This is not a law:
The transnational politics and protest of legislating an epidemic

by

Daniel Grace
B.A., University of Western Ontario, 2006
M.A., McMaster University, 2007

A Dissertation Submitted in Partial Fulfillment
of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

in the Department of Sociology

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HIV/AIDS continues to pose some of the most significant social, political and legislative challenges globally. This project explicates the text-mediated processes by which many HIV-related laws are becoming created transnationally though the use of omnibus HIV model laws. A model law is a particular kind of regulatory text with a set of relations of use. Model laws are designed to be taken, modified and used by stakeholders in the creation of state laws. Because they are already framed in legislative language, model laws are worded in ways that can be expeditiously activated and translated into state law. The problematic of this inquiry arises from the activities of a constellation of legislative actors including human rights lawyers, policy analysts, academics and activists who have worked to critique aspects of the United States Agency for International Development/Action for West Africa Region (USAID/AWARE) Model Law (2004) and subsequent state laws this text has inspired across West and Central Africa. I argue that mapping the origin and uptake of this omnibus guidance text is optimally achieved through a sustained analytic commentary on the institutional genre of “best practice”. Explicating the coordinating function of this textual genre is central to understanding the rapid spread of HIV/AIDS laws across at least 15 countries in West and Central African between 2005-2010. The work processes of legislative creation, challenge and reform under investigation demand an interrogation of complex ruling apparatuses regulated by text, talk and capital relations.

The USAID/AWARE Model Law is rife with contestation: from its name, scope, funding source and process of development, dissemination and domestication to its legislative content and role in protecting or violating women’s rights and public health
objectives. Many of the policy actors critiquing this USAID-funded initiative have been engaged in the development of alternative HIV-related model laws and the shaping of a global anti-criminalization discourse to respond to the increasing use of criminal law governance strategies to prosecute HIV-related sexual offenses and the rise in new HIV-specific criminal laws in and beyond sub-Saharan Africa. This study maps relations that rule, and makes processes of power understandable in terms of everyday transnational work activities organized by the language of law. My research method is informed by the critical research strategy of institutional ethnography. This complex legislative process was made visible through participant observation, archival research, textual analysis and informant interviews with national and international stakeholders. This has involved research in Canada, the United States, Switzerland, Austria, South Africa and Senegal (2010-2011).
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### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABC</td>
<td>Abstain, Be faithful, and use Condoms</td>
</tr>
<tr>
<td>AIDS</td>
<td>Acquired Immunodeficiency Syndrome</td>
</tr>
<tr>
<td>ALN</td>
<td>AIDS Legal Network (South Africa)</td>
</tr>
<tr>
<td>ARV</td>
<td>Antiretroviral medicines/drugs</td>
</tr>
<tr>
<td>AWARE</td>
<td>Action for West Africa Region-HIV/AIDS</td>
</tr>
<tr>
<td>AWARE Model</td>
<td>Action for West Africa Region-HIV/AIDS Model Law (see USAID Model Law; N’Djamena Model Law)</td>
</tr>
<tr>
<td>CAHR</td>
<td>Canadian Association of HIV/AIDS Research</td>
</tr>
<tr>
<td>CHALN</td>
<td>Canadian HIV/AIDS Legal Network (see Legal Network)</td>
</tr>
<tr>
<td>CBO</td>
<td>Community-based organization</td>
</tr>
<tr>
<td>CDC</td>
<td>Centers for Disease Control and Prevention (United States)</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CERPOD</td>
<td>Centre d’Etudes et de Recherche sur la Population pour le Développement</td>
</tr>
<tr>
<td>CIOMS</td>
<td>Council for International Organizations of Medical Sciences</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DEF</td>
<td>Disclosure, Education, Female-controlled methods</td>
</tr>
<tr>
<td>Duke</td>
<td>Duke University (United States)</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community Of West African States Parliament</td>
</tr>
<tr>
<td>FAAPPD</td>
<td>Forum of African and Arab Parliamentarians for Population and Development</td>
</tr>
<tr>
<td>FC</td>
<td>Female circumcision (see FGM)</td>
</tr>
<tr>
<td>FGM</td>
<td>Female Genital Mutilation (see FC)</td>
</tr>
<tr>
<td>FHI</td>
<td>Family Health International</td>
</tr>
<tr>
<td>FTA</td>
<td>Free trade agreement</td>
</tr>
<tr>
<td>GBH</td>
<td>Grievous bodily harm</td>
</tr>
<tr>
<td>GF</td>
<td>Global Fund</td>
</tr>
<tr>
<td>HAART</td>
<td>Highly Active Anti-Retroviral Therapy</td>
</tr>
<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
</tr>
<tr>
<td>IAC</td>
<td>International AIDS Conference</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>IAS</td>
<td>International AIDS Society</td>
</tr>
<tr>
<td>IDU</td>
<td>Injection/injecting drug use/user</td>
</tr>
<tr>
<td>IE</td>
<td>Institutional Ethnography</td>
</tr>
<tr>
<td>IGO</td>
<td>Intergovernmental organization</td>
</tr>
<tr>
<td>IIRP</td>
<td>Institute for Intersectionality Research and Policy (Simon Fraser University, Canada, formally the Institute for Critical Studies in Gender and Health)</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organization for Migration</td>
</tr>
<tr>
<td>IPU</td>
<td>Inter-Parliamentary Union</td>
</tr>
<tr>
<td>LDCs</td>
<td>Least-developed countries (UN classification)</td>
</tr>
<tr>
<td>Legal Network</td>
<td>Canadian HIV/AIDS Legal Network (see CHALN)</td>
</tr>
<tr>
<td>Legal Network</td>
<td>Legislating for Health and Human Rights: Model Law on Drug Use and HIV/AIDS (see CHALN)</td>
</tr>
<tr>
<td>(2006)</td>
<td></td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>LGBT</td>
<td>Lesbian, Gay, Bisexual and Transgender</td>
</tr>
<tr>
<td>MAP</td>
<td>Multi-Country AIDS Program</td>
</tr>
<tr>
<td>McMaster</td>
<td>McMaster University (Canada)</td>
</tr>
<tr>
<td>ML</td>
<td>Model Law</td>
</tr>
<tr>
<td>MTCT</td>
<td>Mother to child transmission (of HIV)</td>
</tr>
<tr>
<td>MOH</td>
<td>Ministry of health</td>
</tr>
<tr>
<td>MSM</td>
<td>Men who have sex with men</td>
</tr>
<tr>
<td>N’Djamena</td>
<td>N’Djamena, Chad Model Law (see AWARE Model Law, USAID/AWARE Model Law)</td>
</tr>
<tr>
<td>NACOP</td>
<td>National AIDS Coordination Program</td>
</tr>
<tr>
<td>NCPPD</td>
<td>Network of Chad Parliamentarians for Population and Development</td>
</tr>
<tr>
<td>NEP</td>
<td>Needle exchange program</td>
</tr>
<tr>
<td>NGO</td>
<td>Nongovernmental organization</td>
</tr>
<tr>
<td>NPO</td>
<td>Non-profit organization</td>
</tr>
<tr>
<td>OACHA</td>
<td>Ontario Advisory Committee on HIV/AIDS</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
</tr>
<tr>
<td>OP/BP</td>
<td>Operational policy/best practice</td>
</tr>
<tr>
<td>OSI</td>
<td>Open Society Institute</td>
</tr>
<tr>
<td>PEP</td>
<td>Postexposure prophylaxis</td>
</tr>
<tr>
<td>PLA</td>
<td>Persons living with HIV/AIDS (see PLHA)</td>
</tr>
<tr>
<td>PLHA</td>
<td>Persons living with HIV/AIDS (see PLA)</td>
</tr>
<tr>
<td>PMTCT</td>
<td>Prevention of mother to child transmission (of HIV)</td>
</tr>
<tr>
<td>PSI</td>
<td>Population Services International</td>
</tr>
<tr>
<td>SADC Model Law</td>
<td>Model Law on HIV in Southern Africa (see SADC Law (2008))</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>STD</td>
<td>Sexually transmitted disease</td>
</tr>
<tr>
<td>STI</td>
<td>Sexually transmitted infection</td>
</tr>
<tr>
<td>TB</td>
<td>Tuberculosis</td>
</tr>
<tr>
<td>TFGI</td>
<td>The Futures Group International</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UNAIDS</td>
<td>Joint United Nations Programme on HIV/AIDS</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNFPA</td>
<td>United Nations Population Fund</td>
</tr>
<tr>
<td>UNHCHR</td>
<td>United Nations High Commissioner for Human Rights</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
</tr>
<tr>
<td>USAID/AWARE</td>
<td>United States Agency for International Development/ Model Law</td>
</tr>
<tr>
<td>UVic</td>
<td>University of Victoria (Canada)</td>
</tr>
<tr>
<td>UWW</td>
<td>Universities Without Walls (Canada)</td>
</tr>
<tr>
<td>VCT</td>
<td>Voluntary counselling and testing</td>
</tr>
<tr>
<td>WARP</td>
<td>West Africa regional program</td>
</tr>
<tr>
<td>WB</td>
<td>World Bank</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
Acknowledgments

The dissertation has been a process of discovery nourished by the support, encouragement and insights of many policy actors, mentors, colleagues, friends and family. While I cannot thank everyone in this acknowledgement section, I wish to note a few key persons who have helped me throughout this long journey.

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Schoefert has been a partner in crime, ad hoc translator, and an endless source of love, support and sarcasm—I am grateful to have him in my life.

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Dedication

for
Manda and Markus
Chapter 1: INTRODUCTION

This is not a law

*I think there are general deductions to be made and lessons to be learned from the unreflectiveness... The [USAID/AWARE Model Law] is an appalling law in so many different ways. It was poorly drafted, it was vague, it was overly-broad, it was unenforceable, it was intrusive on privacy...but, it is important to understand the near-beneficent impulse – the near-beneficent but perniciously-misguided impulse that lay behind it.*

(Edwin Cameron, Constitutional Court Justice, Johannesburg, South Africa)\(^1\)

**Introduction**

In the words of Justice Michael Kirby, Australia, in 1991: “There will be calls for ‘law and order’ and a ‘war on AIDS’. Beware of those who cry out for simple solutions, for in combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of the criminal law” (quoted in ARASA 2007: 16; Eba 2007: 20). This is an ethnography of an HIV-related omnibus “model law” rife with contestation: from its name, scope, funding source and process of development, dissemination and domestication to its legislative content and role in protecting or violating human rights and public health objectives. I map how the creation and critique processes of model laws are ‘put together’ to respond to the social and political challenges of HIV and AIDS transnationally (Smith 1987: 154; see Follér and Thörn 2008). The work of legislative creation, challenge and reform under investigation demands an analysis of complex ruling apparatuses regulated by text, talk and capital relations.

\(^1\) See Nguyen (2010) for reference to Cameron’s IAC address (Durban, 2000) in which he declared, “I am here because I can pay for life itself” (89; see Cameron 2005).
According to many of my informants something “crazy”, “colonial”, “dangerous” and “scary” seems to be going on. However, rather than simply position a specific model text as problematic, this investigation shows the far-reaching and sometimes messy political work activities involved in what I call ‘responding to the response’—that is, the work of responding not only to the disease per se, but to epidemic interventions themselves and what Cameron calls the “perniciously-misguided impulse” which lay behind much of the United States Agency for International Development (USAID)/Action for West Africa Region (AWARE) Model Law. I am guided by Dorothy Smith who questions “How is this world in which we act and suffer put together?” (1987: 154). At the centre of this project is an interest in the constellations of international legislative actors including human rights lawyers, policy analysts, academics, activists, and civil society who have worked to problematize aspects of the USAID/AWARE Model Law and subsequent country-specific laws this guidance text has inspired across West and Central Africa. In this chapter I begin by clarifying the meaning of “model law” and provide some introductory comments on the legislative scope of the USAID/AWARE Model Law. Next, I provide an overview of the layout of this dissertation to present a coherent picture of how this analysis has been organized. I conclude by offering some final thoughts that emphasize the relational character of the chapters that follow.

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2 These are all words used by informants involved in contesting aspects of the USAID/AWARE Model Law. Informants referenced both the process of the legislative creation (USAID funding and rapid promulgation and state law reform processes) and specific provisions in new state laws in West Africa (many focusing on overly-broad provisions criminalizing HIV transmission or exposure). Most informants focused on the content of the Model Law and subsequent state laws as the key issue of concern.

3 It is worth noting that the conceptually allied impulse of actors such as lawyers, academics and civil society who intervene in model and state law processes—a kind of intervention impulse—also challenges conceptions of sovereignty and (often) involves unacknowledged power asymmetries.
What are model laws?

A model law (as an ideal type) is a kind of best practice text that serves in the creation of national or provincial laws. Model laws facilitate the harmonization of laws across a region and may be understood as the textual product which, when activated at the country level, serve to standardize laws within and across state borders. Model laws or model legislation outline detailed provisions and legal standards on an issue and may function as a transnational template or guidance text to be adapted by domestic legislators. As such, I argue that model laws are a specific textual genre constituted by both situation and form (Giltrow et al. 2009; see Gibbons 2003; Carolyn 1984). Not only are model laws written in a “characteristic type of written expression” (framed in the language of law) but situations in the everyday world “give rise” to particular genres (Giltrow et al. 2009: 5-6). For example, Viljoen (2008) explains that “[m]odel laws are often adopted when there are new societal challenges, affecting numerous countries, which have not yet been addressed by legislation in most of the affected countries” (384). In this text I argue that genres also give rise to and interact

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4 See Giltrow et al. (2009) for an example of the thank you note as a genre and of the advances in genre theory (5-7). Other examples of situations which give rise to genres range from advances in technologies that result in different ways of using language, such as text messaging (Giltrow 2009: 5) and blogging (Giltrow and Stein 2009; Devitt 2009) to texts that result from legal proceedings such as the case report genre (Gibbons 2003: 134-138).

