

HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights

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Summary

There is a relationship between HIV/AIDS and human rights. HIV/AIDS is the most severe epidemic to hit the globe and the African continent in particular. It is now well known that HIV/AIDS infects and affects human beings in various ways. This article contends that, at best, the HIV/AIDS pandemic in Africa can be addressed within a comprehensive human rights framework. As part of the global response to HIV/AIDS, the article explores, in depth, the role of the African Commission on Human and Peoples' Rights in addressing the HIV/AIDS scourge within its structural mandate of promoting and protecting human and peoples' rights in Africa.

1 Introduction

The HIV/AIDS pandemic poses the greatest threat to Africa's efforts to achieve its full potential in the social, economic and political spheres. As it was rightly stated by former South African President, Nelson Mandela, the pandemic is 'a threat that puts in the balance the future of nations'.¹ HIV/AIDS is the first worldwide epidemic to occur in the modern era of human rights.² The African continent has been the worst hit. In 2003, an

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¹ In his address at the World Economic Forum session on AIDS on 3 February 1997; <http://www.polity.org.za/html/govdocs/speeches/1997/sp0203.html> (accessed 12 July 2003).

² J Oyegun 'AIDS and human rights' in LA Sadiwa (ed) *Human rights theories and practices* (1997) 108.

estimate of between 25 and 28,2 million people in sub-Saharan Africa were living with HIV.³ HIV/AIDS has indeed become the plague of our time,⁴ and the already unending human rights problems and challenges facing the continent aggravate its sting.

On the African continent, the African Charter on Human and Peoples' Rights (African Charter or Charter)⁵ is the principal instrument for the promotion and protection of human and peoples' rights. Van Boven rightly described the Charter as a human rights instrument specifically designed to respond to 'African concerns, African traditions and African conditions'.⁶ The human and peoples' rights provided for in the Charter include, at least in implied terms, those associated with people infected with and affected by HIV/AIDS. The HIV/AIDS pandemic has become one of the contemporary African concerns. Article 30 of the Charter establishes the African Commission on Human and Peoples' Rights (African Commission or Commission) as a promoter and protector of human and peoples' rights within the continent. The promotion and protection of those human rights associated with the HIV/AIDS pandemic fall within the mandate of the Commission.

The promotion and protection of human rights are legitimate concerns of the international community.⁷ It is therefore not surprising that the United Nations (UN), in particular, has placed HIV/AIDS at the top of its agenda. This initiative is under the auspices of the Joint United Nations Programme on HIV/AIDS (UNAIDS).⁸ The African Commission considers the HIV/AIDS pandemic a serious threat to the human rights of Africans and underscores the difficulties that HIV/AIDS patients face in accessing treatment as a major obstacle to exercise their right to health as provided for by the African Charter.⁹ Accepting that the issue of HIV/AIDS is a human rights issue, which is a threat to humanity, as

³ See UNAIDS/03.39E *AIDS epidemic update* (December 2003) http://www.who.int/hiv/pub/epidemiology/en/epiupdate2003_1_en.pdf (accessed 29 February 2004).

⁴ C Ngwenya 'HIV testing in Swaziland in the wake of AIDS: A human rights framework' in C Okpaluba *et al Human rights in Swaziland: The legal response* (1997) 210.

⁵ OAU Doc CAB/LEG/67/3 rev 5, adopted 27 June 1981 and entered into force 21 October 1986.

⁶ T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183-186.

⁷ Vienna Declaration and Programme of Action 1993, UN Doc A/CONF.157/24, Part I para 5 <http://www1.umn.edu/humanrts/instatee/l1viadec.html> (accessed 13 July 2003).

⁸ UNAIDS is the main advocate for global action on HIV/AIDS. Its mission is to lead, strengthen and support an expanded response aimed at preventing the transmission of HIV, providing care and support, reducing the vulnerability of individuals and communities to HIV/AIDS, and alleviating the impact of the epidemic.

⁹ See para 7 of the Final Communiqué of the 29th ordinary session of the African Commission on Human and Peoples' Rights. See UNAIDS website at <http://www.unaids.org>.

declared by the Commission,¹⁰ this paper seeks to explore the various ways for the Commission to best address the issue of HIV/AIDS in Africa as part of its mandate of promoting and protecting human and peoples' rights. This discussion, therefore, is premised on the fact that HIV/AIDS is the greatest threat to Africa, and that taking it on board the mandate of the Commission should be a matter of priority.

2 Declaration of Commitment on HIV/AIDS

From 25 to 27 June 2001 the Heads of State and Government and Representatives of States and Governments assembled at the UN for the 26th special session of the General Assembly in accordance with Resolution 55/13. This special session was convened as a matter of urgency, to review and address the problem of HIV/AIDS in all its aspects, as well as to secure a global commitment to enhancing co-ordination and intensification of national, regional and international efforts to combat HIV/AIDS in a comprehensive manner.¹¹ During this special session, the Heads of State and Government adopted the Declaration of Commitment on HIV/AIDS, wherein they noted with grave concern that:¹²

Africa, in particular sub-Saharan Africa, is currently the worst hit affected region where HIV/AIDS is considered a state of emergency and imposes a devastating economic burden and that the dramatic situation on the continent needs urgent and exceptional national, regional and international actions.

