

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, Uni-
versity of Pretoria.

First published 2007

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of 31 December 2007.

Acknowledgment

This *Guide* has been prepared by the AIDS and
Human Rights Research Unit for the United Nations
Development Programme-Regional Service Centre
(UNDP-RSC) as part of a UNDP initiative on human
rights, gender, and HIV and AIDS in Eastern and
Southern Africa.

Staff of the AIDS and Human Rights Research Unit
who participated in developing this tool are Susan
Precious, Karen Stefiszyn, Adiam Woldeyohannes,
Patrick Eba and Frans Viljoen. The dedicated assist-
ance of the following interns working with the Unit
is also gratefully acknowledged: Marloes Stammen,
Isabel De Bruin-Cardoso, Emma Chase Bellamy,
Alastair Crewe and Alaric Vandenberghe.

The support of Mary Crewe, Pierre Brouard and, in
particular, Rakgadi Mohlahlane, at the Centre for
the Study of AIDS, is also much appreciated and
acknowledged.

The authors acknowledge the support of Shivaji
Bhattacharya and Irene Akiy of UNDP-RSC for
Eastern and Southern Africa.

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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
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Acronyms and abbreviations

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

Glossary of terms

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.

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.

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