&intYear\\_select=latest&fixed=indicator&language=English](http://www.who.int/whosis/database/core/core_select_process.cfm?strISO3_select=ALL&strIndicator_select=nha&intYear_select=latest&fixed=indicator&language=English).

## Checklist: African Union instruments

1. Has the state ratified the African Charter, the Protocol to the African Charter on the Rights of Women, and the African Charter on the Rights and Welfare of the Child without reservation?  
  
2. Is state reporting under these treaties up to date?  
  
3. Has the government acted upon and implemented the concluding observations that are related to the HIV epidemic?  
  
4. Has the state accepted the AU's African Peer Review Mechanism? If a country review has been undertaken, has the government implemented the recommendations that are related to the HIV epidemic?
5. Has the state ratified the Protocol establishing the African Human Rights Court?
6. Has the state accepted the right of individuals and NGOs to directly access the African Human Rights Court?
7. How much progress has the state made to comply with its commitment under the Abuja Declaration to allocate at least 15% of its budget to health care?

## H. Sub-regional economic communities and the HIV epidemic

*Section H provides a brief survey of the most prominent steps taken by the four regional economic communities in relation to the HIV epidemic.*

There are four major regional economic communities (RECs) in East Africa and Southern Africa: the East African Community (EAC), the Common Market for Eastern and Southern African States (COMESA), the Southern African Development Community (SADC), and the Intergovernmental Authority for Development (IGAD). These RECs set standards related to the HIV epidemic for their members.

### East African Community

The EAC Treaty was adopted in 1999 and came into force in 2000. The EAC is comprised of Kenya, Tanzania and Uganda, who are founding members, and Burundi and Rwanda, who joined in 2007.







In 2000, an East African Integrated Disease Surveillance Network (EIDSNet) was established to reduce morbidity and mortality due to common communicable diseases in the East African Region.

panemics or epidemics'. COMESA's 2005 Gender Policy states that HIV and human rights should be mainstreamed in all of its policies and programmes.

## Common Market for Eastern and Southern Africa

COMESA was adopted in 1993 and came into force in 1994. Most states in Eastern and Southern Africa are members of COMESA.

Article 110(1)(a) of the COMESA Treaty provides that 'member states agree to undertake concerted measures to co-operate in health through the control of

## Southern African Development Community

The SADC Treaty was adopted in 1992 and came into force in 1993. Fourteen states in Southern Africa are SADC members. The SADC Treaty was amended in 2001 and one objective that was included focused on 'combating HIV/AIDS and other deadly or communicable diseases'.



Of all the RECs, SADC has been the most active in responding to the epidemic, primarily because Southern Africa has been the most affected by HIV and AIDS. For example, SADC has developed the Maseru Declaration on HIV and AIDS, an HIV and AIDS Strategic Framework (2003-2007), and the SADC Employment Code related to HIV and AIDS.

In November 2003, IGAD launched a one-year 'monitoring and evaluating programme' on HIV and AIDS in member states to 'address the HIV/AIDS pandemic and build the capacity of national HIV/AIDS monitoring and evaluation operations in countries of the sub-region'.

## Intergovernmental Authority for Development

The Agreement Establishing IGAD was adopted and came into force in 1996. Of the countries targeted in this Guide, Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda are members of IGAD.

## What can states do?

States can examine and try to understand and implement the HIV and AIDS policies, strategies and programmes that they are party to, based on their membership in RECs.



### **Checklist: Sub-regional economic communities and HIV and AIDS**

Has the state actively participated in and fulfilled its obligations under the RECs to which it belongs?

# I. Human rights and the HIV epidemic at the national level

*Section I underlines the importance of domesticating international law, in other words, incorporating international law into domestic legal systems. It provides a brief survey of selected legislative and other measures.*

In translating international law into national law, it is recommended that states:

1. domesticate international human rights.
2. ensure constitutional guarantees for people living with HIV.
3. adopt legislation that addresses the situation of people living with HIV and the underlying causes of the epidemic.
4. establish and support national institutions.
5. ensure community sector involvement and observe the greater involvement of people living with HIV and AIDS (GIPA) principle.
6. encourage judges to interpret the law appropriately in the HIV context and rely on international law.

These obligations are discussed below.

## 1. States should domesticate international human rights.

To 'make rights real' for individuals, states should domesticate or 'transform' treaties into national laws and policies. The realisation of human rights norms is often viewed as a noble aspiration that is unattainable for most individuals. For various reasons, people are unable to access international

and regional human rights systems. However, the attainment of human rights becomes more tangible at the national level, when norms are entrenched in constitutions and other legislation.

National law is more accessible and is usually more detailed and precise than international human rights norms. Therefore, the domestication of international law makes the relevant standards real by integrating them into countries' legal systems.

Domestication, or the incorporation of international laws into national systems, can be done in one of two ways, depending on the constitutional theory that is followed in a particular state.

Under the monist theory, international law becomes part of domestic law upon its ratification. Most countries with a civil law tradition, such as Burundi, Ethiopia and Madagascar, follow this legal approach.

For example, the Constitution of Ethiopia states:

### Article 9(4) of the Constitution of Ethiopia

All international agreements ratified by Ethiopia are an integral part of the law of the land.

Under the dualist theory, the transformation of international treaties requires additional legislation. Most countries with a common law background, such as Botswana and Zimbabwe, follow this approach.

For example, the Constitution of Zimbabwe states:

#### Article 111(B) of the Constitution of Zimbabwe

(1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations –

...

(b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.

## 2. States should ensure constitutional guarantees for people living with HIV.

All the countries included in this study have constitutions that contain justiciable human rights guarantees, usually included in a Bill of Rights. Practically, these rights are justiciable only if they can be asserted effectively in national courts by individuals or groups to question the constitutional validity of government actions and laws. For this to occur, the judiciary needs to be independent from government interference.

Various country constitutions have provisions that are relevant to the HIV epidemic. Only the Constitution of Burundi refers explicitly to HIV and AIDS, while other constitutions have an indirect bearing on the epidemic by referring to its root causes.

Some examples include:

#### Article 22 of the Constitution of Burundi

All citizens are equal before the law, which provides them with equal protection. No one may be subject to discrimination because of their origin, race, ethnicity, sex, colour, language, social situation or their religious, philosophical or political convictions or because of a physical or mental handicap, or because they are suffering from HIV/AIDS or any other incurable disease.

#### Article 35(6) of the Constitution of Ethiopia

Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.

