

Crisis States Research Centre
Project Notes

Law as a Tool: The Challenge of HIV/AIDS¹

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Introduction

The relationship between development studies and international law is by no means straightforward. Among other things, there seems to be little evidence of professional communication, or a shared language, particularly between lawyers and economists (often at the forefront of development studies, along with social and political scientists).² From a lawyer's perspective, this relationship is further complicated by the fact that there appears to be no clear consensus regarding a precise definition of 'development', as a number of authors acknowledge.³

Nonetheless, in some respects international law and the concept of development have been linked for many decades.⁴ In the context of deliberations of international organisations, links were made as early as May 1944 in an International Labour

¹ This study is undertaken as part of the 'Crisis States Programme' (CSP), based at the London School of Economics (LSE). In describing its aim and Research Objectives, the 'Concepts and Research Agenda' (LSE/DESTIN, Crisis States Programme Working Paper No. 1, April 2001) of the CSP refers, *inter alia*, to 'understanding the causes of crisis and breakdown in the developing world and the processes of avoiding or overcoming them'; to assessing how 'constellations of power at local, national and global levels drive processes of institutional change, collapse and reconstruction. . .', and to examining 'the effects of international interventions promoting democratic reform, human rights and market competition on the "conflict management capacity". . . of existing polities'. This study aims, among other things, to examine the extent to which these concepts find expression in international (and related national) law.

² For example, commenting on the lack of dialogue between economists and lawyers, Alston states 'it is clear that the time is long past due for a concerted effort to bring economists and international lawyers together to focus on the economic dimensions of a wide range of human rights issues' (P Alston 'Making Space for New Human Rights: The Case of the Right to Development' 1 *Harv. Hum. Rts. Y.B.* 3 (1988), 3-40 at p. 20). See also, among others, H O Sano, 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development' 22:3 *Human Rights Quarterly* (2000), 734-752 at p. 742.

³ See e.g. K E Davies and M J Trebilcock, 'Legal Reforms and Development', 22:1 *Third World Quarterly* (2000), p. 22, stating that 'the definition of development is highly contested'. See also D Kingsbury, 'Introduction', in D Kingsbury, J Remenyi, J McKay and J Hunt (eds.) *Key Issues in Development* (Houndmills, Basingstoke, Hampshire; New York, Palgrave Macmillan, 2004), p. 2, and A Lindroos *The Right to Development* (Helsinki, The Erik Castrén Institute of International Law and Human Rights, 1999), p. 72.

⁴ Rajagopal argues that international law 'has played a crucial, perhaps even a central, part in the evolution of the ideology and practice of development in the post-WWII period, and, conversely, that development ideology has been a driving force behind the expansion of international law' (B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, Cambridge University Press, 2003), p. 27

Organisation (ILO) declaration,⁵ and this linkage slowly became more pronounced and explicit (as outlined in Part I (A) below). Much of the legal discourse regarding law and development has centred on questions such as whether there is or can be a ‘right to development’, whether this can be categorised as a human right, what such a right consists of, and how it differs from a ‘human rights approach to development’. These issues are not the focus of the present work, although they will be outlined in the text below by way of background.

This paper examines, from a different perspective, the link between development and international law (and this includes international law as reflected in national law). The key question posed here is, broadly, ‘What role does (or could) international law play in development? Specifically, what role does (or could) human rights law (a major pillar of current international and national law⁶) play in addressing the HIV/AIDS epidemic (a major development challenge particularly for many ‘fragile’ or ‘crisis’ states⁷)?’

If indeed international human rights law seems to have little to offer as regards the HIV/AIDS crisis, that fact would tend to undermine claims regarding the reach and importance of this body of law as a tool in tackling key development challenges. However, this research finds that international human rights law has a long history of interaction with development issues, and that, in some circumstances, it does and can play a useful role in regulating aspects of the HIV/AIDS epidemic.

The primary research task here is thus to explore the role of international law, and particularly of international human rights law, as a tool in stemming the rise of HIV/AIDS or bringing an existing epidemic under control. The emphasis is on law as a tool in this context, not as the tool, since the impact of law is always either constrained or facilitated by social, economic and political factors.⁸ The aim is, as a minimum, to ask pertinent questions and present evidence of the role of law in this context, while

⁵ Lindroos (1999), p. 3.

⁶ One commentator states that globalisation has generally been portrayed as an exclusively economic and technological phenomenon, while ‘. . . in the new millennium, there are at least three universal “languages”: money, the Internet, and democracy and human rights.’ He describes as the overlooked ‘third globalisation’ the rise of transnational human rights networks. See H H Koh, *1999 Country Reports on Human Rights Practices*, Washington, D.C.:US Department of State, 2000, (Introduction). See also Kingsbury (2003), pp. 14-15.

⁷ See e.g. World Bank, *Development and Human Rights: The Role of the World Bank*, (Washington D.C., World Bank, 1998), pp. 6 and 7, *inter alia* describing HIV/AIDS as ‘one of the greatest threats to development’, and see Declaration of Commitment on HIV/AIDS, UN Doc. A/RES/S-26/2 (2 Aug. 2001), para. 65, stating that ‘to address HIV/AIDS is to invest in sustainable development’. See also T Barnett and A Whiteside, *AIDS in the Twenty-First Century: Disease and Globalization* (New York, Palgrave Macmillan, 2003) pp. 21-23, and UN Report on the devastating effects of HIV/AIDS (United Nations Department of Economic and Social Affairs – Population Division, *The Impact of AIDS* (New York, United Nations, 2004)). Further, the HIV/AIDS epidemic has been analysed as a major security challenge, e.g. by UNAIDS (HIV/AIDS and Security – http://www.unaids.org/Unaidst?EN/In+focus/HIV_AIDS_security+and+humanitarian+response/HIV - visited, 10/11/2004).

⁸ A similar point is made in UNAIDS *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of its Devastating Human, Economic and Social Impact* (Geneva, UNAIDS, 2002), p.18.

accepting that there may be no answers – or certainly no easy answers – to some of the questions posed.

It is worth clarifying that ‘human rights law’ in this research has a wide interpretation, incorporating issues such as the rights of women and children, as such, to non-discrimination and protection from abuse. It does not employ the interpretation favoured by some writers on HIV/AIDS, in which ‘human rights’ in the context of this epidemic seems to apply primarily or even exclusively to the rights of people living with HIV/AIDS.

It is also important to clarify that this research is written from a legal perspective, drawing on expertise regarding the function and operation of both national and international law. It does not claim particular expertise as regards development studies, or as regards HIV/AIDS, or even as regards Uganda - the country to be looked at as a ‘case study’ in Working Paper 2.⁹

The research will start with a brief review of some of the literature, highlighting certain key questions regarding the link between law/human rights law and development, and law/human rights law and HIV/AIDS (Working Paper 1 - Part I). It will then outline relevant features of the international human rights law regime (Working Paper 1 - Part II), before presenting some Conclusions (Working Paper 1 - Part III). This Working Paper aims to provide, in itself, a broad theoretical framework concerning the above issues. It also aims to locate the later study of Uganda firmly within the wider landscape of international law on the one hand, and development and HIV/AIDS on the other. It will be published as Working Paper 1.

Following this, the research will summarise the situation in Uganda as regards HIV/AIDS (Working Paper 2 - Part I), before addressing the role of law in this context (Working Paper 2 - Part II). In conclusion, the main research findings will be summarised and some recommendations will be made, if appropriate (Working Paper 2 - Part III). This part of the research will be published as Working Paper 2.

Part I – Law/Human Rights Law in relation to A) Development, and B) HIV/AIDS

⁹ The reasons for selecting Uganda as the case study in Working Paper 2 include the fact that Uganda can be categorised as a ‘fragile’ or ‘crisis’ state, in that its ‘political or economic system is confronted with challenges with which existing institutions and organisations are potentially unable to cope’ (CSP, ‘Concepts and Research Agenda’ (LSE/DESTIN, Crisis States Programme Working Paper No. 1, April 2001), p.1). This is particularly evident in the on-going conflict in the north of the country. Further, Uganda has apparently succeeded in reducing the rate of HIV/AIDS prevalence in its population (although there is some controversy regarding this claim), largely through a combination of, *inter alia*, civil society initiatives, governance, and aid from international donors. It appears that law has not been a particular feature of this strategy (although Uganda has ratified the key international human rights treaties and has a Constitution that reflects this). Working Paper 2 will examine whether law was in fact insignificant in Uganda’s apparent success, and will look at a number of related questions, including whether legal reform could have an impact on the current situation or whether it is indeed marginal.

As outlined above, the key question to be addressed in this research is, ‘What is the role of international law, specifically human rights law, in addressing a major contemporary challenge to development (especially in a fragile or crisis state), specifically the HIV/AIDS epidemic?’ In order to put this question in context, the research will, in this section (Part I) briefly summarise, from a legal perspective, some of the main strands of the discourse linking law to development (Part I (A)) and to HIV/AIDS (Part I (B)).

A) Law/Human Rights Law and Development

1) The Right to Development

As already mentioned, one of the key links made between international law and development was the claim to a ‘right to development’. This claim was eloquently described by one of its early proponents in international law, M. Bedjaoui, in these terms: ‘Against the troubling backdrop of a polluted planet whose limited resources are also unequally shared, and where the spendthrift society contrasts sharply with lives of hunger and absolute poverty, the question is continually being asked whether there is a “right to development” of the world’s peoples’.¹⁰ The right to development— which remains controversial to this day - was originally (particularly in the early post-colonial period of the 1960s¹¹) framed as a claim made by poor states that rich states were legally obliged to support them.¹²

Some have argued that this right could be inferred from Articles 55 and 56 of the UN Charter,¹³ and it was also widely conceptualised, by international lawyers among others, as forming part of a ‘third generation’ of human rights. Under the latter categorisation (which is not without its critics), the first generation rights are civil and political; the second are economic, social and cultural, and the third are ‘solidarity rights’.¹⁴

¹⁰ M Bedjaoui, ‘Some Unorthodox Reflections on the Right to Development’, in F Snyder and P Slinn, (eds.) *International Law of Development: Comparative Perspectives*, (Abingdon, Professional Books, 1987) 87-116, at p. 87.

¹¹ Lindroos (1999), p. 3.

¹² P Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed (London, Routledge, 1997), p. 239.

¹³ Art 56 of the UN Charter (Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (1945)) commits member states to take ‘joint and separate action in co-operation’ with the UN to achieve the purposes stated in Art 55, which include the achievement of human rights, ‘higher standards of living ... and conditions of economic and social progress and development’ and ‘solutions of international economic, social, health and related problems’. These provisions, though very general, have been invoked by those positing an international ‘duty to cooperate’ or ‘right to solidarity’, under which the international community bears responsibility to assist states with inadequate resources. See e.g. H J Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford, OUP, 2000), p. 1319.

¹⁴ See N J Udombana, ‘The Third World and the Right to Development: Agenda for the Next Millennium’ *22 Human Rights Quarterly* (2000) 753-787, at p. 761. Another writer sees these categories in terms of the need for liberty (first generation rights), equality (second generation), and fraternity (third generation) (C Wellman, ‘Solidarity, the Individual and Human Rights’ *22:3 Human Rights Quarterly*, (2000) 639-657, at p. 642). For a critique of the ‘Western paradigm’ that privileges civil and political rights at the expense of economic, social and cultural rights, see e.g. S C Agbakwa, ‘Reclaiming Humanity: Economic, Social, and

a) *Moral Claim or Legal Right?*

The claim to a right to development thus originated as a moral claim, and the legal literature explores the significance of transforming a moral claim into a legal right, and the process whereby this takes place. This transformation is seen as strengthening and granting status to a moral claim, even more so if it ultimately results in that claim being categorised not only as a legal right, but as a human right in law.¹⁵ Specifically as regards the right to development, it is said that when human rights become the frame of reference for development policy, the perspective changes from a moral commitment in the development sphere to legal claims of rights-holders, and corresponding duties of donors and of governments that are recipients of development aid.¹⁶ Sengupta, the UN 'Independent Expert on Development', (and an economist who freely uses the language of law) argues that 'human development thinking' is concerned with outcomes, while the human rights approach is concerned with how these outcomes are realised (including how the legal obligations are fulfilled).¹⁷

A problem here is the lack of clarity in much of the literature as to the distinction between legal rights, human rights as legal rights, and human rights *per se*. As one writer has noted, 'the blessing or the curse of the language of human rights is that it's a language everyone feels they own and can use as they like . . .'.¹⁸ It may be useful, therefore, to clarify that: a) not all human rights are legal rights (according to Sengupta, 'human rights precede law and are derived not from law but from the concept of human dignity', and key human rights norms have become law primarily by virtue of being articulated in international treaties and in national law¹⁹), and b) not all legal rights are human rights. The latter can come under the umbrella of the former, but there are many legal rights that are not 'human rights' (e.g., rights attributed to states and corporations). Thus, to clarify, 'human rights' are not necessarily legal rights, and legal rights are not necessarily 'human rights', but legally-recognised human rights are of course legal rights. Therefore, although it is slightly awkward, in this research the term 'human rights law' or

Cultural Rights as the Cornerstone of African Human Rights' 5 *Yale Human Rights and Development L.J.* (2002) 177-216, at p. 206.

