

The Model Law on HIV in Southern Africa: Third World Approaches to International Law insights into a human rights-based approach

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Summary

Legislating in response to the HIV epidemic is a core element of the global HIV strategy. A human rights-based approach is essential in order to comply with international law as well as to ensure effectiveness. This stands in contrast to punitive measures and criminalisation provisions within HIV legislation. Third World states are entitled to be cautious about a purportedly human rights-based approach and an explicit conformity with international law that have their institutional origins in advancing Western hegemonic interests. The insights of Third World Approaches to International Law (TWAIL) are important in harnessing international human rights law as a necessarily transformative framework that is effective in meeting its globally equitable and social justice character. This is especially so for the Southern African model law on HIV. TWAIL provide critical guidance relating to context and strategy for Southern African states in this regard and the model law, in turn, offers important opportunities in advancing TWAIL objectives in its counter-hegemonic struggle for global equity and justice. The Southern African model law on HIV is strongly compliant with international human rights principles and obligations and relevant to effectively address the nature of the HIV epidemic in the region. The domestic adoption of the model law across Southern

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African states has the potential to fulfil a strategically crucial transformative role in advancing Third World resistance.

1 Introduction

The statistics of the human immunodeficiency virus (HIV) and of the acquired immune deficiency syndrome (AIDS) are so staggering as to verge on the incomprehensible. During 2007, an estimated two million people died globally of AIDS; an estimated 33 million people were living with HIV; and an estimated 15 million children (aged under 18 years) were living as orphans due to AIDS.¹ These figures, in fact, signify an improvement, due to concerted efforts in public health responses. According to the Joint UN Programme on HIV/AIDS (UNAIDS):²

No disease in history has prompted a comparable mobilisation of political, financial and human resources, and no development challenge has led to such a strong level of leadership and ownership by the communities and countries most heavily affected. In large part due to the impact of HIV, people throughout the world have become less willing to tolerate inequities in global health and economic status that have long gone unaddressed.

This is unlikely to resonate with many of those living in the Southern African Development Community (SADC) states.³ Despite comprising 3,9% of the global population,⁴ their share of the above three statistical indicators for 2007 were 43,8% of global AIDS deaths, 41,4% of the global population living with HIV, and 37,6% of the global population of children living as orphans due to AIDS.⁵ SADC states account for fully 47,5% of the global population of children aged under 15 years living with HIV resulting from paediatric infections.⁶

Largely due to a recognition of the need to take control at the domestic level of the management of responses to HIV and AIDS, SADC parliaments have developed a model law on HIV as one element of a more concerted approach. This article examines the nature of that model law and, especially, its human rights-based approach to HIV-related legislation. It also considers the extent to which the emerging global scholarship on Third World Approaches to International Law

¹ UNAIDS *Report on the global AIDS epidemic 2008* (2008) 214 217 218 http://data.unaids.org/pub/GlobalReport/2008/JC1510_2008GlobalReport_en.zip (accessed 10 April 2009).

² UNAIDS (n 1 above) 13.

³ The SADC states are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. Madagascar was suspended by the Extraordinary Summit of the SADC Heads of State and Government (30 March 2009) until its return to 'constitutional normalcy'.

⁴ UNDP *Human Development Report 2007/2008* (2007) Table 5 (2005 data).

⁵ UNAIDS (n 1 above).

⁶ UNICEF *The state of the world's children 2008* (2007) Table 4 (2005 data).

(TWAAIL) assists in an improved understanding of legislative responses to HIV within the Southern African context.

Section 2 presents an overview of TWAAIL scholarship, especially in informing the critique of this article. Section 3 describes the Southern Africa model law, its conceptual framework and legislative scope, and briefly compares the West and Central African model law. Section 4 outlines some characteristics from the TWAAIL overview which may better inform appropriate actions, and discusses some aspects of HIV in the region which distinguish it from the epidemic elsewhere. The article concludes that the Southern African model law is a regionally-appropriate response to the HIV and AIDS epidemic, and that it presents opportunities to benefit from TWAAIL insights. Just as importantly, it also may contribute meaningfully to TWAAIL demands for international law to be more relevant to Third World rights to a more just and equitable international order.

2 TWAAIL insights: An overview

TWAAIL's foundations lie in the extent of contemporary international law's origins in a European legal tradition that has insufficiently acknowledged and thus been unable to fully come to terms with the characteristics of its own imperialism and colonialism. A consequential examination of international law needs to understand that it is both culturally constitutive and historically contingent.⁷ This is certainly important with respect to African states, which can be seen to suffer from a 'structural illegitimacy' in view of their origins in the 'brutal state building' of the colonial era.⁸

TWAAIL's origins date from the growth of the decolonisation movement in the aftermath of World War II,⁹ with particular scholarship occurring as the decolonisation process strengthened in the 1960s and 1970s.¹⁰ Explicit TWAAIL critiques have emerged in the past decade or two as a means of eradicating the conditions of underdevelopment in the Third World.¹¹ This requires both a deconstruction of the use of international law to the extent that it creates and perpetuates Western hegemony, and a construction of the bases for a post-hegemonic

⁷ JT Gathii 'Alternative and critical: The contribution of research and scholarship on developing countries to international legal theory' (2000) 41 *Harvard International Law Journal* 265.

⁸ Gathii (n 8 above) 266.

⁹ M Mutua 'What is TWAAIL?' (2000) *ASIL Proceedings 2000* 31. Okafor locates TWAAIL's origins in the pre-1940s decolonisation movements of Latin America. OC Okafor 'Newness, imperialism, and international legal reform in our time: A TWAAIL perspective' (2005) 43 *Osgoode Hall Law Journal* 177.

¹⁰ BS Chimni 'The past, present and future of international law: A critical Third World approach' (2007) 8 *Melbourne Journal of International Law* 500.

¹¹ Mutua (n 9 above).

global order in which Third World states and peoples escape marginalisation.¹² For some scholars, all of this is being sidelined by the hegemonic priorities of a 'post-9/11' global order.¹³ This is a threat insofar as it signifies 'the subtle displacement of Third-World suffering from international consciousness'.¹⁴

2.1 Toward a universal and equitable global order

It is the unjustness of inequality and the strive for substantive responses within a global framework that are unifying features of a diverse and dynamic body of scholarship.¹⁵ A TWAIL analysis demands an intellectual consistency across its various approaches to international law; constituting a 'dialectic of opposition' to an international legal 'regime and discourse of domination and subordination'.¹⁶ This requires that TWAIL exhibit a 'shared ethical commitment' to a just international order, characterised by a global human rights-based approach that is politically transformative.¹⁷

One reason this is essential is the need to move away from the sense in which human rights serve as a means of Third World 'surveillance' by Western interests, as elaborated in Baxi's 'TREM thesis'.¹⁸ For Baxi, the logic of the human rights paradigm in the Universal Declaration of Human Rights (Universal Declaration) — and its consequential human rights covenants — is steadily being supplanted by a trade-related market-friendly (TREM) human rights paradigm which better serves dominant global (Western) interests. That paradigm entrenches the protection of the property interests of global capital as central to its conception of the global social order. It conceives the 'progressive' Third World state as one that is a good host to global capital, protecting it against political instability even at a cost to its most vulnerable citizens. Further, such a state is conceived as market efficient when suppressing its people's human rights-based resistance to the state's 'excessive softness' toward global capital. Unlike the character of the Universal Declaration, the TREMF paradigm acts to deny a redistributive

¹² DP Fidler 'Revolt against or from within the West? TWAIL, the developing world, and the future direction of international law' (2003) 2 *Chinese Journal of International Law* 31.

¹³ Fidler (n 12 above) 74. For ways in which '9/11' was used — especially by the USA — to intensify pro-hegemonic international law and its institutions, see B Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' (2006) 27 *Third World Quarterly* 774.

¹⁴ Okafor (n 9 above) 173.

¹⁵ Mutua (n 9 above) 36. 'Just like the Third World on which it focuses, TWAIL is not a monolithic school of thought' (Okafor (n 9 above) 176).

¹⁶ Mutua (n 9 above) 31.

¹⁷ OC Okafor 'Marxian embraces (and de-couplings) in Upendra Baxi's human rights scholarship: A case study' in S Marks (ed) *International law on the left: Re-examining Marxist legacies* (2008) 256-7.

¹⁸ Okafor (n 17 above) 265-270.

role to the state, which effectively subordinates — even negates — the Universal Declaration’s embrace of the state’s pursuit of a just social order that at least ensures the basic needs of its citizens.¹⁹

Baxi nevertheless offers qualified optimism in the face of such threats to human rights through its subordination to global capital interests. Noting the ‘soft’ character of much international law — especially in the human rights area — he emphasises that the normative expectations of such aspirational laws ‘survive, and even grow stronger, in the face of disappointment. Put another way, the more they stand violated, the greater become their moral strength.’²⁰

Anghie reminds us of the sixteenth century European origins of international law whereby — in furtherance of exploitative trade and territorial conquest — ‘foreigners enjoyed more extensive economic rights than locals who could not assert their claims at the international level or invoke international standards’.²¹ In this setting, the establishment of ‘equal’ rights has emerged in a manner in which they cannot be equally accessed. This has, at least, made their acceptance by dominant and privileged interests that much easier, whilst leaving little for optimism about the immanent elevation of entitlements to globally equitable justice to the level of a ‘hard’ law of rights. Notably, in this regard, Chimni points out that²²

official international human rights discourse eschews any discussion of the accountability of international institutions such as the IMF/World Bank combine or the WTO which promote policies with grave implications for both the civil and political rights as well as the social and economic rights of the poor.