#### Article 27(1) of the Constitution of South Africa

(1) Everyone has the right to have access to:  
(a) Health care services, including reproductive health care;

- (b) Sufficient food and water; and
  - (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance;
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

### Article 24 of the Constitution of Madagascar

The state shall organise public education, free and accessible to all. Primary education shall be compulsory for all.

The link between the HIV epidemic and poverty cannot be over-emphasised. The spread of HIV is driven by socio-economic conditions. For example, in countries where there is food insecurity, women may engage in sex for food and this makes them more vulnerable to HIV. Socio-economic conditions, in turn, are affected by the epidemic. For example, when a member of a household becomes sick, the household must spend more money on his or her care. This makes less money available to purchase food and other goods, and means there is less time for the caregiver(s) to look for work. This results in a household that is further entrenched in poverty. Socio-economic rights should be protected as justiciable guarantees in order to secure the right to health care, social security and education.

Some states in the region have included socio-economic rights in their constitutions in the form of Directive Principles of State Policy (DPSP) rather

than as justiciable rights. DPSP are constitutional guidelines that guide government actions that are not justiciable. However, as the Supreme Court of India has shown (see box below), these DPSP may be used to interpret other rights in the constitution in a way that enhances socio-economic rights.

## Using DPSP to guarantee other socio-economic rights

In the case of *Tellis v Bombay Municipality*, the Indian Supreme Court used the DPSP in the Indian Constitution to interpret the justiciable right to life as encompassing the right to a livelihood.

Another case, *Mohini Jain v State of Karnataka* ((1992) AIR 1861 (SC)), challenged the constitutionality of a state law that set a much higher admittance fee for 'non-government' students as compared to 'government students' at private medical colleges in that state. It was argued that the difference in fees was justified on the basis that 'government' students are 'meritorious', while others are not. The Court found that because it is only included among the DPSP and not in the Bill of Rights, the 'right to education' is not a 'fundamental right.' However, the Court still determined that the 'Constitution made it obligatory for the State to provide education for its citizens', in effect finding that the 'right to education' is justiciable. This decision was based on the Court's view that the justiciable right to life should be 'read together' with, and infused by, the non-justiciable 'right to education' in the DPSP.

In one case from the region, the same expansive approach was not followed. In Lesotho, the Court of Appeal in the case of *Baisokoli v Maseru City Council* did not follow the Indian approach, opting instead to hold that there is a distinction between the Bill of Rights and the DPSP, and that the right to life does not include the right to a livelihood.

## What can a state do?

It is important for a state to examine its constitution to determine whether the rights included are justiciable. If possible, inclusion of HIV and AIDS as grounds for non-discrimination should be added or read in. It is also recommended that the state pay special attention to socio-economic and gender rights.

### Checklist: National constitutional law

1. Are the rights in the Constitution effectively justiciable by an independent and accessible judiciary?
2. Does the Constitution contain a non-discrimination provision covering HIV and AIDS?
3. Does the Constitution provide for a justiciable right to health?
4. Does the Constitution provide for a justiciable right to social security?

## 3. States should adopt legislation that addresses the situation of people living with HIV and AIDS and the underlying causes of the epidemic.

The adoption of legislation that addresses the root causes of vulnerability to HIV is an essential ingredient in the implementation of a rights-based approach to the pandemic. A study conducted in 2006 by the AIDS Rights Alliance for Southern Africa (ARASA) shows that most SADC countries have introduced some legal and policy reform relating to HIV and human rights, protecting the rights of people living with and affected by HIV and AIDS. The *Annexure* to this *Guide* provides relevant legislation that has been adopted by Eastern and Southern African countries.

While states have made efforts to address the issues surrounding the HIV epidemic, it is recommended that states conduct comprehensive law reviews to identify possible inconsistencies and gaps. A legislative review provides a necessary starting point from which countries can engage in a process of legislative reform.

## Equality and non-discrimination

Most Eastern and Southern African countries enshrine the principle of equality and non-discrimination. In some cases legislation is specific and covers HIV and AIDS, but in other instances discrimination is prohibited in general terms.

Examples of non-discrimination laws that explicitly apply to people living with HIV and AIDS include:

**Burundi:** Law 1/018 (2005) on the Legal Protection of People Living With HIV/AIDS requires public authorities to fight HIV-related discrimination.

**Law 1/018 on the Legal Protection of People Living With HIV/AIDS, Article 22.**

The public authorities are obliged to set up all appropriate mechanisms to fight against all forms of discrimination against persons infected with HIV or suffering from AIDS, in addition to providing them with medical and psychosocial care.

**Madagascar:** Law 2005-040 (2005) on the Fight against HIV/AIDS and the Protection of the Rights of People Living with HIV/AIDS covers stigma and discrimination against people living with HIV, particularly in the workplace, schools, clinics and hospitals.

**Law 2005-040, Article 2**

Any difference in treatment, any distinction, restriction, exclusion of a person living with HIV/AIDS or his or her partner(s) and/or his or her close relatives on the ground of his or her real or presumed HIV status, that aim to undermine the recognition, the enjoyment or the exercise of their rights or fundamental liberties shall be considered an act of discrimination.

Any behaviour aiming to discredit, despise or ridicule a person living with HIV/AIDS or his or her partner(s) and/or his or her close relatives

on the grounds of his or her real or presumed HIV status shall be considered an act of stigmatisation.

The majority of legislative activity in relation to equality and non-discrimination has occurred in the area of labour law (employment). For example, Lesotho and South Africa have outlawed discrimination at the workplace. An example from Angola is as follows:

**Angola:** Decree 43/03 (Regulation on HIV/AIDS, Employment, and Professional Training) (2003) expressly forbids HIV testing for purposes of employment

**Decree 43/03 (2003), Section 6(1)**

It is not permitted under any circumstances to conduct an HIV test as a pre-requisite for admission for employment, neither is the forced control of HIV/AIDS in the workplace permitted, unless at the request of the candidate or employee, except for those cases where it is legally required.

## 'Wilful transmission' of HIV

Countries such as Botswana, Kenya, Lesotho, Madagascar, Swaziland and Zimbabwe have criminalised the 'wilful transmission' of HIV. Wilful transmission of HIV can be defined as the deliberate spread of HIV. For example, a person could be charged if he or she knows that he or she is HIV-positive but still engages in unprotected sex with someone else, thereby transmitting HIV knowingly.