¹⁵ One authority (clearly a human rights lawyer!) argues that 'characterisation of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity.' Alston (1988), p. 3.

¹⁶ See e.g., B I Hamm, 'A Human Rights Approach to Development' 23:4 *Human Rights Quarterly* (2001) 1005-1031, at p. 1014. See also UNAIDS Handbook (2002), p. 24, stating that: 'International human rights norms provide a coherent, normative framework for analysis of the HIV/AIDS problem. They also provide a legally binding foundation with procedural, institutional and other accountability mechanisms to address the societal basis of vulnerability and implement change.'

¹⁷ Commission on Human Rights, *Fourth Report of the Independent Expert on the Right to Development, Mr Arjun Sengupta*, UN Doc E/CN.4/2002/WG.18/2 (20 Dec. 2001), para. 7.

¹⁸ Gruskin, S 'The Health and Human Rights Approach: Concepts and Action', *Promotion and Education* (2001), p.10 *et seq.*

¹⁹ A Sengupta, 'Realizing the Rights to Development' 31:3 *Development and Change* (2000) 553-578, at pp. 557-558. Lindroos (1999) (p 29) points out that: 'Moral or political claims, however pressing, cannot always be translated into rights'.

similar will be used as necessary to make it clear when this is the specific category of human rights under consideration.

To return to the process of transformation from ‘values’ into law, one writer conceptualises this as the passage of claims from the status of *de lege feranda* (law as ought to be) to *lex lata* (law as it is). He argues that this transformation follows a process of ‘emergence of values’, i.e. of new ideas hardening into values that become increasingly important to the point where ‘social feeling’ develops to formally sanction them - and that this marks the threshold of law. The claim must then be defined in legal terms to become law.²⁰ Law is accordingly seen as dynamic and ever changing to reflect social realities and evolving norms, and as responsive to perceived deficiencies in the existing law.²¹ (The development of HIV/AIDS-related law has to some extent followed this trajectory – as will be seen below).

It is therefore accepted that the absence of formal legal status does not necessarily deprive a moral claim of its force. According to Sengupta, legislation that converts a ‘valid’ right into a ‘legal’ right is one procedure to make an agreement honoured, but need not be the only one. ‘Even if a right cannot be legislated, it can still be realized if an agreed procedure for its realization can be established . . .’²² (This concept – that rights can be ‘valid’ and realisable even if not strictly ‘legal’ - is relevant in the context of the Ugandan approach to the HIV/AIDS epidemic, where a number of relevant principles were articulated as government policy without apparently being formulated in law - as will be highlighted in Working Paper 2.)

Thus, to summarise: in the legal discourse a moral claim - such as that to a right to development - is seen as being strengthened if it is transformed into a legal right, when, at least in theory, it can then be implemented through legal mechanisms, etc. However, if not regarded as a legal right it can still be a valid and ‘realisable’ claim, as long as workable related rights and duties are in place.²³ These two factors help to account for some of the matters that are at issue in this research – i.e. how it is possible to regulate and respond to crises without necessarily having a formal legal framework in place, and yet the ‘value added’ that such a framework can arguably provide.

²⁰ G. Abi-Saab, ‘The Legal Formulation of a Right to Development’, in R-J Dupuy (ed.) *Le droit au développement au plan international* (Colloque de l’Académie de droit international, 16-18 Oct. 1979, The Hague, Sijhoff & Noordhoff, 1980) 159-175, at p. 160. According to Abi-Saab, (*id.*), three indices help delineate the threshold between values and law: 1) degree of consensus in body-politic over social value in question; 2) degree of concreteness of the content of this social value (i.e., is it specific enough to become law); 3) existence (and effectiveness) of compliance mechanisms. See also Wellman (2000) p. 654.

²¹ Alston (1988) p. 5.

²² Commission on Human Rights, *The Right to Development, Second Report of the Independent Expert on the Right to Development*, UN Doc.E/CN.4/2000/WG.18/CRP1 (11 Sept. 2000) para. 9.

²³ Similar ideas are also analysed in the legal anthropology literature, which makes it very clear that claims and rights can exist outside a strictly ‘legal’ framework. However, a study of that literature is beyond the scope of the present work.

‘International law’ and ‘human rights law’ must also be distinguished from the ‘rule of law’ (although of course they are related to it²⁴). The concept of ‘rule of law’ generally implies a model of legal authority in which government by rules – enforceable in impartial courts by an independent judiciary – takes precedence over government by the will of those holding power.²⁵ It seems to be widely accepted within the development discourse that this is necessary for state stability.²⁶ For the purposes of this paper, it is taken as a given that the rule of law is one key facet of good governance,²⁷ and as such is a prerequisite for effective state capacity in addressing HIV/AIDS. However, while it is important to make this distinction, the concept of the ‘rule of law’ as a background precondition for sustainable development is, again, not the focus of this paper (which is, rather, concerned with the instrumental use of a specific body of law), and does not need further analysis here.

That said, it is worth noting a related issue – i.e. the argument that reforms in substantive areas of law, such as human rights law, are less effective in furthering development than reforms that improve the quality of institutions that enact, administer and enforce such law.²⁸ Certainly these two strands are inextricably linked, as will be explored in Working Paper 2.

b) Proponents and Opponents

Specifically as regards the right to development, to some extent this still inhabits the disputed territory between a moral claim and a legal right. According to some writers, there is as yet no clear consensus on its precise content or even its existence in law.²⁹

Opponents of the right to development claim that it lacks certain essential features of a legal right – in that, among other things, it is vague, it confuses individual and collective

²⁴ See International Commission of Jurists, *Development, Human Rights and the Rule of Law: Report of a Conference held in The Hague on 27 April – 1 May 1981* (Oxford, Pergamon Press, 1981). The summary of the discussions and conclusions of this 1981 conference states that human rights, as such, are inseparable from each other, and moreover that human rights are inseparable from development, and that development is inseparable from the rule of law (p 224).

²⁵ According to the World Bank, the ‘rule of law prevails where (1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by the law; and (4) justice is accessible to all’. World Bank, *Initiatives in Legal and Judicial Reform: 2004 Edition* (Washington D.C., World Bank, 2004), p. 2.

²⁶ For example, the World Bank describes as the first of the ‘five fundamental tasks’ that governments must administer to ensure sustainable, widely shared development: establishing the foundation of law. World Bank, *World Bank Development Report 1997* (Washington D.C., World Bank, 1997). See also, World Bank (2004), p. 1, and UNDP, *Integrating Human Rights With Sustainable Development* (New York, UNDP, 1998) p. 3, stating that development needs ‘the rule of law’.

²⁷ See e.g. UNDP (1998) which states, *inter alia*, in defining ‘good governance’, that ‘it promotes the rule of law’, p. 9.

²⁸ Davies and Trebilcock (2000), pp. 21 and 32-33.

²⁹ See e.g. Lindroos (1999), p. 8. However, other writers are less equivocal about the existence of this right. One argues, e.g., that the most important element in formation of international law remains state practice – and that state practice (i.e. what states do, as opposed to what they may enact in legislation) indicates support for a right to development. (See R Rich, ‘The Right to Development as an Emerging Human Right’, 23 *Virginia Journal of International Law* (1983) 287-328, at p. 327.)

rights (and indeed if interpreted as a collective rather than individual right it could be used to justify individual human rights violations which may occur in the state's quest for development), and it is non-justiciable.³⁰ Further, it is said to 'provide no clarification as to how to proceed in a world of limited resources and where priorities should be set'.³¹

Proponents argue, *inter alia*, that this right is sufficiently well defined to be understood; that individual and collective rights can (and in the case of the right to development must) be interlinked, and that justiciability is not essential to its status as a right.³² Further, they point to the fact that in 1993 consensus was reached on the existence of a right to development, when, at the Vienna World Conference on Human Rights, Article 10 of Part I of the Vienna Declaration and Programme of Action³³ was unanimously adopted by 171 states (including the US, which had hitherto largely opposed this right). This Article stated: 'The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights'.

c) Brief History of Right to Development in International Law

Prior to the 1993 Vienna Conference, the claim to a right to development initially surfaced within the UN proper in the early 1970s. In 1977 and 1979 the Human Rights Commission first passed resolutions on the 'right to development'. These were followed by the establishment of a Working Group to prepare the Declaration on the Right to Development, which was not adopted until 1986. It was passed by the UN General Assembly with a vote of 146 in favour, one against (the US) and eight abstentions. Although attempting to clarify the concept, the 1986 Declaration left much unanswered.³⁴

The essential elements of this 1986 Declaration are summarised by Sengupta³⁵ as 'the right to a process of development in which all human rights and fundamental freedoms can be fully realised (Article 1), and which has to be exercised in a manner that ensures: that the individuals concerned would participate effectively ... at all stages of decision-

³⁰ See e.g. summary in P Alston, 'The Right to Development at the International Level', in R-J Dupuy (ed.), *Le droit au développement au plan international* (Colloque de l'Académie de droit international, 16-18 Oct. 1979, The Hague, Sijhoff & Noordhoff, (1980), pp. 159-175.

³¹ Lindroos (1999), p. 28.

³² As regards the latter, it is pointed out that, in the human rights system, the emphasis is on 'implementation' and 'supervision' (e.g., through the reporting mechanisms of the UN treaty-monitoring bodies) – justiciability and enforceability are not essential (Alston (1980), p. 35).

³³ UN Doc. A/Conf.157/23 (1993). Sengupta ((2000), p. 557) sees the 1993 Vienna Declaration as having recognised the right to development as an 'inalienable human right', initiating a process of consensus building, and establishing binding rights and duties. Seven years later, the UN Millennium Declaration (UN Doc. A/RES/55/2 (18 Sept. 2000)) stated, in Part III, para. 10, '... We are committed to making the right to development a reality for everyone and to freeing the entire human race from want'. See also its Part V, paras. 24 and 25, among others.

³⁴ It has also been criticised for a gender bias that 'exacerbates the inequality of Third World women'. H Charlesworth, 'The public/private distinction and the right to development in international law', 12 *Australian Year Book of International Law* (1992) 190-204, at p. 196.

³⁵ Sengupta (2000), pp. 565-566. See also U Baxi, 'The Development of the Right to Development', in J. Symonides (ed.) *Human Rights: New Dimensions and Challenges* (Ashgate, Dartmouth, 1998) 99-116, at p. 100.

making (Articles 1, 2(3) and 8); that they would be entitled to a fair distribution of the benefits of development and of income (Articles 2 and 8); that States would carry out their responsibilities to enable the process of development to materialize ... (Article 3 and 4); that there would be international co-operation among the States (and international agencies) to facilitate the realization of this right ..., and finally, and most importantly, that all such activities would be carried out maintaining full respect for civil and political as well as economic, social and cultural rights (the Preamble, Articles 6 and 9)'.

Following the adoption of the 1986 Declaration, further UN Working Groups were established with the mandate of trying to clarify and implement the right to development,³⁶ although the results of these initiatives have to date been limited. Despite the apparent consensus on the right to development reached in Vienna in 1993, and its subsequent confirmation in proceedings of various World Conferences³⁷ and in resolutions of the UN General Assembly, this 'consensus' seems to have been under threat since 1997. From that year, major UN resolutions on the right to development have generally had to be adopted with a vote once again, reflecting continuing division in the views of the South and the North.³⁸

Against that backdrop, it is perhaps not surprising that the only regional international treaty that enshrines the right to development is the 1981 African Charter on Human and Peoples' Rights,³⁹ which states, in Article 22: '(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity . . . 2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.' Again, this is relevant to the Uganda study.

There is no need for a more detailed history here of the international debate on the right to development – a debate that remains current in different fora within the UN and elsewhere.⁴⁰ Suffice it to say that, since the 1970s, the concept of this right has shifted from a focus on 'economic development of states, to a multidimensional human right which aims at contributing to the promotion of economic, social, and cultural rights, as well as civil and political'.⁴¹ The latter, wider, focus encompasses action taken to

³⁶ See e.g., Centre for Human Rights, *The Realization of the Right to Development* (New York, UN 1991).

