

International law, human rights and HIV/AIDS

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Abstract This article explores the relevance of international human rights law in the response to the HIV/AIDS epidemic at national and international levels. Public health advocates can use arguments based on this body of law to promote responses to HIV/AIDS that reflect sound public health principles and documented best practice. Development assistance is increasingly linked to rights-based approaches, such as participatory processes, and strategic alliances between health professionals, organizations of people living with HIV/AIDS, and affected communities. Legal and human rights advocacy strategies are increasingly productive and necessary.

Keywords HIV infections/therapy; Acquired immunodeficiency syndrome/therapy; International law; Human rights; Guidelines; Social responsibility; Health policy; National health programs (*source: MeSH, NLM*).

Mots clés HIV, Infection/thérapeutique; SIDA/thérapeutique; Droit international; Droits homme; Ligne directrice; Responsabilité sociale; Politique sanitaire; Programme national santé (*source: MeSH, INSERM*).

Palabras clave Infecciones por VIH/terapia; Síndrome de inmunodeficiencia adquirida/terapia; Derecho internacional; Derechos humanos; Pautas; Responsabilidad social; Política de salud; Programas nacionales de salud (*fuentes: DeCS, BIREME*).

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Introduction

The Joint United Nations Programme on HIV/AIDS (UNAIDS) estimated that AIDS had killed almost 25 million people between the beginning of the epidemic and the end of 2001, that another 40 million people were living with HIV/AIDS by the end of 2001, and that five million new cases were diagnosed in 2001 alone (1, 2). Young women, men who have sex with men, and injecting drug users are particularly vulnerable to infection with HIV. These groups (and others vulnerable to HIV infection and the impact of AIDS) are often characterized by social and economic disadvantage and discrimination; this leads to the observation that in each society, those people who before the arrival of HIV/AIDS were marginalized, stigmatized and discriminated against become over time those at highest risk of HIV infection (3).

The determinants, scope and impact of the global epidemic of HIV/AIDS in epidemiological, social and human terms have been substantially documented. We know how the virus is transmitted, the effectiveness of prevention strategies in individuals and populations (4–10) and how to slow disease progression in those infected with the virus (11–13). Yet in almost all of the developing and transitional countries, where the majority of new cases are occurring, the response has been unable to stop and reverse the tide of infection. HIV/AIDS are now recognized as an immense challenge to international security, peace and development (14). The continued escalation of infection, particularly in Africa, needs a coherent social epidemiology (15) that understands the epidemic in its historical, political and international legal context (16).

The international law of human rights

Human rights are a set of universal entitlements that individuals enjoy irrespective of their sex, nationality, religion, culture or other status, that are inherent to human beings and that are proclaimed and protected by international law. Human rights have major relevance for shaping appropriate responses to the HIV epidemic and other global health challenges, including offering system-wide public health responses and identifying deficiencies in public health research agendas (17).

International human rights law developed in the context of global revulsion at the horrors of the second world war and the establishment of the United Nations (UN) in 1945. In accepting the Charter of the United Nations, its member states recognize that non-interference in their internal affairs is a principle that can be overridden where international peace and security are threatened (18). No doubt referring to the genocide and other war crimes of Nazi Germany, the drafters of the 1948 Universal Declaration of Human Rights were moved to refer to “disregard and contempt for human rights [which] have resulted in barbarous acts [that] have outraged the conscience of mankind ...” (19). Although the declaration is not in itself a legally binding document, it reiterates that “human rights should be protected by the rule of law” (19).

Today, a growing body of international treaties and customary international law details the obligation of states to respect, protect and fulfil human rights (20). States party to the two major covenants, for example, must not only avoid abuses of civil and political rights by their own agents, they must also prevent private sector discrimination and other abuses, while also “taking steps, individually and through international assistance and co-operation, especially economic and techni-

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cal, to the maximum of ... available resources, with a view to achieving progressively the full realization" of economic, social and cultural rights, including the right to health (21). These obligations are as binding as any other international legal agreements on, for example, maritime law or the protection of intellectual property.

International human rights law and HIV/AIDS

Jonathan Mann, the first Director of the World Health Organization (WHO)'s Global Programme on AIDS, identified the international law of human rights as a comprehensive framework to which public health practitioners could anchor responsibility for addressing the underlying causes of HIV/AIDS, trauma and other threats to health. As outlined below, such a "rights-based approach" to public health in general, and HIV/AIDS in particular, supports sound public health practice by providing additional tools to motivate governments to act to achieve public health goals. Rights considerations can help facilitate the setting and monitoring of public health targets and provide a complementary language to identify failures, or incipient failures, of public health programmes. The rights-based approach also provides links with other social movements that use the same language — for example, the women's movement, the struggles of indigenous peoples and the movement of people working to protect the environment.