For example, in Kenya, the HIV and AIDS Prevention and Control Act 14 of 2006 criminalises the wilful and reckless transmission of HIV and provides for the compulsory testing of sexual offenders.

### Kenya: HIV and AIDS Prevention and Control Act 14 of 2006

24: Prevention of transmission

...

(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.

(3) A person who contravenes the provisions of subsection 1 or 2 commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

There are a number of evidentiary and other issues related to wilful transmission. For example, it does not address the root causes of HIV transmission such as consensual sex in situations of unequal power between men and women. Also in a situation where a woman is powerless to negotiate condom use and knows that she is HIV-positive, it may be that she is the one that is charged with wilful transmission, which is opposite to the intention of the law. Another problem is that criminalising wilful transmission may have a 'chilling' effect on HIV testing, with fewer people coming forward to test because of a fear that they will then be known to have been aware of their status, in the case of a charge against them.

Sometimes, transmission of HIV is included in legislation related to sexual offences. This is often related to the mandatory testing of an accused or a person convicted for a sexual offence, such as in Botswana and Lesotho, and the HIV status becomes important during sentencing. However, again, such provisions are problematic as the evidentiary burden is difficult to meet, as is the difficulty in showing intention and transmission. If the purpose of the provision is to protect the victim/survivor, there are other means that can be used, such as the linkage of Voluntary Counselling and Testing (VCT) and the provision of post-exposure prophylaxis (PEP) shortly after the commission of the offence. The provision of VCT and PEP in legislation would probably be more useful in this situation.

Very few criminal prosecutions have been instituted in the countries where specific criminal laws have been adopted for the wilful transmission of HIV. In most cases, no specific law is required as public health or criminal laws could also serve the same purpose. A law against wilful transmission is therefore largely symbolic and ineffective. In addition, it has the potential to do more harm than good by, for example, stigmatising and penalising the women it is meant to protect.

## Domestic violence

As has been discussed previously, gender inequality manifests in various ways, including domestic violence, and this makes women more vulnerable to HIV. Many countries have attempted to address this root cause of HIV. Countries such as Malawi, Mauritius and Namibia, South Africa and Zimbabwe have specific legislation that deals with domestic violence. Further, countries such as Mauritius, Namibia and Zimbabwe have criminalised marital rape.

Examples of domestic violence provisions include:

**Malawi:** The Prevention against Domestic Violence Act 5 of 2006 broadly applies to spouses, family members, long-term visitors and others.

### **The Prevention against Domestic Violence Act**

Part I: Preliminary interpretation of 'domestic violence' includes physical, sexual, emotional or psychological or financial abuse committed by a person against a spouse, child, or any other person who is a member of the household, dependant or parent of a child of that household ...

**Mauritius:** The Protection from Domestic Violence (Amendment) Act 11 of 2004 prohibits marital rape.

### **The Protection from Domestic Violence (Amendment) Act**

Section 2(b): ... 'domestic violence' includes any of the following acts committed by a person against his spouse, a child of his spouse or another person living under the same roof – (d) compelling the spouse or the other person by force or threat to engage in any conduct or act, sexual or otherwise, from which the spouse or the other person has the right to abstain ...

**Namibia:** The Combating of Domestic Violence Act 4 of 2003 prohibits sexual abuse in domestic

relationships, including marital rape, child abuse, incest and abusive foster care arrangements.

## **Other areas of law**

The *Review of Regional and National Human Rights Based HIV and AIDS Policies and Frameworks in Eastern and Southern Africa*,<sup>19</sup> undertaken by UNDP and OHCHR in 2006, indicates that legislative activity is most lacking in regard to property and inheritance rights, harmful cultural practices and the protection of vulnerable groups. Examples of provisions from various countries are discussed below.

## **Property rights and inheritance**

Several countries in the region have attempted to examine property and inheritance rights. Examples include:

- **Botswana:** The Abolition of Marital Power Act 34 of 2004 provides for equal power of spouses who are married in community of property.
- **Lesotho:** Legal Capacity of Married Persons Act (2006) provides for equality of spouses in respect to the disposal of assets.
- **Malawi:** The Deceased Estates (Will, Inheritance and Protection) Bill (2004) criminalises property grabbing.
- **Namibia:** The Married Persons Equality Act 1 of 1996 abolishes the husband's marital power over his wife and her property.

19 Available at <http://www.undprsc.org.za>.

**Namibia: Married Persons Equality Act, Section 5**

A husband and wife married in community of property have equal capacity – (a) to dispose of the assets of the joint estate; (b) to contract debts for which the joint estate is liable; and (c) to administer the joint estate.

control of OI/STI/HIV/AIDS based on the principle of equal and universal access to all

- **Kenya:** The HIV and AIDS Prevention Control Act 14 of 2006 outlines the state’s responsibility in relation to access to health care services.

## Customary practices

Several states have also attempted to deal with harmful customary practices. Examples include:

- **Eritrea:** The Female Circumcision Abolition Proclamation 158 of 2007 criminalises the practice of female circumcision.
- **Kenya:** The Children’s Act 8 of 2001 criminalises forced marriages and female genital cutting.

**Kenya: The HIV and AIDS Prevention Control Act 14 of 2006**

Article 19(2): The government shall, to the maximum of its available resources, take the steps necessary to ensure access to essential health care services, including the access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection.

## Right to health care

Some states have tried to regulate HIV/AIDS and health care. Examples include:

- **Angola:** Law 8/04 on HIV and AIDS of 2004 sets guarantees for public health care and confidentiality in the health care system.

**Angola: Law 8/04 on HIV and AIDS**

Section 3(1): In the fight against HIV/AIDS the State is burdened with the following:

...

- (e) guarantee public health services and actions towards prevention, treatment and

## Child rights and protection

Examples of regulation of children’s rights and protection include:

- **Kenya:** The Children’s Act 8 of 2001 guarantees free primary school education.
- **Malawi:** The Children and Young Person’s Act (Cap. 26:03) codifies child care and protection and provides protection to orphans and vulnerable children.
- **Djibouti:** Law 48 (1999) Defining Health Policy provides for the right to state assistance in matters of health for children, mothers, the physically handicapped, victims of natural disasters and vulnerable groups generally.

## The protection of migrants, refugees and other mobile populations

The laws in Eastern and South African countries are silent on the protection of migrants, refugees and other mobile populations against HIV. However, some countries have adopted policies stressing the need to ensure access to prevention, treatment and care services to members of these groups.