The fact that HIV/AIDS is considered a state of emergency in Africa calls for drastic steps to be taken by African states in addressing the pandemic within their respective territories. African states need to understand the enormity of HIV/AIDS in Africa and its devastating implications to the continent as a whole. This will in turn enable them to commensurately harness all resources and all sectors to fully respond to the global crisis. This should certainly involve multi-sectoral strategies, which could be guided by international organisations, such as the UN, and regional organisations such as the African Union (AU), under which the African Commission falls. It would be foolhardy for African states to respond to

¹⁰ See Resolution on HIV/AIDS Pandemic-Threat against Human Rights and Humanity, done in Tripoli, 7 May 2001. This resolution was premised on the Commission's mandate in terms of the Charter to 'promote human and peoples' rights and ensure their protection in Africa' and especially in regard to the right of every individual to 'enjoy the best attainable state of physical and mental health' provided for in art 16 of the Charter.

¹¹ Para 1 of the Declaration of Commitment on HIV/AIDS 'Global Crisis — Global Action' <http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html> (accessed 13 July 2003).

¹² As above.

the epidemic without the involvement of the international community to which they belong. After all, HIV/AIDS is a global concern. In order to adequately address HIV/AIDS in Africa, one cannot agree more that the need for 'urgent and exceptional national, regional and international actions' is non-negotiable. Hence, the importance of the Commission in playing a role is crucial in this regard.

3 HIV/AIDS as a health concern

HIV/AIDS is a health concern because it affects people's health. It is now well known that HIV attacks and slowly damages the human body's immune system. Because of this, the body can no longer fight off infections and other infectious diseases. When this occurs, the body develops AIDS as a result of the so-called AIDS-defining conditions or illnesses.¹³ The fact that AIDS is a scandalous disease cannot be over-emphasised. Tracing the experience of poorer countries in so far as HIV/AIDS is concerned, Jones notes that:¹⁴

For those in poorer countries of the world [such as in Africa], HIV/AIDS was and was not a new experience. The body's vulnerability to illness had not been curtailed by the plethora of scientific and technological support mechanisms available to richer countries, so the spectacle of early and multiple deaths through illness was, initially perhaps, not as surprising nor as threatening to people's senses of self as was the resurgence of early deaths in the richer world . . . HIV/AIDS introduces deaths in poorer countries on a scale that was in itself scandalous.

Initially, the issue of HIV/AIDS was solely perceived a health issue, which could only be addressed through viable health policies. Standing on its own, this approach could not effectively address the issue of HIV/AIDS. Tomasevski argues that health is subject to vast legal regulations, much of which are not necessarily guided by human rights standards.¹⁵ Today, the issue of HIV/AIDS has widely been accepted to be a human rights issue, which affects a plethora of human rights in a number of ways. Chief among these is the right to health, which does not necessarily mean the right to be healthy.¹⁶

¹³ AIDS Law Project *HIV/AIDS and the law: A resource manual* (2003) 10.

¹⁴ TT Jones *Who cares? AIDS review* (2001) 5.

¹⁵ K Tomasevski 'Health rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 126.

¹⁶ B Toebes 'The right to health' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 169.

4 HIV/AIDS as a human rights concern

Wojcik argues that, in reviewing the relative short history of responses to the HIV/AIDS pandemic, a common denomination of effective programs is the respect for human rights and dignity of persons.¹⁷ HIV/AIDS is therefore a human rights issue, which has to be approached by applying human rights principles. Today every African is either affected by or infected with HIV/AIDS. Through its presence, HIV/AIDS generates poverty, thus affecting the population at large and in particular their right to development. Ngwena asserts that it is difficult to imagine a part of the world that has remained pristine and insulated from HIV/AIDS.¹⁸ On the African continent, the situation is worse.

Anttila argues that HIV/AIDS-related discrimination is a problem not only to HIV-positive persons and AIDS victims, but also to those persons belonging to the so-called risk groups.¹⁹ In the African context, the so-called risk groups include sex workers who are perceived as more likely to be infected with HIV/AIDS. Painting a very grim picture on the African continent, Dr Peter Piot, the Executive Director of UNAIDS, speaking during the Global Forum on Health and Development at the AU Summit, said the following:²⁰

Sixty million Africans have been touched by AIDS in the most immediate way. They are either living with HIV, have died of AIDS or they have lost their parents to AIDS. But the toll of those directly affected is even higher.

Generally, those who are infected with HIV/AIDS consider their right to life²¹ to be in jeopardy.²² As a result, we have HIV/AIDS awareness messages such as 'AIDS Kills'.²³ In order to uphold the right to life, there is an urgent need to uphold the right to enjoy the best attainable state of physical and mental health which is provided for under article 16(1) of the African Charter.²⁴ More importantly, article 16(2) obliges state

¹⁷ ME Wojcik 'Global aspects of AIDS' in DW Webber (ed) *AIDS and the law* (1997) 454.

¹⁸ Ngwena (n 4 above) 210.

¹⁹ M Anttila 'AIDS does not discriminate but people do' in L Hannikainen & E Nykänen (eds) *New trends in discrimination law — International perspectives* (1999) 223.