³⁷ For example, on environment and development, in Rio (1992); on human rights, in Vienna (1993); on population and development, in Cairo (1994); on social development, in Copenhagen (1995), and on women, in Beijing (2000).

³⁸ This brief summary of the history of the 'right to development' in the international arena is based largely on Lindroos (1999), Executive Summary.

³⁹ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). For critique of this Charter in relation to the right to development, see, e.g., Agbakwa (2002), pp. 191-204.

⁴⁰ See, e.g., UN Doc GA/SHC/3796, dated 01/11/2004. This is the Press Release on a UN Debate in the Third Committee (dealing with Social, Humanitarian and Cultural issues), entitled 'Right to Development Must be Given Special Attention, Third Committee Told.' See also 'Action 2', launched by the UN in Oct. 2004, 'to ensure that the rights of individuals are respected and protected . . . as a foundation for sustainable peace and development'. (UN News Service, 'UN launches fresh approach to try to bolster human rights protections in countries', 27 Oct. 2004.)

⁴¹ Lindroos (1999), p. 7. For an account of changes in thinking regarding human rights and development from the 60s to the mid-80s, see e.g., J Donnelly, 'Human Rights and Development: Complementary or

promote the right to health, and, under that umbrella, action taken to combat the HIV/AIDS pandemic can be seen as part of a ‘right to development’.

d) Monitoring/ Implementation

One of the major bones of contention regarding the right to development concerns its implementation, with some of its opponents (largely countries in the North) dragging their feet on this issue, and resisting pressure from its supporters (largely from the South). Unsurprisingly perhaps, some of the richer members of the international community seem happy to endorse this right in principle, but stall when it comes to serious efforts to put it into practice.

Proponents in the UN of the right to development have increasingly sought ways in which to implement this right. For example, in this context Sengupta has, among other things, proposed ‘a compact between the donor countries of the OECD, the financial institutions and the concerned developing countries, with a view to realizing three basic rights – the right to food, the right to primary health’ (which would include HIV/AIDS-related health care) ‘and the right to primary education – within a certain period’.⁴² He has also argued for an international mechanism to monitor the implementation of the right to development, separate from those already contained in existing treaty mechanisms (since the right to development has been recognised as a human right that is distinct from the individual civil, political, economic, social, and cultural rights). He envisages an international committee that would review the implementation of the relevant rights.⁴³

Efforts to move recommendations such as this up the agenda within the UN are precisely the type of initiative that has led to a stalemate, and lack of consensus in UN deliberations.⁴⁴

e) Content

As regards the content of the right to development, various formulations have been put forward.

Competing Concerns?’, in G W Shepherd *et al* (eds.) *Human Rights and Third World Development* (Westport, Conn., Greenwood Press, 1985) 27-55. See also Sengupta, who describes the ‘value added’ of the ‘right to development’ to the evolution of thinking about development (see his Fourth Report (2001)), para. 5. Further, see Hamm (2001), p. 1010.

⁴² Sengupta (2000) p. 562.

⁴³ Commission of Human Rights, *Third Report of the independent expert on the right to development, Mr. Arjun Sengupta*, UN Doc. E/CN.4/2001/WG.18/2 (2 Jan. 2001) paras. 16-18. See also, e.g., recommendations of P Tiakula, ‘Human Rights and Development’, in T Zeleza and P J McCommaughay (eds.) *Human Rights, the Rule of Law, and Development in Africa* (Philadelphia, University of Pennsylvania Press, 2004) pp. 115-117, and of UN Working Group on the Right to Development, 5th session, 11-20 Feb. 2004.

⁴⁴ See e.g., Commission on Human Rights, resolution 2003/83, *The Right to Development*. See also the resolution adopted by the UN General Assembly during its Fifty-Eighth session, *The Right to Development*, UN Doc. A/RES/58/172 (11 March 2004). For details of the votes in favour and against the adoption of this resolution see, UN Doc A/58/PV.77, p. 18.

One useful formulation is as follows: ‘In very general terms, it could be described as denoting a human right of individuals and peoples to pursue their development as they perceive it. While states should ensure realisation of the right to development, it provides a right to individuals and peoples to take active part in the development process and to enjoy the fruits of development in an equitable and just manner, and this is to take place in a development process in which civil and political as well as economic, social and cultural rights are respected and promoted’.⁴⁵

This is similar to Sen’s notion of development ‘as a process of expanding the real freedoms that people enjoy’, including freedom to exercise the full array of human rights.⁴⁶

That said, it is worth noting – particularly in the context of the HIV/AIDS epidemic (where the rights of HIV/AIDS-affected people have to be balanced against the rights of the majority population) - that it is accepted, by Sengupta among others, that all human rights cannot be realised at the same time. Thus, in cases of severe resource constraint, a small group of people might have to see their rights violated in order to benefit a larger section of the population (Sengupta gives the example of dam construction), but he argues that for this violation to be justifiable, the minority group will need to be properly compensated.⁴⁷

As regards the definition of the right to development generally, one writer comments that ‘(t)he general and abstract character of the right to development follows from the nature of the diplomatic debate. Its meaning and normative effect have been left unclear in order to be acceptable to the North and the South.’⁴⁸ She observes that this right is intrinsically relative in that it provides for individuals and peoples to decide on the direction of their development, and to participate in that. Accordingly, ‘some degree of cultural relativism is inherent in the debate on the right to development’.⁴⁹ Again, this is relevant to the Uganda study, in that each country inevitably operates within its own cultural, social and historical context in formulating strategies to further development, and this includes its strategies to combat HIV/AIDS.

⁴⁵ Lindroos (1999), Executive Summary. This is similar to - and possibly based on - Sengupta’s formulation. (For later summary of this, see e.g. Sengupta’s Fifth Report (Framework for Development Cooperation and the Right to Development, UN Doc E/CN.4/2002/WG.18/6 (18 Sept. 2002) paras. 5-7) and Sixth Report (Implementing the Right to Development in the Current Global Context, UN Doc E/CN.4/2004/WG.18/2 (17 Feb. 2004) Part I (paras. 3-6)).

⁴⁶ A Sen, *Development as Freedom* (New York, Knopf, 1999), pp. 3-5 and generally.

⁴⁷ Sengupta’s Fourth Report (2001) paras. 40-41.

⁴⁸ Lindroos (1999) p. 100 and see also Executive Summary.

⁴⁹ *Ibid.*, p. 26. Regarding the universality vs. relativity debate, one author usefully summarises this in terms of three positions: a) legal universalist (human rights are universal); cultural relativist (human rights are not universal, but relative), and c) mitigated universalists or mitigated relativists (there are some universal human rights, but they can only be effectively applied if the particular setting is taken into account) (K Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (The Hague, Kluwer Law International, 2000) p. 33.

Further regarding the content of the right to development, one area of possible confusion is the distinction between a right to development and the ‘development approach to human rights’. Sengupta’s formulation is helpful in clarifying this distinction. He states first that ‘. . . the rights approach to development is not the same thing as realizing the right to development’.⁵⁰ According to Sengupta: ‘The right to development as the right to a process of development is not just an umbrella right or the sum of a set of rights. It is the right to a process that expands the capabilities or freedom of individuals to improve their well being and to realize what they value.’ Thus, it would be possible for a country to realise several rights separately such as the right to food, education, etc. – and to do so following a human rights approach – but nonetheless the right to development, as such, could still not be realised ‘as a process of development where the realization of all the rights are inter-related . . . The process must be distinguished from the outcomes of the process’.⁵¹

2) Concluding Comments – Part I (A)

The above brief overview is, as already stated, by way of background to the main thrust of this two-part research. Nonetheless, it is both important and relevant in putting the later discussion into context, by exploring some of the links between human rights and development in the legal discourse, and their fairly long history.

It is useful, too, to bear in mind that many aspects of the HIV/AIDS epidemic, and the international response to it, can be conceptualised in the language of a right to development. Thus, given that the HIV/AIDS epidemic is accepted as posing huge development challenges, efforts to tackle this epidemic (e.g. through international aid) can be viewed and framed as efforts in furtherance of the right to development.⁵² That said, it is evident that national and international action to address HIV/AIDS can take place, and is taking place, without having to resolve or resort to the contested notion of a ‘right to development’. However, if and when a ‘right to development’ is clearly accepted as a principle of international law, this could open another arena for action regarding HIV/AIDS.

The discussion in Part I (A) above is also relevant in helping to clarify the language used in discussing HIV/AIDS in a legal context – i.e. in making the distinction between the rule of law, a moral claim, a human right, a legal right, a legal human right (or human right in law), and between a ‘right to development’ and a ‘human rights approach to development’. As will be discussed further below, a lack of clarity in the use of this

⁵⁰ The Right to Development: (Second Report of the Independent Expert), E/CN.4/2000/WG.18/CRP1 (11 Sept. 2000) para. 21. Lindroos (1999, Executive Summary) makes a similar point, i.e.: ‘many development organisations have included human rights in their development policies . . . and yet, they have done so with little regard for the right to development, which remains contested as ever’.

⁵¹ Sengupta (2000) paras. 21 and 22. ‘In short, the requirement for improving the realization of the right to development will be that at least some of the rights can be increasingly realized while none other deteriorates in realization or is violated . . . and there be a sustained growth of overall resources.’ *Ibid.*, paras. 22 and 25.

⁵² See e.g. UNAIDS Handbook (2002) p. 19, citing the ‘Windhoek Inter-Parliamentary Union Resolution on HIV/AIDS’ (1998).

terminology has perhaps unnecessarily polarised positions, and obscured debates concerning the human rights of people living with or affected by HIV/AIDS.

B) Law/Human Rights Law and HIV/AIDS

The above section (Part I (A)) of this paper has explored certain links between international law and development, in order to place in its wider context the discussion - that is at the heart of this research - regarding the role of international human rights law in addressing the HIV/AIDS pandemic.

The following section (Part I (B)) will look at explicit HIV/AIDS-related law and policy both as it applies on the domestic/national level (where that law is most directly implemented) and on the international level. Subsequently, this paper will (in Part II) examine the roots of some of these explicit provisions as found in international human rights law, and outline the main relevant international treaties and their implementation mechanisms, before drawing some conclusions (Part III).

As regards HIV/AIDS law - it may seem unlikely that law and the HIV/AIDS pandemic would have much connection. After all, HIV/AIDS is a health crisis that largely inhabits the domain of public health policy. How and why would it interact with law? In fact, the plethora of HIV/AIDS-related law and policy is startling.

Explicit HIV/AIDS-related law and policy as examined here are to be found either in national law, or in quasi-legal or policy documents of the UN or other intergovernmental bodies, as there are currently no international treaties that specifically address the issue of HIV/AIDS. However, international law is the source of, and is reflected in, much of the national law and international policy discussed in this section.

There are certain features of this particular pandemic that account for the fact that it crosses boundaries into numerous realms, including the realm of law. One such feature is its sheer scale. Different authorities cite slightly different statistics regarding this, but, e.g., a recent (February 2004) UN document⁵³ estimated that '42 million people worldwide are living with HIV/AIDS' and that 'the HIV/AIDS pandemic claimed 3.1 million lives in 2002 and to date has orphaned 14 million children'. It also noted that the majority of new HIV infections occur among young people, that women and girls are disproportionately affected by the pandemic, and that the unequal legal and social status of women heightens their vulnerability to HIV (as will be discussed further below and in Working Paper 2). Given its magnitude, it is therefore not surprising that this pandemic has global implications requiring mobilisation of a wide range of resources: economic, social, political – and legal.

⁵³ UN Doc A/RES/58/236 (25 Feb. 2004) Follow-up to the outcome of the twenty-sixth special session: implementation of the Declaration of Commitment on HIV/AIDS. Preamble. See also UN report issued on 23 Nov. 2004, stating that 39.4 million people globally were then living with HIV, an increase from 36.6 million in 2002, and that, *inter alia*, women were increasingly affected (UNAIDS/WHO, *Aids Epidemic Update* 2004 (Geneva, UNAIDS, 2004)).

Another key feature of this pandemic that leads it into the realm of law is the fact that, as one writer comments, it is ‘not just a matter concerning a virus’, but is ‘an epidemic that challenges the ways in which we regulate inter-personal relationships and the ways in which we seek to regulate what others may or may not do’. Thus, HIV/AIDS law has moved from the narrow confines of traditional communicable disease statutes based, e.g., on case notification, to a broader-based body of law concerned with the social, economic, cultural, ethical, and legal environment that regulates behaviour.⁵⁴ As another writer points out, ‘(t)he epidemiological and social character of the HIV/AIDS epidemic has meant that biomedical responses are entirely insufficient to any attempt to bring it under control . . .’.⁵⁵ Strategies to confront the epidemic therefore need to address controversial issues such as the legal status of people living with HIV/AIDS and of particularly vulnerable groups such as prostitutes, injecting drug users, homosexuals, and women and children.⁵⁶

A further relevant factor here is ‘the symbolic effect of legislation. Since HIV transmission is largely behaviour-related, behavioural and attitudinal changes play an important role’. HIV/AIDS-related law itself, and debates regarding this in public fora, in legislatures, and in the media, can serve to sensitise and educate people about this issue.