5 See Viljoen (2008) for discussion of the process of elaboration and adopting model legislation described in 5 stages (385-6). Viljoen also provides valuable discussion on the distinction between treaties, declarations and model legislation: “Even if model laws are adopted by international organizations, they do not constitute treaties. While a treaty is open for ratification, model legislation is not. While treaty provisions become binding on a state upon ratification, the provisions of a model law are not binding under international law. Similar to model legislation, international declarations are not binding. Declarative standards guide states and are often vaguely formulated. A model law has some of the characteristics of both treaties and declarations. As it stands, a model law is not binding. Similar to international declarations, its provisions serve as examples and inspiration to domestic lawmakers. In some sense, then, treaties and model laws both require states to “domesticate” their provisions. However, model legislation is usually much more precise than both treaties and declarations, as it is framed in the legal language of law-makers rather than in the rhetorical terms of international law. Both treaties and model laws need to be given effect in the domestic legal arena.
with other genres making explicit how the genre of best practices in transnational HIV/AIDS work coordinated the development of the USAID/AWARE Model Law. As Devitt (2009) argues, “just as all texts are intertextual, so to are all genres inter-genre-al” (44; see Russell 1997; Giltrow and Stein 2009).

As Smith reminds us, an “[e]xploration into the ruling relations, into institutional complexes, from the standpoint of lived actuality, opens up into a world that is organized in language and is based in texts of various technological orders” (2005: 68). Central to this project is a discussion of the relationship between model laws and the language of law. As such, some preliminary thoughts on how to conceptualise model laws in relation to this field of inquiry are helpful. Gibbons (2003) divides the area of legal language into two major fields. The first broad area of legal language is the “codified and mostly written language of legislation and other legal documents such as contracts, which is largely monolithic” (Gibbons 2003: 15).

To conceptualise how model laws fit within the field of legal language it is necessary to expand upon the categorization of legal written texts provided by Tiersma (1999: 139-41; see Gibbons 2003: 15) so as to consider the varied “technological orders” within the broad field of legal texts.

Tiersma categorises legal texts into three types: operative documents which establish legal frameworks giving rise to legal relations (e.g. legislation, pleadings and petitions, contracts etc.), expository documents which serve to explain the law usually in an “objective manner” (e.g. lawyer’s letter to a client, office memorandum, writing about the law including educational materials) and persuasive documents that seek to

Domestication of treaties may take one of two main forms – direct incorporation, when the whole of the treaty is adopted as a domestic law, or transformation, when parts of national law are amended to reflect the standards in the treaty” (2008: 386).
advance a particular set of legal claims (e.g. submissions which are designed to convince the court) (1999: 139-41; see Gibbons 2003: 15). For the purposes of this project I argue that it is necessary to expand Tiersma’s textual typology to include pre-operative documents: the documents, including model laws, which (may) lead to the creation of the documents that create legal frameworks and establish legal relations.6

The second area of legal language is “the more spoken, interactive and dynamic language of legal processes, particularly the language of the courtroom, police investigations, prisons and consultations among lawyers and between their clients” (Gibbons 2003: 15). I argue that consultations, conferences, meetings and other forms of discourse between lawyers, parliamentarians, activists and other policy actors about model laws and state laws can be conceptually poisoned as part of this second broad field of legal language. By broadening Gibbons field beyond traditional sites such as the courtroom and lawyer-client relations I argue that we can see the work of engaging in legal discourse which both creates and critiques model law.

Focusing on the issue of language related to model laws, Viljoen and Precious (2007) explain that model legislation is more precise than both declarations and treaties “as it is framed in the legal language of law-makers rather than in the rhetorical discourse of lawmakers” (12). As we will see, framing a model law in such legally precise language has important implications for how model law texts may be taken up to inform the processes of creating domestic laws. In fact, “linguistic precision” has been described as “a significant driving force in the drafting and interpretation of legal documents” (Gibbons 2003: 73; see Gibbons 1994).

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6 Smith’s text-work-text imagery is helpful here so as to visualize how operative documents are shaped in time and space through text-mediated work processes (Smith 2006: 67).
Draft legislative language is provided in model laws and in some cases “best practices” of laws and regulations from other (comparable) countries are discussed (Viljoen and Precious 2007; Viljoen 2008). Model laws have been developed or are being considered in various fields in and beyond global health: drug use in prison (CHALN 2006), airbag fraud (Albright 2009), the civil commitment of the mentally ill (Stone 1987), public broadcasting (Rumphorst 2001), safety in biotechnology (Ayele 2007), international commercial arbitration (UNCITRAL 2007) money laundering and the financing of terrorism (Global Program Against Money Laundering 1999), and child pornography and exploitation (International Centre for Missing and Exploited Children 2006). 7

While most discussions of model law focus on macro-regional or transnational legislative reform processes, it is important to recognise the role and rule of different kinds of model laws and codes at the national level, such as the powerful and historically important role of *The Model Penal Code* in the United States—a text originally drafted by the American Law Institute (ALI) in 1952-1962 (Dubber 2011). Robinson and Dubber (2007) explain that *The Model Penal Code* was the most successful attempt to codify criminal law in the United States and must be positioned within the “spotty history of American criminal codification” (321). 8 Further, given

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7 This example may be better positioned as a model policy: “The model policy on missing persons that follows has been designed to serve as a general reference that can be modified to fit the specific needs of any agency, regardless of size. It attempts to present the missing-person response process in a logical progression from case intake through first response and case investigation on to recovery and case closure” (International Centre for Missing and Exploited Children 2006: ii).

8 Robinson and Dubber provide important history to the use of this model text: “As a pragmatic document, the Model Penal Code enjoyed great success in American legislatures. The code’s impact on American criminal law far exceeded that of even the most successful earlier codification project, the Field code. But it was the criminal law portion of the code—the statement of general principles of liability in part I and the definition of specific offenses in part II—that gained historic significance. The sentencing, treatment, and corrections portions, in parts III and IV, saw little acceptance and were
my discussion in this project of the influence of the USAID/AWARE Model Law on other HIV-related model law processes, it is worth noting the possible influence of the American Model Penal Code on the development of a European Model Penal Code (Dubber 2011).

Focusing on the model law at the centre of this inquiry, the USAID/AWARE Model Law (2004) is an omnibus HIV-related model law created to reform laws across West and Central Africa. This single legislative text contains 37 articles aimed at regulating diverse social domains related to HIV and AIDS: HIV and AIDS education and information, safe practices and procedures, the use of traditional medicine, testing and counselling, health services and assistance, confidentiality, discriminatory acts and the intentional transmission of HIV. Human rights lawyers have drawn attention to the ways in which some aspects of the Model Law are positive if read as discrete model articles. For example, The United Nations Joint Programme on HIV/AIDS (UNAIDS) and the Canadian HIV/AIDS Legal Network (CHALN) note some “positive provisions” in the USAID/AWARE Model Law (UNAIDS 2008a; UNAIDS 2009b; Pearshouse 2008; see Pearshouse 2007: 6-7) stating that it has been used to led create new state laws in many African countries that frequently guarantee the confidentiality of one’s HIV test results.9

While the Model Law and new state laws include some “progressive language to prohibit discrimination against PLHIV [Persons living with HIV]”, Pearshouse

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9 In some cases, new HIV-laws also guarantee the involvement of persons living with HIV/AIDS in some HIV-related services (e.g. outreach). Laws also frequently have provisions regarding HIV education campaigns across varied sectors of society (Pearshouse 2008).
notes that many forms of discrimination are left without legal redress due to gaps in the drafting of these Model Law-inspired state laws (2008: 5; Pearshouse 2007). As such, the document is highly problematic as a whole due to specific articles it contains (e.g. Articles 1 and 36 that criminalize HIV transmission) and what it ignores (e.g. attention to women’s rights and other key populations such as sexual minorities) (UNAIDS 2008d; see Appendix B and C for excerpts of key definitions and articles contained within the USAID/AWARE Model Law).

Mobilizing the discourse of human rights and women’s rights, UNAIDS, CHALN and organizations such as the International Community of Women Living with HIV/AIDS (ICW) elucidate how many provisions in USAID/AWARE Model Law—specifically those related to issues of education and information, disclosure obligations of HIV-status, HIV-testing, the criminalization of HIV transmission and ignoring gender—are incongruent with rights based approaches to HIV (ICW 2008; UNAIDS 2008c; see ICW 2008; Pearshouse 2007a; 2007b; 2008). As we will see in future chapters, conversations between key stakeholders representing various institutional standpoints often involved debating the relative merits of the USAID/AWARE Model Law and subsequent country-specific laws. Many of these issues are explored in greater depth in the chapters that follow, including a focused examination of questions related to gender and the criminalization of HIV transmission.

In addition to informing new state laws across Africa, the USAID/AWARE Model Law has also influenced other model law processes including the Southern African Development Community Model Law on HIV in Southern Africa (SADC
Model Law 2008) and the CHALN Model Law *Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS* (CHALN Model Law 2009). Despite the SADC Model Law and CHALN Model Law being within the same textual genre as the USAID/ARE Model Law (e.g. offering draft legal language on issues related to HIV that can be ‘taken up’ to create state laws) the content of these model laws, their explicit commitment to and coordination by human rights discourse, and their process of development, differs from the USAID/AWARE Model Law in significant ways (*see* Table 1). While this research primarily centers on the processes of creating and contesting the Model Law funded by the United States government, it is important to explicate the relational character of model laws to other legislative texts, HIV-related model laws, institutionally-situated work processes and broader discourses in the legislative terrain under investigation. As we will see in the chapters that follow, commercial entities and non-state actors may be involved in the processes of funding, writing and domesticating model laws, including the USAID/AWARE Model Law.

It is essential to underscore that model laws are not laws. That is, a model law only becomes law when translated into state law through a complex text-work-text sequence. Figure 1 is a stylised and highly simplified representation of this sequence.

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10 As chapter 5 explicates, while the SADC Model Law and CHALN Model Law were not created as an explicit reaction to the USAID/AWARE Model Law per se, both of these other model law processes were informed by the USAID/AWARE Model Law in complex ways. For example, many actors involved in creating these other model laws were worked in the process of critiquing/reforming the USAID/AWARE Model Law where they mapped the many failings and dangerous of this text (*see* Table 3 for a comparison of these 3 HIV-related model laws). Chapter 5 underscores how some of the lessons gleaned from the USAID/AWARE Model Law experience informed the process of drafting the SADC Model Law and CHALN Model Law.

11 For example, Viljoen has referenced both in print and during two informant interviews the role of commercial entities in the process of USAID/AWARE Model Law: “Commercial entities may also be involved in the process of domestication, such as the advocacy by Constella Futures Group, a US-based global “consulting firm” providing professional health services, to ensure domestic adoption of the West and Central African Model Law on HIV” (2008: 386).
In the methods chapter which follows I will explain the importance of concepts such as work and text to this cartographic project of transnational coordination.

Figure 1: Conceptualizing texts in action with text-work-text sequences (Adapted from Smith 2006: 67).

It is through an examination of text-mediated work processes and legislative challenge in the everyday world that I am able to map a complex narrative addressing: how the USAID/AWARE Model Law came to be created and activated, how this project relates to the global shifts to criminalize HIV exposure and/or transmission, how actors mobilized to respond to “dangerous” provisions in the legislation, and how this transnational textual process relates to other HIV-related model laws which also seek to reform state laws across transnational regions in and beyond sub-Saharan Africa.

Growing attention is being paid internationally to the ways in which legal environments may support and/or undermine public health efforts to prevent the spread of HIV and AIDS and protect the human rights of infected and affected publics. Critical attention must be paid not simply to what laws look like “on the books” but the
global relations which rule and regulate the creation, critique and impacts of laws in
the everyday lives of people. Explicating the text-mediated model law processes
associated with transnational legislative reform offers important insight into the
politics of epidemic response that have not garnered significant sociological analysis in
the academic or grey literature. This project offers both broader macro analysis of
transnational legislative processes—giving the “big picture” of HIV-related legislative
reform processes—and more focused, ethnographic considerations of text-mediated
work processes focusing on the activities of policy actors, including international
human rights lawyers, who are challenging aspects of the USAID/AWARE Model
Law and broader trends towards the criminalization of marginalized publics including
those infected with or vulnerable to HIV and AIDS. As such, this project is best
positioned as transnational ethnographic research study that is heavily informed by the
critical research strategy of institutional ethnography.

(Model) law as problematic

The law, like HIV, is a profoundly social phenomenon: both may cross state
boundaries and have differential impacts on the lives of everyday publics. The law,
like the everyday world, is problematic.\(^{12}\) Legislating the social dimensions of HIV
prevention and treatment demands a consideration of complex, stigma-laden legal

\(^{12}\) In this project I use the concept of “problematic” in two conceptually different albeit related ways: problematic in the ordinary or everyday sense of the word and problematic in its use by Smith and other institutional ethnographers, to explain how researchers working in this research tradition begin “in the actualities of people’s lives with a focus on the investigation that comes from how they participate in or are hooked up into institutional relations. A problematic sets out a project of research and discovery that organizes the direction of investigation from the standpoint of those whose experience is its starting point” (Smith 2005: 227). Articulated in this way, this project considers the work of actors who find the content of USAID/AWARE Model Law dangerous or problematic (ordinary) while taking their everyday activities and experiences of legislative challenge and contestation as the space from which I direct my research attention (Smith).
issues including, but not limited to, sex work, injection drug use, homosexuality, gender-based violence, discrimination and duties to disclosure one’s HIV status. HIV related laws deal with the intimate and the international—serving to regulate everything from the passage of bodily fluids between persons to the mobilities of persons across state borders. What has received little attention, however, is the text-mediated processes by which some HIV related laws are becoming aligned or harmonized transnationally though the text-mediated interventions of non-state actors who have funded, drafted and promulgated omnibus HIV model laws. I argue that to understand the processes of legislative alignment the ruling relations of model laws must be explicated.

This project addresses a gap in this field to address not only the ways in which the content of USAID/ARE Model Laws and state laws are problematic but also the transnational work processes of creating and challenging omnibus HIV model laws more broadly. It is from the everyday spaces at meetings and conferences in which activists, policy actors and human rights lawyers began to articulate concerns with USAID/AWARE Model Law that my problematic has emerged. Early research into the role and rule of model law in transnational legislative reform processes allowed me to begin to see how these key policy stakeholders are ‘hooked up’ into institutional relations and what some informants referenced as “global health architecture”. Through the processes of discovery I uncovered the text-mediated work processes of actors that challenge dominant criminalization narratives, critique model laws and state laws and create other HIV-related model laws. This ethnographic inquiry has uncovered work processes and ruling relations which range from the quasi-coercive
role of non-state actors who fund legislative development to the litany of complex barriers and challenges created by language in the process of legislative creation and challenge.