These countries include:

- **South Africa:** The HIV and AIDS and STI Strategic Plan for South Africa, 2007-2011 provides, as one of its guiding principles, for the equal treatment and non-discrimination against refugees, asylum seekers and foreign migrants in relation to HIV-related prevention, treatment and care services.
- **Malawi:** Under section 5.9, the national HIV and AIDS Policy of Malawi (2003) urges the govern-

ment to identify and reduce vulnerability to HIV among all mobile populations including refugees.

As a necessary component of the response to HIV, states must ensure the translation of such policy standards into enforceable legislation ensuring access to HIV-related services to migrants, asylum seekers, refugees and other mobile populations.

## What can a state do?

A state can undertake a review of its current laws, identify gaps and address inconsistencies relating to the root causes of HIV and AIDS. Policy documents can be converted into laws, outlining specifically the roles and responsibilities of various stakeholders and the protection of people living with HIV and AIDS. If necessary, the state can examine the need for legislation dealing with HIV and AIDS specifically.

### Checklist: National legislation and policy

1. In light of international law, has the legislature conducted a comprehensive review of legislation with regard to HIV and AIDS?
2. Has the legislature converted important policy documents dealing with HIV and AIDS into legislation?
3. Is there legislation that covers HIV and AIDS, specifically?
4. Is there legislation that addresses the vulnerability of women? Is there effective protection against domestic violence? Is marital rape criminalised? Is there adequate protection of property and inheritance rights?
5. Is there legislation (or policy) that provides for the sexual and reproductive health rights of people living with HIV especially women living with HIV? Are the rights to family and parenthood of people living with HIV protected? Are the specific sexual and reproductive health needs of people living with HIV provided for under the law or in policy?
6. Is there legislation that provides social security benefits to persons who become 'disabled' due to AIDS, and to orphaned children and their care-givers?
7. Is there specific legislation that protects the rights of orphans, vulnerable children and

other vulnerable groups, such as people living with disabilities?

8. Is there legislation that prohibits mandatory HIV testing and discrimination in the workplace?

9. Is there legislation that requires that HIV testing takes place only with informed consent and after proper counselling?

11. Is there legislation that requires confidentiality of HIV test results and knowledge of HIV status unless disclosure is specifically authorised?

12. Is there legislation that allows medical professionals to disclose a patient's HIV status as a matter of last resort in order to protect a clearly-identified person from imminent harm?

13. Are there public health laws that are in line with universal precautions and international guidelines regarding the safety of the blood supply and donated organs?

14. Is there legislation that allows same-sex relations? Are men who have sex with men

included in prevention, treatment and care programmes?

15. Is there legislation (or policy) that ensures that condoms are affordable, accessible to the public, and that condoms are distributed in prison?

16. Is there legislation (or policy) providing for HIV-related prevention, treatment and care services for refugees, internally displaced persons, migrants, indigenous and mobile populations?

17. Is sex work regulated to minimise the risk of HIV transmission?

18. Are HIV research subjects adequately protected by, for example, requiring their informed consent prior to research? Do they benefit from the results of the research?

19. Has the legislature outlawed or addressed harmful cultural practices that contribute to the spread of HIV?

20. Does the law provide for general, rather than specific, offences for deliberate transmission of HIV?

#### 4. States should establish and support national institutions.

In accordance with Guideline 1 of the *International Guidelines*, it is recommended that states adopt a multi-sectoral approach to the HIV epidemic through an effective national framework, which should include the following three principles commonly referred to as the 'Three Ones':

- One HIV action framework that provides the basis for co-ordinating the work of all partners
- One national HIV co-ordinating authority with a broad-based multi-sector mandate
- One country-level monitoring and evaluation system.

## What can a state do?

It is recommended that a state plan, budget, capacitate and empower a national institution in line with the 'Three Ones'.

### Checklist: National institutions framework

1. Does the government have an inter-ministerial committee on HIV and AIDS that is headed by a high-profile member of the executive?
2. Is there non-partisan parliamentary oversight of the executive's actions and programmes on HIV and AIDS?
3. Is there a national co-ordinating body to co-ordinate government and civil society responses to HIV and AIDS?

## 5. States should ensure community sector involvement and observe the greater involvement of people living with HIV (GIPA) principle.

The GIPA principle seeks to ensure that people living with HIV are equal agents of change and not passive recipients of services. One hundred and eighty-nine UN members endorsed this principle in 2001 as part of the Declaration of Commitment on HIV/AIDS.

Civil society plays an important role in the response to the HIV epidemic. The *International Guidelines*

recommend that states consult NGOs and civil society in developing national plans to ensure active participation of people living with HIV and AIDS. States should also collaborate with civil society in creating, maintaining and expanding international and publicly accessible information on the sources, quality and worldwide prices of medicines, diagnostics and related technologies. Furthermore, NGOs and representatives of people living with HIV and AIDS should be actively involved in monitoring and reporting on measures taken with regard to access to HIV prevention, treatment, care and support.

Numerous NGOs are involved in awareness campaigns and training to change negative attitudes associated with HIV and AIDS. In SADC, for instance, the AIDS Law Project, an NGO in South Africa, provides remedial legal services, education, advocacy and research services on HIV, AIDS and the law.

The *International Guidelines* also emphasise the need for community involvement in all phases of HIV and AIDS policy design, programme implementation and evaluation. GIPA favours meaningful involvement over token participation.

People living with HIV and AIDS may be in a good position to appreciate the causes and consequences of HIV and the need for change. Their involvement in the design and implementation of programmes can be useful and effective. This may require capacity building and the ongoing empowerment of people living with HIV and AIDS.

## What can states do?

States should try to involve civil society as partners in the response to HIV and AIDS, rather than see civil society as a threat.

## Checklist: Community sector involvement and the GIPA principle

1. Do civil society and NGOs involve people living with HIV and AIDS in their policy design and programme implementation?
2. Does the government adhere to the GIPA principle? Does the government involve people living with HIV in multi-sectoral structures and other consultations regarding HIV/AIDS policies and programmes and decision-making process?
3. Do people living with HIV have access to and participate in programmes for their empowerment and capacity building, so that they are able to participate effectively and meaningfully as required by GIPA?

## 6. States should encourage judges to interpret the law appropriately in the HIV context and rely on international law.