Moreover, although in some areas the impact of HIV/AIDS-related law is difficult to measure, in other areas it has had a measurable impact— e.g. law and policy mandating the screening of blood and blood products have, in many countries, eliminated this channel of HIV/AIDS transmission.⁵⁷

1) HIV/AIDS-Related Law – National Level

HIV/AIDS-related law (apparently found in over 150 legal jurisdictions in 1995⁵⁸) can be described as ‘that branch of the law that specifically addresses the problems, issues and challenges posed by the HIV epidemic’ by, *inter alia*: 1) regulating and supporting epidemiological surveillance and policy initiatives; ii) mandating interventions for healthier life-styles and other preventive measures (e.g. education, counselling, treatment, and disease management); iii) establishing norms of conduct and rights and duties of persons with HIV/AIDS as well as others, and iv) specifying quality and use of products such as blood, semen, organs, tissue, HIV test kits and condoms.⁵⁹

⁵⁴ D C Jayasuriya, ‘HIV Law: the Expanding Frontiers’, in D C Jayasuriya (ed.), *HIV Law, Ethics and Human Rights – Text and Materials*, (Delhi, UNDP, 1995), pp. 28-29.

⁵⁵ J Putzel, *Institutionalising an Emergency Response: HIV/AIDS and Governance in Uganda and Senegal: a report submitted to the Department for International Development* (London, May 2003), p. 27.

⁵⁶ *Ibid.*, p. 53, paras. 9 and 10.

⁵⁷ Jayasuriya (1995), pp. 28-29.

⁵⁸ *Ibid.*, p. 11. 1995 was the year of publication of this book. By now the majority of jurisdictions would have some such legislation.

⁵⁹ *Id.* Of these, the category most directly related to international human rights norms is iii) – although all the categories are relevant in the sense that they relate to the ‘right to the highest attainable standard of health’, as will be discussed further below.

Under the umbrella of these general categories, there are a number of key areas that have been the subject matter of specific HIV/AIDS-related legislation in different countries. These include provisions regarding: 1) regulation of sexual activity (i.e. through measures to restrict activity likely to spread the virus. These measures include registration systems and compulsory medical examinations, used in some jurisdictions for high-risk groups such as commercial sex workers.); 2) screening (here the debate regarding mandatory vs. voluntary screening - e.g. of pregnant women, marriage applicants, new-borns, prisoners - is still raging, although in some developing countries this debate is not relevant, due to the unavailability of adequate screening facilities); 3) regulation of blood and blood products (the main concern here is to protect the supply of blood by requiring screening tests and discouraging people with HIV/AIDS, or those engaged in high-risk activities, from donating blood. For similar reasons, regulations are in place concerning e.g. semen and human tissue.); 4) reporting and contact tracing systems (requiring, *inter alia*, notification of HIV seropositive cases); 5) detention, isolation and quarantine of HIV seropositive persons; 6) legal restrictions of HIV/AIDS infected persons (e.g. restricting occupation, or movement across borders); 7) criminal law (e.g. making it a criminal offence for a person aware of their HIV-affected status to donate blood, or have sex with another without disclosing their status and obtaining the consent of the other); 8) access to needles and syringes; 9) education and counselling; 10) pharmaceutical laws and clinical trials (e.g. addressing the problem that in some countries there is no proper regulation of clinical trials); 11) treatment, services and research (e.g. the issue of making drugs available to HIV/AIDS patients).⁶⁰

As regards the latter category, there has been some important litigation that has had an impact on the provision of HIV/AIDS medication in some contexts. This includes cases such as *Minister of Health and Others v Treatment Action Campaign and Others*, where the South African Constitutional Court held to be unconstitutional the government's policy of establishing only in certain locations a pilot project for the prevention of mother-to-child transmission of HIV at birth, and of restricting access to the drug in the public health sector.⁶¹ Another relevant case was *Pharmaceutical Society of South Africa (PSSA) and Others v Minister of Health and another*.⁶² This case against the South African government was ultimately dropped by the 39 top pharmaceutical firms that had sought to stop the importation and production of cheaper versions of patented drugs, including HIV/AIDS medication.

⁶⁰ Jayasuriya (1995) pp. 17-28.

⁶¹ 2002 (5) SA 721 (CC). Among other things, the government was ordered without delay to remove the restrictions on availability of the drug in public sector hospitals, to permit and facilitate the use of the drug, to make provision for training of counsellors in the public health sector on the use of the drug, and to take reasonable measures to extend testing and counselling facilities in the public health sector. (See e.g. M Heywood, 'Preventing Mother-to-Child HIV transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health' 19:2 *SAJHR* (2003) 278-315).

⁶² See *Pharmaceutical Society of South Africa and others v Minister of Health and another* (Case No: 4128/2004). See also *New Clicks SA (Pty) Ltd v Manto Tshabalala-Msimang N.O. and another* (Case No: 4329/2004).

Although further examination of these cases is beyond the scope of this research, it is worth noting that they did rely, among others, on arguments invoking human rights principles.

Indeed, under most of the categories listed above there have been cases taken, in a variety of jurisdictions, concerning the rights of people living with or affected by HIV/AIDS, e.g. regarding employment, housing, school attendance, or access to health care.⁶³ Again, such cases are not the focus of this research, but they do illustrate one of the functions of human rights law in relation to HIV/AIDS – i.e. to hold countries to account in court proceedings relating to their HIV/AIDS policies.

In addition to the general areas touched on above, there are other significant legal issues that come into play in the context of HIV/AIDS. Prominent among these are provisions addressing the status of especially vulnerable categories of people, including, as already mentioned, women, children, drug users, sex workers, and homosexuals. The Uganda study in Working Paper 2 will focus particularly on legal issues affecting women and children, and therefore these issues are highlighted below. In any event, as one writer emphasises, ‘women are both socially and physiologically more vulnerable to contracting HIV and the impact of the AIDS crisis on children . . . makes specific work focused on both of these groups an absolute necessity’.⁶⁴

2) HIV/AIDS-Related Policy – International Level

While national law in many countries may specifically regulate matters concerning women and children living with HIV/AIDS, there has also been a great deal of relevant international debate and policy on this and other HIV/AIDS-related issues, as will be outlined in the following sub-sections.

a) Women

As regards women, they may, in addition to biological factors, experience a wide array of challenges that can render them particularly susceptible to HIV/AIDS, and that can be addressed, in part, through legal channels. According, e.g., to the Beijing Platform for Action adopted at the Fourth World Conference on Women (Beijing, 1995),⁶⁵ women are more affected than men by HIV/AIDS due, among other things, to ‘lack of services to meet health needs related to sexuality and reproduction’, including as regards pregnancy, childbirth, family planning, etc. (para. 98). This document also identifies sexual and gender-based violence, social vulnerability and unequal power relationships between women and men as factors contributing to the high rate of HIV/AIDS infection in women

⁶³ See e.g., *Hoffman v South African Airways*, 2000 (11) BCLR 1211 (CC), regarding the policy of South African Airways (SAA) to refuse to employ people living with HIV. This was found by the Court to violate the Constitutional provision on equality and non-discrimination and SAA was ordered to retroactively employ the appellant.

⁶⁴ Putzel (2003), p. 43.

⁶⁵ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 Sept. 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). See also UNIFEM, *Gender, HIV and Human Rights: A Training Manual* (UNIFEM, New York, 2000), pp. 11 and 12.

(paras. 99 and 100), and calls for, *inter alia*, legislation ‘to protect women, adolescents and young girls from discrimination related to HIV/AIDS’ and ‘against those socio-cultural practices that contribute to’ women’s susceptibility to HIV infection (para. 109 (b)).

It has therefore been argued that it is necessary to see HIV/AIDS from a gender perspective,⁶⁶ and that it is not possible to address the problem of HIV/AIDS without tackling wider issues such as the inferior status of women.⁶⁷ In its General Recommendation (No 24) on Women and Health,⁶⁸ the UN Committee for the Elimination of Discrimination Against Women (established under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁶⁹) states that ‘the issue of HIV/AIDS and other sexually transmitted diseases are central to the rights of women and adolescent girls to sexual health’, since ‘in many countries they lack access to information and services for sexual health’. Further, as a result of ‘unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as female genital mutilation (f.g.m.), polygamy, and marital rape, may expose girls and women to the risk of contracting HIV/AIDS. Sex workers are also particularly vulnerable. States should therefore ensure the right to sexual health information for all women and girls, including those not legally resident in the country. In particular, states should ensure the rights of female and male adolescents to sexual health education by properly trained persons. . .’ (para. 18).

More specifically, by way of example one writer spells out the links between prostitution and the lack of economic opportunities for women, including, *inter alia*, that young women whose husbands are older men may become early widows under legal regimes excluding widows’ right to land or property. As widows, they can be perceived as burdens, and be unable to rejoin their birth families and unlikely to inherit from their birth families if they have brothers. Further, where survival depends on land, such women may not be able to support themselves if widowed – all of which may lead them to exchange sex for necessities. ‘Enforcement of laws of sexual and gender equality . . . would afford women opportunities in life that would reduce their vulnerability to HIV infection derived from a lifestyle of selling their bodies to which sex and gender discrimination may commit them.’⁷⁰

The UNAIDS ‘Handbook for Legislators on HIV/AIDS, Law and Human Rights’, argues that the ‘disproportionate impact of HIV/AIDS on vulnerable populations’ (including

⁶⁶ R J Cook, ‘Human Rights, HIV Infection and Women’, in Jayasuriya (1995) pp. 235-270, at p. 235

⁶⁷ J M Mann, ‘Human Rights and AIDS: The Future of the Pandemic’, in J M Mann, S Gruskin, M A Grodin, G J Annas (eds.), *Health and Human Rights: A Reader*, (New York and London, Routledge, 1999), pp. 221-222.

⁶⁸ UN Doc A/54/38 at 5 (1999) (Twentieth Session - 02/02/99) CEDAW General Recommendation No. 24: Women and Health (Article 12)). See also UN Doc E/C.12/2000/4 (Twenty-second Session 2000), General Comment No 14, The Right to the Highest Attainable Standard of Health, para. 21.

⁶⁹ Art. 17, Convention on the Elimination of All Forms of Discrimination against Women, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979).

⁷⁰ Cook (1995) p. 245-246.

women, children, the disabled, and homosexuals) ‘makes improvement of their legal status . . . critical if there is to be an effective response to the epidemic.’⁷¹ Concerning women, UNAIDS here argues that laws need to be reformed and reviewed to ensure, *inter alia*, equal treatment regarding: property (ownership, inheritance, entering into contracts, obtaining finance and credits); marital relations (marriage, separations and divorce, division of assets and child custody); equal remuneration for work of equal value; facilitating family responsibility (e.g. through maternity and paternity leave); protection from sexual violence, and choice regarding methods of birth control and determining the spacing of children.

This UNAIDS Handbook also makes the point that men must be seen as partners in the struggle against HIV/AIDS – i.e. in order to influence gender relations, men must also be involved.⁷² This crucial point is also made elsewhere, not least in the Beijing Platform for Action (e.g., para. 109 (c) and (e)).

b) Children

Thus the argument is that in many cultures their unequal status and relative powerlessness are among the key factors that render women both more vulnerable to contracting HIV in the first place, and less able to cope with its consequences once they have contracted the virus. Children and young people too may face similar challenges. Certainly the statistics are sobering.

A 2003 UN document asserted that: ‘the global AIDS epidemic overwhelmingly affects children and young people: of the 42 million people living with HIV, 3.2 million are children under the age of 15 years; of the 5 million people newly infected with HIV in 2002, 800,000 were children under 15 yrs old; of the 3.1 million AIDS deaths in 2002, 610,000 were children under the age of 15 years.’⁷³ In the same year, a UNAIDS report stated that 6000 young people (15-24) get infected every day (half of all new infections), that up to 60% of infections in women occur before the age of 20, and that about 11.8 million young people were living with HIV at the end of 2001 (7.3 million young women and 4.5 million young men – a figure that draws attention again to the particular susceptibility of women).⁷⁴

In its General Comment on HIV/AIDS and the Rights of the Child (2003)⁷⁵ – which is the first ‘General Comment’ on HIV/AIDS of any of the UN treaty-monitoring bodies - the

⁷¹ UNAIDS Handbook (2002), pp. 69-70. See also Putzel (2003) p. 43.