**Outline of this text**

This work is divided into seven chapters including this introductory chapter. In Chapter 2, I provide an overview of the process of research and discovery including how I came to ask “what the hell is going on?” This chapter expands upon the preliminary comments made in the introduction regarding the problematic of this inquiry and provides a retrospective account of how I came to know what I know about this legislative field. Through this account I describe the multiple institutional sites and geographic regions which are implicated in this project: from community gatherings and NGO offices in Toronto to courtrooms and cafes in Johannesburg, conferences in Mexico City, Vienna and Durban and UN offices in Geneva and Dakar. Rather than divide such sites of inquiry into those “at home” and “away” this project seeks to connect the work processes of diverse institutional actors by examining their transnational text-mediated work that transcends geographic boundaries. In this chapter I provide a brief overview of the alternative sociological strategy of institutional ethnography (IE) in order to make explicit the ways in which my inquiry is informed by this critical mode of research. I review the everyday social relations which gave rise to my interest in this field and outline key sources and processes of data collection. This chapter also outlines the ethical considerations for this project and notes some of the key successes and challenges experienced throughout the research and discovery process.
In Chapter 3 I argue that understanding the origin and transnational uptake of the USAID/AWARE Model Law is optimally achieved through an analytic commentary on the institutional genre of “best practice” replication. I provide an overview of the USAID/AWARE Model Law and give a detailed account of how this text has been positioned as both a best practice *policy* and best practice *process* creating new forms of work for actors in the region. As such, this chapter provides a largely unwritten history of both the textual form of the USAID/AWARE Model Law and the social contexts and processes which gave rise to its creation and activation. The uptake of this pre-operative text is documented in annotated, time series maps to chart the rapid passage of new HIV-related laws across West and Central Africa (Maps 1-6).

Chapter 4 and 5 provide two important examples of contestation and claims-making work conducted by lawyers, policy actors and civil society in relation to the USAID/AWARE Model Law and HIV-related legal and human rights issues more broadly. In Chapter 4 I map some of the textually-mediated work processes which have contributed to the production of a counter narrative to the idea that criminalizing HIV transmission or exposure is a good idea. A diverse group of transnational stakeholders, including activists, lawyers, judges, journalists, academics, and people infected and affected by HIV, are playing important roles in the ongoing development and strengthening of what I call an “anti-criminalization discourse”. In this chapter I explicate the substance of the anti-criminalization discourse and the transnational relations through with it has been coordinated and produced. I position this as a complex discourse which critiques the criminalization of HIV non-disclosure on
numerous fronts and is differentially activated by stakeholders to suit various contexts and audiences. I argue that a set of social and textual relations have produced this discourse through a processes of coordination that relies on the labour of transnational stakeholders and the creation of key texts which have been relayed via anti-criminalization ‘nodes’ within existing networks of international agencies, conferences and the internet. I map the ways in which actors, and the texts they produce, cross transnational boundaries and are (re)produced in various forms from international conference presentations and small meetings to reports, academic publications and various online activities such as email correspondence and blogging. These intersecting work activities collectively try to change the dominant narrative regarding the criminalization and HIV.

In Chapter 5, I explicate some of the discursive strategies through which critics of the USAID/AWARE Model Law conducted their work drawing attention to the social organization of claims-making work within the context of asymmetrical regional/outsider relations of power in West Africa. This chapter focuses on how a subset of global stakeholders involved in furthering the anti-criminalization discourse played central roles in a contentious process of consultation and critique. This mapping highlights issues of textual challenge, discursive dissent and rhetorical strategy to explore how some stakeholders have sought to interrupt and even reverse what they understand to be dangerous aspects of the USAID/AWARE Model Law and related country-specific laws. I draw upon meeting texts and informant interviews to examine some of the key claims-making tensions experienced by informants within and beyond these meeting spaces. Some focused discussion on HIV-related state law reform
processes in Sierra Leone is provided which builds upon the advocacy work discussed in Chapter 4 related to gender-based arguments and the anti-criminalization discourse.

In Chapter 6, I trace the relational textual histories of two other HIV related Model Laws: (1) The CHALN Model Law (2009) *Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS* and (2) The SADC Model Law (2008) *Model Law on HIV in Southern Africa*. I provide an introduction to the SADC Model Law and the CHANL Model Law to explore key dimensions of the development and use of these texts. Many policy actors I interviewed participated in multiple model law processes in various capacities: as primary writers/drafters, consultants, workshop participants, members of funding agencies and in work activities related to the problematization of the model laws and/or subsequent state laws such as the criminalization of HIV transmission. For example, in many cases informants were engaged in critiquing processes related to USAID/AWARE Model Law while writing or advocating for one of the two other HIV model laws examined. Through mapping and comparing model laws to one another I consider the similarities and differences of development, content and (intended) social relations of use across HIV-related model laws. Building on key themes and tensions explored in Chapters 3, 4 and 5, I focus on emergent issues across the work processes of model law creation and reform including co-learning in these legislative activities and engaging with evidence in the processes of (re)writing model law.

Chapter 7 concludes this work. I review key issues and tensions explored in this project and return to the sensitising concept of ruling relations and the themes of sovereignty and capital relations to build upon some of the analysis conducted across
model law processes. Finally, I provide some concluding thoughts and review both the limitations of this project and discuss some areas for future inquiry.

**Final thoughts for the reader**

As outlined, this dissertation is organized into seven chapters that build upon one another. While the chapters each consider an analytically different aspect of this complex narrative, and range from macro mappings to more ethnographically-focused studies of text-mediated work processes, it is important to hold in tension the dynamic, interrelated nature of this analysis. For example, the overview of the formation and dissemination of the USAID/AWARE Model Law in Chapter 3 is neither separate nor separable from the emergence and development of the anti-criminalization discourse (Chapter 4) the work to critique and reform the Model Law in meetings and consultations (Chapter 5) nor the other HIV-related model laws which have developed in a relational (and not merely parallel) track (Chapter 6). While this project represents just a small piece of a much larger story, it is a concerted attempt to add a critical sociological contribution to this largely unexplored legislative terrain.
Chapter 2: METHOD

Transnational research work

Wow - you really did your homework! I think you read this document [looks down at report on gender, violence and HIV] more carefully than our committee [laughter]...alright, let’s talk.

(Gender and Policy Analyst, World Health Organization, Geneva, Switzerland)

I am not sure to what extent I would be willing to disclose some of those documents, especially in the face of some of the controversy around the work on the N’Djamena Model Law. [...] If you could manage to travel to Dakar maybe you could [access them].

(Human Rights Advisor, UNAIDS, Geneva, Switzerland)

Introduction

Conducting research and analysis for this project has been an exciting and rewarding process of discovery—traveling from Western Canada to West Africa and from Switzerland to South Africa; collecting data in UNAIDS and WHO conference rooms, government offices and constitutional courtrooms, cafes and international conferences. In this chapter I review how this project has been informed by an institutional ethnographic approach. In doing so, I provide a retrospective account of how I came to know what I know about the legislative reform process under investigation. First, I provide a brief overview of the alternative methodological approach of institutional ethnography (IE). I explain how this approach has organized my research and discovery process. I review how my method of data collection involves three mutually-informing sources of information: interviews, texts and participant observation. Next, I explicate my research problematic in the context of the
everyday. I review the relations organizing the ordinary experience out of which my interest in this inquiry has come. With this review provided, I outline the processes by which this research was carried out and the sources of data for this inquiry. This includes an account of how and when varied kinds of information were collected from informants and institutional sources. Examples of texts and interviewer-informant exchanges will help to explain the research process. These examples will clarify key issues related to research method while providing a taste of some of the tensions and questions to be explored in subsequent chapters. In the next section I explain the ethical considerations of this research. Finally, I provide some brief concluding thoughts. Throughout this chapter I note key successes and challenges experienced throughout the research and discovery process. Conceptual models, photographs, text excerpts and tables are also used in this chapter to provide some conceptual clarity and context to how this project has unfolded.

**Institutional ethnography as critical research strategy**

This project is heavily informed by the critical research approach known as institutional ethnography. Developed by the Canadian sociologist Dorothy Smith (1987; 1990; 1999; 2005; 2006), institutional ethnography allows for a consideration of complex processes of social organization. This is envisaged as a sociology *for* people (Smith 2005; 2006). Research in this academic tradition is rooted in a critical feminist (social) ontology. Academics working in this research paradigm have explicated the complex ways in which social and institutional forces *translocally* coordinate the everyday worlds of varied publics. By examining institutional
complexes, this mode of ethnographic inquiry allows me to map transnational networks of text-mediated social relations. Interviews, textual analysis and participant observation provided me with “entry” into mapping the complex social relations being examined (Campbell 2006). This critical research strategy provides me with a method of inquiry focused upon the process of discovery and critical social analysis.

I understand my informants to be active subjects who are knowledgeable practitioners of their everyday work practices: they are lawyers, judges, doctors, parliamentarians, activists, government officials and people infected and affected by HIV and AIDS. It is also important to foreground that in addition to being members of one or more of the aforementioned categories, informants also bring expert knowledge from their intersectional subjecthoods: including their HIV-status, gender, sexual orientation, socioeconomic status and ethnicity. Building upon this, participants have different lived experiences of health and illness, discrimination, racialization, violence and oppression which may or may not become explicit during the course of my interviews with them. These subjects participate in various kinds of text mediated social relations including the creation and challenge of policy and legal texts across diverse institutional sites.

For institutional ethnographers texts set words, images, or sounds into a “material form” (Smith 2006: 67). IE uses the concept of “ruling relations” to highlight how people’s social relations are coordinated both locally and translocally by “objectified forms of consciousness and organization, constituted externally to particular people and places, creating and relying on textually based realities” (Smith
2005: 227). Texts—be they print or electronic, words or visual images—are replicated at varied times in multiple sites. In relation to law, Gibbons (2003) notes how:

Once legal actions are committed to paper, they can be consulted and relevant elements reproduced. This leads, over time, to standard ways of performing legal functions, such as drawing up a will. It can also lead to the standardization of the steps through which a legal function must pass for its completion (2003: 18; see Gibbons 2003: 129-161 for related discussion of the development of standard legal genres).

The standardized operating modes of governmental and legislative institutions relies upon this replicability. Model HIV laws and subsequent state laws provide key examples of texts that are of relevance to this inquiry. Other texts include documents produced by USAID, UNAIDS and NGOs based in Canada, Europe and Africa which challenge the USAID-funded Model Law. These texts however—e.g. model laws, state laws, press releases, meeting reports, PowerPoint presentations, academic publications, internal memos, written correspondence between stakeholders and social movement campaign materials—are neither separate nor separable from the actions of people that must always be located in the everyday world.

Smith describes the ‘magic’ of texts in that “they occur in action, in motion, as occurring, and as activated by people at particular times and in particular places” (2008: 9; emphasis added). Mapping the making, movement and activation of legal texts is central to this inquiry. Doing such cartographic work requires that I locate the everyday actors and work processes involved in transnational legal reform efforts. This approach preserves the importance of texts while not becoming textualist.13 Building

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13 By this I simply mean to say that texts must never be read with blinders on to the everyday social world in which they are made and activated; the coordinating function of texts and their relation to translocal relations of ruling must always be kept in view. See Namaste (2000) for a rigorous analysis of the “erasure” of transsexual and transgendered people. Namaste’s work—which explores important HIV/AIDS policy questions in and beyond Canada—is informed by institutional ethnography and seeks
upon the institutional ethnographic work of Campbell (2006) my project is premised on an understanding that in late (post) modernity institutional knowledge is text-mediated.

Figure 2: Conceptual model of key elements of research and discovery

Expanding upon the methodological discussion above, Figure 2 illustrates a stylized model of the dynamic and iterative nature of this research that makes use of texts (e.g. model HIV laws and policies), talk (e.g. formal, digitally recorded interviews with informants) and field research (e.g. attending conferences, court hearings, policy briefings and activist gatherings). Research is a complex work process that must be located in the everyday world. The above figure attempts to capture the

to move “beyond textualist and objectivist theory” (Namaste 2000: 39-70; ). Other research links to Namaste’s work such as Dworkin (2005) who considers which publics are “epidemiologically fathomable” in the HIV/AIDS epidemic (615). Questions raised by Dworkin and Namaste were drawn upon in my work at the World Health Organization as I considered the limits and possibilities of modes of transmission studies (MOTs) to “know your epidemic” and “know your gender sensitive response” (UNAIDS/WHO 2010).
relationship *between* these three interrelated sources of information. For example, field research and texts inform the process of stakeholder interviews—both *who* to interview and the *questions* to ask them. Additionally, interviews with key informants provide access to important texts to review, other people to interview and field sites to visit. Finally, the figure illustrates that the discovery process *evolves iteratively over time*: as information is gathered, data is analyzed and new sources of data and pathways to discovery are revealed.

“Work” is also an important orienting concept in this project. McCoy (2006) describes the ways in which the notion of *work* in IE “directs the researcher’s attention toward precisely that interface between embodied individuals and institutional relations” (110). Work involves effort, intention, and a degree of acquired skill or competence (McCoy 2006; Smith 1987). This generous concept of work has been described as an “empirically empty” term that has value in “directing analytic attention to the practical activities of everyday life in a way that begins to make visible how those activities gear into, are called out by, shape and are shaped by, extended translocal relations of large-scale coordination” (McCoy 2006: 110-111). For example, in this chapter I describe how informants provided a rich description of their work practices. These expert accounts render intelligible how legal texts are made and the complex social relations involved in their creation, challenge and reform. It is through talking with a diverse group of transnational stakeholders about their work experiences—doing “lawyering work” and/or “activist work” and/or “legislative work”—that I am able to understand the complex process under investigation.
Furthermore, conducting research is work, and no matter how charming or skilled the interviewer, being interviewed is work.

My use of “discourse” in this project is keeping with Smith (2005; 2006) who builds critically upon the work of Michel Foucault. Discourse is a concept that refers to the translocal relations that coordinate actions of people who talk, watch, write and read in the everyday world (Smith 2005). To this, Smith adds that “ideological discourses are generalized and generalizing discourses, operating at a metalevel to control other discourses” (2005: 224). For example, the dominant criminalization discourse in relation to the criminalization of HIV non-disclosure is of critical importance in this project. In Chapter 4 I map the ways in which the anti-criminalization discourse has been mobilized and (re)created in the everyday dialogic work of my informants.