A relevant current example cited by Anghie is the international protection of intellectual property rights via the World Trade Organisation (WTO) Trade Related Intellectual Property Rights (TRIPS) agreements. These oblige — *inter alia* — Third World states to ensure the protection of intellectual property within their domestic jurisdictions, and to protect and benefit ‘foreigners’ (essentially, Western private capital interests) far more than ‘locals’.²³ In this context, it is thus necessary to consider the character of international law and the means by which it may more explicitly ensure its genuinely equitable and universal character.

¹⁹ Okafor (n 17 above) 266-267. For a coherent elaboration of the means by which international law is being used to advantage global capital and property interests over Third World states and peoples and, by association, human rights standards, see BS Chimni ‘Third World approaches to international law: A manifesto’ in A Anghie *et al* (eds) *The Third World and international order: Law, politics and globalization* (2003) 52-60.

²⁰ U Baxi ‘What may the “Third World” expect from international law?’ (2006) 27 *Third World Quarterly* 721.

²¹ A Anghie *Imperialism, sovereignty and the making of international law* (2004) 271.

²² Chimni (n 19 above) 62-63.

²³ n 21 above.

2.2 TWAIL: A signpost at the fork in the human rights road

The challenge commences with outlining a distinction between hegemonic and counter-hegemonic international law such that a co-existence between the two 'requires a serious reconsideration of past tactics and even goals', especially in such areas as human rights and development.²⁴ Chimni phrases this distinction as 'between those demands that are not so good for Third World countries and those that are'.²⁵ Echoing other commentators, Rajagopal points out that human rights discourse has also become a convenient tool of hegemonic international law, and has thus contributed to thwarting the attainment of global justice.²⁶ For Mutua, whilst human rights has its origins in European efforts to curb European atrocities, the development of human rights in international law was largely driven by the legacy of European atrocities against colonised Third World peoples. However, its legitimised practice has been one of European 'defence' of the human rights of Third World peoples, enabled by a 'grand narrative' of Third World 'savages' and 'victims' and Western 'saviours', which thus also affords the latter with 'self-redemption'.²⁷

Responses thus need to be rooted and originate in the Third World as well as find 'common universality' through respect for cultural pluralism, 'to create a new multicultural human rights corpus'.²⁸ Human rights can play a role in changing the unjust international order and particularly the imbalances between the West and the Third World.²⁹ TWAIL analysis in this regard differs from so-called 'Asian-values' discourse. Whilst the latter sees human rights as tantamount to being irredeemably Western in origin and purpose, the former largely views human rights — whatever its sins as a hegemonic tool — as a necessary part of the struggle for Third World justice and counter-hegemonic international law.³⁰

Rajagopal describes four primary prospects in promoting a counter-hegemonic international law: first, the growth of regional international law, albeit still vulnerable to the flaws in the dominant global system; second, the replacement of the current multilateral

²⁴ Rajagopal (n 13 above) 768.

²⁵ Chimni (n 19 above) 67.

²⁶ Rajagopal (n 13 above). For the reader surprised by the notion that human rights discourse has served hegemonic purposes, see Rajagopal (n 13 above) 769-775 and, more vociferously, Mutua (n 27 below), including concerning the hegemonic role of Western/international human rights NGOs.

²⁷ M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201 208 210.

²⁸ Mutua (n 27 above) 245.

²⁹ As above.

³⁰ n 21 above, 255-256. There is not uniform optimism about the capacity to reform from 'within'; see, eg, OC Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' (2006) 27 *Third World Quarterly* 808.

system with a co-operative alliance of hegemonic powers, likely not feasible given inevitable clashes between state interests; third, the emergence of a new Third World alliance to succeed the increasingly limited functions of the G-77 (as the primary Third World block), although recent experiences in World Trade Organisation (WTO) negotiations reveal the danger of selective co-option of key states by Western political alliances; or fourth, the emergence of coalitions of smaller states and social movements, for which experience suggests a poor likelihood in creating the necessary global politics.³¹ Elsewhere, Rajagopal has described social movements as ‘extra-institutional forms of mobilisation [that] constitute important arenas of resistance’ and human rights as ‘international law’s sole, approved discourse of resistance’.³²

Given such potential threats and limitations, and the importance of popular engagement in realising the transformative agenda, key issues which need to be mainstreamed within domestic and regional actions in order to re-define international law’s relevance to and within the Third World are those of poverty, agency and resistance.³³ ‘Agency’ concerns local capabilities and autonomy in managing local responsibilities, and relates to the extent to which international law permits or promotes ‘the capability of African peoples to chart their own futures and to self-constitute’ in the face of external and international agencies and actors.³⁴ ‘Resistance’ relates to the essence of TWAIL’s hegemonic versus counter-hegemonic analysis, demonstrating its substantive value to Third World peoples through such actions as ‘the epic (African-led) campaign to reform the relevant world trade rules so as to allow Third World peoples far more access to much cheaper essential (especially HIV/AIDS) medications ...’³⁵

Okafor’s analysis is consistent with Rajagopal’s preferencing of a combination of state-based and social movement strategies. Rajagopal retains some optimism that the existence of such strategic pathways provides a potentially useful framework for TWAIL-informed actions and resistance despite the constraints of that current (TREM-Focused) hegemonic framework.³⁶

For the purposes of later discussion, it is at least noted that the first of his aforementioned options — the development of regional international law — remains a viable pathway despite threats, and provided that it is adequately conscious of the hegemonic potential of human

³¹ Rajagopal (n 13 above) 780-781.

³² B Rajagopal ‘International law and Third World resistance: A theoretical inquiry’ in Anghie *et al* (n 21 above) 151.

³³ Okafor (n 30 above) 799. In the context of HIV and AIDS in Southern Africa, the issue of poverty is highly contested: it is briefly referred to in sec 4.2.

³⁴ Okafor (n 30 above) 804.

³⁵ Okafor (n 30 above) 809.

³⁶ Rajagopal (n 13 above) 781.

rights discourse. This option will further benefit from careful attention to the third and fourth of his alternative prospects: respectively, improved Third World alliances and coalitions of smaller states and social movements. This is especially so in informing strategy and in strengthening the essential place of agency and resistance in ensuring the transformative role of international law in achieving its necessarily counter-hegemonic character.

Following the next section's description of the current nature of the development of a model law on HIV within Southern African states, this article proceeds to examine the relevance of the preceding TWAIL overview and associated insights for that project.

3 Development of the SADC regional model law on HIV

3.1 SADC Parliamentary Forum and its HIV and AIDS focus

SADC was established as an inter-governmental organisation in 1992, with its antecedents mainly in the struggles of the Southern African 'front line' states to end colonial administrations and white minority rule in the region. SADC is governed by its Treaty³⁷ which provides for socio-economic, political and security co-operation although, in practice, its mandate is focused on the former. The Treaty was amended in 2001 in an effort to strengthen its organisational roles and sustainability.³⁸ Generally, SADC aims³⁹

to build a region in which there will be a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region.

It also serves as a 'regional economic community' of the African Union (AU).⁴⁰

The SADC structure includes a Secretariat located in Gaborone, Botswana, and the SADC Tribunal based in Windhoek, Namibia. The Tribunal was established in 2005 and was ready to receive cases in 2007, and serves as a regional African court. Its jurisdiction concerns determining matters of interpretation or application of the Treaty, SADC Protocols and other aspects of SADC actions, as well as matters

³⁷ SADC *Treaty of the Southern African Development Community (SADC)* (2001) <http://www.sadc.int/index/browse/page/120> (accessed 10 April 2009).

³⁸ See, eg, the African Union <http://www.africa-union.org/root/au/RECs/sadc.htm> (accessed 10 April 2009).

³⁹ As above.

⁴⁰ African Union (n 38 above) http://www.africa-union.org/About_AU/Abrecs.htm (accessed 10 April 2009).

where member states have specified its jurisdiction.⁴¹ The Tribunal, further⁴²

is exhorted to develop its own community jurisprudence, applying also general international law principles and principles from individual states' laws ... Whether that law will include general principles of human rights as found in international law and the constitutions of the member states will be determined by Tribunal jurisprudence.

Whilst SADC represents states via their governments, the SADC Parliamentary Forum (PF or Forum) comprises those states' parliaments, with the single exception of Madagascar, which only joined SADC in 2005 and has not yet joined the Forum. SADC PF was established in 1997 and its objectives include the promotion of multiparty democracy, good governance, gender equality and political stability in the region, and respect for the rule of law, human rights and fundamental freedoms.⁴³

It is a regional inter-parliamentary body, although lacking the statutory basis under the SADC Treaty to enable it to affiliate as an associate member of the Inter-Parliamentary Union (IPU).⁴⁴ This is due to the Forum having been established under article 9(2) of the SADC Treaty as an 'other institution' rather than an article 9(1) institution of SADC — and thus lacking the associated formal status of a SADC body — and the unresolved issue of transforming the Forum into a regional legislature, which would require an amendment to the SADC Treaty. Two principal impediments are a view by some that it is preferable to instead — rather than also — support the Pan-African Parliament, which was inaugurated in March 2004,⁴⁵ and the issue of recurrent financing of a parallel regional body. SADC states thus lack the critical roles of other regional legislative bodies — which are affiliated with the IPU — such as the East African Legislative Assembly and the Parliament of the Economic Community of West African States (ECOWAS).