⁷² UNAIDS Handbook (2002) p. 93. See also UNIFEM (2000) p. 14.

⁷³ 59th Session of the United Nations Commission on Human Rights. Agenda Item 13: Rights of the Child (Geneva, 11 April 2003).

⁷⁴ UNAIDS, *HIV/AIDS and Young People: Hope for Tomorrow* (Geneva, UNAIDS, 2003). This document also points out that a factor in the high rate of infection among women and children in areas of armed conflict is that their rape is sometimes used as an instrument of war. Further, it states that ‘more than 14 million people have lost one or both parents to AIDS. They live in households led by children, live in the streets; they face greater risks of malnutrition and abuse than children orphaned by other causes.’

⁷⁵ UN Doc CRC/GC/2003/3 (2003), Committee on the Rights of the Child, General Comment No. 3, HIV/AIDS and the Rights of the Child, para. 2.

UN Committee on the Rights of the Child describes children as ‘at the heart of the HIV/AIDS problem’. It states that women, including young girls, are increasingly becoming infected, and that in most of world, infected women generally do not know their HIV status and unknowingly infect their children, resulting in an increase in infant mortality rates. Further, it notes that adolescents are particularly vulnerable to HIV/AIDS as their first sexual experiences may take place without access to proper information, and that children using drugs are at high risk of infection. The UNAIDS ‘Handbook for Legislators’ continues this theme, pointing out that factors increasing the vulnerability of children include ‘poverty, violence, lack of skills, and harmful social norms such as machismo and early sexual debut . . .’. It argues that ‘working in partnership with young people is the best hope of containing the epidemic’, as they are a resource for idealism and energy, and are not set in their ways.⁷⁶

The magnitude of the HIV/AIDS impact on children was also acknowledged by the UN General Assembly in 2002, in a resolution that summarised the outcome of the 2002 UN ‘Special Session on Children’ (the continuation of a process of monitoring and implementing specific programmes of action, initiated in the 1990 World Summit for Children). This 2002 resolution listed tackling HIV/AIDS as one of the Special Session’s four main goals, and set out a list of eight strategies and actions to be undertaken in this context, with specified deadlines.⁷⁷

Again, HIV/AIDS-related legislation can be used as part of a strategy to address some of the issues confronting children affected by HIV/AIDS. In its first meeting (2003), the UNAIDS Global Reference Group on HIV/AIDS and Human Rights argued that support for children from HIV/AIDS-affected communities requires increased attention to legal protection both at the national and international level. This group cited as an example the right to an identity, which comes into play when children orphaned by AIDS require proof of their identity if they are forced to fend for themselves regarding, e.g., inheritance, education and access to social services.⁷⁸ In this context, one writer points out that ‘(a)n important dimension of addressing the impact of the AIDS crisis is looking after what will continue to be a mounting number of orphans’.⁷⁹

The UNAIDS ‘Handbook for Legislators’ highlights certain ‘laws to be reviewed and reformed to ensure protection against HIV transmission’ of children. These include: freedom from trafficking, prostitution, and sexual exploitation; right to receive information and education on avoidance of HIV/AIDS and how to cope if infected; access to voluntary testing and counselling with consent of parents or children (according to the evolving capacity of children as they get older), and involving children in the implementation of programmes for them.⁸⁰

⁷⁶ UNAIDS Handbook (2002), p. 94.

⁷⁷ UN Doc A/RES/S-27/2 (11 Oct. 2002), A World Fit for Children, paras 45-47.

⁷⁸ UNAIDS, *Public Report – First Meeting of the UNAIDS Global Reference Group on HIV/AIDS and Human Rights*, (Geneva, UNAIDS, Jan. 23-24, 2003), p. 13.

⁷⁹ Putzel (2003) pp. 43-44. For a more detailed consideration of HIV/AIDS and orphans, see Barnett and Whiteside (2003), pp. 196-213 and 345-346.

⁸⁰ UNAIDS Handbook (2002), p. 69.

c) General

On the international level, there are a number of other major quasi-legal or policy directives generally addressing the issue of HIV/AIDS (in addition to those UN and UNAIDS initiatives already cited). Chief among these is the Outcome Document negotiated in the UN General Assembly Special Session on HIV/AIDS in June 2001 (hereafter UNGASS).⁸¹

Like most international documents, the UNGASS document represents the lowest common denominator for agreement, and has both strengths and weaknesses. One writer notes that it is vague on 'sensitive issues' (as with the 'Declaration on the Right to Development', and for similar reasons, such as the need for consensus), so that it should complement, but not substitute for, other more explicit national and international guidelines that set higher standards. This writer notes that the primary human rights focus of the document is on preventing and reducing the vulnerability of women and girls to HIV/AIDS. This document is described as 'far reaching' in recognising that access to medication in HIV/AIDS is a fundamental element of the right to the highest attainable standard of health (as articulated in certain key international legal treaties, described in the following section (Part II)).⁸²

The Outcome Document itself articulates a number of goals, under different headings, such as leadership (emphasising that strong leadership is essential for an effective response to the epidemic); prevention (e.g., setting various goals to be achieved by 2005, including ensuring availability of prevention programmes (para. 52), and reducing the proportion of HIV-infected infants by 20% (para. 54)), and human rights (e.g., setting the goal of 2005 for national strategies to promote women's human rights (para. 59), and for implementing national policies to provide for orphans (para. 65)). Then follows a section on 'Resources', stating that the HIV/AIDS challenge needs new resources, to be provided by, *inter alia*, developed countries meeting targets for contributions from GNP for development assistance, and the international community increasing international development assistance generally (paras. 83 and 84) – provisions that could come within a 'right to development' framework. The document concludes with guidelines for 'Follow-up' at the national level (e.g. to conduct national periodic reviews of progress achieved in realising these commitments (para. 94)); at the regional level (e.g. to include HIV/AIDS concerns on the agenda of regional meetings (para. 97)), and at the global level (e.g. to devote at least one full day annually for the General Assembly to review a report on progress achieved in realising these commitments (para. 99)). The latter process, under which the General Assembly can regularly review the progress of states regarding HIV/AIDS, plus the use of 'concrete targets', has been described by some

⁸¹ UN Doc A/RES/S-26/2 (2 Aug. 2001), Declaration of Commitment on HIV/AIDS.

⁸² S Gruskin 'The UN general assembly special session on HIV/AIDS: Were some lessons of the last 20 years ignored?', 92:3 *American Journal of Public Health* (Mar 2002) p. 337 *et seq.* As regards the right to health, Gruskin points out that international human rights law does not state that there is a right to treatment, but in the context of HIV/AIDS the right to health is interpreted to include governments' obligations to make drugs and treatment available to the maximum extent possible, and to progressively improve their ability to supply these.

writers as a ‘powerful tool’ strengthening a document that is not, in itself, legally binding.⁸³

In support of UNGASS, UNAIDS in June 2001 published a Global Strategy Framework (GSF) proposing various principles and leadership commitments to provide a ‘common strategic approach’ for achieving the UNGASS global targets.⁸⁴

Prior to the adoption of the UNGASS document and its linked GSF, a 1996 international consultation on HIV/AIDS and Human Rights (convened by UNAIDS and the UN High Commissioner for Human Rights) developed 12 ‘International Guidelines on HIV/AIDS and Human Rights’,⁸⁵ which aimed to clarify obligations relevant to HIV/AIDS that are contained in existing human rights instruments (such as the Universal Declaration of Human Rights⁸⁶). The 2002 ‘Handbook for Legislators’, mentioned above, attempted to translate these Guidelines into concrete plans of action for lawmakers and others involved in policy, with examples of good practice. It is not necessary here to explore these Guidelines, but it is worth noting that they cover many of the issues already discussed.⁸⁷

3) Concluding Comments – Part I (B)

As mentioned at the start of this section (Part I (B)), there is a plethora of law and policy explicitly regarding HIV/AIDS, as is evident from the above. It is worth noting certain features of these many documents.

One is that the vague and aspirational nature of some of the international documents, in particular, can be problematic. Among other things, there is the obvious drawback that statements of that kind are by definition difficult to interpret and to implement.⁸⁸

Another problem has already been identified in Part I (A) of this paper – i.e. the lack of clarity about the meaning of some of the language of human rights. It is worth noting

⁸³ D Patterson and L London, ‘International Law, Human Rights and HIV/AIDS’, 80:12 *Bulletin of the World Health Organization* (2002) 964-969, at p. 996.

⁸⁴ UNAIDS, *The Global Strategy Framework* (Geneva, UNAIDS, 2001). As regards its ‘Guiding Principles’, it states that it is ‘founded on the respect, protection and fulfilment of human rights’ (p. 2). It outlines a number of ‘Lessons Learned’ (pp 3-7, e.g. the perhaps rather obvious lesson that the major impact of the pandemic is yet to come), and it proposes an ‘. . . Expanded Response to the Epidemic’ (pp. 8-12, including through supportive legal and social norms to reduce vulnerability). It concludes with 12 ‘Leadership Commitments’ (pp 14-15), such as, again, developing relevant legislation and policies, and addressing the needs of children and women.

⁸⁵ One of these – Guideline 6, on ‘Access to Prevention, Treatment, Care and Support’, was revised in 2002 to take account of changes in this area. See OCHR and UNAIDS, ‘*HIV/AIDS and Human Rights - International Guidelines: Third International Consultation on HIV/AIDS and Human Rights*’ (Geneva, 25-26 July 2002).

⁸⁶ GA res. 217A (III), UN Doc A/810 at 71 (1948).

⁸⁷ These include: Public Health Legislation (Guideline 3); Criminal Laws and Correctional Systems (Guideline 4); Anti-discrimination and Protective Laws (Guideline 5); Legal Support Services (Guideline 7); Women, Children and other Vulnerable Populations (Guideline 8); State Monitoring and Enforcement of Human Rights (Guideline 11), and International Cooperation (Guideline 12).

⁸⁸ However, documents such as the GSF are an attempt to articulate a plan of action for the aims of UNGASS, and the UNAIDS Handbook for Legislators has a similar aim as regards the 12 Guidelines.

here an interesting discussion that took place in Geneva in 2003, at the first meeting of the UNAIDS Global Reference Group on HIV/AIDS and Human Rights.⁸⁹ This highlighted the fact that there is considerable confusion regarding the meaning of ‘human rights’, and that this term can cover a wide range of ill-defined and sometimes contradictory notions. The meeting started by noting that ‘the integration of human rights to HIV/AIDS work is under attack; there is a need to highlight the effectiveness of the ways in which the connection between HIV/AIDS and human rights are being understood and work’, and that this was the reason the Global Reference Group had been established (p. 3). This Group went on to discuss five agreed frameworks within which to address HIV/AIDS in relation to human rights, including a legal framework (pp. 4-5). Most striking, however, were a number of issues raised as ‘impediments in advancing HIV/AIDS and human rights’ (pp. 6-9), including the fact that the ‘lack of evidence and documentation . . . of the value of integrating human rights in the response to HIV/AIDS is proving to be an obstacle in ensuring the integration of human rights in governmental and UN HIV/AIDS efforts’; that there was a ‘lack of unified understanding of what is meant by a rights-based approach to HIV/AIDS’, and that the ‘lack of general understanding of human rights (what they include, what they do not, how they operate etc.) is an impediment in bringing human rights into HIV/AIDS work’. These issues will be touched on again below.

A further problem particularly with the international documents outlined above is that some of these set out seemingly conflicting demands, e.g., to grant ‘full enjoyment of all human rights’ to women while at the same time respecting cultural diversity.⁹⁰ One of the challenges of international law, when applied in national law, is somehow to bridge this gap – and it is here that the tensions inherent in cultural relativity comes into play, as will be discussed more fully in Working Paper 2. Suffice it to say here that in some countries the notion of conforming with many international human rights law principles is highly controversial, and destabilising to traditional norms. However, in the context of the HIV/AIDS crisis decisions are being made in some of these countries that tradition needs to give way on occasion to the imperatives of public health, and this may include recognition of hitherto unpopular human rights principles (such as gender equality).

The theme of seemingly conflicting rights is repeated throughout the discourse linking HIV/AIDS and human rights law, and is indeed an inherent feature of law itself, in the sense that almost all rules have exceptions, and most obligations have limitations, and rights of one group of people often have to be balanced against rights of others (see above, Part I (A), where the example is given of conflicting interests as regards dam construction). International human rights law explicitly allows for exceptions, e.g. on the grounds of public health, (although these have to meet the criteria that, *inter alia*, the particular action has to be taken in accordance with the national law, it has to be in the interests of a legitimate objective, it has to be strictly necessary to achieve this goal, it

⁸⁹ UNAIDS (Jan. 23-24, 2003).

