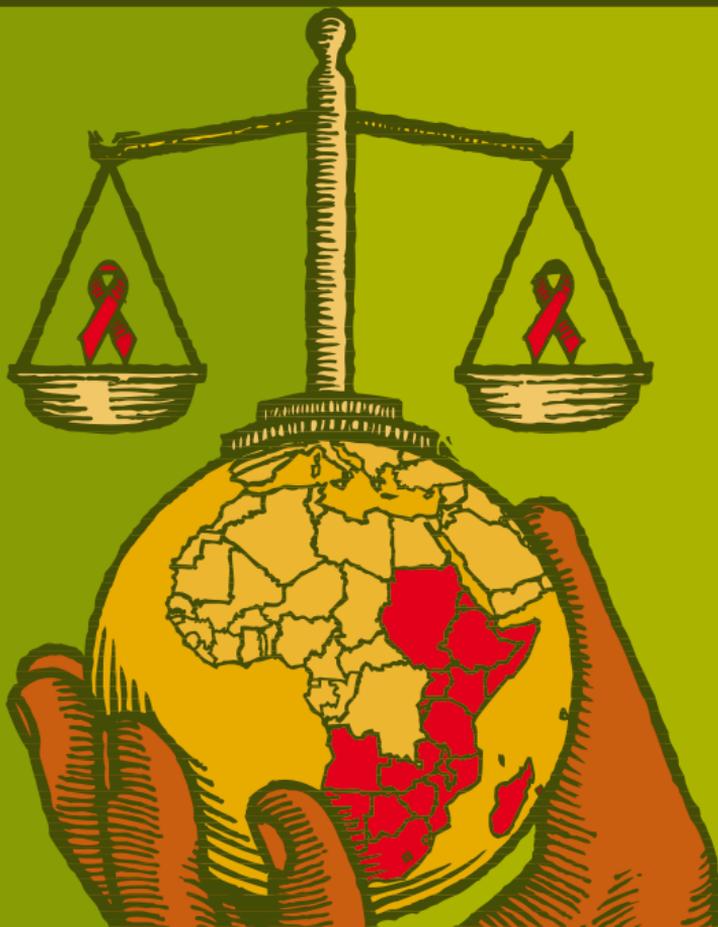


# Checklist of human rights obligations to effectively address HIV and AIDS in Eastern and Southern Africa



# United Nations

1. Has the state ratified without reservations the relevant United Nations (UN) treaties: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC); and the International Labour Organisation (ILO) conventions? Ratification is a formal action under international law indicating that the state has consented to be bound by the treaty. Ratification makes that state a 'party' to a particular treaty.

2. Has the state taken steps to domesticate the relevant UN human rights treaties and ILO conventions?

To be able to rely on international treaties at national level, most states need to 'domesticate' or transform treaties into national laws and policies. Domestication integrates human rights norms into countries' legal systems.

3. Is state reporting under these treaties up to date?

Depending on the treaty, states are to report to different human rights treaty bodies on how they have progressed with respect to the provisions of the treaty. To check a state's reporting status, including due dates and overdue reports, refer to the website of the UN Office of the High Commissioner for Human Rights at [www.ohchr.org](http://www.ohchr.org) or the *Guide to an effective human rights response to the HIV epidemic: Using international law to shape national law in Eastern and Southern Africa*.

4. Has the government acted upon and implemented concluding observations that are related to HIV?

Treaty bodies make concluding observations and recommendations after the examination of state reports. Concluding observations provide guidance to a state on how to better implement the human rights in the treaty. States are encouraged to disseminate and implement the concluding observations and to report on the progress made in the next state report.

5. Has the state accepted the optional individual complaints mechanisms under the optional protocols to the ICCPR and CEDAW?

If a state ratifies the optional protocols of the ICCPR and CEDAW, individual complaints on provisions of the treaties are allowed against that state.

6. Is there evidence of state implementation of the *International Guidelines on HIV/AIDS and Human Rights (International Guidelines)*?

The *International Guidelines* translate human rights norms into a series of concrete measures that states are recommended to undertake in relation to HIV and AIDS. The *International Guidelines* do not have the legal status of a treaty. However, governments are urged to adopt the *International Guidelines* in order to guide them in their response to the epidemic.

7. Does the state make every effort to ensure the accomplishment of the United Nations Millennium Development Goals with specific reference to HIV?

While all Millennium Development Goals are important for development, Millennium Development Goal 6 urges states to halt and reverse the spread of HIV and AIDS by 2015.