²⁰ UNAIDS Press Release, Maputo, 10 July 2003; <http://www.unaids.org/EN/media/press+releases> (accessed 31 August 2004).

²¹ Art 4 African Charter.

²² The South African example of Gugu Dlamini illustrates the worst kind of treatment that an HIV-positive person can be subjected to. Dlamini, an AIDS activist, was killed in December 1998 by people in her community because she publicly disclosed that she was HIV-positive.

²³ This message is sometimes misleading, because not every infected person is killed by HIV/AIDS. The message tends to dehumanise those infected by the pandemic, thus affecting them psychologically.

²⁴ The right to health is closely related to, and dependent upon, the realisation of other human rights, such as the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to

parties to the Charter to take measures to protect the health of their people and to ensure that they receive medical attention when they are sick. This is very crucial for people living with HIV/AIDS. The right to health involves the provision of anti-retroviral drugs which is necessary for the prevention of parent-to-child transmission of HIV.²⁵

In *Treatment Action Campaign and Others v Minister of Health and Others*,²⁶ the Constitutional Court of South Africa held that the government's policy of confining the provision of Nevirapine to research sites was unreasonable and in contravention of the state's obligation in terms of the Constitution, and in particular section 27(1) of the Constitution, which provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to health care services.²⁷ In *Free Legal Assistance Group and Others v Zaire*,²⁸ the Commission held that a shortage of medicine constituted a violation of article 16 of the African Charter.

The recognition of the right to health is related to the right to dignity.²⁹ The right to dignity cannot be achieved without the right to equality³⁰ and the right against discrimination.³¹ In the South African case of *Hoffman v South African Airways*,³² a job applicant living with HIV/AIDS was refused employment as a South African Airways cabin attendant as a result his HIV-positive status. The Constitutional Court held that people living with HIV/AIDS 'must not be condemned to

information, and the freedom of association, assembly and movement. These and other rights and freedoms address integral components of the right to health. See para 3 of UN General Comment No 14, 22nd session (2000), HRI/GEN/1/Rev 5.

²⁵ See WHO 'Prevention of mother-to-child transmission of HIV: Selection and use of Nevirapine' WHO/HIV_AIDS/2001.03 WHO/RHR/01.21 http://www.who.int/docstore/hiv/PMTCT/who_hiv_aids_2001.03.pdf (accessed 17 March 2004).

²⁶ 2002 (5) SA 721 (CC). The decision in this case captures a fundamental transformation in the conception of judicial enforcement of socio-economic rights under the South African jurisprudence, in particular the question of remedies, and also illustrates the value of socio-economic rights and their ability to influence the policy of a government. See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

²⁷ See E Baimu 'The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African *Nevirapine* case' (2002) 2 *African Human Rights Law Journal* 160.

²⁸ (2000) AHRLR 74 (ACHPR 1995).

²⁹ Art 5 African Charter.

³⁰ Art 3 African Charter.

³¹ Art 2 African Charter.

³² 2001 (1) SA 1 (CC). Sec 9(1) of the South African Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

“economic death” by the denial of equal opportunity in employment³³ and ordered South African Airways to employ the appellant. In another South African case, *A v SAA*,³⁴ South African Airways refused to hire the applicant an account of his HIV status. South African Airways admitted that the testing of A without his informed consent and refusing to employ him thereafter because of his HIV-positive status was ‘unjustifiable’. A settlement, including payment of R100 000 (approximately US \$16 100) to A, was eventually drawn up. The Court in this case never considered the merits of the case.

Those infected with HIV/AIDS need to exercise their right to receive information³⁵ on how to live with HIV/AIDS. Most importantly, HIV/AIDS, being a disability, presupposes that people with HIV/AIDS have the right to special measures of protection in providing for their physical or moral needs.³⁶ In the case of *Bragon v Abbott*,³⁷ the United States Supreme Court decided that people living with HIV are protected by the non-discrimination section of the Americans with Disabilities Act No 42 of 1990.

Those affected have a need to recognise and uphold their right to receive information,³⁸ in order to be well informed on how to prevent HIV/AIDS. In the same vein, they need to exercise their right to education³⁹ on specific issues related to HIV/AIDS as a preventive measure. They also need to be informed on how to respect the rights of those infected, who are also entitled to the enjoyment of all the rights and freedoms recognised and guaranteed in international human rights

³³ Para 38. Since HIV is not a listed ground for discrimination in sec 9(3) of the South African Constitution, it was argued that the SAA policy of not employing HIV-positive persons as cabin attendants amounted to unfair discrimination on the listed ground of disability. However, the Constitutional Court avoided this argument and opted to deal with HIV-status discrimination as an analogous ground.

³⁴ J 1916/99 (unreported); see AIDS Law Project ‘HIV/AIDS: Current law and policy — Your rights in the workplace’ <http://www.alp.org.za/kyr/misc/20000717kyry.doc>.

³⁵ Art 9 African Charter.

³⁶ Art 18(4) African Charter. This article has an implication for the right to social security as it may be interpreted as requiring member states to provide disability grants for people living with HIV/AIDS.

³⁷ 524 US 624.