⁹⁰ See e.g., UNGASS document (2001) para. 59, regarding the rights of women, and para. 20, which explicitly recognises the important role, in addressing HIV/AIDS, of, *inter alia*, ‘culture’ and of ‘taking into account the particularities of each country as well as the importance of respecting all human rights and fundamental freedoms’.

must be the least restrictive alternative, and it must not be imposed in an unreasonable or discriminatory way).⁹¹ As one writer puts it, ‘restricting human rights requires a balance to be made between the benefits to be expected from the restrictive measure and the adverse consequences for the persons concerned, as well as the public interest in the free exercise of the right in question.’⁹² This ‘balancing act’ is evident in much of the HIV/AIDS-related legislation – e.g. in provisions allowing for breach of medical confidentiality in certain cases concerning people with HIV/AIDS.

Perhaps the most hotly contested debate of this kind as regards HIV/AIDS is that between those who argue for the strict application of human rights principles for people living with HIV/AIDS (including rights to confidentiality, to voluntary treatment, etc.) and those who feel that a more coercive regime may be preferable in the interests of the majority population.⁹³ As one writer states: ‘There is a tension between the principles of democracy and the respect for individual rights on the one hand and the imperatives of securing public health on the other and polities need to be open to considering more compulsory measures where conditions warrant and capacity exists to engage in this constructively’.⁹⁴ It is beyond the scope of the present research to explore in depth this dilemma as it relates to human rights law, but it will be touched on again in the conclusion to this Working Paper.

Part II - International Human Rights Law Regime

Most of the debates and documents linking international law with development (Part I (A) above) and those linking national and international law and policy with HIV/AIDS (Part I (B)) are, to a considerable extent, both derived from and a reflection of international human rights law. This section of the research (Part II) will therefore briefly examine the salient features of the system of international human rights law in this context.

⁹¹ See D Tarantola and S Gruskin, ‘Children Confronting HIV/AIDS: Charting the Confluence of Rights and Health’, 3:1 *Health and Human Rights*, pp. 61-86, at p. 71. More specifically, see ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, UN Doc E/CN.4/1985/4, Annex. See also, the 1966 International Covenant on Economic, Social and Cultural Rights (GA res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3 (1966)), Art 4, which provides that some rights can be restricted only ‘as far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’.

⁹² M Maluwa ‘Law, HIV/AIDS and Human Rights’, *AFLA Quarterly* (Jan. – March 2001) 1-13, at p. 4.

⁹³ See e.g. T Allen and S Heald, ‘HIV/AIDS Policy in Africa: What Has Worked in Uganda and What Has Failed in Botswana?’ 16 *Journal of International Development*, (2004) 1-14, at p. 12. This point is also discussed as a ‘dilemma’ in G Prins, ‘Moral and Consequent Dilemmas Raised by the AIDS Pandemic with Special Reference to South Africa’ (Paper presented to Crisis States Programme Seminar, London School of Economics, 20 Oct. 2004) pp. 3-5.

⁹⁴ Putzel (2003), p. iv. See also *Ibid* pp. 3, 39-40, 49 and 53. However, other writers consider that there is an increasingly accepted ‘basic, inextricable link between promoting and protecting human rights and health’, which serves as a ‘new basis for action’ as regards, *inter alia*, HIV/AIDS. S Gruskin, A Hendriks and K Tomasevski, ‘Human Rights and Responses to HIV/AIDS’, in J M Mann and D J M. Tarantola (eds.) *AIDS in the World II: Global Dimensions, Social Roots, and Responses* (New York, Oxford University Press, 1996) 326-340, p. 326.

There is much literature on the history, structure, and content of international human rights law and its implementation mechanisms, which can be found elsewhere.⁹⁵ The aim here is simply to shed light on this legal regime in relation to HIV/AIDS, and, more specifically, to explore the possibility that international human rights law now forms a legal underpinning which most states in the world subscribe to (at least to the extent that they have ratified relevant treaties), and which provides a legal framework relevant to the HIV/AIDS pandemic even in countries (such as Uganda) that apparently lack explicit HIV/AIDS-related law.

A) International Human Rights Regime: Framework

As already mentioned in Part I (A), human rights are not necessarily legal rights – they are, in the words of a renowned human rights lawyer, ‘rights which all persons hold by virtue of the human condition. They are thus not dependent upon grant or permission of the state and they cannot be withdrawn by fiat of the state.’⁹⁶ Human rights become legal rights when they find expression in legal documents such as international treaties and domestic law, or are so well established that they form part of international customary law.⁹⁷ The content of international human rights law is most clearly set out in various international treaties, and this brief overview of the relevant law will therefore focus on these.⁹⁸

The Charter of the UN makes a number of references to the importance of human rights, e.g. in its Article 1(3), where one of the purposes of the UN is stated to be: ‘To achieve international co-operation in solving international problems . . . and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion’. However, the Charter does not contain much detail on the content of ‘human rights’, and this was left to be further elaborated in subsequent legal and quasi-legal documents.

Key among these were the documents that became known as the international Bill of Human Rights, generally accepted as comprising the Universal Declaration of Human Rights (1948 - UDHR); the International Covenant on Economic, Social and Cultural Rights (1966 - ICESCR); the International Covenant on Civil and Political Rights (1966 – ICCPR) and its First Optional Protocol ((1966) - granting those within the jurisdiction

⁹⁵ See e.g., J Donnelly, *International Human Rights*, 2nd ed (Boulder, Colorado, Westview Press, 1998), and Steiner and Alston, (2000).

⁹⁶ This was the simple formulation used by Professor R Higgins in her LLM teaching. See R Higgins, ‘Human Rights’, in *International Protection of Human Rights, LLM Course Materials, Vol 1, Part I* (London, LSE, 1997/8).

⁹⁷ International customary law is defined in Art 38 of the Statute of the International Court of Justice as ‘evidence of a general practice accepted as law’. Thus, customary law is widely (although not universally) regarded as consisting of two main elements: the material facts as represented by the actual behaviour of states, and the subjective belief that such behaviour is required by law. See e.g., R Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press, 1994), p. 19.

⁹⁸ Where not otherwise stated, the information in this sub-section on the ‘human rights regime framework’ is based on T van Boven, ‘The International System of Human Rights: An Overview’, *UN Manual on Human Rights Reporting* (New York, UN, 1997), pp. 3-16.

of ratifying states the right of individual petition (see below)).⁹⁹ Of these, the ICESCR and the ICCPR in particular are very widely ratified,¹⁰⁰ and the UDHR, although only a UN resolution and therefore not binding as such, contains a number of provisions (such as its non-discrimination clause (Article 2)) that are now generally considered to be incorporated into international customary law.¹⁰¹

Most of the human rights elaborated in these and other treaties are ‘individual rights’, in that they make the individual human being the main beneficiary of the rights, as opposed to ‘collective rights’ which apply to large groups of people. (It is worth noting there that some writers classify the ‘right to development’ as one of the ‘collective rights’.¹⁰²)

In addition to the human rights instruments mentioned above as the Bill of Rights, there are other general human rights instruments that have a regional, rather than a global, focus. These include the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR - 1950); the American Convention on Human Rights (ACHR - 1969), and the African Charter on Human and Peoples’ Rights (ACHPR - 1981).¹⁰³ These general regional treaties will not be discussed in this research, with the exception of the ACHPR, since the focus here is on global international law (Working Paper 1), and law relevant to Uganda (Working Paper 2).

Along with the general human rights documents, there are also numerous international human rights treaties that have a more specific focus. These include instruments that aim to provide protection against, *inter alia*, gender, age-related, cultural and racial discrimination, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979 – CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination (1963 – CERD), and the United Nations Convention on the Rights of the Child (1989 – CRC).¹⁰⁴ There are also a number of ILO conventions concerning workers’ rights.¹⁰⁵ Others of the more specialised treaties address the issue of major violations of international law, defining these and setting out government obligations to deter and punish perpetrators. These include the Convention

⁹⁹ Optional Protocol to the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc A/6316 (1966), 999 UNTS 302 (1966).

¹⁰⁰ The ICCPR had 154 ratifications and the ICESCR 151 ratifications on 24 Nov. 2004.

¹⁰¹ Regarding the customary law status of the UDHR, see e.g., H Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ 25:1&2 *Georgia Journal of International and Comparative Law* (1995/1996), pp. 287-397 at p. 340, and J Humphrey *No Distant Millennium: The International Law of Human Rights* (Paris, UNESCO, 1989), pp. 155 and 164.

¹⁰² See e.g. van Boven (1997), pp. 5-7

¹⁰³ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, amended by Protocols Nos 3, 5, 8, and 11 (1951); American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS (1969); African [Banjul] Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

¹⁰⁴ International Convention on the Elimination of All Forms of Racial Discrimination, GA res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014, 660 UNTS 195 (1965), and Convention on the Rights of the Child, GA res 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989)..

¹⁰⁵ See e.g., Convention no 111 on Discrimination (Employment and Occupation), ILC, 42nd session, Geneva (1958) and Convention no 182 on the Worst Forms of Child Labour, ILC, 87th session, Geneva (1999).

Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984 – CAT); the Convention on the Prevention and Punishment of the Crime of Genocide (1948 – the Genocide Convention), and the recent Statute of the International Criminal Court (ICC) (1998).¹⁰⁶

Of the above-mentioned documents, those that are most relevant to this research are those comprising the international Bill of Rights, plus CEDAW and the CRC.

In the African context, the relevant treaties are the ACHPR, the African Charter on the Rights and Welfare of the Child (1999 – ACRWC); the Protocol to the ACHPR on the Rights of Women in Africa (ACHPR Protocol, recently adopted but not yet in force), and the subsequent (non-binding) African Union’s ‘Solemn Declaration on Gender Equality in Africa’.¹⁰⁷ As already noted in Part I (A), the ACHPR is the only general international human rights treaty to articulate a ‘right to development’, and the Protocol to the ACHPR provides for a right to ‘sustainable development’ for women (Article 19).

B) International Human Rights Regime: Content

Although there are no binding international human rights treaties that specifically focus on HIV/AIDS, such treaties do contain numerous principles relevant to this issue. In addition, as mentioned in Part I (B), governments have repeatedly made political commitments regarding HIV/AIDS in, e.g., UN resolutions and declarations, and concluding documents of international conferences.

Among the many human rights principles identified as relevant to HIV/AIDS, and found in the documents outlined below, are the following: the right to non-discrimination, equal protection and equality before the law; the right to life; the right to the highest attainable standard of physical and mental health; the rights of women and children; the right to liberty and security of person; the right to freedom of movement; the right to seek and enjoy asylum; the right to privacy; the right to freedom of opinion and expression and the right to freely receive and impart information; the right to freedom of association; the right to work; the right to marry and found a family; the right to equal access to education; the right to an adequate standard of living; the right to social security, assistance and welfare; the right to share in scientific advancement and its benefits; the

¹⁰⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, annex, 39 UN GAOR Supp (No. 51) at 197, UN Doc A/39/51 (1984); Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948) Rome Statute of the International Criminal Court, UN Doc 2187 UNTS 90 (1998).

¹⁰⁷ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990); Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July – 13. Aug. 2003; Solemn Declaration on Gender Equality in Africa, Assembly of the African Union Third Ordinary Session 6 – 8 July 2004, Addis Ababa, Ethiopia.

right to participate in public and cultural life; the right to be free from torture and cruel, inhuman or degrading treatment or punishment.¹⁰⁸

Various UN documents and other sources stress that, in the HIV/AIDS context, the pertinent rights should not be considered in isolation but are interdependent.¹⁰⁹ Further, the issue of cultural relativity appears again in this context, since it is suggested that, in the application of human rights relating to HIV/AIDS, ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be remembered. It remains the duty of States, however, to promote and protect all human rights within their cultural contexts.’¹¹⁰

As already indicated, almost all international human rights rules are subject to limitations, and it is important to note that this body of law is also subject to the concept of a ‘margin of discretion’. According to this concept, countries are allowed (e.g. in cases before international courts) leeway as to how they interpret or apply particular human rights provisions, and are thereby granted ‘a margin of discretion’ that takes account of their specific circumstances.

Different writers highlight slightly different human rights provisions as relevant in relation to HIV/AIDS, and it is not necessary for the purposes of this research to examine each treaty and its articles in greater detail. However, while all the rights listed above are considered important in this context, it is worth expanding briefly below on a few of these that are particularly significant to this research. These are: the right to health, the rights of children, the rights of women, and the principle of non-discrimination.