SADC and Forum responses to HIV and AIDS have taken two different but complementary pathways, linked to and informed by global and continental initiatives, such as UN General Assembly declarations on HIV and AIDS and the 2001 Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases of African Summit of the

⁴¹ SADC Tribunal Protocol of Tribunal and the Rules of Procedure thereof arts 14 & 15 <http://www.sadc.int/tribunal/protocol.php> (accessed 10 April 2009).

⁴² See African International Courts and Tribunals http://www.aict-ctia.org/courts_sub-reg/sadc/sadc_home.html (accessed 10 April 2009).

⁴³ SADC Parliamentary Forum <http://www.sadcpf.org/index.php?disp=about> (accessed 10 April 2009).

⁴⁴ Inter-Parliamentary Union <http://www.ipu.org/english/membshp.htm> (accessed 10 April 2009).

⁴⁵ African Union http://www.africa-union.org/root/au/organs/Pan-African_Parliament_en.htm (accessed 10 April 2009). Only two SADC member states (DRC and Seychelles) are not current members.

Organisation of African States, predecessor of the AU.⁴⁶ In 2003, SADC states adopted the Maseru Declaration on the Fight against HIV/AIDS in the SADC Region.⁴⁷ The Maseru Declaration committed SADC member states, individually and collectively, to concerted efforts in responding to HIV and AIDS through scaling-up services, community education, training and programme efforts, and this remains the focus of SADC's HIV work plan.⁴⁸

At the same time, SADC PF has focused on building parliamentary awareness and support for parliamentary actions on HIV and AIDS, and on legislative reform. A PF regional forum in 2002 resolved to consider the development of model HIV legislation, and this was duly agreed upon by the Forum's Plenary Assembly, in the context of the United Nations (UN)'s 2001 General Assembly Special Session which committed states to adopt a human rights approach in addressing HIV and AIDS.⁴⁹ A survey of legislative efforts to address HIV was carried out in 2004,⁵⁰ and led to the Forum recommending a concerted action on legislative review and reform.

The Forum adopted a wide-reaching plan of action on HIV and AIDS by its Secretariat staff and, in 2005, formalised the establishment of a dedicated small staff unit, which grew during 2008.⁵¹ From 2005, a particular focus was placed on parliamentary training on HIV/AIDS and orphans and vulnerable children (OVC), shaped by collaboration with a technical and funding partner, European Parliamentarians for Africa, and the sheer magnitude of this dimension of the issue and

⁴⁶ For the Abuja Declaration (2001), see http://www.un.org/ga/aids/pdf/abuja_declaration.pdf (accessed 10 April 2009).

⁴⁷ SADC Declaration on HIV and AIDS (2003) [http://www.sadc.int/sadcaidsinfo/docs/Technical Documents/The Maseru Declaration on HIV and AIDS.pdf](http://www.sadc.int/sadcaidsinfo/docs/Technical%20Documents/The%20Maseru%20Declaration%20on%20HIV%20and%20AIDS.pdf) (accessed 10 April 2009).

⁴⁸ See, eg, SADC *SADC HIV and AIDS business plans: Strategic 5-Year business plan 2005-2009* (2004) [http://www.sadc.int/sadcaidsinfo/docs/Technical Documents/Southern African Development Community \(SADC\) HIV and AIDS Business Plan 2005-2009.pdf](http://www.sadc.int/sadcaidsinfo/docs/Technical%20Documents/Southern%20African%20Development%20Community%20(SADC)%20HIV%20and%20AIDS%20Business%20Plan%202005-2009.pdf) (accessed 10 April 2009).

⁴⁹ UN *Declaration of Commitment on HIV/AIDS* (2001); for human rights, see paras 58-61 http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf (accessed 10 April 2009). A subsequent UNDP-commissioned study in 2006 recommended that regional institutions be tasked 'with taking the lead in developing model legislation' on HIV and AIDS. UNDP *A review of regional and national human rights-based HIV and AIDS policies and frameworks in Eastern and Southern Africa* (2006) 75.

⁵⁰ National Development Institute for International Affairs and SADC Parliamentary Forum *Survey of legislative efforts to combat HIV/AIDS in the Southern Africa Development Community (SADC) region* (2004) http://www.sarpn.org.za/documents/d0001339/NDI_Nov2004_HIV.pdf (accessed 10 April 2009).

⁵¹ By late 2008, the Forum's HIV/AIDS unit comprised five officers — co-ordinator, web-master, information officer, training ('capacity development') officer and accountant — and the present author on a part-time voluntary basis. It has also recruited national HIV/AIDS researchers in seven of the 14 member parliaments: Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe; see <http://www.sadccpf.org/hiv/aids/page.php?pn=research%20assistants> (accessed 10 April 2009).

associated political interest in responding to it.⁵² For example, whilst the number of orphaned children in sub-Saharan Africa increased from 30,9 million in 1990 to 48,3 million in 2005, the share of that cohort due to AIDS was, respectively, 330 000 and 12 million, representing a rapidly growing proportion of that growth (roughly, increasing from 1% to 25% of the total OVC population).⁵³

By 2007, the Forum was in a position to escalate its work on legislative reform. It contracted technical expertise in this regard from the University of Pretoria's AIDS and Human Rights Research Unit,⁵⁴ which prepared a 'position paper' to inform, in particular, parliamentarians in the process of drafting a model law.⁵⁵ The draft model law was successively amended following various review processes, culminating in several formal discussions in mid-2008.⁵⁶ This process enabled a final draft to be produced in preparation for SADC PF's conduct — in collaboration with the AIDS and Human Rights Research Unit — of a 'satellite session' on the model law at the XVII International AIDS Conference held in Mexico City in August 2008.

The model law was formally adopted at the November 2008 Plenary Assembly of the Forum. Following that, the Forum Secretariat has been pursuing opportunities with member parliaments, and especially the relevant parliamentary committees responsible for HIV matters, as well as key social movements, to determine preferred mechanisms for achieving the domestic adoption of the model law. This needs, for each state, to take account of three primary concerns. First is the issue of whether the model law should be used as a basis for modifying or supplanting existing domestic law; second, whether adoption of the law

⁵² These workshops led to the 2004 Cape Town Declaration on an Enhanced Parliamentary Response to the Crisis of Orphans and other Children made Vulnerable by HIV/AIDS in Africa http://www.awepa.org/resources/cape-town-declaration-on-an-enhanced-parliamentarian-response-to-the-crisis-of-orphans-and-other-ch_en.html (accessed 10 April 2009).

⁵³ UNICEF *Africa's orphaned and vulnerable generations: Children affected by AIDS* (2006) 35 http://www.unicef.org/publications/files/Africas_Orphaned_and_Vulnerable_Generations_Children_Affected_by_AIDS.pdf (accessed 10 April 2009).

⁵⁴ Established in 2005 as a collaboration between the University's Centre for Human Rights and Centre for the Study of AIDS; see http://www.chr.up.ac.za/centre_projects/ahrru/ (accessed 10 April 2009). Financial support to the PF for these purposes has come from the Swedish International Development Co-operation Agency.

⁵⁵ SADC Parliamentary Forum *Model law on HIV in Southern Africa: Position paper* (2007) http://www.sadcpf.org/SADC_PF_model_law_on_HIV_position_paper.pdf (accessed 10 April 2009).

⁵⁶ Primarily, but not only, the following PF workshops: 'HIV/AIDS Standing Committee and Policy Organs: Workshop on Consideration of Model Legislation on HIV & AIDS', Pretoria, South Africa (25-27 June 2008); 'Regional Consultation and Action Planning Meeting on Rights-Based Law in the Context of National Responses to HIV' (with UNAIDS and AIDS and Rights Alliance for Southern Africa), Johannesburg, South Africa (7 July 2008), and 'Regional Consultative Meeting of Experts on the Draft SADC PF Model Law on HIV' (with University of Pretoria AIDS and Human Rights Research Unit), Pretoria, South Africa (15-16 July 2008). For a final version of the Model Law on HIV in Southern Africa, see http://www.chr.up.ac.za/centre_projects/ahrru.

would best or more likely occur by formal government sponsorship or as a private member's bill; and third, whether the domestic laws should seek to ensure uniform provisions across the member state jurisdictions or to strategically accommodate policy differences.

All three aspects are likely to impede the model law's passage into domestic legislation. However, it is first necessary to summarise the key features of the framework 'position paper' and of the model law before considering its rationale and content in terms of parliamentary strategy and policy adequacy. This needs to occur in terms of both the nature of HIV in the region and the previous survey of TWAIL scholarship and insights.

3.2 Overview of the Model Law on HIV in Southern Africa

The position paper sets the framework for the model law and provides a general discussion of the role and nature of HIV-responsive laws. In doing so, it emphasises a human rights focus as more effective than proscriptive or punitive (criminalisation) approaches in responding to the epidemic. This accords with UN experience: 'Countries that have recorded the greatest success in addressing their national epidemic have implemented a strong human rights-based approach.'⁵⁷

The paper describes the model law as serving as a 'template' which is relevant to the various jurisdictions, and possessing persuasive value 'materially, on the quality of [its] provisions; formally, on the process of [its] adoption; and organically, on the nature of stakeholders involved in that process'.⁵⁸ It emphasises the importance in any state-based adaptation of its provisions to ensure that the 'minimum core' of human rights protections and primary focus on being HIV-responsive are not compromised, especially given that SADC states are parties to the range of UN and African Union (AU) human rights instruments.⁵⁹

The importance of this in the SADC region is that, whilst various countries have adopted appropriate policy in the area, this is ultimately unenforceable, and – within those states that have adopted HIV-related legislation – it has tended to be concerned with employment law and the criminalisation of transmission.⁶⁰ Prior efforts to promote

⁵⁷ UN General Assembly *Summary of the 2008 high-level meeting on the comprehensive review of the progress achieved in realising the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS (United Nations Headquarters, 10-12 June 2008): Note by the President of the General Assembly, 62nd session UN Doc A/62/895 (3 July 2008) para 27.*

⁵⁸ n 55 above, 5-6.