In 1996, an international expert consultation group convened by UNAIDS and the Office of the High Commissioner for Human Rights, which included human rights experts, representatives of national AIDS programmes, people living with HIV/AIDS, and nongovernmental organizations, prepared guidelines for states on the application of international human rights law in the context of HIV/AIDS. The guidelines (consisting of twelve succinct paragraphs) were included in the report of the consultation tabled at the 53rd session of the Commission on Human Rights in 1997 (22). The Commission welcomed the report and invited states to consider the guidelines (now known as the "International Guidelines on HIV/AIDS and Human Rights") (23). Subsequent resolutions in 1999 and 2001 asked states to report on measures taken, where appropriate, to promote and implement these guidelines (24, 25), and tools have been prepared to help specific groups implement the guidelines in their areas of responsibility (26, 27).

The commentary that accompanies the guidelines addresses complex issues in areas such as confidentiality and disclosure of HIV status by applying international legal principles to these dilemmas. The guidelines note that the international law of human rights allows states to impose limitations on certain personal freedoms, such as the right to liberty of movement, but only where the state can establish that the restriction is:

- provided for and carried out in accordance with the law, i.e. according to specific legislation that is accessible, clear and precise, so that it is reasonably foreseeable that individuals will regulate their conduct accordingly;
- based on a legitimate interest, as defined in the provisions guaranteeing the rights;
- proportional to that interest and constituting the least intrusive and least restrictive measure available and actually achieving that interest in a democratic society, i.e. established in a decision-making process consistent with the rule of law (22).

For example, the guidelines envisage circumstances in which public health legislation might legitimately authorize health care professionals to inform their patients' sexual partners of the HIV status of the patients (22). By requiring strict legal processes for any limitations on the rights of people infected, however, the guidelines reflect the "public health rationale" for preventing discrimination against people living with HIV/AIDS (28). In 2002, the High Commission for Human Rights and UNAIDS held another international consultation to revise the sixth guideline, which addresses access to prevention, treatment, care and support (22, 29). The revised guidelines recommend that domestic legislation incorporates safeguards and flexibilities in international agreements, such as intellectual property agreements, to promote and ensure access to HIV/AIDS prevention, treatment, care and support for all (22, 29, 30).

In addition to international human rights law, other international legal agreements also influence the spread and impact of HIV/AIDS. For example, the agreements of the World Trade Organization (WTO) — such as those that regulate the terms of trade and other matters between its members — greatly influence national income and the distribution of income within and between countries, and hence influence the resources available to governments for effective prevention, treatment and care.

Limitations of international human rights law in the context of HIV/AIDS

As Fidler notes, what makes public health sense does not automatically become a human rights obligation in international law (other than in the most general terms) (31). Thus international human rights law does not provide particular guidance on injecting drug use, other than the general principles of non-discrimination and the obligations to control diseases, which can arguably be used to require the introduction of proven public health measures such as needle and syringe programmes.

Although international human rights treaties include monitoring mechanisms, and some provide for individual complaints about states' behaviour, the provisions for enforcement are generally weak, unlike, for example, trade agreements. In contrast with WTO infringements, no mechanism exists to impose monetary fines on violators of human rights (although international development aid can be tailored to support democratic freedoms and good governance as a precondition to further assistance.)

International human rights law, as reflected in the International Guidelines on HIV/AIDS and Human Rights, does not provide, or claim to provide, a moral code for living with HIV/AIDS. It says nothing, for example, about our personal moral responsibility to care for affected people, although it addresses states' obligations in these areas.

Historically, human rights approaches in Western countries have tended to privilege civil and political rights over socioeconomic and developmental rights. In the early years of the epidemic, this prompted a focus on discrimination against people living with HIV/AIDS and on vulnerable groups, such as men who have sex with men, which reflected the preoccupations with individual rights and protection of citizens from state interference typical of American civil libertarianism. For many developing countries, however, such a narrow concept of rights fails to engage with the full range of social, political and cultural

factors that underlie vulnerability to HIV and responses to AIDS. It is not surprising, therefore, that practitioners in developing countries may be sceptical of approaches that focus solely on libertarian notions of rights (32). This reinforces the need for human rights approaches to policy development which are able to integrate attention to socioeconomic rights in response to HIV (33). For public health practitioners, developing, using, evaluating and adapting planning tools that bring the full spectrum of human rights into mainstream public health policy are the ways to integrate these rights in day-to-day practice (34).

How human rights law is used to mitigate the impact of HIV/AIDS

International level

United Nations General Assembly Declaration of Commitment on HIV/AIDS

The United Nations General Assembly's Declaration of Commitment on HIV/AIDS notes that "the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic". It also sets concrete, time-bound targets for the introduction of national legislation and other measures to ensure the respect of rights in regard to education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection (35). Although states are not legally bound to implement the promises made in the declaration, the General Assembly's annual review of states' progress in meeting these commitments and the monitoring instruments being developed to measure compliance provide powerful tools to encourage government action.