Building upon this reading of discourse it is necessary to say something about the concept of ideology as it relates to this project. To start, Appadurai (1996) draws attention to the flow of ideoscapes which are neither separate nor separable from the movements of persons, monies and technologies. Appadurai builds an example of ideology as “concatenations of images”—or strings of connected images—that are “often directly political and frequently have to do with the ideologies of states and the counter ideologies of movements explicitly orientated to capturing state power or a piece of it” (1996: 36). Elements of the “Enlightenment worldview” compose these ideoscapes, consisting of chains of “ideas, terms, and images, including freedom, welfare, rights, sovereignty, representation, and the master term democracy” (Appadurai 1996: 36; emphasis original). Further, the fluid nature of ideoscapes is
“complicated by the growing Diasporas (both voluntary and involuntary) of intellectuals who constantly inject new meaning-streams into the discourse of democracy in different parts of the world” (Appadurai 1996: 37).\textsuperscript{14}

Purvis and Hunt present a theoretical reading of “ideology” that “supplements discourse theory rather than opposing it” (1993: 473).\textsuperscript{15} My use of ideology maintains this supplemental understanding. While Purvis and Hunt deviate from Marx’s original conception of ideology, their analysis retains a critical Marxian thrust in that they argue that ideology as a concept places “emphasis upon the way in which the interpellation of subject positions operates systematically to reinforce and reproduce social relations” (1993: 473). For example, scholars in the sociology of medicine and the political economy of health have examined how discursive practice of medicine may be “revealed as an ideology stabilizing power of the state and society’s other established institutions” (Gerhardt 1989: 254). The ideological function of legal discourses in this project complements this important scholarship concerned with dominant discourses of medicine.

Fairclough (1992) explains that ideology may be located within both the structure of discourse and in particular discursive events themselves. For example, one

\textsuperscript{14} Of course, Marx and Engels first discussed “ideological class domination” within the German Ideology [1845-6] explaining that the ruling ideas within any historical era are the ideas of the ruling class. For Marx, the technological devise of the camera obscura becomes a metaphor with ideology representing reality in inverted form—a “false consciousness” representing things “upside down” (see Kofman 1999 for review of how this photographic devise is a metaphor for Marx, Freud, and Nietzsche). While I find Marx’s use of the metaphor overly simplistic (an historically convenient mechanical metaphor perhaps?) it is a germane example to consider given the attention in this process to the use of metaphor and rhetorical play in the field of legislative development and contestation.

\textsuperscript{15} To build upon the discussion of discourse above, Purvis and Hunt make a useful distinction for the purposes of this text: “If ‘discourse’ and ‘ideology’ both figure in accounts of the general field of social action mediated through communicative practices, then ‘discourse’ features upon the internal features of those practices, in particular their linguistic and semiotic dimensions. On the other hand, ‘ideology’ directs attention toward the external aspects of focusing on one way in which lived experience is connected to notions of interest and position that are in principle distinguishable from lived experience” (1993: 476).
may consider the ideological assumptions upon which ‘turn taking practice’ is based, and reproduced, in teacher-pupil discourse (Fairclough 1992: 90). Medical education and doctor-patient interactions are two instances of ideological ‘turn-taking’ and knowledge dissemination (see Strauss et al. 1985). Gibbons (2003) positions turn taking as “an interesting manifestation of power relations” (93) using the courtroom as an example to highlight how “turn taking conventions reveal a hierarchal social structure” (94). In this project we must consider how text-mediated ideological ‘turn taking’ occurs in the everyday world when different stakeholders are engaged in processes of legislative consultation and claimsmaking transnationally. Attention to power-asymmetries must be at the forefront of any such analysis.

My use of ideology in this broader project focuses attention upon the ideas, interests, and positions that inform the involvement and interventions of key institutionally-located stakeholders. This reading of ideology includes considering health and policy discourses that do not (yet) have dominance in the social world. For example, in Chapter 4 we will consider the development of a transnational ant-criminalization counter narrative. Accordingly, Beach (2005) argues that “[t]he study of ideology should not simply be a critical tool to identify and judge malignant institutions of power and the perversions of ideology, which promote or mystify injustice and inequality…[but also critique] benevolent and empowering systems of thought as well as postulating new ideological world views” (14). Restricting her use of ideology to a more classically Marxist interpretation, Smith explains that when

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16 In this review of ideology I have not elaborated conceptions of ‘positive’ and ‘negative’ ideology (see Larrain in Purvis and Hunt 1993: 477-479) nor recounted Habermas’ hypothesis which postulated that “science and technology…[are] far from value free and must therefore be called ideological” (Gerhardt 1989: 250; see Beach 2005).
locating the ideological functions of discourse the “significance of the textual can be seen as clearly central to investigations of social relations that connect the local into the extended social relations of the ruling” (Smith 2005: 218).

The concept of ideology motivates researchers to examine the coordinating function of discourses. In this way, Smith explicates how the ideological discourse of neoliberalism has governed public economic discourse within North America since the 1980s (2005). More specifically, institutional ethnographers argue that new public managerialism (NPM) is “a discourse mediating neoliberalism and institutional discourses in a variety of institutional settings, such as healthcare” (Smith 2006: 217; see Smith 2005; Rankin 2001). Eastwood (2006) argues “[u]nder the ontology of institutional ethnography, the dynamics that have been abstracted ideologically into concepts such as ‘globalization’” may be “reattached to actual activities being carried out by actual people” (183-184). As such, at the core of this project is an interest in the material goings-on in the everyday world with conceptions of ideology helping to explicate the extra-local coordination of these transnational work activities.

The cartographic quality of this research considers the making, marketing, movement and challenges to HIV and AIDS policy texts transnationally. My thinking in this vein is heavily informed by the work of Appadurai (1996), Urry (2000) and others (reviewed in Chapter 4) who have led me to (re)consider the complex mobilities of policy texts, or what might be conceptualized as policyscapes or legalscapes.\(^\text{17}\)

However, I will neither reify the movement of laws or legislative reform practices nor

\(^{17}\text{For the purpose of this analysis such legalscapes are positioned as kind of subset of informational technoscapes. For clarification, by technoscape, Appadurai attends us to “the global configuration, also ever fluid, of technology and the fact that technology, both high and low, both mechanical and informational, now moves at high speeds across various kinds of previously impervious boundaries” (1996: 34).}\)
the work practices of lawyers and activists challenging new model laws and country-
specific laws. Instead, we must turn to examine USAID/AWARE Model Law though a historically located set of transnational work practices of so-called global health and human rights institutions (Oberleitner 2007). This project recognizes the increasing role of international organizations and non-state actors—from the WHO, UNAIDS and the World Bank to the Bill and Melinda Gates Foundation and the Global Fund—to shaping both domestic and global health policy (Davies 2010; Lieberman 2009). The terrain of this analysis is complex but our attention to a set of text-mediated social relations related to USAID/AWARE Model Law allows a focused consideration of the flows and frictions of finances, texts and persons across borders (Urry 2000).

Aligned with Carroll’s (2004) review of IE as a critical research strategy, in this study I have produced a critically-informed institutional ethnographic account which maps and critiques “the logics and priorities of entrenched power, and shows how those priorities are instantiated and inscribed in texts and extra-local relations that reach into everyday life” (166). Such relations of power exist in varied albeit related sites from the individual household to sites of international legal creation and the transnational activities of groups and policy actors which seek to problematize HIV legal reform initiatives. Policy is both made and challenged in the everyday world and must be mapped as such. Similarly, power is exercised by so-called “legislative architects”, “policy wonks” and activists alike. The complex practices of transnational HIV and AIDS policy and legal reform must not be reified. However, this does not

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18 However, I find important insights in the work of theorists such as Urry (2000) and Appadurai (1996) in their extensive discussion of *scapes* in late (post) modernity. I also find discussions of the “postmodern turn” or “cultural turn” to provide important challenges to my transnational institutional ethnographic project (*see* Nash 2000; also see Namaste 2000 for a post-modern informed application of IE to research with transgendered and transsexual people).
prevent an analytic imagination. In fact, it is a critical, reflexive and iterative research process which allows this project to be possible. The transnational character of my dissertation research makes it stand in contrast to the important (largely) state-based institutional ethnographic research which informs this project (see Eastwood 2006; G.W. Smith et al. 2006; Turner 2006; Grace 2008b). The institutional systems under analysis are diverse and multiple; the texts being explored cross borders and are activated by publics in complex ways that have yet to be mapped in the social science literature.

**The development of my research problematic**

For Smith (2005), “[a] problematic sets out a project of research and discovery that organizes the direction of investigation from the standpoint of those whose experience is its starting point” (276). In this section I outline how I began my inquiry in the everyday world: the reaction of those working for transnational organizations (including NGOs, women’s organizations, legal networks and UN agencies) whose work seeks to draw attention to potentially “dangerous”, “colonial”, “infectious” and “ineffectual” aspects of HIV legal reform based upon USAID/AWARE Model Law. It is important to note that this starting point is different, albeit related, to the formative institutional ethnographic research that arose from the everyday experiences of persons with HIV infection (see G.W. Smith et al. 2006). Subsequent phases of my research expanded upon the work of the institutionally-located actors which first drew my attention to the legislative reform process under investigation. In reflecting upon the growth of my interest in this field of study I have become aware of the critical
importance of the International AIDS Conference (IAC), run by the International AIDS Society (IAS), as significant to my interest and understanding in both the processes of HIV and AIDS-related model laws in general and the problematic nature of USAID/AWARE Model Law specifically.

It is worth noting that while I have been fortunate to find critical spaces for engagement at the IAC conferences, much of what is delivered in such international conference sites may be viewed with an eye to processes of social constructionism and paradigms of coercion to understand how HIV and AIDS related policy knowledge and diffusion takes place (Lieberman 2009). Lieberman states with ethnographic insight that someone who has attend conferences such as the IAC: “…has a palpable sense of ‘key messages’ being delivered by conference organizers and lead actors throughout the sessions of the conference” (2009: 85). One clear example of this in my experience is the promotion of policies supporting male circumcision (MC) at IAC 2006, 2008 and 2010 with relatively little space for meaningful critique of such models of disease control. In the next chapter, a model of MC supported by key actors involved in the USAID/AWARE Model Law process will be explained. Lieberman also draws on his experiences in “civil society consultations” in such large conference venues and positions them as largely a ritual rather than a forum for the meaningful exchange of ideas. He states:

Decisions about policy and best practice are made by high-level experts and bureaucrats prior to a meeting, often in consultation with important NGOs. Leaders of the global governance regime perceive that civil society

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19 Lieberman continues: “If policies generated at such conferences are adopted in developing countries, one cannot immediately infer that this is the result of independent, technical analysis of domestic circumstances and the impact of Recommended AIDS control policies, but rather a socialization in the analyses promoted by the professional community. The conferences are highly social events, and in meetings and plenary sessions, the policies being promoted are not often directly challenged” (85)
organizations, particularly with roots in the global South, must be consulted if the regime is to govern with authority. At least there must be the appearance of consultation (2009: 85; emphasis original).

Lieberman’s quote also highlights the question of which policy actors make decisions about what is constituted as “best practice”—an important organizing theme in this work. I now turn to discuss some of the (rare) spaces for policy critique and meaty dialogue that were central to the development of my research problematic and interest in model law.

My knowledge of the idea of “model law” as a generalized textual process first began to develop in 2006 at the International AIDS conference (IAC 2006) in Toronto. This was also my first time at a conference of this size—over 20,000 people and an overwhelming sea of delegates, displays, academic discourse and activist dissent. At the conference I met up with a friend and former employer who is the executive director of the NGO I worked with in India; I had been interested in issues related to foreign aid funding, microcredit, women’s community groups and HIV. We reflected on what an interesting source of both information and spectacle this conference was—from the presence of “big pharma” to Bill Clinton; from small activist demonstrations and artistic exhibitions to talks by Bill and Melinda Gates, Alicia Keys and world renowned academics and physicians. This is where I saw activism meet with (and sometime collide with) academics; where industry, celebrity, and the public intellectual frequently took center stage.
The photo above (Image 1) is from the star-studded opening ceremonies which involved performances of dance by First Nations communities, music by artists such as the Bare Naked Ladies and Our Lady Peace, and talks by politicians, philanthropists and celebrities. IAC 2006 marked the 10th anniversary of the breakthrough treatment for HIV/AIDS known as highly active antiretroviral therapy (HAART); the conference theme was *Time to Deliver*. Dr. Mark Weinberg, Chair of the conference, noted the absence of Steven Harper: “Mr. Harper, the role of Prime Minister includes the responsibility to show leadership on the world stage. Your absence sends a message
that you do not regard HIV/AIDS as a critical priority, and clearly all of us here tonight disagree with you."

On the issue of model law or model legislation as a legislative process, my introduction came in the form of a passionate presentation at IAC 2006. Richard Pearshouse (2006) gave an oral session at the Toronto conference titled “Model legislation: Harm reduction and human rights” in which it was argued that in many countries harmful laws undermine harm reduction efforts to address the HIV epidemic among people who use illegal drugs. In the session it was explained that model laws or model legislation provide detailed legal frameworks which can provide the foundation for enacting policies and laws consistent with a harm reduction and human-rights based response to HIV. As Pearshouse described this notion of “model” legislation I became interested in the processes by which the model was created—it was explained that the framework incorporated laws from a number of jurisdictions—and the extent to which this approach has been successful in changing state laws. The salient argument of the talk was that a “rights-based approach” to legal reform was necessary on the international level to support HIV prevention efforts and that this “model” approach would allow for a useful benchmark with which national laws could be reviewed and changed. I made some notes regarding this session—*I tend to take a lot of notes!*—however I largely forgot about the specifics of this issue of model legal reform. My interest in model law as a textual process was reignited through conversations with HIV/AIDS activists in Toronto and Vancouver over the preceding months and years. Of particular significance was the problematization of the content of

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20 This declaration by Dr. Weinberg was met with a standing ovation in the audience and was heard on the televised broadcast of the ceremonies.
a different HIV/AIDS related model law presented two years later at the IAC in Mexico City (see Betteridge et al. 2006; Elliott 2006).21

Two years later as I was in the process of focusing my dissertation research, I attended that conference (IAC 2008) to present on a panel concerning critical social science research approaches to questions of HIV and social inequality. Specifically, I spoke about my interest in using institutional ethnographic research strategies to inform different kinds of HIV-research in and beyond the social sciences (Grace 2008a). It is at this Mexico City conference where a number of presentations were given concerning the highly problematic nature of USAID/AWARE Model Law. I also become interested in the political nature of the IAC conferences, finding them to be important contexts to make sense of activism surrounding legislative reform. The photograph below exemplifies how activist groups organized to push the US President-elect to address national and international HIV and AIDS policies.