⁵⁹ n 55 above, 7-8. All SADC PF member states are parties to all of the relevant human rights treaties.

⁶⁰ n 55 above, 12-14; UNDP (n 49 above) 73. For various legislation, policies and case law in the region, see UNDP *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa (2008) Parts D2, D3 & D4, respectively* http://content.undp.org/go/cms-service/download/asset/?asset_id=1704942 (accessed 10 April 2009).

model HIV laws within the region have been external initiatives lacking domestic ownership and appropriate engagement of the responsible legislative bodies.⁶¹

Foreshadowing the political impediments to a rights-based approach, the position paper observes that⁶²

of the 14 SADC member states, at least eight criminalise commercial sex work or activities related to it, 11 criminalise male-to-male sex, and in most of them, the situation of women and girls is one of inequality and serves to fuel the epidemic.

In its discussion of the scope of legislation, the paper notes that a human rights-based approach remains the most proven successful strategy in response to the epidemic, including compared to a response based on 'public health principles'.⁶³ It asserts that criminalisation approaches are — at best — futile and more likely to be counter-productive, and that sufficient provisions are already contained within domestic criminal statutes to complement rights-based HIV legislation with respect to such concerns as sexual assault and the protection of minors.⁶⁴ The paper concludes with a discussion of a range of contentious issues such as cultural practices, mother-to-child transmission, HIV testing and disclosure of status, and the situation of prisoners, and annexes a summary of the current legislative situation concerning HIV and AIDS across SADC states (minus the Democratic Republic of the Congo, plus the Seychelles, which withdrew from SADC in 2004) and Uganda.

This, understandably, ensured robust dialogue at the principal consultative forum on the model law, the Deliberative Session for Members of Parliament and Legal Drafters on Model Legislation for HIV and AIDS in the SADC Region, held in Dar es Salaam, Tanzania, in November 2007, as a session of the Forum's Regional Standing Committee on HIV/AIDS. Recurring issues raised throughout the five-day forum concerned such aspects as the legal status of sodomy, condom provision to prisoners, criminalisation of 'intentional transmission', the right of HIV-positive people to have a family, and the status of commercial sex workers. In a useful intervention as a sessional speaker, a High Court judge from Botswana reminded the gathered legislators that, in the absence of proper legislation, courts increasingly resort to international law to safeguard the human rights of those living with

⁶¹ n 55 above, 15.

⁶² n 55 above, 8.

⁶³ n 55 above, 17. For a valuable discussion of the need for a rights-based approach to health services and care, in the specific context of HIV/AIDS, see P Farmer 'Global AIDS: New challenges for health and human rights' (2005) 48 *Perspectives in Biology and Medicine* 10.

⁶⁴ n 55 above, 27–29. For the inappropriateness, if not counter-productivity, of criminalisation approaches, see PM Eba 'Pandora's box: The criminalisation of HIV transmission or exposure in SADC countries' in F Viljoen & S Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa* (2007) 13.

or affected by HIV. He noted the range and limitations of relevant laws across the region (an 'uneven' legislative landscape) and the need for more uniform remedies and protections for affected populations consistent with human rights provisions.⁶⁵

Whilst the draft model law was well-informed by the proceedings of that 'deliberative session', its provisions were bound to be contentious to many legislators across the region. Debate within subsequent consultative workshops on the model law has tended to focus on the legal status of the issues referred to in the preceding paragraph, except that the right of HIV-positive persons to have a family seems to have been broadly accepted. This is at least so in principle, even though it remains problematic in practice in terms of references to 'wilful transmission' when the HIV status is known. As for the scope and provisions of the model law, it has — first and foremost — placed a human rights-based approach as the primary benchmark, which has challenged many parliamentarians favouring some forms of criminal responses to various vulnerable or marginalised populations.

The model law describes its aims as being to provide a legal framework for national law reform on HIV in conformity with international human rights law standards; to promote effective prevention, treatment, care and research strategies and programmes on HIV and AIDS; to ensure the respect, protection and realisation of human rights for people living with or affected by HIV; and to promote the adoption of specific national measures to address the needs of vulnerable and marginalised groups in the context of AIDS.⁶⁶ It seeks to be particularly informed by compatible provisions within existing HIV laws within countries of and beyond the region.⁶⁷

There are various notable provisions. The following is, thus, only a selective summary of the model law's treatment of particular issues. Part II concerns prevention. It includes provisions for the eradication of 'harmful cultural practices that contribute to HIV transmission' and sensitisation of the community to the associated dangers of those practices, defined as including 'early marriages, female genital mutilation, forced marriages and widow inheritance'. It requires the state — *inter alia* — to ensure access to quality female and male condoms and needle exchange programmes, and to 'consider' the decriminalisation of commercial sex work and consensual adult same-sex relationships. It provides, for those states where male circumcision is legal and culturally and religiously acceptable, that it only be performed in accordance with proper standards

⁶⁵ SADC Parliamentary Forum Deliberative Session for Members and Legal Drafters on the Model Law for HIV and AIDS in the SADC Region (including the final Communiqué) 10-14 November 2007, draft version.

⁶⁶ SADC Parliamentary Forum Model Law on HIV in Southern Africa (Draft) (2008) sec 1. All references within this paper to the SADC PF model law are to the version presented to the Plenary Assembly in November 2008.

⁶⁷ The model law has adapted provisions drawn from laws in place across eight different countries, of which seven are African states, as well as UN and AU instruments.

and with the prior voluntary and informed consent of the person or his guardian, and that campaigns emphasise that male circumcision ‘may reduce but does not eliminate the risk of HIV transmission’.

Part III deals with HIV testing and counselling. It requires the state to ensure free and accessible HIV testing facilities, with testing being voluntary and anonymous and both preceded and followed by counselling. Whilst it defines compulsory testing, its only reference to it is to prohibit it for prisoners. It authorises a ‘person providing treatment, care or counselling services to a person living with HIV [to] notify a third party of the HIV status of that person’ when that provider determines that the third party is at risk of HIV transmission, the person living with HIV has failed to inform the third party of that risk, and the provider has ‘ensured that the person living with HIV is not at risk of physical violence resulting from the notification’.⁶⁸

Part IV provides for the protection of the rights of people living with or affected by HIV, especially children, women and girls, and prisoners. It prohibits any discrimination against any person on the basis of their HIV status, including safeguarding all sexual and reproductive rights, the rights to marry and to bear children, and the right to access anti-retroviral treatment. It requires measures to safeguard the HIV-affected child’s inheritance and property rights and that the court designate an adult guardian for children remaining in child-headed households, who shall also be guaranteed state support and assistance. It further provides that the state shall protect women and girls from ‘traditional practices that may negatively affect their health’, prohibit marital status as a defence to a rape charge or non-consensual sexual act, and ensure equal legal rights to women regardless of HIV status. Prisoners are to be afforded access to information on and the means of HIV prevention, including clean injecting drug equipment and access to condoms, the provision of which may not be regarded as an offence. General provisions for testing, counselling and free health services apply equally to prisoners, who may not be isolated due to HIV status, and should receive compassionate early release in the final stage of AIDS.

Part V obliges the state to ensure access to high-quality treatment, care and support, including ‘the use of all flexibilities under the [TRIPS Agreement] and the Doha Declaration as well as measures to encourage the local production of medicines’, prompt and free treatment and support for all rape survivors, and ‘protection of the population against fake and counterfeit medicines and treatments’.

⁶⁸ The person in a relationship to first ascertain their HIV status is often the female, with frequent reported instances of violence against her by her male partner when informed of her status (whether or not he transmitted the virus or knows his status). This thus seems to expose the woman to such additional risk and to place a substantial legal onus on the service provider in such circumstances. Nevertheless, this provision is consistent with UNAIDS’s recommended language; see UNAIDS *UNAIDS recommendations for alternative language to some problematic articles in the N’Djamena legislation on HIV (2004)* (2008) 11-12 http://www.icw.org/files/Alternative_language_280308.doc (accessed 1 November 2008).

Part VI concerns research and clinical trials, and requires the establishment of an ethical research body to review HIV-related human biomedical research in accordance with the model law and human rights principles, and mandates the written voluntary informed consent of persons in associated trials and research.

Part VII concerns support to people living with HIV, including the regulation of community home-based care. It provides that non-governmental organisations (NGOs) may institute legal proceedings on behalf of HIV-affected persons and assures such persons of their right to 'meaningful participation in the design and implementation of HIV and AIDS activities at national and community level'.

Part VIII deals with offences and penalties, and sets down penalties associated with breaches of confidentiality and unlawful disclosure, violations concerning testing and counselling, and contraventions of the requirements for informed consent to research and clinical trials. Part IX provides for two state-based enforcement options: the establishment of an HIV tribunal or assignment of jurisdiction to a superior court.

In brief, the PF model law is strongly compatible and consistent with international standards and obligations, including those concerning human rights instruments, and is comprehensive in its human rights provisions. It is also controversial for the same reasons, especially when legislators are faced with seemingly inevitable temptations to sacrifice an effective legal basis for combating the HIV and AIDS epidemic to 'moral' concerns and punitive desires. These are not problems that have plagued the model law that is considered in the next sub-section.