Global Fund for AIDS, Tuberculosis and Malaria

The Board of the Global Fund for AIDS, Tuberculosis and Malaria sought to promote dialogue and collaboration between government and civil society during the preparation of funding proposals by requiring demonstrated consultation with and participation of affected communities. Participation is key to the rights-based approach to development (36), although the Board may be more influenced by practical considerations than by legal considerations in this respect. Nongovernmental representatives who sit on the Board and technical advisory committee can monitor governments that try to falsify their applications.

Access to medications

Following the global outcry about the high cost of drugs for the treatment of HIV/AIDS, including antiretroviral drugs, the WTO's Ministerial Council declared in November 2001 that the agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS agreement) "does not and should not prevent members from taking measures to protect public health" (37). The WTO statement followed the decision by Brazil to allow the local generic manufacture of patented medications unless the manufacturers drastically reduced the cost of the drugs or started making them in Brazil (38–40). In June 2002, the TRIPS Council (the body responsible for administering the TRIPS agreement) postponed until 2006 the end of the transition period during which least-developed countries do not have to provide patent protection for pharmaceuticals (41, 42).

Parliamentarians

In 1999, UNAIDS and the Inter-Parliamentary Union jointly published the Handbook for Legislators on HIV/AIDS, Law and Human Rights (26). In September 2001, the 106th Inter-Parliamentary Conference in Ouagadougou, Burkina Faso, called on all parliamentarians "to step up their national efforts to establish effective national and international AIDS policies and programmes ... including the use of condoms, measures to counter discrimination and the provision of care to affected persons, including orphans." The resolution urged governments to give human rights precedence over trade rights, and it urged pharmaceutical companies to reduce the prices of medicines "above all in developing countries" (43).

HIV testing in UN peacekeeping operations

In November 2001, UNAIDS convened an Expert Panel on HIV Testing in UN Peacekeeping Operations to discuss whether the UN should introduce mandatory HIV testing for peacekeeping forces (44). Amongst other documentation, the panel considered a detailed submission based on international human rights law and national precedent (45). The panel unanimously rejected mandatory testing; instead it endorsed voluntary HIV counselling and testing for UN peacekeeping operations.

National level

Participation

The International Guidelines on HIV/AIDS and Human Rights propose that states, through political and financial support, ensure community consultation in all phases of HIV/AIDS policy design, programme implementation and evaluation (22). Again, participation is key, because without this "reality check", governments risk introducing laws and policies that increase rather than diminish inequity and discrimination, and hence increase HIV infection and associated harms. For example, some governments have proposed amending the criminal law without fully considering the potential costs and benefits in public health terms, particularly from a gender perspective (46).

The Kenyan Legal Task Force on Issues Relating to HIV/AIDS provides an example of a participatory process. In June 2001, the Honourable Amos Wako, Attorney-General of Kenya (and former member of the UN Human Rights Committee), convened the Legal Task Force on Issues Relating to HIV/AIDS to make recommendations to the government on a possible legal framework for responding to the HIV/AIDS epidemic in Kenya. The task force undertook public consultations around the country and, in July 2002, it launched its report and recommendations. The Attorney-General promised that new legislation would be in place before the end of 2002.

Treatment access

In April 2001, 39 pharmaceutical companies bowed to worldwide condemnation by abandoning court action against the South African Government over legislation that could be used to make essential drugs affordable for millions of South Africans. In this case, the Treatment Action Campaign supported the government with arguments based, in part, on international human rights law and obligations (47).

Prevention of mother-to-child transmission

In July 2002, the Constitutional Court of South Africa held that the constitution required the government “to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV” (48). The human rights protections in the Constitution of South Africa were constructed to reflect international human rights laws that bound South Africa, and the Treatment Action Campaign argued, with evident success, that government policy was in breach of South Africa’s international legal obligations (49). By introducing international human rights law into a popular and militant public health campaign, a growing social movement successfully achieved a major shift in a national policy on HIV.

Reducing women’s vulnerability

Although less organized and less visible in popular mobilization than Treatment Action Campaign, women’s rights activists in South Africa effectively used human rights arguments drawn from international law to influence the formulation of national policies relating to key areas of women’s vulnerability to HIV, including domestic violence, sex discrimination and reproductive health rights (50–54). Such strategies are beginning to permeate the Southern African region (55).

Monitoring

In 1999, the (then) Australian National Council on AIDS and Related Diseases published an instrument to measure states’ compliance with the International Guidelines on HIV/AIDS and Human Rights (56). In July 2001, the UK All-Party Parliamentary Group on AIDS published a report of the inquiry into the UK’s respect for and promotion of the guidelines (57). This was the first time a parliamentary group had undertaken such a review. The report looked at each of the 12 guidelines and made 136 observations and recommendations on how the British Government could better incorporate each guideline into policy and practice.