21 It is at this conference that I also first learned and discussed the issue of travel restrictions on HIV-positive persons. Until this time I had be unaware on the unjust travel restrictions imposed by more than 60 countries on people who are living with HIV. It was explained to me that the IAC could not be held in the United States due to such restrictions currently maintained by the Bush Government. The 2012 conference, held in Washington DC, speaks to a changed legislative environment since the Obama Administration has overturned harmful and human-rights violating policies. In fact, I had a wonderful and highly informative discussion at the IAC 2010 with a lawyer who worked to overturn these US travel restrictions. We talked about her work and the legislative struggle of removing laws. She was generous in speaking with me at the IAC because, as she said, 'I remember the struggle of the dissertation! Email to talk law anytime.' I note this example because I have been fortunate throughout this process of research and discovery to have the support of people in both causal conversations and data gathering to more structured interviews and archival access. See Lieberman (2009: 8, Table 3.1) for locations of international AIDS conferences (1985-2008) divided into 6 geographic regions. Africa, Asia and Latin America (grouped in Table 3.1 under the Global “south” have only hosted 1 conference each.
In Mexico, arguments presented by two individuals—both whom would come to inform this research project in their capacity as informants—were striking to me. In subsequent chapters I will examine some of the arguments presented by these advocates and policy analysts, among others (e.g. questions of GBV as a cause and consequence of HIV). However, for the purposes of positioning my problematic, I simply wish to note some of the ideas and unanswered questions which sparked my sociological imagination.

In one session at the IAC 2008 Michaela Clayton, Executive Director of the NGO partnership *AIDS and Rights Alliance for Southern Africa* (ARASA), asked the following complex question: “Criminalizing HIV transmission: is this what women really need?” (Clayton et al. 2008). Clayton, a powerful and dynamic human rights advocate, spoke about the increasing proliferation of laws which criminalize HIV
transmission in the African context. The specific USAID/AWARE model law I am examining was referenced. Through a number of sessions at IAC 2008 she argued—as have others that I have interviewed through the course of this research—that while these model laws have been promoted as essential for addressing women’s vulnerability to HIV they have “negative” and “dangerous” impacts on women in Africa who are seeing their health and human rights threatened. The “rush to criminalization” and “USAID support for the criminalization of HIV transmission” were problematized by Clayton and others who discussed sensitive issues such as gender based violence (GBV) that can result from the disclosure of one’s HIV-status (Clayton et al. 2008; see Strode 2008).

More specifically, Clayton gave voice to what is at stake by allowing the movement towards criminalizing HIV transmission to continue. While the promotion of USAID/AWARE Model Law is couched in human rights language and touted as an omnibus legislative intervention that will address the vulnerability of women to HIV, Clayton argued:

These HIV-specific criminal laws have been passed notwithstanding the lack of evidence that they are effective in preventing HIV transmission, and without regard to their likely detrimental effect on women. They place women in a position of not being able to disclose their HIV status because of a risk of violence and of facing prosecution if they do not disclose. In some cases they attach criminal liability regardless of whether safer sex was practiced, HIV status was disclosed, the actual risk of transmission, and whether the threat or perceived threat of violence prevented disclosure. Many laws penalize mother-to-child HIV transmission, regardless of whether precautions are taken or are indeed available to women (2006: 1).

Clayton raised concerns with the role of USAID in supporting model law reform in the region as well as the failure of international health organizations, including UNAIDS, to strongly and clearly oppose criminalization and advocate for alternatives grounded
in human rights. The excerpt above also highlights the tension of evidence and legislative reform which is a key issue in this project.

In another session related to model law, Richard Pearshouse called what was going on in West and Central Africa an issue an “HIL virus” that has spread across the region—or a “Highly Inefficient Laws virus” (Pearshouse et al. 2008). In the course of interviews I learned that I was not alone in having my interest in this field motivated, in part, by the powerful words and legislative analysis given by Pearshouse. As I explore in this research, I am interested in the work of both the creation and promulgation of the USAID/AWARE Model Law and the work of contestation by legislators and activists alike. As I note with the “HIL virus” comment made my Pearshouse at IAC 2008, varied rhetorical strategies (or rhetoric work) are used by both those who seek to promote and those who aim to problematize model laws. The use of metaphor and rhetorical strategies related to the creation, promotion and reform of HIV-related model laws is but one example of a tension which I examine throughout this project.

As alluded to above, it is also worth noting that when interviewing key stakeholders in Canada, Switzerland, South Africa and Senegal, the work of both Clayton and Pearshouse, among others, was mentioned by informants. For example, Edwin Bernard explained that “a lot of it [how I thought about my work] changed in Mexico…it made me feel like I was doing something valuable” (Journalist, Berlin). Bernard, in explaining how he became an “accidental activist”, commented upon the importance of IAC 2008 to make connections with key stakeholders including Justice

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22 This reference to a ‘HIL Virus’ echoes the words of Justice Michael Kirby, High Court of Australia, who said “We have a responsibility to guard against the proliferation of a new virus – HUL – highly useless laws!” (quoted in Naylor 2004: 6).
Edwin Cameron and Richard Pearshouse. This extended quote notes the significance of Pearshouse’s address to the HIV work of Bernard:

This is kind of embarrassing, but in the first year of the blog, before I went to Mexico [IAC 2008]…I reported on several proposed or recently enacted laws in various parts of Africa, but I didn’t know they were based on the Model Law…until I went to Mexico and heard Richard Pearshouse’s presentation…and read the [CHALN] policy article, and I was astounded! Richard Pearshouse’s presentation was amazing. It was so passionate. […] What inspired me was that he was a lawyer [working for CHALN] but was able to frame the model law in a way that he wanted us to be activists. He basically said, you do realise this is funded by the Futures Group, which is funded by USAID, and they have stands here at the conference, and I think you should maybe go and tell them what you think of that. I was really - it was so inspiring…his presentation, it turned into, what I felt was really a call to action. Because it was so outrageous. It was an inspiration of what my work could do as well. […] Until then I had thought of the blog as a collection of information, and I wasn’t sure what people doing – now I had leaned people like [Justice Edwin Cameron] were using my work [Justice Cameron’s speech at IAC 2008 was heavily informed by Bernard’s work]. That week in Mexico was amazing…being acutely aware now that there was this ‘legislation contagion’ I started to look more at what was going on (Journalist, Berlin).23

When interviewed, Bernard recalled feeling a “call to action” upon listening to the address of Pearshouse in Mexico City (see Bernard 2008; 2011a).24 The above quote also contains insights that will be examined throughout this project, namely:

when and how people became alerted to the USAID/AWARE Model Law, the role of funding agencies in model law, the sociology of knowledge (how knowledge does/does not “move” and become activated), the way metaphors and rhetorical strategies are used in this field (e.g. quoting “legislation contagion”) and the diversity of global stakeholders involved in contesting aspects of HIV/AIDS model laws (e.g.

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23 Although Bernard is based out of Germany, I had the opportunity to first talk with him at the IAS (2010) in Austria and subsequently formally interview him while he was in Toronto working with the CHALN.

24 The (potential) power and role of activists, academics and public intellectuals to influence subsequent academic work, policy initiatives and activist activities is an important issue to question. Further, the institutionalization of particular discourses—such as those around the criminalization of HIV exposure and/or transmission, often referred to as the “criminalization of HIV”—through exercises such as those carried out by the IAC must be considered.
journalists, academics, activists, lawyers, judges living in Africa, North America and Europe).

In conversations with academics about my interest in what was going on in the Canadian context around criminalization, my interest in the problematic nature of USAID/AWARE Model Law become crystallized. While many people helped me to clarify the problematic of this investigation (some of which I have been able to thank by name in the acknowledgement section), meetings with Eric Mykhalovskiy were key to focus my attention to the textual process under investigation. Mykhalovskiy, like Bernard (as discussed above), had his interest sparked by the powerful presentations and unanswered questions presented at the 2008 IAC in Mexico City. As such, I think it is important to critically reflect on the power some institutional spaces such as the IAC give to inform the academic and popular discourse of HIV and AIDS. The more I read and spoke with people—activists, analysts and academics alike—the more it become clear that there were unanswered questions and that I could contribute something through an investigation of the processes of creation and contestation of HIV-related legislation. As such, it was not the material presented at the conferences that alone gave rise to this problematic; instead, it was the unexamined, transnational textual processes and the broader sets of questions raised by activists, academics, people living with HIV in West Africa and policy analysts which organized the direction of this investigation.

**Research process and sources of data for this inquiry**

In this section I give an account of some of the key activities carried out during the research and discovery process (*see Appendix F for table outline research activities*
described here). While the multi-staged, ethnographic character of this project will be evident throughout, I use this section to provide some more context and clarity to each of the research processes. I have already outlined some the everyday institutional contexts from which my problematic has emerged. It is through exposure to various kinds of legislative, activist and academic activities that I was able to begin the more formalised research activities which have resulted in this work. This early process of discovery was important because I began to talk with people who spoke eloquently about legislative relations of ruling. I also learned about the transnational character of this legislative process which had not been examined sociologically: the work of lawyers, activists, legislators and funding agencies who are creating and contesting HIV model laws. As such, while my project is informed by talking with people infected and affected by HIV and AIDS—for example, HIV-positive women I spoke with who are living in West Africa and Southern Africa—the focus of my project is on transnational policy and activism work. This project is one small albeit important piece of a complex legislative mapping.

The completion and revision of my research proposal and ethics application helped me to clarify the problematic of this investigation, review key subfields of literature to which my research may contribute, and consider key ethical considerations for this research project. As I have acknowledged at the beginning of this work, the involvement of key academics, members of civil society and activists was extremely influential in how I conceived of and designed the project. Opportunities to participate in community forums during this stage also helped me to refine questions and understand the complexity of legal issues involved such as HIV disclosure in different
legal contexts (e.g. the public forum “HIV, Disclosure and the Law” hosted at the AIDS Vancouver Island (AVI) in March 2010). In keeping with this mode of sociological research, while the research trajectory was designed and mapped in part at this stage (e.g. key informants, institutions and texts of interest) through successive stages of research and discovery the project evolved while guided by the research problematic. I found the iterative nature of the research process to be both demanding and exciting.

At the beginning of the investigation a preliminary round of interviews and meetings with key stakeholders in Canada (Toronto and Vancouver) allowed me to access key texts (e.g. Model Laws developed by the CHALN and UNAIDS Policy Statements) and begin to make contacts with potential key informants. My interdisciplinary HIV and AIDS training through a Universities Without Walls (UWW) fellowship (CIHR initiative) and participation as conferences and NGO events (e.g. those hosted by the CHALN) was highly instructive at this stage of my research. I found opportunities to talk about my project with Canadian activists and academics alike to be extremely helpful. This preliminary stage of interviews and data collection also afforded me opportunities to gain a better understanding of the different legislative environments which I had to understand and the increasingly complex web of institutions that are key to this legal terrain.

The first substantive stage of interviews and field research occurred in Geneva, Switzerland. During the summer of 2010, while conducting a research internship with the WHO and additional doctoral coursework through Duke University, I conducted

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25 The coursework was completed during my tenure as a Global Health Fellow, Duke University, while I was conducting research in Geneva, Switzerland. Coursework through Duke University also gave me
interviews with key policy and legislative stakeholders doing work related to the creation and challenge of USAID/AWARE Model Law. For example, interviews with lawyers and policy advisors at UNAIDS, The Global Fund and the WHO were highly revealing during this stage of discovery. In particular, formal interviews with lawyers and policy analysts at UNAIDS were essential to gaining access to both key legislative texts and informants in West and South Africa. This work of gaining access will be explored later in this chapter.

It is during this phase of my global health and policy research in Europe that I had the opportunity to present and conduct research at the *XVIII International AIDS Conference* in Vienna, Austria (Grace and MacIntosh 2010a; Grace and MacIntosh 2010b).26 I have previously explicated the importance of this conference in exposing me to key tensions and unexplored questions related to HIV model law processes. The conference gave me an important opportunity to understand both academic and community engagements in legal reform initiatives broadly. For example, presentations ranged from how the law acts as an impediment to HIV prevention

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26 It is worth noting that when presenting a poster at the IAC 2010 on legal reform questions related to Acute HIV Infection of gay men in British Columbia, Canada, I had rich discussions with two key legal experts who would become important informants: Cécile Kazatchkine (CHALN who conducted legislative analysis of legal reform on Francophone west Africa) and Edwin Bernard (a journalist who runs criminalhivtransmission.blogspot.com). While I knew the work of these stakeholders previously, the conference was an important site of exchange and an opportunity to confirm the importance of understanding how their work activities would inform a richer understanding of processes related to USAID/AWARE Model Law.
efforts globally in areas such as sex work, the criminalization of homosexuality, drug use and HIV non-disclosure. This conference presented me with the occasion to interview key stakeholders involved with the creation and reform of USAID/AWARE Model Law. In addition, IAC 2010 allowed me to map the discursive focus on HIV legal reform and human rights present in the work of many activists, academics and policy actors. Collectively, my research and interviews in Geneva and Vienna gave me a rich ethnographic understanding of the legislative process under investigation. This stage of data collection also prepared me for the subsequent stages of interviews and analysis.

After a rich experience focused on global health and policy institutions related to USAID/AWARE Model Law, in the early fall of 2010 I reviewed my data and conducted interviews with key NGOs involved in HIV-related model laws and subsequent state laws. Interviews with lawyers and policy analysts at the Canadian HIV/AIDS Legal Network (CHALN, Toronto, Canada) were useful to help me understand the connections between UNAIDS, CHALN and private consultants. Alternative model laws developed by the CHALN which focus on gender, HIV and human rights were also explored. These interviews were greatly informed by the research that I had conducted in Geneva and Vienna with policy actors and activists. As interviewing is an iterative process, this stage of “regrouping” and reviewing what I had done thus far (including listening to interviews, transcribing and making notes) was important preparation for the next phases of research in South Africa and West Africa.
In the fall of 2010 I traveled to conduct interviews and field research in South Africa and Senegal (Dakar, Senegal; Cape Town, South Africa; Johannesburg, South Africa). This phase of the research allowed me to visit NGOs and organizations engaged in the creation of the Model law (e.g. FAAPPD) and with African-based NGOs that were contesting aspects of new state laws based upon the USAID-funded Model Law (e.g. AIDS Legal Network). I also had revealing interviews with stakeholders engaged in the creation and promulgation of the USAID/AWARE Model Law. Additionally, this stage of the data collection allowed me to interview UNAIDS staff working on Model Law reform processes in West Africa as well as interviews with key players in HIV legal reform in Africa (e.g. Edwin Cameron, sitting Constitutional Justice, South Africa). The opportunity to travel and meet with key stakeholders during period of research was enlightening. Many of the informants I conducted interviews with at this stage provided access to key texts and other informants which has greatly aided my understanding of this complex policy field. As one informant put it simply, “now that you are here [Dakar, Senegal] we can really talk...you know, face-to-face [...] It is important that you came” (UNAIDS, Dakar, Senegal). While many interviews and meetings with stakeholders were pre-arranged (e.g. a meeting with FAAPPD staff, Image 3) other information gathering was more serendipitous (e.g. following a USAID truck to see other work they were conducting in Dakar, Image 4).
Finding the Dakar offices of the FAAPPD to gain background knowledge of the USAID/AWARE Model Law development and promulgation (Dakar, Senegal, 2010).