1) The Right to Health

International human rights law formulates the right to health as the right to ‘the highest attainable standard of physical and mental health’, as in Article 12 of the ICESCR. Under this Article, this right further comprises, *inter alia*, ‘the prevention, treatment and control of epidemic ... diseases’ and ‘the creation of conditions which would assure to all medical service and medical attention in the event of sickness’. Provisions concerning the right to health are also found in, among others, the UDHR (Article 25 (1)), and both global and regional treaties on the rights of women and of children. Every country in the world is currently party to at least one human rights treaty that calls for the provision of health-related rights.¹¹¹ The WHO has defined ‘health’ as ‘a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity’.¹¹²

¹⁰⁸ This is the list cited in UN Doc E/CN.4/1997/37, International Guidelines on HIV/AIDS and Human Rights. See also Maluwa (2001), pp. 5-10, and UNAIDS Handbook (2002), p. 26.

¹⁰⁹ See e.g. UN Doc E/CN.4/1997/37, and Gruskin (2001), who states that ‘the extent to which governments respect, protect and fulfil all rights, civil, political, economic, social and cultural, is relevant both to who gets ill and to what is done about it’.

¹¹⁰ UN Doc E/CN.4/1997/37. See also, e.g., R Bayer and L O Gostin, ‘Aids and Ethics’, in Jayasuriya (1995), pp. 271-294, at p. 273.

¹¹¹ Gruskin (2001).

¹¹² Constitution of the World Health Organisation, UNTS 14 (1946).

Government obligations pertinent to HIV/AIDS under this heading include, *inter alia*, the provision of HIV/AIDS-related information, education and support, including access to means of prevention (such as condoms and clean injecting equipment); the provision of testing with pre- and post-test counselling, and the provision of a safe blood supply and access, as far as possible, to treatment and drugs.

The principle of ‘progressive realisation’ applies to these obligations, i.e. the principle that governments must fulfil them to the maximum extent possible, taking into account their particular capacity and resources, while nonetheless progressively improving their performance.

The right to health is clearly a key human right relevant to HIV/AIDS, and the Committee established under the ICESCR has, in its ‘General Comment’ on the right to health, described health as the fundamental human right indispensable for the exercise of other human rights.¹¹³

2) Human Rights of Children

As regards the particular entitlements of children, the main general global and regional human rights treaties all contain at least one child-specific article. In addition, there are, as mentioned above, two international treaties that focus exclusively on a broad spectrum of child rights: i.e. the CRC and the ACRWC. All of these treaties – the general and the specific – make it clear that children are entitled to most of the human rights granted to adults, and, in addition, they are entitled to specific rights by virtue of their particular requirements as children.

Many of the rights articulated are pertinent to HIV/AIDS prevention, and include those general rights already listed above, as well as others, such as those prohibiting child trafficking and sexual abuse, and providing for the care of orphans. In its General Comment on HIV/AIDS and the Rights of the Child, the Committee on the Rights of the Child emphasised that HIV/AIDS is seen as mainly a medical or health problem, but it involves a much wider range of issues. While the Committee described the right to health (Article 24) as central, it stressed that HIV/AIDS impacts heavily on children and affects all rights – political, civil, economic, social, and cultural (para. 5).¹¹⁴

¹¹³ UN Doc E/C.12/2000/4 (Twenty-second Session 2000), General Comment No 14, The Right to the Highest Attainable Standard of Health, para. 1. This Committee also describes the right to health as ‘closely related to and dependent on the realisation of other human rights – as contained in the International Bill of Rights’ (para 3). Further, it emphasises that the right to health implies certain essential elements, which are: availability (including functioning public health facilities, goods and services); accessibility (including non-discrimination, and physical, economic and information accessibility); acceptability (including that health facilities must be respectful of medical ethics and culturally appropriate), quality (including that health facilities must be scientifically and medically appropriate and of good quality) (para 12).

¹¹⁴ UN Doc. CRC/GC/2003/3 (2003), para. 5. This General Comment also specified the rights that are considered most relevant to children in the context of HIV/AIDS.

Both the CRC (Article 1) and the ACRWC (Article 2) set the upper age limit for childhood at 18, although in the CRC the definition is qualified to some extent,¹¹⁵ while in the ACRWC it is absolute.

Certain key rights have been identified as underpinning all other rights in the CRC. These are the principle of non-discrimination (Article 2), the requirement that the best interests of the child should be a primary consideration in all actions concerning children (Article 3), the right to life (or, more accurately, the right not to be arbitrarily deprived of life) (Article 6), and the right of children to express their views on matters affecting them (Article 12).¹¹⁶ These key rights are seen as useful for conceptualising the nature of the rights of children in relation to HIV/AIDS: i.e. they are rights-holders and agents in own lives, and at same time, depending on their level of maturity, vulnerable and requiring special protection.¹¹⁷

One authority categorises children confronting HIV/AIDS as those infected, affected (e.g. by the impact of HIV/AIDS on their family or community) and/or vulnerable (by virtue of, *inter alia*, growing up and becoming sexually active in a world with HIV/AIDS).¹¹⁸ Interestingly, reference is also made here to the problems posed - for devising and implementing HIV/AIDS policy (e.g. in identifying population subsets for service provision) - by the fact that, *inter alia*: a) the international definition of a child generally specifies the upper age limit of 18, while epidemiological surveillance uses age ranges from 0-14, and 15-18 year olds are included in the 15-49 adult category, and b) different countries set very different legal standards as the age of consent for consensual sex, and these standards may again differ between same-sex (where this is permitted) and heterosexual relationships.¹¹⁹

3) Human Rights of Women

As with children, the main general international human rights treaties contain reference to the particular rights of women and, in addition, there are specific treaties concerning the legal entitlements of women. The main relevant treaties in the latter context are CEDAW and the ACHPR Protocol. The former is quite widely ratified,¹²⁰ but the latter was only adopted in the middle of 2003, and is not yet in force. The 'Solemn Declaration on Gender Equality in Africa' of the African Union recently (July 2004) encouraged support for the ACHPR Protocol.¹²¹

¹¹⁵ According to the CRC, a child is 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier' (thus, an earlier age limit is possible).

¹¹⁶ See e.g. UN Doc CRC/GC/2003/3 (2003), para. 5.

¹¹⁷ D Tarantola and S Gruskin (1998) pp. 61-86, at p. 66.

¹¹⁸ *Ibid*, pp. 62-64.

¹¹⁹ *Ibid*, pp. 71-74.

¹²⁰ CEDAW had 179 ratifications on 20 Oct. 2004 (see OHCHR website)

¹²¹ This also called for the establishment of AIDS Watch Africa as a unit within the office of the chairperson of the Commission, to provide an annual report on the HIV/AIDS situation in the continent and to promote local production of anti-retroviral drugs (Art 10).

As already noted in Part I (B) above, women are disproportionately vulnerable to HIV/AIDS. A key human right principle here is, again, their right to ‘the highest attainable’ standard of health, as inter-related with other rights including the right to life and survival, to freedom from ill-treatment, to marry and found a family, to freedom of expression, etc.¹²² However, the point has already been made in Part I (B) that access to information and services for women is inadequate in reducing their vulnerability to HIV/AIDS, and attention must be given to the wider issue of discrimination against them in all areas, and to the protection of their sexual and reproductive rights.¹²³

4) Non-Discrimination

Another key feature of the international human rights regime in relation to HIV/AIDS is the principle (found in all the main international human rights documents) of non-discrimination – i.e. the notion of equal protection before the law, and freedom from discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In the context of HIV/AIDS, a number of international organisations and others view discrimination on any of these grounds as not only wrong in itself but also as creating and sustaining conditions leading to greater vulnerability to infection by HIV,¹²⁴ in that it both increases the likelihood of infection (e.g. by denying access to preventive information and support) and decreases capacity to cope once infected (e.g. by limiting access to care and treatment). As already discussed, women and children (as well as, among others, homosexuals and injecting drug users) are among those considered to be at particular risk of discrimination.

Under the umbrella of ‘non-discrimination’ is the contentious issue of the right of people living with or affected by HIV/AIDS to be free from discrimination in relation to confidential access to health care, freedom of movement, etc. In this context, it is worth noting that the Commission on Human Rights has confirmed, in a number of resolutions, that where international law prohibits discrimination based, *inter alia*, on ‘other status’, this term is to be interpreted as prohibiting discrimination related to health status, including HIV/AIDS status.¹²⁵

That said, as already indicated in Part I (B) above, the right to non-discrimination, like many human rights, is not absolute and may be modified – in accordance with strict criteria – including on grounds of public health. The Human Rights Committee (see below) has also confirmed that ‘the enjoyment of rights and freedoms on an equal footing

¹²² See e.g. Cook, in Jayasuriya (1995), pp. 245-264.

¹²³ See e.g. UN Doc E/CN.4/1997/37, which reiterates various issues affecting women, such as their inability in some contexts to negotiate safer sex or to avoid HIV-related consequences of the sexual practices of their husband or partners, as a result of social and sexual subordination, economic dependence and cultural attitudes.

¹²⁴ *Ibid.* And see e.g. UNAIDS, *A Conceptual Framework and Basis for Action: HIV/AIDS Stigma and Discrimination* (Geneva, Nov 2002).

¹²⁵ See, *inter alia*, Commission on Human Rights Resolutions 1995/44 of 3 March 1995, 1996/43 of 19 April 1996 and 2003/47 of 23 April 2003 concerning the protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS).

... does not mean identical treatment in every instance'. Further, while the right to equal protection of the law prohibits discrimination in law or in practice in any fields regulated and protected by public authorities, a difference in treatment is not necessarily discriminatory if it is based on reasonable and objective criteria.¹²⁶

C) International Human Rights Regime: Implementation

International law in general, and perhaps international human rights law in particular, are often perceived as made up of imprecise standards that have 'no teeth'. To some extent this is an accurate perception, but it is not altogether so.

There are in fact many implementation mechanisms, both formal and informal, that make up the international human rights system, and some of these do on occasion influence state practice, and hence the lives of those in the jurisdiction of that state, as will be indicated below.¹²⁷

Governments that ratify international human rights treaties undertake, in so doing, to provide conditions within their countries that enable the fullest possible realisation of those right. This is understood as an obligation on the part of governments to respect (i.e. to refrain from directly violating the rights in question), to protect (i.e. to prevent violations by non-state actors, and to provide legal means of redress if violations do occur) and to fulfil (i.e. to take the necessary administrative, legislative, budgetary, etc. measures) the particular rights.¹²⁸

To encourage governments to accomplish these tasks, human rights treaties generally have a supervisory system, frequently in the form of a reporting procedure that requires states – at prescribed intervals of e.g. four or five years – to submit reports on their progress in implementing particular treaties (i.e. a regular supervisory system). State representatives normally present their reports in person to the relevant Committee, and, after dialogue with the representatives, the Committee may ask for additional information and it will issue its 'Concluding Observations' on the report, and its recommendations for future action. In recent years, various human rights treaty-monitoring bodies¹²⁹ have increasingly made specific comments and recommendations to states regarding their particular HIV/AIDS situation. For example, both the Human Rights Committee and the Committee on the Rights of the Child have made such recommendations to Uganda.¹³⁰

¹²⁶ Human Rights Committee, General Comment No. 18, Non-discrimination (Thirty-seventh Session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI\GEN\1\Rev.1 at 26 (1994), paras. 8 and 13.

¹²⁷ The relationship of international law to national law can be complex. Suffice it to say here that in some jurisdictions international legal obligations accepted by the state are considered to be directly applicable within the state, and to take precedence over national law. In others, international legal obligations need to be explicitly incorporated by the creation of new national law, but national law is in any event interpreted as far as possible to be compatible with the international obligations.

¹²⁸ See e.g. Tarantola and Gruskin (1998), pp. 67-69.

¹²⁹ These are committees of independent experts that monitor implementation of core international human rights treaties. They are created in accordance with the provisions of the treaty that they monitor.