## African Union (AU)

1. Has the state ratified the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on the Rights of Women (the Women's Protocol), and the African Charter on the Rights and Welfare of the Child without reservation?

The Women's Protocol, in particular, has provisions on sexual and reproductive health rights, cultural practices, and violence against women. These are some of the root causes of the spread of HIV and by ratifying and implementing the Women's Protocol, African states will go far to address the root causes of HIV infection.

2. Is state reporting under these treaties up to date?

State reporting is an important process that reviews progress on the implementation of human rights norms at the domestic level. It also promotes engagement with civil society, which is to assist with compiling state reports.

3. Has the government acted upon and implemented the African Commission's concluding observations related to HIV?

It is recommended that concluding observations be widely publicised, disseminated and implemented. The state should report on the progress made on the concluding observations in its subsequent report to the Commission.

4. Has the state accepted the AU's African Peer Review Mechanism (APRM)? (If a country review has been undertaken, has the government implemented the recommendations related to HIV?)

The APRM requires states to conduct a self-assessment of their policies, delivery mechanisms, and outcomes in key social development areas, including HIV and AIDS.

5. Has the state ratified the Protocol on the Establishment of an African Court on Human and Peoples' Rights?

The African Court on Human and Peoples' Rights supplements the individual communications procedure under the African Commission on Human and Peoples' Rights.

Upon ratification of the Protocol, the African Commission is able to direct cases to the African Court on Human and Peoples' Rights, which can deliver binding judgments against states that are party to the AU human rights instruments.

6. Has the state accepted the right of individuals and NGOs to directly access the African Court on Human and Peoples' Rights?

When ratifying the Protocol on the Establishment of an African Court on Human and Peoples' Rights, states may accept the right of non-governmental organisations (NGOs) or individuals to bring cases directly before the Court.

7. Has the government complied with its commitment under the Abuja Declaration to allocate at least 15 per cent of its budget to health care?

In the Abuja Declaration and Plan of Action on HIV/ AIDS, Tuberculosis and other Related Infectious Diseases, African states pledged to allocate at least 15 per cent of their annual budgets to the health sector. Many countries have made progress towards this goal.

## Sub-regional economic communities

1. Has the state actively participated in and fulfilled its obligations under the sub-regional economic community (REC) to which it belongs?

There are four major sub-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.

# Constitutional law

1. Are the rights in the country's constitution effectively justiciable by an independent and accessible judiciary?

A justiciable right can be enforced 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 such as release from detention or compensation. Justiciable rights are usually found within a bill of rights in a country's constitution.

2. Does the Constitution contain a non-discrimination provision covering HIV?

While the ideal situation is to have an explicit reference to non-discrimination on the grounds of actual or presumed HIV status, most constitutions do not contain a provision specifically referring to HIV and AIDS as they were written and adopted before HIV and AIDS become a major pandemic. However, most constitutions have a non-discrimination or equality clause that outlines the grounds for non-discrimination. The grounds usually include race, gender, political affiliation and disability, among others. In many countries, HIV and AIDS are considered 'analogous' grounds and are considered as grounds for non-discrimination.

One example of a non-discrimination clause that includes HIV and AIDS is from Burundi. Article 22 of the Constitution of Burundi contains such a provision, which reads: '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, color, language, social situation or his 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.'

### 3. Does the Constitution provide for a justiciable right to health?

A justiciable right to health is important as it places an obligation on duty-bearers to uphold the right to health. Ultimately, it is up to the courts to decide whether a state has achieved what it said that it would. Some countries have a right to health under directives of state policy, so that, while they work towards providing adequate health care for their people, they cannot be taken to court by individuals or NGOs who dispute that the state is working fast enough or dedicating enough resources to health.

Other countries have a justiciable right to health. For example, South Africa and Eritrea both have a justiciable right to health. Under 'Fundamental Rights and Freedoms', the Constitution of Eritrea provides for a justiciable right to health, according to which the state shall endeavour to make available to all citizens health, education, cultural and other social services within the limit of its resources.

### 4. Does the Constitution provide for a justiciable right to social security?

Similar to the right to health, a justiciable right to social security is important. Due to the link between HIV and poverty, access to social security is potentially a protective factor, especially for women who are more often poor than men. For example, the right to social security is justiciable under the Constitution of South Africa, whereby everyone is guaranteed the right to have access to social security, including appropriate social assistance within the government's available resources.