USAID vehicle (foreground) photographed on my first day of field research in West Africa (Dakar, Senegal, 2010).
After completing the substantive field research phases of investigation I focused on data analysis, writing and contacted informants for additional information when necessary. During this stage a limited number of additional interviews were also conducted. In some cases follow-up interviews were required (using phone or Skype). The majority of clarification and text-exchange (sending of additional documents, review of interview transcripts) occurred using email. While analysis of data and some interview transcription occurred during earlier phases of this research and discovery process, this phase of the research allowed for full transcriptions to be completed and a comprehensive mapping of the information I had come to know over the course of the research.

The final stage that I have outlined related to the research process involves the final review and defence of the dissertation and ongoing planning for knowledge transfer and exchange (KTE) activities related to this project. While the process of dissertation defence is obviously an important work process to acknowledge, it is during the preparation for this defence and the wiring of this text (the dissertation proper) that important questions around KTE are ruminating. For example, I seek to not only trace the contemporary social history of HIV-related legislative reform related to USAID-funded Model Law but also question the extent to which future work can help to inform more inclusive processes for HIV legislation creation and implementation and problematize work processes related to model law and allied funding regimes. For example, I believe the comparative analysis I offer of different HIV-related model laws (USAID/AWARE, CHALN and SADC, Chapter 6) can

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27 I place final in quotes simply to note that while this is the final stage of this specific doctoral project, this broader project and data will continue to grow as it informs the trajectory of other institutional analyses related to global health and legislative reform.
inform related work activities moving forward; there are important lessons to be learned and I hope to be a part of the discussion. During the process of research and discovery I have been encouraged by national and international stakeholders for the need for aspects of this research. Many stakeholders have expressed a desire to be engaged in related KTE activities in the form of accessing written materials (to be available in English and French) and to meet with me individually or collectively to discuss the research findings and implications for future legislative reform activities. I look forward to this important, ongoing phase of the research and knowledge translation process.

**Talking to people: from the scheduled to the serendipitous**

In their article on interviewing for institutional ethnographers, DeVault and McCoy (2002) explain that interviews could be better conceived more generally as “talking to people” in that conversations range according in their degree of formality and planning—from the highly scheduled to more serendipitous occasions of discovery (756; see Campbell and Gregor 2002: 77-79). This research project is the result of talking to people across such a continuum. Figure 3 illustrates what I mean by a “continuum of conversations”. This schematic tool allows me to illustrate the varied kinds of formal and informal discussions I had with people during the course of this research.
This above model illustrates how formal interviews and more informal conversations that occurred in the context of this research can be placed on a conceptual continuum. In this project, I talked with people in contexts ranging from formal, pre-arranged audio-recorded interviews to completely unexpected, serendipitous opportunities for conversation that also greatly aided the discovery process. This continuum also highlights the importance of both planning and interview preparation on one end to being open to unexpected opportunities for research-related conversations on the other. It is important to note that in addition to the forms of talk exemplified on this continuum above, I had many conversations with my dissertation committee and other academics in Canada and abroad which ranged from formal, scheduled meetings to more informal discussions about my research.

At one end of this conversational continuum, I conducted 32 in-depth qualitative interviews and 3 follow-up interviews (total of 35 interviews). Twenty-eight of these interviews were pre-arranged (via phone or email); seven of these interviews, while formal, happened as the result of meeting people at conferences, NGOs or activist venues and setting up an interview ‘on the spot’. These interviews
ranged from 32 minutes to 140 minutes (median interview time = 92 minutes). These ethnographic interviews were semi-structured, containing both general (semi-standard) questions about HIV-AIDS legal reform in addition to questions tailored to the specific knowledge and textual experiences of each informant. Later in this chapter I provide examples of the kinds of work informants are asked to do in the context of the interview including reviewing specific legislative texts. Approximately half of these informants were contacted for additional information via email or telephone after the interview. All but one of the informants who were contacted post-interview responded and assisted my research further by making necessary clarifications to the information they provided, sending supporting documents and/or answering additional questions.

The other end of this continuum involved more informal conversations with people during my work and travel. Quantifying the number of these more informal conversations is difficult as they have ranged from talking with people in bars, universities, hospitals, NGOs, government offices, court rooms, conferences, libraries and while sitting with people on the train and subway. Conversations during my work at the WHO/UNAIDS, National and International conferences, and with friends and colleagues in the field of HIV and AIDS (including academics, activists, lawyers and policy actors) are some of the most significant conversations I have had during the course of research. For example, I talked about so-called “policy ballers” with an HIV-activist in the Global Village of the IAC 2010 who was working to challenge problematic provisions to USAID/AWARE model law; this conversation led me to come to know the important work of two African-based HIV and AIDS NGOs in this
research field. These are the kinds of conversations that cannot be planned; such conversations have furthered my discovery process and must not be discounted.

In some cases I was doing HIV-related research in particular settings (NGOs, government offices, court houses) and had the opportunity for more informal conversations. For example, I enjoyed having casual lunch-time chats about model law and human rights with staff at the Canadian HIV/AIDS Legal Network while I waiting to conduct pre-arranged interviews with policy analysts at the organization. When I told the Network staff how much I enjoyed the highly layered and policy-oriented conversation they assured me they frequently discussed “highly important matters of pop culture” and I just came on a good day! In others instances—such as sitting on the subway or in a restaurant—opportunities for such conversations were less expected but have led to important contacts, sources of information and insights into my research. The accessories I have with me (a laptop, books on HIV and the law, copies of laws and policies) have served as visual cues to a number of would-be informants to approach me to discuss what I am working on. For example, while reading a World Bank text on HIV legal reform on the subway in Vienna I had a useful conversation with someone working in the field of global public health. He said, “I just had to introduce myself when I saw what you were reading”. In another case, an unexpected conversation occurred with a man who identified as a porn actor and producer in Cape Town—he was extremely knowledgeable of HIV programs and policies in the African context. In a final example, I had an instructive discussion with a journalist outside of the South African Constitutional Court when she explained that in covering the court
she learned “how to look” at the Court to understand both the explicit and implicit meanings of varied processes.

It is important to note that a number of challenges presented themselves specifically related to the work of setting up an interview date and time. Like all people, my informants are busy; they lead hectic professional and personal lives. The majority of informants had their interviews conducted during their paid work hours or during a lunch break (e.g. in an empty conference room, their office or a coffee shop). Finding time during the work day where they had approximately 90-120 minutes for an interview proved difficult for many informants. In some cases scheduling interviews took multiple, even dozens of emails over the course of several months. In other instances, interviews had to be rebooked or stopped and restarted due to other work activities informants had to prioritise. Fortunately, the patience of my informants to rebook interviews, respond to multiple emails as necessary, and make time for the interview had led to the richness of this ethnographic account.

**Matters of geography and interview location**

I wish to say something about the importance of travel and interview location to this project. By location I recognise not only the country and city context in which interviews occurred (e.g. Geneva, Switzerland and Dakar, Senegal) but the specific institutional location of the interview (e.g. informants office at her/his NGO or government agency and the back of an empty conference room at an international conferences). While some interviews and follow-up questions/correspondence occurred via telephone and email, I was fortunate to be able to talk with the majority of my informants in-person and in their work contexts.
There were many important advantages to the international travel I was able to do for this project: access to key texts, experience with the diverse transnational institutions and actors involved and the ability to meet with informants in-person to discuss their everyday work activities. For example, travel to Cape Town, South Africa allowed me to follow up on interviews with legal NGOs I was previously exposed to in Vienna and Geneva, access key legal texts I had not seen, and gain a rich sense of social movement work activities protesting aspects of the USAID/AWARE Model Law in the African-context.

While some interviews were conducted in bars, cafes and other public venues, I found that a key advantage of conducting interviews in the workplace—or in close proximity to some of the palaces in which informant’s HIV and AIDS related work occurred—was the ease at which informants could access key model law related texts (in hard or electronic format) and the names and contact information for potential informants. For example, Susan Timberlake’s (UNAIDS) mid-interview accessing of texts and potential informant names on her computer, discussed below, was beneficial on two fronts: it helped to create a richer, more detailed account of her work activities in the remaining portion of the interview and it provided me with access to valuable texts and new informants as the process of discovery continued. It is important to underscore the central importance of texts in the context of the interview process. This theme will be explored further in the next section.

**The work of knowing where to look, what to read and who to talk with**

A number of challenges presented themselves when attempting to identify and contact potential key informants. While a list of prospective informants was developed
during the proposal phase of this project, as the research evolved so did the list of key players who could add to this cartographic work. The iterative nature of this project made known key actors and institutions during the process of discovery which were previously unacknowledged. In order to identify key players in this legislative field three interrelated sources of information were used: (a) key texts, (b) contacts provided by (gatekeeper) informants and (c) information learned by attending conference sessions, advocacy booths and activist demonstrations. I have already noted the mutually-informing nature of these data sources over time (Figure 2).

Key texts, such as “AWARE-HIV/AIDS Regional Workshop on AIDS Model Law N’Djamena, Chad September, 8–11, 2004” (USAID/AWARE 2004), provided important sources of information regarding potential key informants for this study. While these institutional texts vary in the detail provided regarding conference proceedings, they offered important early insight into some of the networks of actors and institutions involved in HIV-related model law. For example, texts of workshop sessions often include participant information with institutional affiliations and contact information in the appendices. While I was able to access some of these key texts by searching organizational websites and libraries (UNAIDS, USAID etc.) I faced a number of challenges in this area: texts that I was not able to access and additional key texts that I was not aware of (e.g. important conferences and key process documents). In fact, the early phases of research in this project were dizzying at times as I become aware of a growing number of texts I had to consult and knowledgeable persons with whom I should speak. In this respect, both informant interviews and attending conference sessions and activist demonstrations provided important ways to gain
information about the people I needed to talk with for this study and where I should further focus my attention.

Through the course of interviews I was frequently told about key texts I should read and persons with whom I should speak. Often I was given texts in hard or electronic copy by informants and received “e-introductions” to other potential informants by people I had already interviewed. About two-thirds of informants provided me with some form of text related to HIV model laws and/or gave me with the names, contact information or an introductory email to other key stakeholders of interest. The importance of informants as gatekeepers to accessing texts and speaking with other informants is well exemplified in an interview with Susan Timberlake:

Well, here is what you may want to read [informant leaves interview table and goes to her computer desk]…I will send it to you now. And from what you are asking where you really need to go to is Dakar. You can access the rest in Dakar. Do you know the key people you can talk with who were involved in [USAID/AWARE model law] there?…I will introduce you now [informant forwards email to introduce me to field UNAIDS staff in Dakar and also emails me key model law texts including conference proceedings in 2007 and 2008] (Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

As the above example highlights, it is important not to underplay the significance of key gatekeepers in facilitating access to texts and other potential informants. As one UNAIDS West African-based informant told me, there was someone I “needed to speak with” involved in USAID/AWARE Model Law from the beginning, that but she would “never take my call” or answer an email from me. At the end of the interview I sat in the office of this UNAIDS informant as she convinced the key would-be informant (a process that took about eight minutes over the phone) to
meet with me the following week at her office in Senegal. The meeting that resulted proved to be highly constructive.

In a particularly memorable interview with Justice Edwin Cameron in his Johannesburg Court chambers, our conversation led me to discover a set of texts and research materials of which I was not previously aware. Justice Cameron also emailed a colleague during our interview so that these texts could be forwarded to me electronically. Justice Cameron discussed how research and the work of nearly 100 African activists “had killed the issue in South Africa. The idea of a criminal intervention [HIV transmission cases] in South Africa.” The report, however, did not seem to have much impact beyond South African legal reform processes:

*Interviewer:* Right. Wow, that is so striking and wildly unfortunate…
*Informant:* It is. And it’s all in our report. The report existed but it was insulated from use elsewhere. The report has occasionally been quoted abroad but it’s a great pity. It was a very, very thorough and solid piece of scholarship which our Committee did, but, as you say, we were completely unaware of this [unaware the Model Law process had begun in West Africa in 2004]. It was daft. And, I think it’s important to see that it wasn’t purely malignly victimizatory – there was a silly beneficent impulse behind it – but, desperately and grievously wrong-minded.

*Interviewer:* And this report – I haven’t seen it – is it available electronically?
*Informant:* Mmm hmm. Yes.

*Interviewer:* Okay.
*Informant:* Yes, I can have it sent to you. Let me just write an email to the researcher who worked with me on the report, Ms. Havenga, I’ll write an email now so it’s done. [Justice leaves seating area and writes email at his desk]. You wrote to me on which email? My justice email? (Constitutional Court Justice, Johannesburg, South Africa).

In another example of texts being made available by key informants, a policy consultant stopped in the middle of his answer to say:

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29 Also links to the idea that as much as I as a researcher attempted to access all relevant texts to my project, I could not find many due to access issues lack of knowledge of them etc.
What I would like to propose [to] you is to send you by email a presentation made by AWARE 1 [focusing on] policy environment - a global view of [our work]. Unfortunately, it’s in French, but I think that it is possible to translate in English… Anyway, as soon as I finish I can send you via email and you see that in this presentation you have the status of the process of adoption of HIV law in Africa and you have...Anyway, [I’ll send] all the process [documents] that [I] have (Policy Advisor/Consultant USAID/AWARE, West Africa).

It is important to note that providing these texts (e.g. PowerPoint slides, reports, memos) were not viewed as a substitute for explaining work processes in the interview; these texts serve a valuable additional source of information.