¹³⁰ See UN Doc CCPR/CO/80/UGA. Concluding Observations of the Human Rights Committee: Uganda. 04/05/2004, para. 14, and UN Doc CRC/C/15/Add.80, Concluding Observations of the Committee on the

There are also special supervisory procedures, such as the consideration of individual complaints or ‘communications’ made to the relevant treaty-monitoring body, the consideration of inter-state complaints, and/or independent inquiry procedures (i.e. inquiries instigated by the monitoring body itself). Treaty monitoring bodies can also initiate the appointment of ‘special rapporteurs’ – i.e. experts who can provide information and recommendations on particular issues (e.g. education), or on particular countries. Further, the treaty monitoring bodies can, *inter alia*, issue ‘General Comments’ (to assist states in interpreting the content of particular treaties, and/or in understanding the methods of work of the particular Committee) and they may also hold ‘days of discussion’ on particular themes.¹³¹ The Committee on the Rights of the Child has undertaken the latter two activities focussing on children and HIV/AIDS.¹³²

There are currently seven global human rights treaty-monitoring bodies. For the purposes of this research, the most relevant are those established under the ICCPR (the Human Rights Committee); the ICESCR; the CRC and CEDAW.¹³³ Of these, two are empowered, under certain conditions, to hear individual complaints: i.e. the Human Rights Committee, and the Committee established under CEDAW. To date, a few HIV/AIDS-related individual complaints have been made to these bodies. For example, in 1994 the Human Rights Committee found that Australia, in an effort to prevent the spread of HIV/AIDS, had unreasonably violated the right to privacy in enacting laws to criminalise private homosexual acts between consenting adults.¹³⁴

As regards implementation of human rights treaties in Africa, the ACHPR established a Commission on Human and Peoples’ Rights in 1987, one year after the ACHPR entered into force. Its role includes promoting (e.g. by collecting data, organising seminars,

Rights of the Child: Uganda. 21/10/97, paras. 5, 6, 7 and 32. A 1998 study of the Concluding Observations of four human rights treaty-monitoring committees showed HIV/AIDS was mentioned in 24% of a total 211 reports between 1993 and 1998 (Whelan, D. International Center for Research on Women ‘A Human Rights Approach to Reducing Women’s Vulnerability to HIV/AIDS’, paper presented at XIIth International Conference on AIDS, Geneva, July 1998).

¹³¹ In recent years there has also been increasing emphasis on trying to mainstream HIV/AIDS into the various UN human rights mechanisms, including by encouraging the human rights treaty bodies to pay particular attention to HIV/AIDS-related rights when considering country reports, and all special rapporteurs to integrate the issue of HIV/AIDS into their mandates. See e.g. UNAIDS, ‘HIV/AIDS and Human Rights: Report of Outcomes of The 59th Session of the UN Commission on Human Rights’ (17 March – 25 April 2003).

¹³² See CRC General Comment 3, and Day of Discussion (CRC, ‘Children Living in a World with AIDS’, General discussion day, CRC/C/79 Annex VI, 19th session, 5 Oct. 1998).

¹³³ The other three are those established under CAT, CERD and the Migrant Workers Convention (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 Dec. 1990)

¹³⁴ Human Rights Committee, Communication No. 488/1991, *Nicholas Toonen v. Australia* (views adopted on 31 March 1994, fiftieth session). Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX EE, para. 8.5. A similar case was decided by the European Court of Human Rights (ECHR), in relation to Ireland: ECHR decision, *X v Ireland*, 6/1987/129/180 (Oct. 28, 1988). See also Gruskin, Hendriks and Tomasevski, (1996) pp. 333-334.

initiating legal reforms) and protecting human rights.¹³⁵ However, all its work is non-binding. The Commission may receive inter-state communications, and communications submitted by non-state actors, although their response to these is limited to issuing reports and non-binding recommendations. The ACHPR also receives reports submitted by States parties every two years.¹³⁶

There is also an African Committee on the Rights and Welfare of the Child, newly established (its first meetings were held in 2002). Its role is primarily to promote and protect the rights and welfare of the child, and to monitor the implementation and give interpretations of the ACRWC. States that are party to this Charter have to submit reports, every 3 years, on their implementation measures. Unlike the UN Committee on the Rights of the Child, the ACRWC Committee is empowered to receive communications from any person, group or NGO, and it may investigate any matter falling within the Charter. It therefore has fairly wide powers of investigation and of independent action, but its ability to employ these is yet to be tested, and it is already showing signs of strain in terms of a lack of resources.

In addition to these two African implementation mechanisms, there is also an African Court on Human and Peoples' Rights, created under a Protocol to the ACHPR,¹³⁷ which entered into force on 25 January 2004. The aim of this Court, which is obviously still in its infancy, is to complement the protective mandate of the ACHPR by rendering binding decisions in any dispute or case concerning the interpretation and application of the Charter, the Protocol, or any other human right instrument ratified by the state concerned. Cases may generally be submitted to this court by the African Commission or by states, but NGOs and individuals may institute cases under certain conditions. The Court may also render an advisory opinion, in some situations. The exact relationship between the Court and the Commission remains to be seen.¹³⁸

D) Concluding Comments – Part II

Under the various implementation mechanisms, both in the international and in the African context, people living with HIV/AIDS could therefore, for example, take complaints alleging inappropriate discrimination to either the Human Rights Committee, and/or, regarding gender issues, to the CEDAW Committee, if their governments have ratified the necessary treaties. In Africa, cases could be taken to the African Court when this is operational, and/or, as regards children, complaints could be made to the ACRWC

¹³⁵ See OAU, The African Commission on Human and Peoples' Rights: Establishment, Information sheet no. 1, available on the ACHPR's website, <http://www.achpr.org>.

¹³⁶ For further information, see e.g. C Heyns and F Vijoën, 'The Regional Protection of Human Rights in Africa: An Overview and Evaluation', in Zeleza and McConaughay (2004), pp. 135-136, and M Evans, T Ige and R Murray, 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights', in M Evans and R Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, (Cambridge, Cambridge University Press, 2002), pp. 36-60.

¹³⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

¹³⁸ See e.g. J Harrington, 'The African Court on Human and Peoples' Rights' in Evans and Murray (2002), pp. 316-317.

Committee. NGOs acting on behalf of such people could also, in some instances, take cases on their behalf.

Further, country practice regarding HIV/AIDS could be examined under any of the (global or regional) regular or special supervisory procedures outlined above, and in particular through the well-used reporting mechanism. NGOs may also submit reports, giving their views on matters relating, *inter alia*, to HIV/AIDS, to the relevant treaty monitoring bodies to accompany the official country reports.

As is evident from the above, there are, therefore, numerous international supervisory procedures and control mechanisms that form part of the human rights system, many of them relevant, in theory or in practice, to the issue of HIV/AIDS. However, it is worth bearing in mind, that, in the words of one well-known international lawyer, these ‘can never be considered as substitutes for national mechanisms and national measures . . . Human rights have to be implemented first and foremost at national and local levels. The primary responsibility of States is to realise human rights *vis-à-vis* the people who live under the jurisdiction of these States’, although the international community can take a legitimate interest in state compliance with international standards, and has an important supplemental role to play.¹³⁹

Part III - Conclusion

In the context of the HIV/AIDS pandemic, this paper has endeavoured to outline the often complex inter-relationship between international law/human rights law and development (Part I (A)), and between international law/human rights law and HIV/AIDS (Part I (B)). It then summarised the international human rights system on which much of the relevant law is based, and which now permeates the legal systems of most countries to a greater or lesser extent, both as a legal framework and as a possible implementation mechanism.

As already noted, one of the most striking features of the relevant legal and policy documents is their sheer quantity. Whether all these documents actually have much impact in practice can be better assessed by looking at the national level, and it is here that the study of Uganda in Working Paper 2 should be of particular interest.

Nonetheless, certain initial conclusions can be drawn from the more theoretical information presented in this Working Paper.

First, there has been a link between international law/human rights law and development for many decades, as is explicit in the international arena in the debate concerning the ‘right to development’. This debate remains current. More recent formulations of the right to development encompass a broad spectrum of social, economic, cultural, civil and political entitlements – it is no longer measured primarily in economic terms. Under this more recent formulation, the right to development would incorporate a ‘right to health’,

¹³⁹ Van Boven (1997).

in the form of, *inter alia*, HIV/AIDS care, treatment and prevention strategies to address the huge development challenge posed by this epidemic.

Then there are questions concerning the nature of law, and why it is necessary (if it is necessary!) to formulate rights – e.g. to development, and/or to health – in legal terms. One response is that the transformation of human rights into legal rights allows access to certain frameworks and implementation mechanisms, and – as regards international law – to debates and decisions made in the international arena. This is seen as the ‘value added’ of an international human rights law framework.

In this context, it is worth repeating that human rights are regarded as preceding law, and then possibly crystallising into law. Just as ‘culture’ does not remain static, nor does law. Whether national and international, law is constantly in a state of flux. Norms that are on the threshold of becoming law can still have an impact on particular societies, and can be sufficiently clear to be implemented. As will be considered in Working Paper 2, it is therefore possible that countries such as Uganda can function with a combination of their own local customary law (varying between different ethnic groups) and law inherited from colonial times, and also be evolving towards integration of certain international law norms, reflected e.g. in their constitutions.

That said, law can only function effectively if it reflects the values of a substantial proportion of the particular society. As one writer states, ‘(c)learly law is an important tool. However, law is not an end in itself. Any law remains a dead letter unless supported by the values and expectations of a society as a whole. For that society to embrace a law, they have to be participants in its development, understand it and be able to enforce it.’¹⁴⁰

The relationship between law and values is significant. Law has a particular importance in the context of HIV/AIDS, due to the nature of the virus and the fact that it is spread and can be controlled by regulating human behaviour – which is one of the main functions of law. This puts law squarely in the HIV/AIDS arena.

Particularly on the national level, HIV/AIDS-related law can be seen, *inter alia*, as the detailed practical expression of international law norms such as the right to health. While many of the roots of such national rules can thus be traced to notions embedded in international law, explicit legislation to regulate HIV/AIDS is, to date, only found in national legislation. Support for such legislation is also found in non-binding, sometimes quasi-legal, documents issued by the UN and other international bodies (such as the Outcome Document of UNGASS).

However, the international human rights law framework and implementation machinery have the potential to directly affect the way in which HIV/AIDS-related issues are decided, as has already happened on occasion. The incorporation of specific international law norms into national constitutions – as in Uganda – arguably provides a human-rights backdrop that can influence national policy and law.

¹⁴⁰ Maluwa (Jan. - March 2001) pp. 12-13.

In addition, the international human rights reporting system and other mechanisms – such as ‘days of discussion’ and special rapporteurs – do at least encourage governments to address human rights issues (including those relating to HIV/AIDS) in their particular countries on a regular basis. Such mechanisms work largely on the ‘politics of embarrassment’, and a problem here is the fact that some governments are, of course, not easily embarrassed, and are quite willing to be less than frank in their dialogues with international bodies.

Nonetheless, a particularly important role for law lies in its potential, both nationally and internationally, to raise and have decisions made on HIV/AIDS-related human rights issues through complaints mechanisms including court proceedings. Although resort to these fora has been, to date, relatively infrequent, when this does occur its impact can be enormous, and can change both national and international HIV/AIDS policy.¹⁴¹

To return to the question posed at the beginning of this paper: ‘What is the role of international law, specifically human rights law, in addressing a major contemporary challenge to development, specifically the HIV/AIDS epidemic?’ Based on the information set out in this paper, it is possible to answer that law does have a multi-faceted role, as one of various ‘tools’ in addressing the HIV/AIDS epidemic. Further, this is an apt analogy, since in many respects human rights law, and indeed most law, is no more and no less than that: a tool. And the use to which it is put, and the interpretations given to it, depend very much on who is using it, and how, and why.

Although the international human rights law framework and implementation machinery is – like all law – inevitably flawed, it is important to emphasise that international human rights law is not quite the blunt instrument that both its proponents and opponents in the HIV/AIDS context seem to portray. It is subject to many limitations and exceptions, and is explicitly tailored to take national differences into account (e.g. as regards the ‘margin of discretion’). It is not ‘all or nothing’, but rather some aspects of it (e.g. the right to inherit property) can be extended to some groups (e.g. women and children), without embracing wholeheartedly every other rule. Further, the fact that a particular human rights approach (or lack of it) has apparently worked one country does not mean it will or could work in another.

It therefore seems in the interests of the proponents of human rights in the HIV/AIDS context to more widely acknowledge and use the flexibility of international human rights law (such as limitations on grounds of public health). Likewise, it is in the interests of its opponents to become more knowledgeable about the nature of the system they criticise, and to explore the possibility that some aspects of it may be useful in attempting to tackle the HIV/AIDS epidemic.

In this context, again, the importance of clear and well-defined legal and human rights language is helpful, bearing in mind that many of the concepts under discussion (such as

¹⁴¹ See e.g. *Nicholas Toonen v. Australia*, and *Pharmaceutical Society of South Africa (PSSA) and Others v Manto Tshabalala-Msimang N.O.* – cited in Part I (B) and Part II above.

the right to health, or to development, or indeed ‘human rights’) are by their very nature complex, hard to define, and variable in different countries and contexts.

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