# Domestic case law

## 1. Does domestic law specifically entitle judges to rely on international law guarantees?

It is an accepted legal principle that judges can rely on international law even in the absence of a specific mandate. However, judges are generally reluctant to rely on this principle. To overcome this reluctance, states often allow for the principle of reliance on international law in their constitutions. If it is not included, it is recommended that domestic law should specifically mandate judges to do so.

## 2. Have judges relied on international human rights law as a source of remedy and as a source of interpretive guidance in cases dealing with HIV?

Few courts have relied on international law as the basis on which to decide cases. Courts have more often used international human rights norms to guide the interpretation of national law. For example, in the case of *Diau v Botswana Building Society*, the Industrial Court of Botswana examined international human rights instruments, the constitutions of other countries and other international sources of interpretive guidance on HIV to assist in deciding the case.

## 3. Have judges relied on the Constitution to decide cases and interpret the law dealing with HIV?

It is important for judges and lawyers to use the national law, especially the constitution of the country, when dealing with cases related to HIV. The use of the constitution, specifically the bill of rights, will help to address human rights violations and the underlying causes of HIV. For example, using the right to non-discrimination in the constitution as its basis, the South African Constitutional Court found that the refusal of an airlines company to employ someone living with HIV as a cabin attendant was discriminatory and against the law.

# National policy

## 1. Has the state created a national policy framework for HIV and AIDS?

It is recommended that states follow *International Guideline 1*, which states that: 'States should establish an effective national framework for their response to HIV which ensures a co-ordinated, participatory, transparent and accountable approach, integrating HIV policy and programme responsibilities across all branches of government.'

## 2. Has the state adopted other HIV and AIDS-related policies or integrated HIV and AIDS-related issues into other relevant national development and budgetary processes or national strategic documents, such as poverty reduction strategy papers?

It is important to mainstream HIV and AIDS into national strategic documents, particularly those that address the root causes of HIV. This highlights the multi-sectoral nature of HIV and also the fact that HIV has an impact on the developmental progress made by states.

## 3. Does community consultation take place in all phases of HIV and AIDS policy design, as required by *International Guideline 2*?

Community consultation helps community organisations to carry out their activities effectively. It also creates a situation whereby government and civil society are working together towards a common goal in the context of HIV and AIDS.

# National legislation

1. In light of international law, has the legislature conducted a comprehensive review of its legislation with regard to HIV and AIDS?

A legislative review is an important first step towards legislative reform, as gaps and inconsistencies in legislation can be identified and addressed in the context of HIV and AIDS.

2. Has the legislature converted important policy documents dealing with HIV and AIDS into legislation?

Policy that relates to HIV and AIDS demonstrates commitment to respond to the epidemic by governments. However, such commitment is strengthened by legislation which creates duties and accountability.

3. Is there legislation that specifically deals with HIV and AIDS?

Based on the legislative review undertaken, it may be desirable that states adopt laws that address HIV and AIDS explicitly, instead of relying on the interpretation of existing laws. Laws dealing with HIV and AIDS specifically allow for greater certainty, accessibility and can highlight areas that need particular attention.

4. Is there anti-discrimination legislation that covers HIV and AIDS? Do other laws prohibit discrimination against people living with HIV?

According to *International Guideline 5*, states should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV, and people living with disabilities, from discrimination in both the public and private sectors. This will go far to address the spread of HIV as people no longer live in fear of the consequences of disclosing their status or coming forward for information and treatment. In other words, this legislation creates a conducive environment for vulnerable groups to come forward to protect their rights.

5. 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?

The risk of infection through the transfusion of contaminated blood is over 90 per cent. It is recommended that states adopt and implement legislation dealing with blood, tissue and organ donation.

6. 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?

Gender inequality is a root cause of the spread of HIV. The roles that societies assign to women profoundly affect the ability of women and girls to protect themselves against HIV and cope with its impact. Therefore, to limit the spread of HIV, women's rights must be realised and women must be empowered in all spheres of life. It is recommended that states examine customary practices and laws that maintain women and girls in subordinate positions and start to address these inequalities.

7. 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?

The sexual and reproductive health needs of people living with HIV, especially women living with HIV, can differ from those of other members of society. Some biological and medical conditions, as well as societal attitudes and beliefs place people living with HIV in a specific situation with respect to their sexual and reproductive health rights and needs. People living with HIV need to access specific health services and be able to make autonomous and informed decisions on issues such as childbearing and childcare. It is therefore recommended that states take all the necessary legislative

and other measures to protect the rights to family and autonomy of people living with HIV and ensure the availability and accessibility of quality health care services catering for their specific needs.