I also must recognise that just as some informants asked to be “off the record” (to preserve anonymity) in regard to all or part of their interview answers, in a number of instances texts were given to me “for my eyes only” or with conditions on which aspects I could cite. For example, after giving me a text one informant cautioned “But, there is information that doesn’t need to be shared. For example [points to section of an internal strategic plan in West Africa] It’s okay [to use cite this in your research]…but [points to 2 columns of information] this is really internal” (UNAIDS West Africa Staff, Dakar, Senegal).30

I must underscore that beyond giving me access to key texts and other informants to interview, these interview encounters began to make visible how my informants were participating in various forms of electronically-mediated communication (internet and phone) with colleagues who were dispersed all over the world. It is precisely these kinds of communications technologies that enable my

30 On a related point, determining authorship of varied texts (for example, model laws, policies, activist publications, public letters) is an important step to know some of the key persons to talk with. After a key text was identified through the processes of discovery, three main authorship-related issued emerged: 1. Cases where no author is listed; 2 Cases where many authors and/or institutions are listed, 3. Cases where the author is listed but they are not the person who wrote the text and/or they did not have intimate knowledge of the work processes involved in drafting, revising and activating the text.
participants to work collectively, often in ‘real time’, on various activities such as the production and dissemination of texts which critique the USAID/AWARE Model Law and the criminalization of HIV non-disclosure. In short, my interviews provided an important window into some of the ways in which the transnational work of my informants—e.g. discussing issues over Skype, editing and forwarding documents or reading blog posts, reports and journal articles—was organised and mediated by technology.

In addition to informants being an important source of texts, they also were able to activate texts in the course of the interview. Many informants used texts (both those that I brought into the interview and those that they had available to them at the time) in a number of capacities during the interview. Texts such as minutes from meetings and participant lists from workshops reminded informants of key players, dates and activities and served as a kind of memory aid to prompt further detailed information. Texts provided informants with a concrete way to discuss their detailed work processes related to model law creation and challenge. For example, in discussing the definition of “wilful transmission” of HIV it was useful to have texts (e.g. reports and model laws) for informants to read, discuss and talk through. Because of the importance of language in legislation—a topic explored throughout this work—it is important that informants were able to provide detailed accounts of how and why specific articles were drafted and challenged.

**Interview process and matters of ethics**

This research has made use of interviews with key informants working in the field of HIV and AIDS, human rights and legal reform as well as field research and
textual analysis. My ethical considerations for working with human subjects were in accordance with the University of Victoria, Human Research Ethics Board (HREB) Application for Ethics Approval for Human Participant Research (2009). My research was also in keeping with the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (TCPS). The Tri-Council Policy Statement describes the policies of the Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council of Canada (NSERC), and the Social Sciences and Humanities Research Council of Canada (SSHRC). As I am a holder of a SSHRC Canada Graduate Scholarship (CGS)\(^{31}\) I was committed to both sets of institutional research ethics guidelines.

All informants gave voluntary, informed consent prior to conducting an interview. To ensure that consent was obtained, informants:

(a) were introduced to the overall purpose and parameters of the research;
(b) had what was required from their participation in the research (including, for example, the length of the interview and the nature of questions being asked) clearly outlined;
(c) were provided with a review of possible discomforts and risks they may experience;
(d) had the voluntary nature of participation in the research reiterated; and,
(e) were told that they may withdraw from participation in the interview at any time, without explanation.

Informants were asked to review and sign an interview consent form. This document reviewed the ethical considerations outlined by the approved HREB application. With the permission of the informants, interviews were digitally recorded with notes taken to augment the recording. For example, in some cases the actions of informants—from

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the waving of hands for emphasis to leaving the interview table to obtain documents or look up the name of someone on the computer—were important to note.\textsuperscript{32}

Anonymity of informants is protected in some cases. All informants were given the option to participate in interviews with their anonymity preserved; this option was presented with some caveats for a number of informants. In some cases, I explained that the specific nature of the informants activities would make it extremely difficult to have anonymity preserved. In these cases, however, all informants were willing to have their name and institutional affiliations used in association with the information they shared. For example, before interviewing Edwin Bernard about how his journalistic and advocacy work related to model law reform he recognised the difficulty of me talking about his work without him becoming identified: “There’s no way [I can preserve anonymity; \emph{laughs}]. No way. I am already too public. But of course, I am happy to be identified by name. So, a cross or a tick [looking at the consent form]?” (journalist, Criminal HIV Transmission blog).\textsuperscript{33}

In keeping with the sentiment of Bernard, in many cases informants were willing to be “on the record” with their work experience with anonymity not being a condition of participation in the interview. In some cases informants said their name could be identified unless it was in respects to specific pieces of information they deemed to be particularly “dangerous” or “could get them into trouble” in the context of their work. For example, one informant said, “well, I will talk about my work in this area, but this part [of the interview] can’t have my name attached to it”. In cases where

\textsuperscript{32} In some cases informants agreed to proceed with interviews but did not want to have the session digitally recorded. In these cases, all informants agreed that detailed notes could be taken during the interview.

\textsuperscript{33} Bernard’s blog can be accessed at \url{http://criminalhivtransmission.blogspot.com/}. 
informants had hesitation for being identified for any or all of the information they disclosed during interviews, I have preserved their anonymity in its entirety to avoid their potential identification. When necessary, the anonymity of informants is protected by virtue of the fact that: only I would have knowledge of the identity of the participants as related to the interview data; a pseudonym would replace informants’ names to insure confidentiality in transcripts, the Dissertation, and future publications; no reference would be made to city names, organizations, or other specifically identifying information that may be shared during the interviews; data collected would be kept secured by password protection for digital files and/or stored in a locked and secure location for hard copies of signed consent forms and other related research data.

The Application for Ethics Approval for Human Participant Research (2009) was submitted after committee approval of this research proposal. Research with human subjects commenced once ethics approval was obtained.  

34 Adding to the discussion of research challenges throughout this chapter, it is worth noting that the formality of the interview—both the audio recording and the work of reading and signing the detailed “legally sounding” participant consent form—was a research hurdle to overcome in some cases.  

35 Because English was not the first language of some informants, more time was required to review and explain the form to ensure that all aspects were properly understood. In some cases the consent form was forwarded prior to the interview so that informants would have time for a comprehensive review prior to the interview. In cases where English was not the informant’s first language, extra attention was also paid
mitigated by thoroughly explaining the purpose of the research and reviewing the consent form in detail. Humour, in some cases, also proved beneficial:

*Informant:* Ah, okay. This is too formal [laughs looking at the consent form] [explanation of consent form; ~10 minutes]

*Interviewer:* Great. [After consent form signed] Sorry, it is very technical. But you work at UNAIDS, so you must be used to a little bureaucracy, right? [both laugh] (UNAIDS West Africa Staff, Dakar, Senegal).

In summary, it is worth noting that while for many this formality was something they had dealt with before or did not pose any significant challenge, for others the form—itself a text with particular organizing functions—proved to be an initial barrier.

**Conclusion**

In this chapter I have strived to convey the kinds of research activities that I undertook related to this project and the thinking that has coordinated my analysis. As described, this was an exciting process of discovery informed by the critical research strategy of institutional ethnography. Throughout this account I have also highlighted some of the key research challenges I encountered. It is worth reiterating an overarching challenge of this project: *understanding the complex, transnational social character of HIV model law creation and challenge*. In some respects, this is a central challenge of this research. How as a researcher can I come to know and map the transnational terrain of HIV-related model law reform? This is, after all, a complex area of research involving many global institutions, actors, texts and work processes. I have worked to provide a detailed account of how through my transnational research activities I have worked to provide a rich, albeit limited, account of this field. As a

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to speaking slowly, reiterating questions and seeking clarity when any ambiguity existed as to the meaning of the informant’s response.
whole, in this chapter I have worked to explain how my IE-informed project has involved an iterative and multi-phased research process committed to understanding complex social relations.
Chapter 3: LEGISLATION REPLICATION

“Best practice” as a coordinating genre in global HIV/AIDS work

...people do model legislation because it’s a shortcut. It’s a way to provide assistance to do, to avoid, a lot of the hard work in coming up with a good law and so, it can be...then it can be abused [...] it can just be a cut and paste thing because of a low resource person or even anybody who thinks that it’s a good law...will just use it, and they will bypass all the [domestication and consultation] process.

(Susan Timberlake, Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland)

Introduction

As reviewed in Chapter 1, a model law is a particular kind of regulatory text with a set of relations of use. Model laws are designed to be taken, modified in whole or in part, and used by stakeholders in the creation of state laws. Because they are already framed in legislative language, model laws are worded in ways that can be expeditiously activated and translated into state law. In this chapter I argue that mapping the origin and uptake of the USAID/AWARE Model Law is optimally achieved through a sustained analytic commentary on the institutional genre of “best practice”. Explicating the coordinating function of the best practice genre is central to understanding the rapid spread of HIV/AIDS laws across the West and Central African region. Rather than being new, the institutional mandate of best practice replication has been a key feature of global health institutions work activities in the HIV response.

36 The 18 counties in the West and Central Africa Region covered by AWARE’s mandate are: Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Côte d’Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.
over the past two decades (UNAIDS 1999; UNAIDS 2000).

I argue that many best practice replications in the field of HIV/AIDS are aligned with the biomedical rationalities and/or rhetoric of evidence-based medicine (Mykhalovskiy and Weir 2004; Timmermans and Mauck 2005), evidence-based practice (Dawes et al. 2005) or evidence-based policy (Orsini and Scala 2006) and are reshaping the global response to HIV/AIDS in fields of practice in and beyond biomedical approaches to HIV prevention, treatment and care. Best practice replications are enabled through a set of social and technological relations of use including the availability of mobile, standardizing texts and the work of institutions that fund their development and promote their activation. The story of how the USAID/AWARE Model Law came to be created and activated is a complicated one and this text is but a partial account. In this chapter I position best practice as both a coordinating genre and rhetorical smokescreen in the work of HIV/AIDS practice standardization and replication.

The initial funding of the AWARE-HIV/AIDS project by USAID in 2003 was done with the stated objective of replicating best practices in the West and Central Africa region through the identification and dissemination of “proven and high-impact prevention, care, and treatment practices” (FHI 2008: 2). I argue that it is this conception of replicating HIV best practices across this region which is central to the organizing institutional logic and work processes of AWARE. Actors worked to “rapidly scale up evidence-based interventions” and learn from other countries experiences so as to avoid attempting to “reinvent the wheel” (FHI 2008: 2).

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37 For example, the notion of patient “empowerment” and the “best” response possible is mobilised through this discourse of EBM (Mykhalovskiy and Weir 2004; Orsini and Scala 2006).
The launching of AWARE in 2003—with focused programs in HIV/AIDS and reproductive health—was positioned as a radical and innovative strategy to harmonize approaches which could transcend national borders in order to combat shared health problems across the diverse region. While the funding for the project came from USAID, the core management team of AWARE-HIV/AIDS was led by Family Health International (FHI) who worked in consortium with Population Services International (PSI) and Constella Futures (CF)/The Futures Group (TFG). The team was based in Accra, Ghana and managed activities across 18 countries in West and Central Africa from this single location. A division of institutional responsibilities related to best practice replication exists across these three organizations along with a global network of associate partners (5 from 2003-2006, 3 from 2007-2008) each with specific roles in this transnational project (see Appendix A for a list of key institutions who played central organizing roles in supporting the funding and development of the USAID/AWARE Model Law, some of which are reviewed in greater detail within this chapter).

39 Sometimes this is referenced as Constella Futures.
40 The ability to use transnational standardising texts and innovations in communicative technology helped to facilitate the challenge of communication articulated by the organizations involved: “AWARE-HIV/AIDS needed to transcend national borders and many communication challenges to bring countries in West and Central Africa together to develop a common agenda that tackled head-on the issues that they had identified. Toward this objective, the project identified priorities within HIV technical areas that most needed to be addressed, the best practices whose replication would do the most to address them, and technical institutions and networks that could be strengthened to sustain these processes and support a robust response” (FHI 2008: 4).
41 AWARE’s closeout report in 2008 states this division of labour clearly: “FHI was responsible for overall program management and for implementation, monitoring, and evaluation, and also led the project’s best practices and institutional strengthening components. Constella Futures was responsible for the project’s advocacy component, while PSI managed the cross-border component and WAAF-funded projects, which it had implemented previously under the FHA Project” (FHI 2008: 11).
42 AWARE-HIV/AIDS management team worked with five associate partners between 2003-2006: “Bureau d’Appui à la Santé Publique (BASP’96), which supported monitoring and evaluation and research; Care and Health Program (CHP), which provided expertise on voluntary counseling and testing; Centre Hospitalier Affilié à l’Université de Quebec (CHA) and Centre Hospitalier Universitaire de Sherbrooke (CHUS), which provided direction on STI services for sex workers; and JHPIEGO,
Just as a discourse of best practices helped to justify the funding and creation of AWARE-HIV/AIDS in 2003, I argue that the work process of defining and identifying best practices in 2004 through a series of meetings and reports helped to shape and support a regional policy agenda in which the creation of a model law for HIV was identified and supported despite no evidentiary basis for an omnibus legal reform initiative. The USAID/AWARE Model Law is but one example of a best practice supported by AWARE and should be viewed in relation to other programs and policies which have been replicated across the region through the same replication architecture and work of this USAID funded institution.

The rapid activation of the USAID/AWARE Model Law into a omnibus country-specific law in Benin in 2005—the first country to pass an HIV/AIDS law based on the model text—was subsequently framed a “best practice” example to be emulated across the rest of the region. As such, I argue that Benin has been positioned as a kind of process best practice (how to rapidly create a state-specific law in West and Central Africa) based on the already written program or policy best practice (the USAID/AWARE Model Law). The rhetorical framing of Benin as a “success story” and best practice of “advocacy for policy change” through presentations and publications further promoted the USAID/AWARE Model Law and often was positioned alongside a complementary narrative of its alignment with women’s rights and human rights (USAID 2005).

Informant interviews and analysis of key documents reveal the ways in which whose efforts concentrated on the quality of STI services” (FHI 2008: 3). The number of partners was reduced after a 2006 evaluation of AWARE-HIV/AIDS (FHI 2008). See FHI (2008) for more specific detail on institutional arrangements and the divisions of responsibilities.
the genre of best practices coordinates the work processes of actors across the West and Central Africa region with success being measured by the “total number of replications” and “total number of countries replicating” identified best practices. I argue that it is the framing of both the USAID/AWARE Model Law and country specific laws (Benin 2005) as best practices which helped to coordinate transnational work processes enabling a rapid onslaught of many highly problematic laws across the region between 2005-2010 (see Maps 1-6).