³⁸ n 24 above. See the South African case of *Karen Perreira v Sr Helga's Nursery School & Another*, Case No 02/4377, judgment October 2003. In this case, a foster mother of a three-year-old child elected to disclose her child's HIV status to a nursery school, believing that it was in the child's best interest for the school to be aware of her medical condition. The school expressed fears of admitting the child and indicated that it did not consider itself equipped to admit a child with HIV as none of its teachers had received any training on how to deal with children with HIV. The school opted to defer the application until such time as it considered itself ready to admit children with HIV and until a child was ‘past the biting stage’. The High Court found that since the school had not made a final decision to exclude the child, its conduct did not amount to unfair discrimination. Currently the decision is being appealed.

³⁹ Art 17 African Charter.

instruments. This is the only way they can give due respect to the infected persons' right to dignity⁴⁰ and equality.⁴¹ They need to be protected from discrimination on the basis that their family members or relatives are infected. HIV/AIDS also affects the right to development⁴² because it has social, economic and cultural implications for both the infected and the affected. Whether infected or affected, every individual is entitled to the equal protection of the law.⁴³

From the above it is clear that all the human rights associated with HIV/AIDS are somehow interrelated and interconnected. After all, human rights are universal, indivisible, interdependent and inter-related.⁴⁴ There seems to be no way in which one human right can be sustained without the due recognition of other human rights. It is also important to note that the enjoyment of human rights is not absolute. Coupled with the right to enjoy human rights is a responsibility and duty towards fellow human beings. The African Charter clearly provides that every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.⁴⁵ According to Mutua, the use of duties alongside rights emphasises the non-individualistic, communal nature of African societies.⁴⁶ Further, the Charter states that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.⁴⁷ The same is true for all the human rights associated with HIV/AIDS.

The African Charter's provisions do not differentiate between people infected with or affected by HIV/AIDS. While special emphasis should undoubtedly be placed on the rights of infected individuals, otherwise known as people living with HIV/AIDS, individuals should enjoy their human rights regardless of whether or not they are living with HIV/AIDS. Caution should be taken, however, not to concentrate on a particular group of persons and neglect another, as human beings are all equal, and should enjoy their right to equality and protection of the law. Wojcik calls this a 'false dichotomy of protecting individual human rights and

⁴⁰ n 29 above. In the *Hoffman* case, the Court held that people who are living with HIV must be treated with compassion and understanding and called upon people to show *ubuntu* towards them. *Ubuntu* is the recognition of human worth and respect for the dignity of every person; para 38.

⁴¹ n 30 above. The Court in the *Hoffman* case made reference to art 2 of the Charter and held that the need to eliminate unfair discrimination does not only arise from the South African Constitution, but also from its international obligations in terms of sec 231(2) of the Constitution.

⁴² Art 22 African Charter.

⁴³ Art 3(2) African Charter.

⁴⁴ Vienna Declaration and Programme of Action, A/CONF 157/23 para 5.

⁴⁵ Art 27(1) African Charter.

⁴⁶ M Mutua *Human rights: A political and cultural critique* (2002) 339.

⁴⁷ Art 27(2) African Charter.

neglecting the rights of society'.⁴⁸ He argues that both the individual and society can be protected. In fact, both the individual and society must be protected and human rights law must play an important role in restoring human dignity to both.

Article 2 of the African Charter provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

While the Charter does not specifically provide for HIV/AIDS as a prohibited ground for discrimination, it may be argued that HIV/AIDS status falls under 'other status' within the meaning of article 2 of the Charter. The question, therefore, is how best the African Commission can take the HIV/AIDS aboard its mandate?

The Commission can best address the issue of HIV/AIDS by making use of its mandate to promote and protect human and peoples' rights associated with the epidemic. It is now convenient to consider what a human rights approach to HIV/AIDS contains in order to reconcile it with the role of the Commission in addressing HIV/AIDS.

5 A human rights approach to HIV/AIDS

According to the Vienna Declaration and Plan of Action, human rights and fundamental freedoms are the *birthright* of all human beings.⁴⁹ A human rights-based approach rests upon the premise that all human rights are universal, indivisible and interrelated. Because of the universality, indivisibility and interrelationship of human rights:⁵⁰

[T]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis . . . [thus] it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

It is in this vein that, in so far as human rights are affected by HIV/AIDS, the African Commission is also mandated to promote and protect them.

A human rights-based approach to HIV/AIDS can be said to entail three distinct dimensions. Firstly, it refers to the processes of using human rights as a framework for addressing the HIV/AIDS pandemic. Secondly, it entails the assessment of human rights implications of any HIV/AIDS policy, strategic plan, programme, legislation or constitution.

⁴⁸ n 17 above.

⁴⁹ Para 1 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, Vienna, 14–25 June 1993, UN General Assembly document A/CONF 137/23 (my emphasis).

⁵⁰ n 49 above, para 5.

Thirdly, it involves the making of human rights an integral dimension of the design, implementation, monitoring and evaluation of these HIV/AIDS related policies, strategic plans, programmes, legislations and constitutions. Applying these dimensions to the work of the Commission, the human rights-based approach ensures that every person's human right to dignity is promoted and protected. More importantly, a human rights-based approach guides the development of programmes and policies which seek to address the questions around HIV/AIDS.

