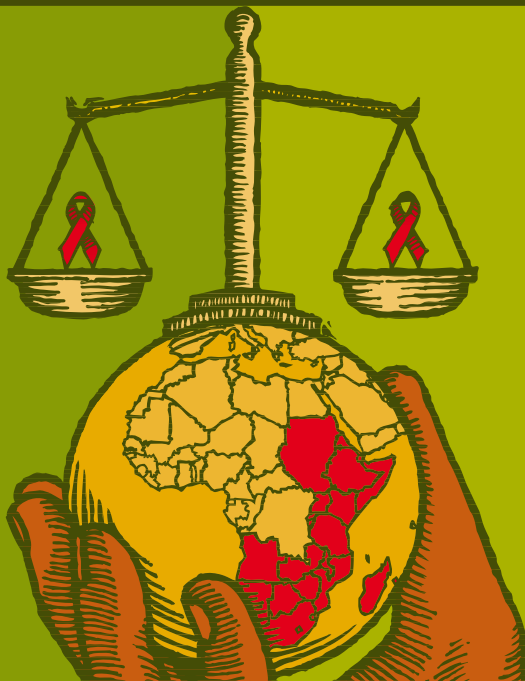


Checklist of human rights obligations to effectively address HIV and AIDS in Eastern and Southern Africa



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 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?

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