In June 2002, a regional workshop was convened in Tobago by the Caribbean Community (CARICOM). Participants from Guyana, Jamaica, Suriname and Trinidad and Tobago explained how their countries’ laws and policies measured against the guidelines. The outcome of this workshop was an action plan to support the implementation of priority area one of the Caribbean Regional Strategic Framework on HIV/AIDS, which addresses policy, advocacy and legislation (58).

AIDS law organizations

National associations — comprising lawyers, other professionals and people living with HIV/AIDS who are united in promoting rights-based approaches to HIV/AIDS — have been formed in many countries. With the support of the United Nations Development Programme, these groups have been encouraged to form regional networks in the regions of Asia and the Pacific, Latin America and the Caribbean and Africa (59). Other organizations, such as research centres and legal clinics, also promote laws and policies based on human rights. Some also offer legal services to people infected with and

affected by HIV/AIDS, who often come from disadvantaged communities and may not possess the information and advocacy skills necessary to participate when laws and policies are debated.

Training for judges

In the common law tradition, international human rights law is persuasive in the interpretation of statutes and the development of national jurisprudence; however, judges and magistrates also need to understand the basic facts about HIV/AIDS. In September 2001, over 70 judges, magistrates and other lawmakers attended a sensitization seminar on HIV/AIDS in Lagos, Nigeria, which was hosted by the Center for the Right to Health (60).

In 2002, a training package for magistrates who act as Commissioners of Child Welfare was developed in South Africa. The package will help sensitize magistrates to the complex legal and policy issues related to HIV/AIDS that arise in the placement of children in need, many of whom will have been orphaned by AIDS (61).

The influence of human rights law on the HIV/AIDS epidemic

This article has described some of the many initiatives that are being undertaken in different contexts and that reflect approaches to law and policy related to HIV/AIDS that have roots in international human rights law. This body of law provides powerful tools for three distinct sectors seeking to address the HIV epidemic.

First, human rights law helps states respond appropriately to the challenges of the HIV/AIDS epidemic by providing a framework on which they can formulate laws and policies that integrate public health objectives and human rights standards.

Second, human rights provide a basis for tools for nongovernmental organizations and advocacy groups to use to monitor the performance of states in their policies and programmes and to take action for redress when public health policies violate rights.

Third, human rights also speak to the obligations of public health practitioners with responsibilities for the protection and promotion of health at a population level.

In public health itself there is increasing debate about what its ethos and value systems should be in a globalizing environment (62–64). The emphasis is increasingly on re-establishing a commitment to social justice and popular participation (65, 66) that “locates organized and active communities at the centre as initiators and managers of their own health” (62). For those reasons, public health practitioners should be familiar with human rights tools and understand their origins, potential and limitations. Importantly, the rights-based approach to HIV/AIDS needs people infected and affected to be meaningfully included and to participate in the design and implementation of effective policies and programmes. Practitioners not yet comfortable with these approaches might well consider strategic alliances with skilled advocates and affected communities to advance common agendas. ■

Conflicts of interest: none declared.

Résumé

Droit international, droits de l'homme et infection à VIH/SIDA

Le présent article pose la question du rôle des règles internationales en matière de droits de l'homme face à l'épidémie de VIH et de SIDA aux niveaux national et international. Les défenseurs de la santé publique peuvent puiser dans cet ensemble de lois les arguments qu'ils utilisent pour promouvoir des interventions destinées à combattre l'infection à VIH et le SIDA qui reflètent de solides principes de santé publique et les meilleures pratiques établies.

L'aide au développement est de plus en plus liée à des démarches fondées sur les droits, comme les processus participatifs, et à des alliances stratégiques entre professionnels de santé, organisations et personnes vivant avec le VIH et le SIDA, et communautés affectées. Les stratégies à base juridique, notamment en matière de défense des droits de l'homme, sont de plus en plus développées tout autant que nécessaires.

Resumen

Legislación internacional, derechos humanos y VIH/SIDA

En este artículo se analiza la pertinencia de la legislación internacional en materia de derechos humanos en la respuesta a la epidemia de VIH y SIDA a nivel nacional e internacional. Los defensores de la salud pública pueden usar argumentos basados en este cuerpo de leyes para promover respuestas contra el VIH y el SIDA que reflejen unos principios sólidos de salud pública y las mejores prácticas documentadas. La

asistencia para el desarrollo está cada vez más ligada a enfoques basados en derechos, como los procesos participativos, y a alianzas estratégicas entre los profesionales de la salud, las organizaciones de personas que viven con el VIH y el SIDA y las comunidades afectadas. Las estrategias jurídicas y de defensa de los derechos humanos son cada vez más eficaces y necesarias.

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