A human rights-based approach is in line with the focus adopted by the UN Commission on Human Rights.⁵¹ In Resolution 1999/49 on the global efforts to combat HIV/AIDS, the UN Commission put emphasis on⁵²

[t]he increasing challenges by HIV/AIDS, the need for intensified efforts to ensure universal respect for and observance of human rights and fundamental freedoms for all, to reduce vulnerability to HIV/AIDS and to prevent HIV/AIDS related discrimination and stigma.

Within the African human rights system, the African Commission is one mechanism that can take the issue of HIV/AIDS aboard its mandate. After all, it is through the human rights-based approach that a legal and ethical framework for addressing the social and development impact of HIV/AIDS in Africa can be sustained through the application of international human rights norms and standards.

6 The African Charter and HIV/AIDS

While the drafters of the African Charter never anticipated the existence of the HIV/AIDS pandemic, the substantive provisions of the Charter are to some extent flexible enough to address the denial of human rights as a result of HIV/AIDS.⁵³ This gives the African Commission an opportunity to make the provisions work towards addressing the pandemic in so far as it affects human rights and freedoms among the African people. As expressed in the Latin maxim, *ubi jus ibi remedium*, that is, where there is a right there is a remedy, the Commission is entrusted with the responsibility of providing remedies to those rights and freedoms that

⁵¹ See the Office of the High Commissioner for Human Rights' Programme on HIV/AIDS and Human Rights at http://www.unaids.org/EN/Intfocus/hiv_aids_human_rights.asp (accessed 31 August 2004).

⁵² Resolution 1999/49 E/CN 4/RES/1999/49.

⁵³ One criticism levelled against the substantive provisions of the Charter is by Ouguerouz, who argues that none of the human rights guaranteed in the African Charter carries an absolute guarantee because the exercise of most of these rights is circumscribed *ab initio* by limitation clauses or the so-called 'claw-back clauses'. See F Ouguerouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2002) 429.

have been tampered with by state parties to the Charter. This is also directly applicable to those human rights associated with HIV/AIDS, which are violated by state parties to the Charter.

Article 1 of the African Charter specifically provides that state parties to the Charter shall recognise the rights, duties and freedoms enshrined therein and shall undertake to adopt legislative or other measures to give effect to them. On the issue of HIV/AIDS, the African Commission should play a pivotal role by developing guidelines which are Africa-specific to assist state parties in the adoption of legislative or other measures such as policy making, aimed at giving effect to the rights, duties and freedoms associated with HIV/AIDS. The Charter provides a check and balance mechanism through article 62, which requires state parties to undertake to submit every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed therein. This covers the rights and freedoms associated with HIV/AIDS.

The African Charter further underscores the responsibility entrusted to state parties by spelling out in article 2 that every individual shall be entitled to the enjoyment of the Charter provided rights and freedoms without any distinction whatsoever. As already stated, this distinction automatically accommodates the HIV/AIDS status. It must be noted that this proposition is yet to be certified by the Commission, should a question arise in its consideration of inter-state or individual communications. The right to equality and the entitlement to equal protection of the law provided under article 3 of the Charter is one of the most important rights to be accorded to those infected with and affected by HIV/AIDS. With regard to the above articles, in Communication 241/2001, *Purohit and Moore v The Gambia*,⁵⁴ the Commission held that:⁵⁵

Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the rights provided under the African Charter.

By upholding the right to equality, the African Commission would invariably be instilling the right to dignity of the African people, guaranteed under article 5 of the African Charter. Suffice it to say that the right to dignity is at the core of human rights and fundamental freedoms. As reflected in the Vienna Declaration, '[h]uman rights and

⁵⁴ Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002–2003. Assembly/AU/7(II); http://www.achpr.org/english/_doc_target/documentation.html (accessed 14 July 2003).

⁵⁵ Para 69.

fundamental freedoms are the *birthright* of all human beings' and '[t]he universal nature of these rights and freedoms is beyond question'.⁵⁶

Other rights which complement the above include the right to liberty and to the security of person, provided under article 6; the right to freedom of movement, provided under article 12; the right to have equal access to the public service of his or her country, provided under article 13; the right to work under equitable and satisfactory conditions, provided under article 15; the right to health, provided under article 16; the right to a family, provided under 18; the right to economic, social and cultural development, provided under article 22; and the right to a general satisfactory environment, provided under article 24. The above articles are not conclusive. All these rights are interlinked to the HIV/AIDS pandemic and one cannot address the issue of HIV/AIDS without making reference to them. The duty to enforce these rights rests upon the African Commission.

7 The Grand Bay Declaration and HIV/AIDS

The Grand Bay Declaration and Plan of Action of 1999⁵⁷ is an important document of the African Commission as it provides a good basis for addressing the root causes of human rights violations in Africa. The Grand Bay Declaration constitutes a collective vision for human rights promotion and protection on the continent and far-reaching/forward-looking strategies for its implementation by the AU member states. The Grand Bay Declaration provides that African governments must work towards ensuring the full respect of rights of people with disability and people living with HIV/AIDS, in particular women and children.⁵⁸

The abovementioned provision is in line with the UN recommendation that programmes to combat AIDS should give special attention to the rights and needs of women and children, and to factors relating to the reproductive role of women and their subordinate position in some societies, which make them especially vulnerable to HIV infection.⁵⁹ While the statement in the Grand Bay Declaration is a good statement, the Commission must itself take the initiative in addressing the issue of HIV/AIDS within its mandate and to assist African states in the fight against the scourge.