3.3 Comparative comments on the West and Central African Model Law

In 1998, the IPU adopted its resolution on HIV and AIDS.⁶⁹ This called on governments to 'adopt legislation ensuring that the human rights of persons infected or affected by HIV/AIDS are respected', and to 'review and reform penal legislation and prison systems so as to ensure that they comply with international obligations for the protection of human rights, especially as regards HIV/AIDS'.⁷⁰ In this context, the IPU called upon legislators to comply with the International Guidelines on HIV/AIDS and Human Rights in implementing this resolution.⁷¹

The process to develop a model law on HIV in West and Central Africa was led by the Action for West Africa Region (AWARE) HIV/AIDS Proj-

⁶⁹ UNAIDS and Inter-Parliamentary Union *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* (1998) Annex B.

⁷⁰ n 69 above, para 7.

⁷¹ UNAIDS *International guidelines on HIV/AIDS and human rights* (2006 Consolidated Version) http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf (accessed 1 November 2008).

ect, a 'USAID-funded instrument'.⁷² In September 2004, it conducted a regional workshop in N'djamena, Chad, to adopt the model law — commonly referred to as the N'djamena model law — in collaboration with regional bodies, including the Forum of African and Arab Parliamentarians for Population and Development and ECOWAS.⁷³

The UN General Assembly's 2001 Declaration of Commitment on HIV/AIDS included an unqualified commitment that states legislate 'to ensure the full enjoyment of all human rights and fundamental freedoms by people with HIV/AIDS and members of vulnerable groups'.⁷⁴ However, AWARE's statement of 'justification' forming a part of that workshop report qualified that commitment, 'to find solutions that reconcile individual rights and demands of public health based on a prescriptive framework model'.⁷⁵ This was an early sign of intent to qualify human rights guarantees.

The N'djamena model law comprises seven chapters dealing with, respectively, access to education and information; secure health practices and procedures, mainly concerning the handling of and exposure to blood; the regulation of traditional medicine practitioners; voluntary counselling and testing, including provisions for mandatory testing; health and counselling services; confidentiality, including provisions for involuntary disclosure; and prohibitions on discrimination on the basis of real or suspected HIV status.⁷⁶

The N'djamena model law contains — at best — very weak and qualified human rights provisions, elements of mandatory testing and disclosure, and criminalisation of non-intentional HIV transmission. It makes no explicit reference to human rights. It is silent on the rights of prisoners and their access to condoms, silent on male-to-male sex, silent on commercial sex work, silent on injecting drug use, and silent on the rights of women and girls. It is gender-blind on provisions for partner notification of HIV status. For an epidemic with well-established gender dimensions, it makes just two references to women, neither of which exhibit sensitivity to or awareness of such considerations. Firstly

⁷² AWARE-HIV/AIDS Project Regional Workshop to Adopt a Model Law for STI/HIV/AIDS for West and Central Africa (2004) 3 <http://www.awarehiv.org/images%5Cinserts%5CModel%20law%20on%20HIV-AIDS%20.PDF.pdf> (accessed 28 August 2008), but site <http://www.awarehiv.org/> and this report unavailable by 1 November 2008 (copy of document with author).

⁷³ ECOWAS is the regional counterpart to SADC, comprising 15 countries of West Africa, and similarly to SADC is a regional economic community of the AU.

⁷⁴ UN (n 49 above) para 58.

⁷⁵ n 72 above, 7. It is not clear whether this report was agreed to by the workshop partners to represent an official record of proceedings, or whether the absence of commentary on human rights aspects or dissenting views on the scope of the model law is an accurate representation of the workshop discussions.

⁷⁶ *West and Central Africa: Law # of 2004 on HIV/AIDS Prevention and Control* in UNDP (n 60 above) 279-283. The version in this UNDP report is slightly amended from that annexed to AWARE (n 72 above) 9-19; but not with respect to human rights provisions.

is the inclusion of mother-to-child transmission within the definition of 'HIV transmission' (article 1), which thus includes breast-feeding within the scope of 'wilful transmission' should infection of the child occur and, secondly, is the provision for mandating HIV testing of a pregnant woman who undergoes a medical check-up (article 18(c)).

UNAIDS has responded with recommendations on extensive amendments to the model law in order to harmonise it with international human rights obligations and UN HIV and AIDS resolutions and declarations.⁷⁷ This includes advising against the model law's adoption of various criminalisation provisions. 'There is no evidence that criminalising HIV is an effective means of preventing HIV transmission. Furthermore UNAIDS is concerned that criminalising HIV transmission is likely to undermine proven HIV prevention efforts ...'⁷⁸

In meeting the need for effective responses to HIV and AIDS, Kirby has spoken of 'the danger of a virus of a different kind, namely the virus of highly inefficient laws', by which he means 'intuitive' legislative responses to the epidemic which are contrary to the most effective means of its prevention, based on the protection of the human rights of vulnerable populations.⁷⁹ Such legislative inefficiencies include mandatory testing, restrictions placed on people living with HIV, criminalisation and punishment, involuntary disclosure associated with social stigmatisation, and weak or absent protections of the human rights of persons living with or affected by HIV, especially those vulnerable to labelling as 'unclean, immoral and dangerous to the community — people who need to be controlled, checked and sanctioned'.⁸⁰

Since the 2004 adoption of the N'djamena model law, seven states have adopted or adapted its provisions, and another six states are preparing to do so.⁸¹ A number of the national laws closely follow many of the punitive and counter-productive provisions of the model law,

⁷⁷ n 68 above.

⁷⁸ n 68 above, 15.

⁷⁹ M Kirby 'The never-ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 167.

⁸⁰ As above.

⁸¹ The seven legislating states are Benin (2005), Guinea (2005), Guinea-Bissau (2006), Mali (2007), Niger (2007), Sierra Leone (2007) and Togo (2005). The prospective legislating states are Cameroon, Cape Verde, Chad, Côte d'Ivoire, Mauritius and Senegal (R Pearshouse 'Legislation contagion: The spread of problematic new HIV laws in Western Africa' (2007) 12 *HIV/AIDS Policy and Law Review* 2/3, 5 and n 1 <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1275> (accessed 10 April 2009). The inclusion of Mauritius — a SADC state — may mean to refer to Mauritania or simply be a geographic error. With the exception of Cameroon and Chad, all these states are ECOWAS members, except Mauritania, which left ECOWAS in 2000. The UNDP's 2008 *Compendium* only includes Benin's law. A subsequent report cites the AWARE model law as 'best practice' shaped by Benin's domestic adoption, followed by Burkina Faso, Cape Verde and Niger (suggesting nine legislating states), each with support from various UN agencies: Family Health International *Disseminating and replicating best practices in West Africa: Strengthening West Africa's response to the HIV/AIDS epidemic* (2008) 9-13.

and all of those domestic laws provide that ‘wilful transmission’ is an offence whilst not defining it.⁸² The N’djamena model law includes a definition of wilful transmission that is based on knowledge of status but does not include intent.

This is not inconsistent with the IPU’s 2005 HIV/AIDS resolution that ‘calls upon parliaments to enact legislation to punish those who knowingly take the risk of transmitting HIV/AIDS, or who wilfully do so’.⁸³ However, the IPU may be having a re-think, given the ‘final conclusions’ to its First Global Parliamentary Meeting on HIV/AIDS in 2007. These state that ‘there is no evidence that criminal laws specific to HIV transmission will make any significant impact on the spread of HIV or on halting the epidemic’.⁸⁴

UNAIDS urges the criminalisation of HIV transmission only where it is wilful and actually occurs, and encourages states to use general criminal law provisions rather than HIV-specific laws in this regard.⁸⁵ ‘In the overwhelming majority of cases, HIV is not spread by criminals but by consensual participants in a sexual act, neither of whom know their HIV status.’⁸⁶

Equating knowledge of status with intent when engaging in risky activities is particularly problematic in jurisdictions in which ‘wilful transmission’ is defined to include mother-to-child transmission. This is the case with the West and Central African model law. It has been, at the least, incorporated into the corresponding legislation for Sierra Leone, explicitly criminalising a pregnant woman who knows her HIV-positive status but fails to ‘take all reasonable measures and precautions to prevent the transmission of HIV [to] the foetus’.⁸⁷ Given the impact upon such risk due to the availability in many parts of Africa of single-dose medication rather than full triple therapy during pregnancy, as occurs throughout Western countries,⁸⁸ it is spurious to thus attribute criminal culpability to the mother.

⁸² Pearshouse (n 81 above) 9-10. Only Togo’s law includes intent as a factor in wilful transmission.

⁸³ Inter-Parliamentary Union *The role of parliamentarians in advocating and enforcing observance of human rights in the strategies for the prevention, management and treatment of the HIV/AIDS pandemic* (2005) para 14(c).

⁸⁴ Inter-Parliamentary Union *Final conclusions* (2007) para 18.

⁸⁵ UNAIDS *Policy brief: Criminalisation of HIV transmission* (2008) 1 http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf (accessed 10 April 2009).

⁸⁶ S Burris & E Cameron ‘The case against criminalisation of HIV transmission’ (2008) 300 *Journal of the American Medical Association* 5, <http://jama.ama-assn.org/cgi/reprint/300/5/578> (accessed 10 April 2009).

⁸⁷ n 3 above; Prevention and Control of HIV and AIDS Act 2007 (Sierra Leone) sec 21 <http://www.sierra-leone.org/Laws/2007-8p.pdf> (accessed 10 April 2009); conviction carries a sentence of up to seven years’ imprisonment and a fine.

⁸⁸ S Lewis ‘Keynote address at the closing session of the XVI International AIDS Conference’ Toronto, Canada (2006) <http://www.aids-freeworld.org/content/view/74/153/> (accessed 10 April 2009).