When individuals feel that a state is not living up to its obligations, they can approach the courts. Article 8 of the Universal Declaration on Human Rights emphasises that everybody has the right 'to an effective remedy' by courts for violations of human rights guaranteed in the constitution or by the law. Litigation provides an option for individuals

to demand human rights that are related to HIV and AIDS. Moreover, a favourable judgment in a particular case can have a positive impact on a large number of people. However, in reality, litigation is not always a possibility for individuals due to various reasons, such as the costs involved. Thus, NGOs and others should consider litigation very carefully and often only engage in strategic litigation as a last resort.

The following cases are examples of how human rights may be enhanced through the court system in the context of HIV and AIDS:

### *Hoffmann v South African Airways*,<sup>20</sup> Constitutional Court of South Africa (2001)

This case involved a plaintiff who applied for employment as a cabin attendant with South African Airways (SAA), which is a corporate enterprise of the Republic of South Africa. The plaintiff was asked to undergo a medical examination that included HIV testing. The results of the examination indicated that he was clinically fit and suitable for employment. However, he tested HIV-positive. Due to this test result, SAA considered him to be unfit for employment, in accordance with its policy that prohibited the employment of people living with HIV as cabin attendants.

The South African Constitutional Court found that SAA's policy discriminated unfairly against the plaintiff because of his HIV status. The judgment stated that discrimination against HIV-

20 *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

positive people is a 'fresh instance of stigmatisation' and an 'assault on their dignity'. Importantly, the court also outlawed pre-employment HIV testing unless it was an inherent requirement for the job, which could only be determined by the Labour Court upon application by an employer.

Accordingly, the Court ordered that SAA employ the plaintiff.

### ***Diau v Botswana Building Society (BBS)*,<sup>21</sup> Case No IC 50/2003, Industrial Court of Botswana**

In this case, the Botswana Building Society offered the plaintiff conditional employment as a security assistant. In her employment letter she was informed that she had to undergo and pass a full medical examination and subsequently submit a certified document regarding her HIV status. The plaintiff refused to provide the document and, therefore, was not offered permanent employment.

According to the Industrial Court of Botswana, the plaintiff had the right to refuse to undergo the test, as it was 'irrational and unreasonable to the extent that such a test could not be said to be related to the inherent requirement of the job'. The Court concluded that the plaintiff's right not to be subject to inhuman and degrading treatment had been infringed. The Court

held in that regard that: 'To punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human.' The dismissal of an employee for a refusal to undergo an HIV test was determined to be 'a form of economic death'.

In reaching its decision, the Court referred to the World Health Organisation's best practices, ILO conventions, the *International Guidelines on HIV/AIDS*, constitutions of several countries, and the decisions of South African courts and administrative tribunals regarding HIV testing. The Court characterised the HIV test in this particular case as 'compulsory post-employment testing' instead of compulsory testing as a condition of employment.

As a result of the case, the plaintiff secured employment at the Botswana Building Society and was paid four months' salary as compensation.

### ***EN and Others v The Government of the RSA and Others*,<sup>22</sup> The High Court of South Africa (2006)**

In 2003, the South African government put in place an Operational Plan for the comprehensive management of HIV and AIDS. The plan recognises the critical role of antiretroviral (ARV) medicines in the treatment of HIV. It

21 *Diau v Botswana Building Society* (2003) 2 BLR 409 (IC).

22 *EN and Others v Government of the RSA and Others* 2007 (1) BCLR 84 (D).



stipulates that persons with a CD4 count of below 200 and persons who have already developed symptomatic AIDS need to start ARV treatment. Prisoners are also entitled to ARV treatment if those criteria are met.

Fifteen individuals serving prison sentences in the Westville Correctional Centre, all of whom were HIV-positive, were entitled to start ARV treatment because they met the criteria set out in the plan. However, due to delays in the implementation of the plan by prison officials, they did not receive ARV medicines.

The individuals instituted a case in which they asked that the government be compelled to remove impediments and to fast-track the procedures of implementation because it was a matter of urgency to them and to all similarly situated prisoners.

The Durban High Court found that the government had not complied with its constitutional and statutory obligations in relation to the 15 prisoners who brought the case and to similarly situated prisoners.

Article 35(2) of the South African Constitution provides that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

The Court ordered the government to provide ARV treatment to the prisoners and to all other similarly situated prisoners at Westville Correctional Centre.

## Checklist: Domestic case-law

1. Are judges specifically entitled to rely on international law or constitutional guarantees in deciding cases?
2. Have judges, in fact, relied on international law or corresponding constitutional provisions in deciding cases dealing with HIV and AIDS?

# J. Conclusion and recommendations

*The Eastern and Southern African region forms the epicentre of the HIV epidemic. However, legal responses of states in this region have not always been adequate to respond to the epidemic. While many states have adopted laws dealing specifically with HIV or AIDS, some have not yet adopted a human rights-based approach to the epidemic.*

In some countries, there has been some legal reform. However, it appears that the law is still inaccessible to the majority of people who face HIV-related discrimination, which results in an inadequate protection of human rights. Often, the underlying factors that drive the epidemic and in particular gender inequality have yet to be addressed effectively.

themselves to uphold the treaties' principles and obligations. However, the tangible effect on the domestic legal systems of states has been limited. It is recommended that states abide by international standards and formulate laws and policies that protect people living with HIV and in particular, reduce women's vulnerability to HIV.

Many states have signed and ratified international human rights treaties, thus formally committing

The sources of human rights and HIV commitments are summarised in the following table:

**Table 7: Sources of state commitments**

Level	Binding	Non-binding
Global (UN, WTO)	<ul style="list-style-type: none"> <li>• ICCPR</li> <li>• ICESCR</li> <li>• CEDAW</li> <li>• CRC</li> <li>• TRIPS</li> </ul> <p>(General Comments) (Concluding Observations) (Findings)</p>	<p><i>International Guidelines on HIV/AIDS and Human Rights</i></p> <p>Tools: <i>Handbook for Legislators on HIV/AIDS, Law and Human Rights</i></p> <p>Declarations: Universal Declaration of Human Rights</p> <p>MDGs</p> <p>UNGASS Declaration of Commitment on HIV/AIDS</p>

Regional (AU)	<ul style="list-style-type: none"> <li>• AU Constitutive Act</li> <li>• African Charter on Human and Peoples' Rights</li> <li>• Protocol to the Charter on the Rights of Women in Africa</li> <li>• African Children's Charter</li> </ul>	<p>Abuja Declaration Maputo Declaration</p> <p>Resolutions by African Commission</p>
Sub-regional (SADC, EAC, COMESA)	Treaties Protocols	Resolutions Code (SADC Employment Code) Strategic plans Programmes of action
National	Constitution Legislation Case law Common law	Policies Strategic plans Programmes of action Codes of conduct Ethical guidelines