⁵⁶ n 49 above, para 1 (my emphasis).

⁵⁷ Adopted at Grand Bay, Mauritius on 16 April 1999; <http://www.africanreview.org/docs/rights/grandBay.pdf> (accessed 10 July 2004).

⁵⁸ n 57 above, para 7.

⁵⁹ See UN General Recommendation No 15 *Avoidance of discrimination against women in national strategies for the prevention and control of Acquired Immunodeficiency Syndrome (AIDS)*.

8 The African Commission's mandate in respect of HIV/AIDS

The African Commission is an intergovernmental institution responsible for the implementation of the provisions of the African Charter within the member states of the AU at an international level. The Commission does not have a programmatic strategy of addressing the HIV/AIDS pandemic in Africa. This is very unfortunate, as the Commission remains the only operational enforcement mechanism within the African human rights system. What is needed is for the Commission to give an impetus to the use of the Charter provisions in order to fight the HIV/AIDS pandemic on the continent. Baimu argues that the potential of socio-economic rights has not been explored sufficiently to improve the standard of living of the African people, particularly in the context of HIV/AIDS, and that this is a source of grave concern in Africa.⁶⁰

Of great importance is the fact that article 60 of the African Charter provides that the African Commission shall draw inspiration from international law on human and peoples' rights. Particular emphasis is put on the provisions of various African instruments on human and peoples' rights, the Charter of the UN, the Constitutive Act of the AU,⁶¹ the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the UN of which parties to the African Charter are members. In fulfilling its mandate, therefore, the Commission has vast sources from which to draw inspiration in its task of addressing the issue of HIV/AIDS in Africa.

The Commission is tasked with three main functions, namely, ensuring the promotion of human and peoples' rights,⁶² protection of human and peoples' rights⁶³ and interpreting the provisions of the Charter.⁶⁴ Often these functions overlap. For example, when the Commission embarks on promoting these rights, it automatically ensures their protection. When interpreting any provision of the Charter, it automatically promotes them, thus protecting them at the same time. When it embarks on its protective function, it achieves its goal by interpreting the Charter, automatically promoting the rights contained in the Charter. I will now consider how the issue of HIV/AIDS can fit within these three main functions of the Commission.

⁶⁰ Baimu (n 28 above) 164.

⁶¹ The Constitutive Act of the AU succeeded the Charter of the OAU in 2002.

⁶² Art 45(1) African Charter.

⁶³ Art 45(2) African Charter.

⁶⁴ Art 45(3) African Charter.

8.1 The promotional function of the Commission and HIV/AIDS

Ankumah correctly describes the promotional mandate as a fundamental requirement for the respect and recognition of the rights provided for in the Charter.⁶⁵ Therefore it logically follows that those human rights associated with the HIV/AIDS pandemic can be recognised and respected through the promotional function of the Commission. The promotional function of the Commission can be divided into three main activities.

Firstly, it involves the collection of documents, undertaking studies and researches on African problems in the field of human and peoples' rights, organising seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples' rights and giving recommendations to governments.⁶⁶ One of Africa's problems is the issue of HIV/AIDS. Obviously, when addressing this issue, the collection of documents, the undertaking of studies and researches on HIV/AIDS, should be undertaken. So far the Commission has not undertaken activities which specifically address HIV/AIDS as a human rights issue. Capacity building on HIV/AIDS and human rights through seminars, symposia and conferences as well as advice to member states on their HIV/AIDS policies and legislations are also crucial in this regard.

Secondly, it involves the formulation and laying down of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.⁶⁷ In so far as HIV/AIDS is concerned, the African Commission has not yet considered this path. Such principles and rules can be formulated in line with the UN Guidelines and the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases.⁶⁸ Under this activity, the Commission can formulate a database of policies and legislation specifically dealing with HIV/AIDS in respect of member states.

After all, African leaders affirmed their plans and commitments to win the battle against HIV/AIDS, including ensuring the full respect of the rights of people living with HIV/AIDS, particularly women and children, as stated in the Grand Bay Declaration. The challenge, which remains to

⁶⁵ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 21.

⁶⁶ Art 45(1)(a) African Charter.

⁶⁷ Art 45(1)(b) African Charter.

⁶⁸ The Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases; adopted by the African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases held in Abuja, Nigeria, 24–27 April 2001; OAU/SPS/ABUJA/3; <http://www.un.org/ga/aids/pdf/Abuja.declaration.pdf> (accessed 31 August 2004).

be addressed, is to translate these commitments and declarations of intention into concrete actions. The possibility of drafting the AU Guidelines on HIV/AIDS sponsored by the Commission's expertise should thus be considered.