The Sierra Leone law appears to similarly criminalise breast-feeding by a woman knowing she is HIV positive. For HIV-positive mothers, exclusive breast-feeding is advocated; risk to the infant arises when a combination of feeding practices are used, as it reduces the infant's viral resistance. For women unable to consistently afford substitute milk formula — especially when informed that breast-feeding risks transmission — or concerned about available water quality to mix infant formula, criminalisation of breast-feeding is manifestly absurd, and exacerbated by situations in which pregnant women are unable to access or afford anti-retroviral treatment for themselves or their newborn child. '[I]n 2007 only an estimated 34% of pregnant HIV-positive women in need were receiving such treatment.'⁸⁹ Criminal culpability might more reasonably rest with the political decision makers and the international community which fails to fulfil resource commitments on treatment.

UNAIDS — as with other UN agencies in the West African region — appears not to have been engaged in the process of developing the N'djamena model law. The drafting process was clearly driven by AWARE, which comprised four of the 2004 workshop's five opening presentations, and there is no reference to UNAIDS in the workshop report. The workshop report notes the attendance of 'representatives for the United Nations Agencies in Chad'. However, in its annexed list of participants, no UN presence is listed amongst the 50 attendees. From the combined text of the report and the list of participants, AWARE's HIV/AIDS officers and the US Embassy's *chargé d'affaires* — and, at the closing session, the US Ambassador — appear to be the only attendees outside regional member states or formal regional bodies.⁹⁰

Even if UNAIDS had been excluded from that process, this does not account for its apparent invisibility in the subsequent processes of developing and adopting domestic HIV laws and its associated engagement with the relevant governments. Its production of a strong and coherent response to the deficiencies and shortcomings of the N'djamena model law did not occur until 2008, by which time many laws had already been adopted.

The framework of West African law on HIV and AIDS appears to illustrate Kirby's warning of 'intuitive' responses to resort to punitive measures. This is the consequence of political representatives being tempted to sacrifice effective responses in order to exhibit 'strong' and 'moral' leadership. In the case of the N'djamena model law, this proved to be unnecessary, as the USAID-funded external process provided that 'leadership'.

⁸⁹ n 85 above, 6. The figure for African states would be even lower.

⁹⁰ n 72 above, 1 5, Annex 4.

4 TWAIL responses to the Model Law

The Southern African Model Law has the capacity to provide leadership of a different kind. Resonant with Rajagopal, it is explicitly human rights-focused, indigenous to the region in origin, mandate and process, and unfolding as a collaborative exercise between regional legislators and key social movements.⁹¹ There appears to have been a degree of symbiosis in this regard: the uniting of major non-governmental agencies in supporting the development of a model law that is rights-based, participatory in its process and that repudiates coercive or punitive provisions also served to strengthen the Forum's own efforts at leveraging the commitment of legislators otherwise attracted by criminalisation provisions.⁹²

This contrasts with the apparent lack of civil society resistance in West Africa, which granted at least tacit approval to the punitive provisions in that region's Model Law. This does not mean that the SADC PF Model Law is fully rights-based: It merely asks states to 'consider' the decriminalisation of commercial sex work and consensual sexual relations (article 11(4)); it provides that pre-test counselling includes notification of the 'fact' of confidentiality of the results and 'encouragement of disclosure' to a partner even though contrary provision is made for a doctor to divulge the person's status to a third party deemed to be at risk of infection where the HIV-positive person fails to do so (articles 13(3) and 15(4)); and it enables 'actual or perceived HIV status' to be grounds for denying a person health or life insurance, retirement benefits or social security on the condition that there are other grounds for such denial (article 21(1)). However, as previously discussed, the Southern African Model Law is nevertheless strongly compliant with human rights provisions, and by global standards.

The Model Law is also capable of contributing to the building of regional international law, but is clearly hampered in this regard by SADC's resistance to date to establish a regional parliamentary body. This places Southern African states at some considerable disadvantage compared to other parts of Africa, notably those states covered by the ECOWAS Parliament and the East African Legislative Assembly,⁹³ and the parallel judicial structures of the ECOWAS Community Court of Justice and the East African Court of Justice. On the other hand, this enabled SADC PF — with its informal status within the SADC frame-

⁹¹ Rajagopal (n 13 above) 780-781.

⁹² See, eg, 'Civil Society Statement on HIV-related Legislation in Southern Africa', signed by 15 civil society agencies across 10 countries of the region (14 July 2008) <http://www.chr.up.ac.za/press%20releases/PRETORIA%20CIVIL%20SOCIETY%20STATEMENT%20ON%20HIV%20RELATED%20LEGISLATION.doc> (accessed 10 April 2009).

⁹³ The East African Community comprises the original member states of Kenya, Tanzania and Uganda, plus — since 2007 — Burundi and Rwanda. Tanzania is a member of both EAC and SADC.

work — to develop a model law in an incremental and collaborative manner that has afforded it the opportunity to canvass support and build consensus across a range of core but controversial elements.

But, as it stands, the PF Plenary Assembly's adoption of the Model Law carries no formal authority, but rather enables concerted parliamentary-level processes toward that end as well as adding symbolic weight to parliamentary support due to PF endorsement by its parliamentary representatives. There is a strategic shortcoming in the Forum's actions in this regard, which concerns the role of the SADC Tribunal.⁹⁴ To the extent that regional justiciability is an important objective of a regional model law, a preferred course of action — rather than a protracted state-by-state adoption of some version of it — would appear to have been for the Forum to advocate SADC's formal adoption of it, whether as a declaration or as a protocol.

The SADC Tribunal demonstrated in its earliest stages — its second case — that its development of regional jurisprudence will rely upon international law, including human rights law, as well as being guided by human rights jurisprudence in other regional jurisdictions.⁹⁵ SADC protocols are fundamental sources of law for the Tribunal, and SADC declarations are influential and may also be referenced by parties in formal proceedings. The model law would only come within the Tribunal's jurisdiction once it is adopted domestically, and then only for matters concerning that state, although any domestic judgments on it may be influential in subsequent Tribunal decisions concerning matters arising from other member states. This suggests that, insofar as the development of regional jurisprudence is concerned, the model law remains outside of the Tribunal's jurisdiction as it is not a 'subsidiary instrument' and the Forum's Plenary Assembly adoption of the model law is also unlikely to constitute a states' agreement that confers such jurisdiction, in accordance with the Tribunal's Protocol (article 14).⁹⁶

Such an important issue of strategy was absent from options canvassed in the position paper prepared to inform the development of the model law. Whilst that paper correctly stated that 'the main weakness of [national] policies is that they are not legally enforceable', it did not point out that such policies at least have a persuasive value that the model law appears to lack within the regional jurisdiction. The Tribunal's early demonstration of the core relevance of international

⁹⁴ 'The Tribunal shall have jurisdiction over disputes between states, and between natural or legal persons and states' (art 15(1)), provided that the applicant 'has exhausted all available remedies or is unable to proceed under the domestic jurisdiction' (art 15(2)), and regardless of the consent of the other (state) party (art 15(3)); n 41 above.

⁹⁵ *Mike Campbell (PVT) Limited & Another v Republic of Zimbabwe (2/07)* [2007] SADCT 1 (13 December 2007) <http://www.sadc-tribunal.org/docs/CASENo207.pdf> (accessed 10 April 2009).

⁹⁶ Comments by the Tribunal's Registrar, Justice C Mkandawire (interview with author 8 April 2009).

law in its decision making also suggests that any such non-compliance of various national laws on HIV may be currently vulnerable to successful regional judicial challenge without any influential role of the Model Law in this regard. However, as per Rajagopal's reference to strategic pathways being faced with both opportunities and limitations in pursuing TWAIL-informed actions,⁹⁷ SADC states may also have an advantage in this adopted pathway. The Forum's strong leadership in the model law's development through a participatory process with a focus on rights-based provisions may, in turn, help to leverage the political commitment necessary for advancing the transformation of SADC PF into a regional parliamentary structure. The Forum's collaboration with several state parliaments in adopting the model law as domestic legislation without sacrificing human rights provisions may, in turn, help to expedite its domestic adoption across other member states and, as a consequence, strengthen its regional uniform character as appropriately rights-based law. There is no less guarantee that member states will adopt laws in conformity with the model law whether it enjoys the support of member parliamentarians via the Plenary Assembly or it assumes the status of a SADC protocol with member states. The former course has probably enabled stronger engagement of civil society in the process whilst the latter course strengthens its justiciability at the regional level in the absence of domestic adoption.

The effective engagement of key members of the judiciary across several states needs to be strengthened in this regard. This, in turn, may assist in better advancing a domestic legal framework strongly based on international legal standards and obligations and with better state attention to Tribunal powers. Nevertheless, the continued absence of a regional legislature remains a potentially inherent limitation.

4.1 TWAIL insights to SADC collective action

The Forum's focus on networking with key civil society organisations, academia and social movements within the region may serve to build state-based coalitions necessary to promote the centrality of 'agency' as advocated by Okafor,⁹⁸ whose reminder of the need to ensure local autonomy and capabilities is pertinent. Although the region is not submitting to the external agenda-setting and shaping of the legislative framework as has occurred in West and Central Africa, it remains an issue for the Forum that non-local actors may normatively disregard its direct engagement in various capacity-building activities with the parliaments of member states with respect to HIV and AIDS-related issues.⁹⁹

⁹⁷ Rajagopal (n 13 above) 781.

⁹⁸ Okafor (n 30 above) 804.