8. Has the legislature outlawed or addressed harmful cultural practices that perpetuate the inequality and exploitation of women and contribute to the spread of HIV? Is legislation supported by information and awareness-raising campaigns?

Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides for the prohibition and condemnation of all forms of harmful practices that negatively affect the human rights of women and for the creation of public awareness in all sectors of society.

9. Does the law provide for general, rather than specific, offences for wilful (intentional) transmission of HIV?

Any offence for the wilful transmission of HIV should be general and also apply to other serious diseases. In fact, deliberate transmission offences are usually covered by existing public health or criminal law provisions and should not require the creation of 'special offences.' Often, criminalisation of deliberate HIV transmission can be counterproductive and has little impact on the spread of the epidemic, if not increase its spread, as people no longer feel they want to go for tests, in case they unintentionally subject themselves to such an offence.

10. Is there legislation that provides social security benefits to persons who become disabled due to AIDS and to orphaned children and their caregivers?

Social security protection is a human right. It is the protection that a society provides to individuals and households, and it helps to ensure access to health care. It also guarantees income security, particularly in cases of old age, unemployment, sickness, inability to work, work injury, pregnancy, or loss of a breadwinner.

11. Is there specific legislation that protects the rights of orphans and vulnerable children in the context of HIV and AIDS?

'Property grabbing' is on the increase. Legislation should be enacted to protect the inheritance and property rights of widows and orphans. Legislation should also prohibit discrimination in access to medical services, education, employment, and housing for orphans and vulnerable children.

12. Is there legislation that prohibits mandatory HIV testing?

It is important that voluntary testing be reinforced in all HIV legislation, policies and programmes, both to comply with human rights principles and to ensure sustained public health benefits. While a call to mandatory testing is often heard from politicians and others, it is ultimately counterproductive and does not achieve public health goals of reduction of HIV incidence and prevalence.

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

Without informed consent, a person's rights to liberty and privacy are violated. Proper pre-test counselling is essential so that individuals fully understand the potential consequences of a positive diagnosis. It also helps them to develop the coping skills to deal with a potential positive diagnosis. Post-test counselling is also important for both people who test positive and those who test negative, in an effort to ensure that they are able to undertake the necessary lifestyle changes to remain healthy.

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

Confidentiality in HIV testing is one of the most important components of protecting a person's right to privacy. Information related to testing should only be released with

the permission of the person tested. Disclosure of HIV status without the consent of the person tested leads to discrimination, stigma and abuse.

15. 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?

For example, the Professional Guidelines of the Health Professions Council of South Africa, although not an act of law, provide for disclosure in such instances. It recommends that health care workers use their discretion to divulge the information to other parties who are at clear risk of infection. Such a decision must be made with the greatest of care and after other recommended steps have been taken, such as counselling the patient on the importance of disclosure to his or her sexual partner and informing the patient on other measures to prevent HIV transmission. Many states are considering including similar provisions in HIV legislation or policies, recognising that a blanket exception to disclosure is not always workable in every situation.

16. Is there legislation that allows for same-sex relations? Are men who have sex with men included in prevention programmes?

The UN Human Rights Committee has noted that the criminalisation of homosexual practices cannot be considered a reasonable means or fair measure to prevent the spread of HIV. It is recommended that states consider decriminalisation of homosexuality in the case of consenting adults.

17. Is there legislation (or policy) providing for HIV-related prevention, treatment, care and support services for asylum seekers, refugees, internally displaced persons, migrants and other mobile populations?

The failure to provide access to education and information about HIV and AIDS, as well as treatment, care and support services to groups such as asylum seekers, refugees,

internally displaced persons, migrants and other mobile populations may increase their vulnerability to HIV infection and further fuel the AIDS epidemic. The provision of these HIV-related services for members of these groups is fundamental to an effective response to HIV.

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

The correct and consistent use of condoms is the best form of protection from HIV (after abstinence). Condoms should be readily available universally, either free or at low cost. Condom use should be promoted in ways that help overcome social and personal obstacles to their use. Effective condom promotion targets not only the general population, but also people at higher risk of HIV exposure such as sex workers and men who have sex with men.

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

Regulating sex work, rather than criminalising it, enables the promotion of safe sex and the implementation of public health measures. It is recommended that states consider the decriminalisation of sex work.

20. Are HIV research subjects adequately protected (in requiring informed consent), and do they benefit from the results of the research?