Thirdly, it involves the co-operation of the Commission with other African and international institutions concerned with the promotion and protection of human and peoples' rights in Africa.⁶⁹

Also falling under this mandate is the exercise of the Commission of promotional activities through education and publicity in designated countries. For promotional purposes, commissioners are assigned to countries belonging to the geographic region of which the commissioner is a national or in which the commissioner resides.

In an endeavour to ensure the implementation of the African Charter, the African Commission adopted a method of appointing Special Rapporteurs in relation to different thematic areas. So far there are three Special Rapporteurs. The first, the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions,⁷⁰ was appointed in 1994. The second, the Special Rapporteur on Prisons and Conditions of Detention in Africa,⁷¹ was appointed in 1996. The third, the Special Rapporteur on the Conditions of Women on Africa,⁷² was appointed in 1999. It would be necessary for the African Commission to consider the possibility of appointing a Special Rapporteur on HIV/AIDS in order to strengthen the work of the Commission in so far as addressing HIV/AIDS on the continent is concerned.

8.2 The protective function of the African Commission and HIV/AIDS

The Commission's protective function involves consideration of individual communications or complaints against member states to the Charter under article 55 of the Charter, and making recommendations to the Assembly of Heads of State and Government under article 59 of the Charter and to the member state concerned. This function is best undertaken with the assistance of civil society, especially non-governmental organisations (NGOs).

So far, no communication alleging violations of human rights associated with HIV/AIDS has been brought before the Commission. This does not, however, mean that human rights associated with HIV/AIDS have never been violated by African states. The Commission is the appropriate regional forum for individuals to bring their cases

⁶⁹ Art 45(1)(c) African Charter.

⁷⁰ Eighth Annual Activity Report of the African Commission, Annex VII.

⁷¹ Tenth Annual Activity Report of the African Commission, Annex VII.

⁷² Eleventh Annual Activity Report of the African Commission.

relating to human rights associated with HIV/AIDS in accordance with the Charter.⁷³ It is also through the protective mandate that the Commission can interpret *in extenso* the provisions of the Charter, especially those relating to the issue of HIV/AIDS.

8.3 The interpretative function of the African Commission and HIV/AIDS

The interpretation mandate of the Commission is one avenue for the effective implementation of the human rights provisions of the Charter. In interpreting the Charter, the Commission enriches the African human rights jurisprudence. The Commission may be called upon by any member state party to the Charter or an NGO to interpret a certain provision in terms of article 45(3) of the African Charter. On the interpretative function of the Commission, Odinkalu argues that '... the Commission has been mostly positive and sometimes even innovative ... In cases where it has proceeded on merits, it has interpreted the rights of the Charter effectively ...'.⁷⁴ For example, in Communication 241/2001, *Purohit and Moore v The Gambia*,⁷⁵ the Commission interpreted the right to health, which is relevant to the fight against HIV/AIDS, in the following way:⁷⁶

[The] enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.

On the right to health, the Commission further stated that, while it recognised the fact that most African countries were faced with the problem of poverty, which rendered them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right, state parties to the Charter are obliged 'to take concrete and targeted steps, while taking full advantage of [their] available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'.⁷⁷

With respect to the HIV/AIDS pandemic, the African Commission adopted a resolution on the same at its 29th ordinary session held in Tripoli, Libya in April/May 2001. In this resolution, the Commission declared that the HIV/AIDS pandemic is a human rights issue, which is a

⁷³ SB Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

⁷⁴ C Odinkalu as cited in HJ Steiner & P Alston *International human rights in context — Law, politics, morals* (2000) 929.

⁷⁵ n 54 above.

⁷⁶ Para 80.

⁷⁷ Para 84.

threat to humanity. Secondly, the Commission called upon African governments, state parties to the Charter, to allocate national resources that reflect a determination to fight the spread of HIV/AIDS, to ensure human protection of those living with HIV/AIDS against discrimination, to provide support to families for the care of those dying of AIDS, to devise public health care programmes of education and to carry out public awareness, especially in view of free and voluntary HIV testing, as well as appropriate medical interventions.

Third, the Commission declared HIV/AIDS as a human rights issue and called for comprehensive action on the part of African governments, state parties to the African Charter, international pharmaceutical industries and aid agencies.

9 Recommendations

The UN Declaration of Commitment on HIV/AIDS provides persuasive recommendations to be adopted at the regional level. These recommendations are discussed below. These recommendations may be applied and adopted by the Commission as they may easily be accommodated within its mandate. It must be noted that these recommendations would be ineffective without the support of the AU, the parent organisation of the Commission. The support of the AU would set the benchmark for determining the real commitment on the part of the African leaders needed in the fight against the pandemic, beyond the usual political rhetoric.

Firstly, there must be an inclusion of HIV/AIDS and related public health concerns as appropriate on the agenda of regional meetings at the ministerial and Heads of State and Government level.⁷⁸ With regard to the Commission, this can be addressed by including an agenda item on HIV/AIDS during its biannual ordinary sessions. This will enable NGOs with observer status with the Commission, as well as Intergovernmental organisations, to effectively contribute to the HIV/AIDS and human rights in Africa discourse, while challenging the role of the Commission in its efforts of addressing the pandemic.