⁹⁹ This is an ongoing issue for the Forum with some of its key external partners which, eg, engage in training and policy development activities directly with Southern African parliaments in the absence of timely notification of SADC PF, let alone engagement.

This needs to be confronted forcefully, given the importance to effective counter-hegemonic agency of engagement with appropriate transnational social movements. This is especially so concerning global issues demanding global responses duly informed and shaped by the situation, experiences and priorities of the most adversely impacted within marginalised and disadvantaged populations. Such agency is also crucial to aspects of Third World resistance that are necessary for Southern African states. This concerns, for HIV and AIDS in SADC states, at least three areas of attention.

First, human rights duties, obligations and protections must be rigorously and persistently asserted — even restated and reinterpreted — in a non-hegemonic context. This requires due regard to marginalised populations as well as alliances which more effectively engage western states in actually meeting their unequivocal commitments and obligations under international agreements, especially with respect to the financing of and support for measures to deal with the epidemic. To paraphrase Baxi, such commitments have been so consistently violated that they become morally stronger in the face of such repeated disappointment.¹⁰⁰ This is evident, for example, in the repeated defaulting by key donor (notably Western and, in particular, G8) states concerning official development assistance levels and the resourcing of efforts towards achieving the Millennium Development Goals within Third World states. For Lewis, '[e]verything in the battle against AIDS is put at risk by the behaviour of the G8'.¹⁰¹

Second, it is necessary to strengthen Third World solidarity on trade-related issues that adversely impact capacity to respond to HIV and AIDS. This includes access to affordable medications, and provides the strategy for resistance to the TREMF paradigm of which Baxi has warned. The model law provides that the state must take 'all necessary measures' to ensure access to treatment by those needing it, including 'the use of all flexibilities' under the TRIPS Agreement and the Doha Declaration — which asserts and elaborates those 'flexibilities' — and encouragement for 'the local production of medicines'.¹⁰²

Okafor emphasises the inevitable conflict between such WTO trade obligations and UN treaty provisions that shape international human rights law, including with respect to poverty eradication and the right to development, to the extent that trade rules inhibit the achievement of human rights obligations.¹⁰³ As a consequence,¹⁰⁴

it is now a widely established principle that the relevant global patent protection rules can and ought to be broken in order to provide ready access to

¹⁰⁰ n 21 above.

¹⁰¹ n 88 above.

¹⁰² n 65 above, para 36(1). All SADC member states are WTO members and are therefore bound by those instruments.

¹⁰³ Okafor (n 30 above) 802-4.

¹⁰⁴ n 55 above, 8.

cheap life-saving essential drugs to the poorer peoples of the world; a large percentage of whom live on the African continent.¹⁰⁵

Likely so, but it may not be necessary to explicitly go outside the WTO framework. The Doha Declaration presents the SADC region with opportunities in confronting TRIPS rigidities. It would obviously be useful for a case before the SADC Tribunal to elaborate the HIV and AIDS situation within member states as a 'national emergency' in accordance with the Declaration (para 5(c)) and to shape regional jurisprudence on the application of TRIPS, although a collective declaration to that effect by member states via SADC may suffice. It is also important for strategic elaboration of a regional agreement to apply TRIPS 'flexibilities' to their fullest practical extent, and to build alliances with supportive non-regional states that may be capable of assisting with the associated technology transfers in accordance with the Declaration.¹⁰⁶ This likely extends such flexibilities beyond the most affected states to the extent that those supportive states are instrumental to Doha-sanctioned measures taken or called for by seriously-affected states, and may characterise the recent co-operation agreement between Mozambique and Brazil on the production of antiretrovirals.¹⁰⁷

Co-operative elaboration of regional political alliances as well as counter-hegemonic international law — as advocated by Rajagopal — may thus represent viable arenas of resistance that the HIV crisis not only enables but demands. Gathii seems to hold out some cautious optimism in interpreting the Doha Declaration in this way, concluding that it 'might build a more stable and perhaps fair legal framework'.¹⁰⁸ To do so, however, may require Third World states — and notably the most HIV-impacted states of Southern Africa — to test the limits of the Declaration, in view of USA opposition at the time to the need to elaborate 'flexibilities' due to what it claimed was a failure by developing states to prove TRIPS rigidities.¹⁰⁹ This might, importantly, extend to exploring the legal limits of the consequences of the 'national emergency' provisions, especially given the apparent interpretation which could invite Third World states to engage in expropriation of foreign capital and suspension of foreign patent rights.¹¹⁰ It may also be timely in the

¹⁰⁵ Okafor (n 30 above) 809.

¹⁰⁶ Declaration on the TRIPS and Public Health, Ministerial Conference, WTO Doc WT/MIN(01)/DEC/2 (2001) para 7.

¹⁰⁷ Agencia de Informacao de Mocambique 'Mozambique: Anti-retroviral factory by 2010, pledges Lula' (17 October 2008) <http://allafrica.com/stories/200810171101.html> (accessed 10 April 2009).

¹⁰⁸ JT Gathii 'The Doha Declaration on TRIPS and public health under the Vienna Convention on the Law of Treaties' (2002) 15 *Harvard Journal of Law and Technology* 317.

¹⁰⁹ Gathii (n 108 above) 297.

¹¹⁰ AO Sykes *TRIPs, pharmaceuticals, developing countries, and the Doha 'solution'* (2002) 10-12 http://www.law.uchicago.edu/Lawecon/WkngPprs_126-150/140.Sykes.TRIPs.pdf (accessed 10 April 2009).

new post-Bush/Cheney environment of apparent mutual dialogue and global rapprochement rather than neo-imperialist paternalism.

A third area for SADC states' attention is the need to emphasise the more relevant characteristics of the epidemic within the region in order to better inform appropriate responses. The HIV epidemic within Southern Africa exhibits different characteristics than elsewhere, which invites a portrayal of HIV as constituting parallel epidemics, one in Southern Africa, and one or others elsewhere. This is not an entirely satisfactory distinction from referring to HIV as a unified global pandemic, as the region does not have a monopoly on a discrete form of epidemic in terms of viral subtype or means of transmission. However, the dominant features of the epidemic in Southern Africa distinguish it from HIV epidemics elsewhere.

4.2 The particular character of HIV in Southern Africa

Higher rates of long-term concurrent heterosexual partnerships by both males and females — including various cultures practising polygamy — are especially vulnerable to HIV transmission given the higher 'viremic window' for closely-spaced sexual encounters between different partners, with the viral load decreasing over time.¹¹¹ This characterises the epidemic in Southern Africa, as well as that HIV transmission appears to be linked to a different virus subtype more readily transmitted via heterosexual vaginal sex than is the subtype more prevalent elsewhere. The lower HIV transmission rates within other regions of Africa and the Middle East, where polygamy is more common, are likely attributable to higher levels of male circumcision — which lowers the likelihood of transmission from an HIV-positive female by about 60% — and much lower rates of female concurrent relationships.¹¹²

Evidence of the different character of HIV transmission in Southern Africa must not be mistaken for a continuation of 'past racist discourse about black sexuality'.¹¹³ So-called 'promiscuity' is lower in Africa — and Asia — than in Western states, and is more evidently linked to¹¹⁴

¹¹¹ H Epstein *The invisible cure: Why we are losing the fight against AIDS in Africa* (2008) 57-58 61. Epstein has strongly criticised the 2008 UNAIDS global report (n 1 above) for its failure to adequately treat evidence of the role of concurrent relationships in HIV transmission in Southern Africa, and a consequential inability to engage in appropriately informed policy dialogue on such a significant core of the issue. See H Epstein 'Open letter to the Lancet regarding UNAIDS 2008 Report on the Global AIDS Epidemic' (30 July 2008) (copy with author).

¹¹² Epstein (n 111 above) 62; n 1 above, 122. Male circumcision protects the male against infection. Women benefit from the reduced number of HIV-positive males (assuming continued safe practice) including the female's primary partner, especially where she is monogamous.

¹¹³ n 111 above, 255.

¹¹⁴ N Scheper-Hughes 'AIDS in South Africa: The invisible cure' (letter in response to book review: H Epstein) *The New York Review of Books* Vol 50, No 18 (20 November 2003) <https://www.nybooks.com/articles/16809> (accessed 10 April 2009).

the legacy of apartheid's barely concealed genocidal project ... of apartheid [which] forced male workers to live in worker hotels that destroyed the social fabric of proudly patriarchal peoples. Contained to concentration camp-type barracks near mines and factories, workers took temporary 'wives' and formed 'bedholds' in place of households. When women were unavailable to service the army of displaced workers recruited from all over southern Africa, migrant workers engaged in same-sex relations, violating strong cultural taboos. [Thus] was born an environment ripe for a sexually transmitted epidemic.