According to *International Guideline 5*, states should enact or strengthen anti-discrimination laws and other protective laws that ensure ethics in research involving human subjects. Further, the right to bodily integrity should be upheld in all research. All research involving humans should be subjected to the highest ethical standards.

# Treatment

1. Is there universal access to treatment, including prevention of mother-to-child transmission (PMTCT), support and care?

United Nations member states committed themselves to 'developing and implementing a package for HIV prevention, treatment and care with the aim of coming as close as possible to the goal of universal access to treatment by 2010 for all those who need it' (Outcome document from the 2005 World Summit). All states should consider a policy or provision in the law dealing with treatment.

2. Does the government have accessible national anti-retroviral policies to gradually achieve universal access to treatment?

*International Guideline 6 (revised):* '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 anti-retroviral and other safe and effective medicines, diagnostics and related technologies for the treatment of HIV and related opportunistic infections.'

3. Has the state made use of 'flexibilities' in relation to the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) to ensure universal access to treatment for people living with HIV?

TRIPS protects patents and other intellectual property rights, but its flexibilities enable states to take measures to protect public health, such as importing generic medicines. It is recommended that states use these flexibilities to make universal access to treatment possible.

# National institutional 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?

It is important for a high-profile member of the executive to take the lead to show the state's commitment to respond to HIV and AIDS. For example, the Malawi Cabinet Sub-Committee on HIV/AIDS oversees the government's response and is chaired by the Vice-President.

2. Is there non-partisan parliamentary oversight of the executive's actions and programmes on HIV and AIDS?

Parliamentary oversight can be effective in bringing about law reform and a greater understanding of HIV and AIDS. It also illustrates a state's commitment to respond to HIV and AIDS.

3. Is there a national co-ordinating body ('AIDS council' or 'commission') to co-ordinate governmental and civil society responses on HIV and AIDS? Does a high-profile member of the executive head the co-ordinating body?

Important roles of a national co-ordinating body on HIV and AIDS include democratic oversight, exercise of ownership over the national framework, service of 'umbrella functions' for partnerships, and the enabling of national partnership arrangements. The national co-ordinating body can also be responsible for resource mobilisation and monitoring and evaluation.

# Community sector involvement

1. Does the government support community-based organisations that are involved in care and antiretroviral treatment delivery, so that they can expand their services?  
Governments alone cannot undertake an effective response to HIV.

2. Does the government involve the community sector as a partner in the implementation of the 'three ones'?

The 'three-ones' principle entails: one HIV/AIDS action framework that provides the basis for co-ordinating the work of all partners; one national AIDS co-ordinating authority with a broad-based multi-sector mandate; and one country-level monitoring and evaluation system.

3. Does the government solicit community input for HIV and AIDS policy design, programme implementation and evaluation?

The *International Guidelines* recommend that states consult NGOs and civil society in developing national plans to ensure the active participation of people living with HIV. The involvement needs to be meaningful and effective.

4. Has the government adopted the greater involvement of people living with HIV (GIPA) principle?

The GIPA principle seeks to ensure that people living with HIV are not just passive recipients of services. Instead, they should be actively involved in developing better HIV and AIDS services. By involving people who best understand the needs of individuals who are most affected, governments can more effectively address the epidemic, especially with respect to human rights.

# Raising awareness and ensuring access to rights

1. Has the state applied effective programmes, including in-school programmes, to raise public awareness? Has it implemented programmes to end discrimination and stigma against people living with HIV, and to promote tolerance and understanding? Have any efforts targeted vulnerable groups?

Groups particularly vulnerable to HIV and subsequent discrimination and stigma include sex workers, men who have sex with men, injecting drug users, young people orphaned by AIDS, victims of violent conflict, asylum seekers, refugees, trafficked people, and women. While general programmes are required, programmes specifically focusing on the needs of these groups are also needed.

2. Has the state implemented effective education and awareness-raising programmes for prevention?

Effective education and awareness-raising programmes for prevention should include basic facts, stigma mitigation and condom promotion campaigns.

3. Does the state inform people living with HIV of their rights? Are people living with HIV provided with free legal services to help them secure their rights? Does the country monitor that the rights of people living with HIV are being respected?

People living with HIV are entitled to the same rights as everyone else but because of their status their human rights are frequently violated. It is important for states to ensure that the rights of people living with HIV are respected, protected and promoted through law, and also that people are aware of the laws in place. A legal aid system, whereby people who have suffered from human rights violations can seek redress, is also highly recommended.