To effectively use the international human rights norms set out above to address the HIV epidemic, it is recommended that states:

- ratify all the UN, AU and sub-regional treaties;
- accept the optional complaints mechanisms;
- submit their state reports regularly, as required by the various treaties;
- implement the recommendations of treaty bodies included in concluding observations;
- disseminate information and raise awareness about international human rights commitments;
- ensure constitutional guarantees
- engage people in the law reform process at the national level and raise awareness about their rights and the rights of others;
- adopt legislation addressing the situation of people living with HIV, other vulnerable and marginalised people and the underlying causes of the epidemic;
- ensure that the laws are made accessible through information campaigns and legal aid;
- establish and support a national institution in

line with the 'Three Ones'

- involve civil society and observe the GIPA principle;
- ensure that judges interpret the law appropriately in the HIV and AIDS context and rely on international law when appropriate;
- mobilise resources (domestically and internationally); and
- develop human capacity.

The HIV epidemic has exposed pre-existing human rights violations, stigma and inequalities in most of the countries in the region. The epidemic has made evident the extent of gender inequalities and the stigma attached to certain vulnerable groups. It has also exposed a range of human rights issues.

If HIV and AIDS are addressed in a comprehensive manner, with a focus on human rights, the possible result will be a more equal, just and tolerant society. To achieve this ideal, agents of change must make full use of international human rights law to support their national-level response to the HIV epidemic.

## K. Links to other tools

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*The following materials are available and are part of the same series, published in partnership with UNDP:*<sup>23</sup>

- To assess a state's legal response to HIV and AIDS, consult the tool *Checklist: Human rights obligations to effectively address HIV and AIDS in Eastern and Southern Africa*.
- For full-text versions of important treaties, legislation, policies and case law mentioned in this *Guide*, consult the *Compendium of key documents on human rights and the HIV epidemic in Eastern and Southern Africa*, or the CD-ROM *Documents on human rights and the HIV epidemic in Eastern and Southern Africa*.
- For teaching tools with accessible information, obtain a copy of the PowerPoint presentation on *Supporting the response to the HIV epidemic in Eastern and Southern Africa through the international human rights framework* or the similarly titled flipcharts.
- A brief introduction to the tools, their co-relations and suggested use is contained in *How to Use the Tools*.
- Inter-Parliamentary Union (IPU). *Taking Action against HIV: A Handbook for Parliamentarians*, 2007.
- UNAIDS. *Handbook on HIV and Human Rights for National Human Rights Institutions*, 2007.
- UNAIDS. *Reducing HIV Stigma and Discrimination: A Critical Part of National AIDS Programmes. A Resource for National Stakeholders in the HIV response*, 2007.
- AIDS Rights Alliance for Southern Africa. *HIV/AIDS and Human Rights in SADC*, 2006.
- United Nations Development Programme and Office of the High Commissioner of Human Rights. *A Review of Regional and National Human Rights Based HIV and AIDS Policies and Framework in Eastern and Southern Africa*, 2006.

Other recent publications that may be helpful:

- AIDS and Human Rights Research Unit. *Human Rights Protected? Nine Southern African Country Reports on HIV, AIDS and the Law*, 2007.

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<sup>23</sup> Documents are available at UNDP Regional Service Centre for Eastern and Southern Africa located in Johannesburg, South Africa.

# Annexure: Legislation relevant to HIV and AIDS adopted in the Eastern and Southern African region

Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Angola	Article 18 of the Constitution (general equality and anti-discrimination)		Article 47 of the Constitution (right of citizens to medical and health care)  Law 8/04 (2004) (guarantees for public health care and confidentiality in health care system)			Law 8/04 (2004) on HIV and AIDS (intentional transmission of HIV constitutes a crime)		
	Law 8/04 on HIV and AIDS (right to employment)							
	Decree 43/03 (Reg. on HIV/AIDS, Employment, and Professional Training) (2003) (forbids HIV testing in employment)							

Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Botswana	Article 15 of the Constitution (general anti-discrimination)					Penal Code (Amendment) Act 5 of 1998 (compulsory HIV test for persons convicted of rape and harsher sentences for convictions where HIV test is positive)	Abolition of Marital Power Act 34 of 2004 (equal power of spouse married in community of property)	
	Article 19 of the Constitution (explicit anti-discrimination protection for people living with HIV)  Law 1/037 Revising the Labour Code (prohibits discrimination in workplace)  Law 1/018 on the Legal Protection of PLHIV (2005) (specific legislation protecting people living with HIV)		Law 1/018 on the Legal Protection of PLHIV 2005 (indicates govt. obligation to mobilise necessary means to make medication available)	Article 35 of the Constitution (child health and well-being)		Law 1/018 on the legal protection of PLHIV 2005 (criminalises voluntary transmission of HIV)		
Burundi								

Legislation									
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices	
Comoros	Preamble of the Constitution (general equality)		Bill on the rights and obligations of PLHIV (2007) provides for universal access to care treatment and support for PLWHA.	Bill on the rights and obligations of PLHIV (2007) provides protection to children, in particular orphans in relation to access to information and protection from violence.					
	Article 10 of the Constitution (general equality)	Law 173 Defining National Policy on the Integration of Women in Development (2002) (calls for improved data on HIV prevalence in women, devt. of maternity services, and measures to fight rape and prostitution)	Law 48 Defining Health Policy (1999) (general right to health and proclaims guarantee of this right to be an essential mission of the state)	Law 48 Defining Health Policy (1999) (right to state assistance in matters of health for children, mothers, the physically handicapped, victims of natural disasters, and vulnerable groups generally)	Law 48 Defining Health Policy (1999) (right to state assistance in matters of health for children, mothers, the handicapped, victims of natural disasters, and vulnerable groups generally)				
Djibouti									

Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Eritrea	Article 14 of the Constitution (general prohibition against discrimination)	Article 7 of the Constitution (specifically protects women) Proclamation 86/1996 (provides for affirmative action, ensuring fair participation of all citizens and women)	Article 21 (1) of the Constitution (provides health services according to available resources)				Proclamation 58/1994 (men and women have equal rights to claim and use land for residential as well as farming purposes)	Female Circumcision Abolition Proclamation 158 of 2007 (criminalises female circumcision)
	Article 25 (general equality provision) Labour and pension legislation (amended to include benefits for PLHIV)	Article 35 of the Constitution (equal rights of women in marriage, right of women to eliminate influences of harmful customs, prohibition of laws, customs, practices that oppress or cause bodily or mental harm to women) Proclamation 213/2000 (considers domestic violence as a cause for divorce)	Article 41 of the Constitution (right to equal access to publicly funded social services, state must allocate increasing resources to public health, education and social services)	Article 36 of the Constitution (rights of the child, including special protection for orphans)	Article 35 of the Constitution (right of women to own property)			Article 35 of the Constitution (abolishes laws, customs and practices that cause harm to women)
Ethiopia								



Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Kenya	Section 82 of the Constitution (general anti-discrimination)		HIV/AIDS Prevention and Control Act 14 of 2006 (bars mandatory HIV testing in employment, marriage, admission to education institutions)	Children's Act 8 of 2001 (guarantees free primary school education; criminalises forced marriages and female genital mutilation)		HIV/AIDS Prevention and Control Act 14 of 2006 (15 year minimum sentence for wilful transmission of HIV; allows compulsory testing of those accused of sexual offences)  Sexual Offences Act 3 of 2006 (renders deliberate transmission of HIV/AIDS a criminal offence; provides rape victims with free medical care and counselling)		Children's Act 8 of 2001 (guarantees free primary school education; criminalises forced marriages and female genital mutilation)
	Legal Capacity of Married Persons Act (2006) (repealed marital powers)  Labour Code (Amendment) Act (2006) (pre-employment HIV testing outlawed, confidentiality and non-discrimination guaranteed)	Sexual Offences Act (2003) (knowing or unreasonably not disclosing HIV status is considered an offence)			Child Protection and Welfare Bill (gives protection to children, including orphaned and vulnerable children)		Sexual Offences Act (2003) (recognises unlawful sexual act in a marriage; sexual offences against children and commercial sexual exploitation of children are also included)	
Lesotho								

Legislation		Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Country	Madagascar	Article 8 of the Constitution (general equality and anti-discrimination)		Article 19 of the Constitution (protection of health)	Articles 23 and 24 of the Constitution (right to free public education)		Law 2005-040 (2006) on the fight against HIV/AIDS and the protection of rights of PLHIV (criminalises reckless or negligent transmission of HIV)		
		Law 2005-040 (2006) on the fight against HIV/AIDS and the protection of rights of PLHIV (extensive rights protection)							
Country	Malawi	Section 20 of the Constitution (general equality provision)	Protection against Domestic Violence Act 5 of 2006 (broad applicability not only to spouses but also family members, long-term visitors and others)		Penal Code (Amendment) Bill of 2000 (age of consensual sex for girls to be raised from 13 to 16 years)  Child (Care, Protection and Justice) Bill (2003) (codifies child care and protection, better protection for orphans and vulnerable children)	Child (Care, Protection and Justice) Bill (2003) (codifies child care and protection, better protection for orphans and vulnerable children)		Deceased Estates (Will, Inheritance and Protection) Bill of 2004 criminalises property grabbing	

Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Mauritius	Labour (Amendment) Act, 2004 (prohibits harassment based on HIV status in workplace)	Protection from Domestic Violence (Amendment) Act 2004 (prohibits marital rape, amongst other things)	HIV and AIDS Act 31 of 2006 (provides provisions on disclosure, testing, counselling, needle exchange)	Child Protection (Amendment) Bill 36 of 2005 criminalises child trafficking, abandonment and abduction of child		Sexual Offences Bill 6 of 2007 (proposal to decriminalise sodomy)		
	Sex Discrimination Act 43 of 2002 Equal Opportunities Bill 19 of 2005 Discrimination: Civil Status (Amendment) Act (2004) (foreigner with HIV cannot marry citizen of Mauritius)	Sex Discrimination Act 43 of 2002						
Mozambique	Articles 35 and 36 of the Constitution (general right to equality and women's equality)	Bill on Domestic Violence (protects victims of domestic violence)	Article 89 of the Constitution (right to medical and health care)	Article 47 of the Constitution (children's right to protection and care for their well-being)				
	Act 5 of 2002 (protects the rights of PLHIV in the workplace) Bill on the protection of people infected with or affected by HIV (integrates HIV status to the national Code of non-discrimination)		Act 5 of 2002 (provides the right to medical treatment and medication) Ministerial Diploma 183-A/2001 (organizational norms of the National Health Services for the assistance of PLHIV)	Article 88 of the Constitution (right to education)				

Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Namibia	Article 10 of the Constitution (general equality and anti-discrimination)	Combating of Domestic Violence Act 4 of 2003 (prohibits 'sexual abuse' in domestic relationships, including marital rape, child abuse, incest and abusive foster care arrangements)		Child Status Act 33 of 1960 (prohibits any person with custody of the child from causing or conducting seduction, abduction or prostitution of a child)	Children's Status Bill 13 of 2005 (deals with social issues relating to the impact of HIV on children)	Combating of Rape Act 8 of 2000 (provides harsher sentence for HIV-positive rapists)	Married Persons Equality Act (1996) (abolishes marital power husband would have over his wife and her property)	
	Labour Act 15 of 2004 (no discrimination on basis of HIV status in employment)					Married Persons Equality Act 1 of 1996 (abolishes the marital power of the husband over his wife and her property)		
	Affirmative Action Act 29 of 1998 (promoting women's equality)							
Rwanda	Article 9 of the Constitution (general equality)	Article 9 and Chapter 9 of the Constitution Gender-based Violence Bill 7 of 2006	Bill on Reproductive Health					
Seychelles	Article 27 of the Constitution (general provision against discrimination)		Article 29 of the Constitution (right to healthcare)		Article 36 of the Constitution (protects the disabled)			

Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
<b>Somalia</b>	Article 8 of the Constitution (equality and anti-discrimination)		Article 17 of the Constitution (country has duty to combat communicable diseases, provide free medicine, promote and extend healthcare and private health centres)					
<b>South Africa</b>	Section 9 of the Constitution (general equality and anti-discrimination) Basic Conditions of Employment Act 75 of 1997 (minimum sick leave days) Employment Equity Act 55 of 1998 (deals with HIV/AIDS in employment) Labour Relations Act 66 of 1995 (prohibits the dismissal of an employee on the basis of HIV and AIDS status, except for members of the South African Defence Force or National Intelligence Agency)	Criminal law (Sexual Offences and Related Matters) Amendment Bill (2006) (criminalises marital rape) Domestic Violence Act 116 of 1998 (provides protection for women in emotionally and physically abusive relationships)	Section 27 of the Constitution (right to access healthcare services, no one can be denied emergency medical treatment) Section 28 of the Constitution (basic health care services for children) Section 35 of the Constitution (adequate medical treatment for detainees and prisoners' at state expense)	Section 29 of the Constitution (right to education) Section 28 of the Constitution (basic health care services for children) Children's Act (No. 38 of 2005) (provisions touching on HIV/AIDS, gender and youth, prohibition of forced marriages below age of marriage, female genital mutilation and female genital circumcision prohibited, virginity testing below age of consent prohibited)	Section 35 of the Constitution (adequate medical treatment for detainees and prisoners' at state expense) Section 26 of the Constitution (right to adequate housing) Section 27 of the Constitution (right to sufficient food and water and social security)	Criminal law (Sexual Offences and Related Matters) Amendment Bill 50B of 2003 (passed 22 May 2007) (compulsory HIV testing of alleged offenders) Criminal Law Amendment Act 105 of 1997 (life imprisonment for an HIV-positive first-offender convicted of rape) Criminal Procedure Second Amendment Act 85 of 1997 (granting of bail more difficult for HIV-positive suspected rapists)		

Legislation									
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices	
South Africa (continued)	Occupational Health and Safety Act 85 of 1993 (minimise occupational exposure to HIV, administration of post-exposure prophylaxis)  Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000) (HIV/AIDS is mentioned as 'prohibited ground' for discrimination)  Compensation for Occupational Diseases and Injuries Act (130 of 1993) of South Africa (workers are in a position to claim compensation in the event of contracting HIV in the course of normal working activities)  Code of good conduct: Key aspects of HIV/AIDS and employment of South Africa (2000) (broader protection for people infected by HIV)		Medical Schemes Act 131 of 1998 (ensures that medical schemes may not exclude any person if they pay their contributions)  Medicines and Related Substances and control Amendment Act No 90 of 1997 allows parallel importation and generic substitution  National Health Act No 61 of 2003 regulates access to health records held by clinics (confidentiality of records)						

Legislation									
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices	
Sudan	Article 21 of the Constitution (general right to equality) Draft law on HIV/AIDS (legal and institutional reform to support persons living with HIV/AIDS)								
	Section 20 of the Constitution (general equality provision)	Sexual Offences and Domestic Violence Bill (2006) (criminalises marital rape)	Section 16 of the Constitution (right of detainees to medical treatment)	Section 27 of the Constitution (special protection for women and children)	Section 16 of the Constitution (right of detainees to medical treatment) Section 27 of the Constitution (special protection for women and children)	Sexual Offences and Domestic Violence Bill (2006) (expand rape to marital rape, criminalises intentional failure to disclose HIV-positive status, death penalty for rape where HIV/AIDS is aggravating factor)		Section 28(3) of the Constitution (women shall not be compelled to undergo or uphold any custom to which they are in conscience opposed to)	
Swaziland									
	Section 12 of the Constitution (general equality provision) Section 13 of the Constitution (general anti-discrimination provision) Section 22 of the Constitution (equal right to work, equal terms)					Sexual Offences (Special Provisions) Act 4 of 1998			
Tanzania									

Legislation		Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Country	Uganda	Section 21 of the Constitution (general equality provision) Equal Opportunities Act, (2006) (non-discrimination on basis of sex, HIV status)	Domestic Relations Bill (2003) (before parliament for over a decade, but not yet passed; addresses women's property rights in marriage, women's right to negotiate sex on the grounds of health, sets the minimum age of marriage at 18, prohibits female genital mutilation, and criminalises widow inheritance and marital rape)		Section 30 of the Constitution (right to education) Section 34 of the Constitution (rights of children)		Domestic Relations Bill (2003) (addresses women's right to negotiate sex on the grounds of health, and criminalises marital rape)	Domestic Relations Bill (2003) (addresses women's property rights in marriage, etc.) Uganda Human Immunodeficiency virus Bill of 2007 request HIV testing before widow inheritance	Section 33 of the Constitution (prohibits laws, cultures, customs or traditions that are against the interests and dignity of women) Domestic Relations Bill (2003) (prohibits female genital mutilation, and criminalises widow inheritance and marital rape)
	Zambia	Section 39 of the Draft Constitution (prohibits discrimination on basis of 'health') Section 40 of the Draft Constitution (equal treatment for men and women)	Penal Code (Amendment) Act No 15 of 2005 (prohibits marital rape)		The Penal Code (Amendment) Act 15 of 2005 (provides punishment for neglecting to provide food, clothes, bedding, etc., which affects the health of a child)		The Penal Code (Amendment) Act 15 of 2005 (extends the definition of sexual harassment to include sexual imposition using forceful behaviour)		Section 40 of the Draft Constitution (prohibits any law, culture, custom or tradition that undermines dignity, welfare or interest of women)



Legislation								
Country	Anti-discrimination, equality (including employment)	Gender violence	Right to health care, reproductive health	Child protection	Vulnerable groups	Sexual offences	Property rights and inheritance	Customary practices
Zambia (continued)	Section 44 of the Draft Constitution (equality before, during and on dissolution of marriage)							The Penal Code (Amendment) Act 15 of 2005 (criminalises harmful cultural practice on a child which includes sexual cleansing, female genital mutilation, initiation ceremony that results in injury and the transmission of an infectious disease)
Zimbabwe	Section 23 of the Constitution (general anti-discrimination provision)  Statutory Instrument 202 Of 1998 under the Labour Relations Act (deals with HIV in the workplace)		Criminal Law (Codification and Reform) Act 23 of 2004 (criminalises marital rape)			Criminal Law (Codification and Reform) Act 23 of 2004 (criminalises wilful transmission of HIV, provides for HIV testing for sexual offenders)		

# How to get hold of the tools

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*This Guide is part of a series of tools developed by the UNDP to improve the implementation of human rights norms in the context of HIV. Other tools in the series are: a Checklist, a Flipchart, a Compendium of instruments, and a CD-ROM and website containing the afore-mentioned tools, as well as a PowerPoint presentation. For more information, or to obtain copies of any of the tools, please contact:*

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