This is a reminder of TWAIL's emphasis on the importance of cultural and historical context. Farmer's commentary on international reactions to President Mbeki's contribution to the AIDS dialogue at the XIV International AIDS Conference in Durban, South Africa, in 2001, is of interest in this regard. For Farmer, Mbeki's 'sin' was primarily embodied in his 'heretical' canvassing of new options in the pricing and supply of patented drugs, of citing poverty and social inequality as instrumental factors in HIV prevalence, of pointing out the invisible dynamics of racial inequality in accessing treatments viewed as differentially 'cost-effective', and his repudiation of President Clinton's assistance for financing the purchase of drugs on loan terms less favourable even than the World Bank.¹¹⁵

It is only within a political discourse informed by culture and history that the debate may occur on the relationship between poverty and HIV, and thus on inequality and racial characteristics. To date, much of the discussion in the region has simply viewed poverty as a driver of human behaviour within an economic framework. This is not especially useful in informing policy and legislative responses to the epidemic, nor in developing effective strategies to address the need for and nature of behaviour change within the region with reference to the devastating consequences of unsafe sexual practices within concurrent partnerships. This needs to at least emphasise condom use in multiple heterosexual relationships, complemented by the promotion of male circumcision, and comprehensive anti-retroviral treatment programmes which ensure counselling and ongoing clinical care.¹¹⁶

Epstein argues that Uganda's early success in lowering HIV prevalence and transmission was largely due to the Ugandan government devising domestic responses and 'not simply adopt[ing] whatever programmes foreign advisers prescribed', such that those responses — focusing on changing behaviours within or toward multiple sexual

¹¹⁵ P Farmer 'AIDS heretic: Paul Farmer reveals how the President of South Africa broke the AIDS establishment's inequality taboo' (2001) *New Internationalist* http://find-articles.com/p/articles/mi_m0JQP/is_331/ai_30065280 (accessed 10 April 2009). Farmer emphasises that, contrary to popular opinion, Mbeki 'has never denied that HIV is the etiologic agent of AIDS' and, at that conference, 'consistently referred to the disease as "HIV/AIDS"'.
¹¹⁶ Refer to, eg, n 115 above, 263-269.

activity — were initially ‘largely dismissed’ by WHO and USAID.¹¹⁷ A dilemma for the SADC PF Model Law is that effective responses thus require a primary focus on concurrent heterosexual partnerships, but that the legislative and political focus is on other elements, concerning prisoners, commercial sex workers, injecting drug users and men who have sex with men.¹¹⁸

These, however, all remain necessary elements of the model law, including from a human rights-based approach. Injecting drug use may be unfamiliar to legislators in most SADC member states, but is the most common cause of HIV transmission in one member country, Mauritius, and not unknown elsewhere. Commercial sex work remains a significant factor in transmission, especially given the size of migrant labour workforces in such industries as the mining sector within and between most countries in the region. The incidence of migrant labour is itself an important factor in both male and female concurrent relationships. Transactional sex is a common phenomenon, in large part undergoing some change in character to the extent that it is ‘heightened by the penetration of the global market in consumer goods’,¹¹⁹ but also an exploitative sexual practice by — most commonly — older males toward adolescent and young females. It is reported that, in such instances, the relationship may last for a reasonable period of time and that safe sex, especially condom use, is rare.¹²⁰ Male-to-male sex is practised across all member states, even though it remains commonly denied or ignored by politicians and legislators, who seem content to leave a mutually-consensual private adult sexual act within the criminal law, thus thwarting efforts to reach an already difficult to reach vulnerable population. This also poses a problem in ensuring the provision of condoms to prisoners, with a common response from legislators being that to do so makes them complicit in facilitating a criminal act (sodomy).

The Model Law makes strong provision against discrimination due to HIV status, and explicitly includes ‘vulnerable or marginalised groups’ — which are defined to include ‘sex workers, injecting drug users ... members of sexual minorities, [and] prisoners’ — across the scope of its

¹¹⁷ Epstein (n 111 above) 65 167.

¹¹⁸ Conversely, western responses have often targeted messages to people in heterosexual relationships, when the need has been to primarily focus on those other elements. ‘Aiming propaganda at heterosexual teenagers is (outside the special case of Africa) a waste of money. It is, however, often an easier course than tackling drugs, whores and buggery, which many politicians would prefer to pretend have no place in their countries’ (‘Getting the message: Good news on treatment. Bad news on propaganda’ *The Economist* 5 June 2008 http://www.economist.com/science/displaystory.cfm?story_id=11487365 (accessed 10 April 2009)).

¹¹⁹ n 115 above, 77.

¹²⁰ n 115 above, 127; G Bertozzi ‘Sugar daddies and garden boys: Relationships that increase infection risk for young adolescents’ eforum posting (11 August 2008) <http://www.healthdev.org/viewmsg.aspx?msgid=edee3cb4-a186-4bac-bd74-80102e3d8d8d> (accessed 1 November 2008).

provisions. Given the care taken in the drafting process to avoid criminalisation provisions, the harmonisation of the model law with existing domestic criminal laws remains a difficult issue to be addressed on a state-by-state basis, with the need to ensure the retention of a 'minimum core' of human rights and continued advocacy to legislators of each state's obligations under international human rights law.¹²¹

These are important elements of Third World resistance. They include the counter-hegemonic assertion of human rights focused on the conditions and priorities of the Third World, the building of Third World solidarity to subordinate trade-related issues to human rights priorities, activism across Southern African states to elaborate jurisprudence in response to the HIV epidemic, and the determination of rights-based responses to that epidemic which are domestically determined, relevant and managed. These imperatives must inform the progress of the Forum's model law into regional application. Such TWAIL insights to essential collective action represent a transformative project in ensuring that the international human rights regime is capable of working towards its character of global justice.

5 Concluding comments: HIV model law as post-hegemonic process

Kirby notes that, faced with such enormous challenges as that posed by HIV and AIDS, 'the natural human reaction is flight or fight'.¹²² But flight — denial and neglect — is not an option with respect to HIV, including for the West. As Gro Harlem Brundtland points out, 'bacteria and viruses travel as fast as money'.¹²³

Aginam describes the development of Western responses to and management of epidemics over the centuries of expanding global trade and commerce, mainly resulting in the practice of quarantining of persons and products.¹²⁴ Inevitably, Western states collectively adopted standards of practice in this regard, as international trade became so crucial to their accumulation of wealth. Colonial public health objectives concerned the protection of western interests, including containing communicable diseases and viruses whilst minimising their adverse impact on commercial interests, including labour exploitation, within colonial territories.¹²⁵

¹²¹ n 55 above, 7; n 64 above, 32-7.

¹²² n 79 above, 164.

¹²³ Cited in O Aginam 'The nineteenth century colonial fingerprints on public health diplomacy: A post-colonial view' (2003) 1 *Law, Social Justice and Global Development Journal* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/aginam (accessed 1 November 2008).

¹²⁴ As above.

¹²⁵ As above.

The practice and structure of public health diplomacy, entrenched power relations between states, the politics of exclusion, and the process of continuous discovery all conspire[d] to impede emerging global health governance mechanisms, and widen the gulf of inequalities in a postcolonial global health context.

The Third World history scholar should need no further reminder of the shortcomings of an externally driven public health response to HIV, especially one not explicitly framed within a human rights-based approach.¹²⁶ With such rapid and regular global human movement, this inherited health governance mechanism does not adequately serve its original purposes.

Curiously, in this context, whilst the West and Central African Model Law makes only limited provision for the right to information on HIV — including making information available at points of entry — it mandates it to the extent possible for nationals ‘going abroad’.¹²⁷ The scope of mandated training covers all government personnel appointed abroad, sailors on fishing and passenger boats, and all airline flight personnel. Echoing Anghie’s reminder of Third World states’ obligations under TRIPS to safeguard Western capital interests, those states may be required to protect Western states from the risk of viral transmission. This provision would seem to enable (western) ports to prohibit entry where proof of HIV ‘training’ is lacking, and readily permits expanded population coverage. One can but imagine the reverse situation being applied.

TWAIL emphasises that, for HIV legislation to be focused on ensuring the full extension of international human rights law to all people in a just and equitable manner, it must be historically and culturally informed. A failure to do so threatens the pursuit of an international legal regime that is post-hegemonic. The disastrous impact of the HIV epidemic upon the peoples of Southern Africa cannot be a pretext to modify, curtail or postpone the human rights of those affected populations.

This article particularly points to the leadership that TWAIL scholarship also provides in highlighting the potential value of regional coalitions, of the seizing of regional control of appropriate responses, of the importance of regional institutions such as the proposed SADC parliament and of the effective and strategic shaping of regional jurisprudence through the SADC Tribunal in this regard. Important space remains for co-operative alliances with external agencies alongside the strengthening of local coalitions with regional social movements, but local leadership must be assured despite encountering resistance from external actors.

Southern African states also have the opportunity — even obligation to Third World agency — to confront global trade-related injustices with

¹²⁶ See also Farmer (n 63 above).

¹²⁷ n 76 above, art 6.

respect to HIV and AIDS, even within existing international structures due, in large part, to the global flexibilities to TRIPS secured by successful African-led interventions. This points to the likely emergence of challenges, especially from threatened global interests. Legislators need to be supported in comprehending the political importance to Third World resistance and counter-hegemonic struggle constituted by the process, content and consequences of the Forum's legal framework.

Taken together, the character of the Southern African Model Law and its broader process indicate its potential reciprocal contribution to tackling TWAIL-informed concerns about the limited prospects for embracing a transformative post-hegemonic global order. The difficulty of pursuing such an agenda cannot diminish the need to do so.

Such concerns include understandable doubts about capacity to maintain sufficient solidarity in pursuing an ultimately just system of international law, within which human rights are truly universal. For those engaged in the Southern African Model Law on HIV, the pathway remains paved with many challenges. It values '*the local* as an agent of change' and may serve to lift the 'national/domestic' above the ambivalent in TWAIL-based discourse.¹²⁸ The potential benefits for the Third World — and thus for all peoples — are enormous.

¹²⁸ n 7 above, 266 275 (emphasis in original). Gathii notes Rajagopal's reference to international law not taking 'the local' seriously, and that TWAIL is more 'ambivalent' about the value of the national/domestic context than 'traditional Western approaches' which see it as a barrier to the 'emancipatory potential of universalist projects'.