Secondly, there is a need to support data collection and processing to facilitate periodic reviews by regional commissions and/or regional organisations of progress in implementing regional strategies and addressing regional priorities and to ensure wide dissemination of the results of these reviews.⁷⁹ This fits perfectly into the Commission's promotional mandate as provided by article 45 of the Charter.

⁷⁸ Para 97 Declaration of Commitment.

⁷⁹ Para 98 Declaration of Commitment.

Thirdly, there is a need to encourage the exchange of information and experience between countries in implementing the measures and commitments contained in the Declaration, and in particular to facilitate an intensified North-South and triangular co-operation.⁸⁰ Different countries have responded differently to HIV/AIDS. Some countries have succeeded in containing the pandemic while others have not. The Commission may therefore co-ordinate the exchange of such information and experiences between member states in order to address the human rights concerns relating to HIV/AIDS.

Fourthly, numerous international organisations are involved in the fight against HIV/AIDS. Chief amongst these is the UN, whose programme, UNAIDS, offers a comprehensive approach in the fight against the pandemic. UNAIDS is guided by the UN System Strategic Plan for HIV/AIDS-2001-2005,⁸¹ which establishes the critical links between the work of individual UN organisations, the achievement of UN system objectives, and agreed goals and targets — most notably those of the UN General Assembly, and ultimate impact on the epidemic. As the African continent remains in the red in so far as the pandemic is concerned, the African Commission should establish a specialised programme, in order to complement the global efforts undertaken by the UN through UNAIDS. It might also prove worthwhile for the Commission to enter into a memorandum of understanding with UNAIDS in order to join hands in the fight against the pandemic on the continent.

Fifthly, subscribing to a human rights-based approach to HIV/AIDS calls for the overall respect and recognition of human rights in general. If member states of the AU continue to violate human rights, it would be difficult to see the Commission carrying out its mandate of protecting and promoting human rights on the continent. The co-operation of member states is therefore crucial in the fight against HIV/AIDS.

Lastly, the implementation of the above-mentioned recommendations requires resources. In its Sixteenth Annual Activity Report,⁸² the African Commission stated that in order for it to successfully discharge its mandate, it would be necessary that a significant amount of human, material and financial resources be made available to it. The fact that the Commission is starved for funds is well known, and neglecting the Commission in this way will be to the detriment of the average African. This will seriously hamper the already expressed commitment by the Commission in addressing HIV/AIDS and its human rights challenges in Africa.

⁸⁰ Para 99 Declaration of Commitment.

⁸¹ <http://www.unaids.org/about/files/UNSSP20012005.html#globalstrat> (accessed 14 July 2003).

⁸² n 54 above.

10 Conclusion

Oyegun⁸³ raises a rather obvious, yet thought provoking, question as to whether or not Africans, in general, and people living with HIV/AIDS, perceive themselves as bearers of rights, as citizens with entitlements such that they are 'active subjects and full members of society, rather than objects of a government's abuse or neglect'. The response to this question is that Africans are human beings and that this entitles them to be bearers of fundamental human rights. It is very unfortunate that, in practice, most of them do not enjoy these fundamental human rights to the maximum. Africa is now well known as a continent of perpetual suffering and this suffering is made worse by the prevalence of HIV/AIDS. The African Commission, therefore, has a daunting task in addressing HIV/AIDS within its Charter-based mandate of promoting and protecting human and peoples' rights in Africa. As an intergovernmental institution, it possesses a potential of making Africans realise their fundamental human rights and freedoms in accordance with the African Charter and other international human rights instruments.

This is the time for Africans to appreciate the importance of the Charter and the role of the Commission in addressing the issue of HIV/AIDS in Africa, as inspired by international law on human and peoples' rights in line with article 60 of the Charter. Without the Commission adopting a human rights approach to HIV/AIDS within its mandate, as guided by the International Guidelines on HIV/AIDS and Human Rights⁸⁴ and other international instruments, Africa will continue to be ravaged by violations of human rights associated with HIV/AIDS, and the statistics of those suffering from the pandemic will never cease to increase.

In the words of Mandela, 'the challenge of [HIV/] AIDS can be overcome if we work together as a global community. Let us join hands in a caring partnership for health and prosperity . . .'.⁸⁵ This will be essential in reversing the declaration by the British Prime Minister, Tony Blair, that the state of Africa is a 'scar to the conscience of the world'.⁸⁶ While the international community focuses on Africa in order to heal it from the scandalous disease of HIV/AIDS, the continent must also take steps to heal itself through its own available means. As long as the African

⁸³ n 2 above.

⁸⁴ The International Guidelines on HIV/AIDS provide an important means of supporting both human rights and public health, emphasising the synergy between these two areas.

⁸⁵ Mandela (n 1 above).

⁸⁶ Tony Blair as quoted by G Monbiot in *Guardian Unlimited* (2003-06-03) <http://www.guardian.co.uk/comment/story/0,3604,969210,00.html> (accessed 20 March 2004).

Commission does not tackle the issue of HIV/AIDS in a more robust manner, joining hands with other organisations in caring partnership, not only for health and prosperity, but for instilling a culture of human rights among our African states, which is seriously lacking, the full enjoyment of human rights in Africa will remain a pipe dream.