In a timely examination of the global governance of AIDS, Lieberman underscores the need to focus on power asymmetry in an analysis of “best practice” diffusions rather than interpret the dissemination of ideas on HIV prevention as evidence of global collective learning. He notes two key points to argue that much of what has been learned and subsequently repeated is the resultant product of mediated power relationships: (1) the existence of conflicting evidence on the efficacy of the majority of prevention strategies—“which begs the question of which evidence drives the learning process” and (2) the many cases of leaders of global governance “presenting, in a heavy-handed manner, evidence of particular ‘best-practice’ cases to other countries” (Lieberman 2009: 86). Lieberman argues that “a limited body of evidence from best-practice cases is repeated to actors and policy makers across the world, providing a narrowed framework from which the policies have been made” (2009: 97). This view of best practices is consistent with the medical humanist perspective on evidence based medicine (EBM) which views this paradigm of medical practice as a form of “technological oppression” that limits and negates possibilities

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43 For example, Lieberman uses the example of Thailand being held up as a best practice country by UNDP and others in 2005 constituting it as a “country that could ‘share its know how’ on how to prevent HIV transmission (2009: 97).
While aspects of the USAID/AWARE Model may seem to limit possibilities for many policy actors (e.g. by coordinating work activities in a way that assumes omnibus legal reform is what must be done thereby negating the possibility this is not an appropriate approach to HIV governance; providing draft legislative language) some countries have chosen not to engage in the model law process to date. They are, however, the exception to the rule.\textsuperscript{44} I expand upon some critical insights from EBM scholars by arguing that it is important to consider how the institutional genre of best practice replication creates and demands new forms of work for actors. Rather than creating new kinds of work for doctors, nurses and patients (as EBM research has focused on; \textit{see} Mykhalovskiy and Weir 2004; Orsini and Scala 2006) HIV/AIDS best practices including the USAID/AWARE Model Law put new work demands on a diverse group of actors including parliamentarians, PHAs, policy analysts, lawyers etc.\textsuperscript{45} The specifics of some of these new forms of best practice work will be explicated in this chapter.

\textbf{Defining “best practice”}

Best practice guidelines (BPGs) or collections are text-based governance strategies which aim to shape the actions of actors in multiple local settings according to the parameters which are circulated within an authoritative text. For example, in a critical discussion of how EBM seeks to “address the persistent problem of clinical

\textsuperscript{44} More research at the country level is required to understand why some countries decided to not engage in the process of omnibus HIV/AIDS law creation and if any pressure was placed on these counties to conform to the new regional standard.
practice variation with the help of various tools, including standard practice guidelines.” Timmermans and Mauck (2005) note that critics have raised concerns suggesting that such guidelines may lead to “cookbook medicine” (18). The production of BPGs in the field of health point to a complex social organization of knowledge at work: some texts relying on inclusion criteria aligned with EBM and clinical practice with others having a broader set of factors which are considered by those who establish criteria for “best practice” inclusion. While variation exists with respects to how these guidelines are developed and the extent to which they are based on best available scientific evidence, the exercise of BPGs is framed as an attempt to standardize actions across multiple settings, learn from previous successes, and enter science into local practice through a particular kind of guidance text.

The concept of “best practice” is a kind of shell term to which meaning is attached. As such, the concept is used differently across time and institutions. A case in point are the shifting definitions UNAIDS and Family Health International (FHI) have used when operationalizing the term in widely disseminated best practice collections (UNAIDS 1999; UNAIDS 2000; FHI and UNAIDS 2001). For example, the term “international best practice” was originally used by UNAIDS but shifted over time due to the institutional acknowledgement that best practices are (often) context dependent: “This realization led to a shift in aspirations from the identification of international best practices to the identification of what could be described as local and national best practices” (Funnell 1999: 6).

An early evaluation of UNAIDS Best Practice Collection (BPC) reveals how

46 The metaphor of a cookbook is an interesting one as both “cookbook medicine” and “cookbook law” require that the user can read and follow the recipe on the page.
the broad definition of best practice which was used to organize the text and related work processes—“anything that works whether fully or in part and provides useful lessons learnt”—was seen as confusing to many people at the country level (Funnell 1999: 17). Interviews with UNAIDS informants about the problematic nature of the USAID/AWARE Model Law which are reviewed in Chapter 5 and 6 reveal similar tensions with the connotation of the word “model” in model law (demonstrating the problem with the popular understanding that “model” = “best” = “gold standard” best practice replication). It is worth noting that the mandate for the creation of the BPC stems from a 1994 decision by the Economic and Social Council which established UNAIDS determining the objective “to achieve and promote global consensus on policy and programmatic approaches” (Funnell 1999: 6). While reviewing the best practice work of AWARE-HIV/AIDS I will explore how one of the first steps the organizations took was to define the meaning of “best practice” for their work.

Although many definitions of best practice are used contemporaneously in and beyond the field of HIV and AIDS, generally speaking “best” implies a normative judgment of something that can and should be replicated based on its proven efficacy and “practice” references the particular text-mediated work processes which are deemed to have met this standard. In some definitions the word “promising” is also used (e.g. “Promising and Best Practices”) so as to include current practices that are potentially best practices but have not yet met the institutional requirements for this classification (AWARE-HIV/AIDS 2006) while others disseminate resources

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47 For example, some informants in this BPC evaluation cited the problem with the broad use of the term including one who stated: “The problem is that ‘best’ connotes excellence. Makes it look like the Bible. People will challenge things presented as BP – who says it’s best? We must use the term carefully. ‘Anything we can learn from’ is not a saleable concept – we need a new concept” (quoted in Funnell 1999: 20).
coordinated by the language of “good practices” and “practice examples” such as the World Bank which has developed a guide for global HIV/AIDS policy and law reform (World Bank 2007). A common idiom involved in the process of describing the rationale for assembling, disseminating and/or activating best practices is a stated desire to avoid “reinventing the wheel” (FHI 2008: 4; FHI 2008: 25). This reference highlights a kind of pragmatism inherent in the logic of best practice replication: time, money and resources can be saved through a process of shared learning and replication at national, macro-regional and international levels. I argue that actors who engage in the project of best practice replication have new demands placed upon them.48

I now move this review of best practice operationalization to a specific examination of the work of AWARE-HIV/AIDS. In March 2004 a consensus-building regional workshop was held in Dakar, Senegal with key stakeholders from across West and Central Africa.49 The focus of this workshop—the first major task of the newly created organization—was to define the meaning of best practice for AWARE-HIV/AIDS and its partners through a participatory process. Best Practice50 was defined as: “an experience, initiative or program that has proven its effectiveness and its contribution to the response to the HIV/AIDS epidemic, and that can serve as an example and inspiring model for others (program planners, managers, and implementers)” (AWARE-HIV/AIDS 2006: 10). In order to be accepted as a best

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48 This echoes work by Mykhalovskiy and Weir (2004) which argues that rather than erasing the patient, as humanistic analytic perspectives have argued, the phenomenon of evidence-based medicine leads patients to have new demands put on them resulting in “new relations with physicians, relations mediated by scientific evidence” (1063).


50 “Best Practices” and “Promising and Best Practices” are both used in references to this definition and related reports (FHI 2008).
practice, the experience, initiative or program should also be: “useful and relevant, effective, innovative, produce results within a reasonable time, efficient/cost-effective, ethically sound and sustainable” (AWARE-HIV/AIDS 2006: 10; see FHI 2008).

With the concept of best practice defined, I argue that this genre helped to coordinate the ongoing work activities of AWARE-HIV/AIDS. For example, key steps and work processes were identified at the meeting to allow for the selection and replication of best practices:

- Designation of a committee of experts in charge of the selection (working groups)
- Preparation of operational tools for the process (submission form, call for abstracts, application form for candidates, explanatory notes on processes and criteria, and guide or selection)
- An inventory of existing Best Practices, identified in previous literature (Summary Booklet of Best Practices UNAIDS, Compendium of Best Practices of Advance Africa etc.)
- Call for submission and nomination of PBP candidates
- Selection of Promising and Best Practices by working groups
- Publication and dissemination of selected Promising and Best Practices (FHI 2008: 10-11)

Workshop groups were created in five best practice technical areas: behavior change communication (BCC), voluntary counseling and testing (VCT), sexually transmitted infections (STI), prevention of mother-to-child HIV transmission (PMTCT) and care and treatment (C&T). These working groups were identified and began meeting three months later (June 2004) where members were “oriented on the process of selecting promising and best practices as stated at Dakar” and worked to develop tools to aid in the best practice selection process (AWARE-HIV/AIDS 2006: 11). This work lead to the further solidification of best practice selection tools by AWARE-HIV/AIDS staff and a call for submissions was made in the region resulting in more than 50 best practice submissions. Coordinating texts were created by
AWARE to standardize the rating system and selection process. Those abstracts that received a unanimous “excellent” score by the selection task force members were labeled as best practices; re-examinations were held for those submissions where differing points of view about the best practice submission were held. Support was provided to best practice “originators” (those who submitted the best practice) to assist them in documenting their best practice according to required criteria on submission forms.51

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**Figure 4: Recording best practices**

(AWARE-HIV/AIDS Form, 2007/2008)

As such, the best practice genre organizes the kinds of work AWARE-HIV/AIDS engages in: from the policies and programs they help to replicate across the region (which according to a text-mediated process must meet a pre-defined set of criteria) to the ways in which everyday work activities are recorded on forms (Figure 4).

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51 Beyond the 5 working groups listed above, other special expert groups were created in two areas: (1) advocacy for policy change and (2) community based health financing. It is under the advocacy for policy change group that the Benin experience has been positioned as a best practice. It appears that labeling of Benin’s speedy adoption of the USAID/AWARE Model Law as a best practice is a legitimization of the work AWARE-HIV/AIDS was already doing (had already created and disseminated the Model Law) rather than a peer-reviewed process of submitted best practices which had to meet a set of pre-defined criteria as described above.
The organizing features of a best practice text: USAID/AWARE Model Law

A model law is a particular kind of pre-operative text which may be organised by the genre of best practice. To start, it is important to take a closer look at the USAID/AWARE Model Law itself (the model law proper) to understand its organizing features. This review is contrasted in Chapter 6 to other model laws which fall into the same best practice genre but have important differences in design which influence how the text works to coordinate the actions of those who put it to use in the everyday world.

The Model Law on STI/HIV/AIDS for West and Central Africa contains 37 articles which are connected by their focus on the prevention, care and treatment of HIV/AIDS in West and Central Africa. It is this broad focus that gives this model law its omnibus character: a kind of text that seems to call out to would-be users to ‘legislate it all and legislate it quickly’. The main components of the model legislative language provided in the text are definitions contained in Article 1 (Appendix B) and the fields of proposed legislation in the text contained in Articles 2-37 which are organized into seven chapters (Appendix C). The text is available online and in hard copy, produced in French and English and contains no direct references to research evidence or other relevant case law. I will discuss these domains of the Model Law after a review of the justification section of the text.

The Model Law contains a preamble “justification” section which discusses the sub-Saharan Africa region as the most affected by HIV/AIDS globally—citing 3 million new infections in 2003 alone with the total number of infections at 25 million.
This justification section discusses the gendered nature of the epidemic\(^{52}\) and the need to protect the human rights of people with HIV.\(^{53}\) The extended excerpt from the justification passage of the Model Law below provides further insight into how the text is rhetorically framed as a progressive and essential activity:

Indeed, laws exist in all countries, but the peculiar nature of the AIDS epidemic, its multidimensional nature, spread rate and the extent of the damage it causes, warrant an equally specific intervention. The declaration on the commitment on HIV/AIDS, adopted during the 26th special session of the General Assembly of the United Nations on HIV/AIDS, held in New York in 2001 and the declaration of African Heads of State at the Abuja and Addis Ababa summit implored signatory countries to enact, reinforce and implement in as much as possible, laws, regulations and other measures in order to eliminate all forms of discrimination against people infected by HIV/AIDS and members of vulnerable groups and to ensure that they fully enjoy their fundamental rights and liberties, with a view to guarantee their access to education, heritage, employment, health care, social and health services, prevention and support and treatment, information and legal protection, while respecting their privacy and confidentiality and developing strategies to combat stigmatization and social exclusion associated with the pandemic.

In response to this call, we need to find solutions that reconcile individual rights with demands of public health based on a framework of norms and principles. The proposed law is intended to provide this legal framework which may serve as the basis for such actions, by providing countries with a flexible tool that will enable them to legislate, taking into account their legal, social, political and cultural context (USAID/AWARE Model Law 2004: 10).

I argue that this justification section positions the USAID/AWARE Model Law as a best practice text which is focused on women’s rights, human rights, and is in keeping

\(^{52}\) A gendered social determinants argument is presented arguing that “Women represent a particular target [for becoming infected by HIV] as they are subject to many types of marginalization: poverty, cultural status, higher level of illiteracy, lower levels of education in general, informal and irregular employment” (USAID/AWARE Model Law 2004: 9).

\(^{53}\) This section explains: “The human rights of people affected or infected by HIV/AIDS in Africa are often violated. Those living with the disease are faced with various forms of violence and extreme hardship. In certain cases, children are denied the right to education. Widows and orphans of people who died from this disease are often denied the right to inheritance and are sometimes expelled from their homes” (USAID/AWARE Model Law 2004: 9). The text goes on to recognize that “[t]he violation of the human rights of people affected or infected by HIV/AIDS reduces the effectiveness of prevention, care and treatment programs” (USAID/AWARE Model Law 2004: 9).
with international calls for legislative reform including those of the General Assembly of the United Nations on HIV/AIDS and declarations by the African Heads of State. This framing of the Model Law can also be seen within the body of the model itself as the first section of the Model Law gives a fill in the blank section at the top: “Law # of ….. 2004 on HIV/AIDS prevention and control” followed by a preamble of the relevant conventions, charters and declarations in this field:

Considering the Universal Declaration of Human Rights
Considering international conventions on civil and political rights as well as economic, social and cultural rights
Considering the African Charter of human rights and the rights of people
Considering the Convention on elimination of all forms of discrimination against women
Considering the Convention on the rights of children
Considering the African charter on the rights and well-being of children
Considering the International convention on the protection of all migrants and the members of their families
Considering the Abuja declaration
Considering the Declaration of Commitment on HIV/AIDS

Finally, the justification section of the text also positions the “flexibility” of this tool as key: pointing to the need to adapt and domesticate the tool to fit local specificities of the legal environment and social, political and cultural contexts of each country.

I will now provide an introductory overview of the 37 articles in the text to give a richer picture of both the content and organization of this best practice text.

Article 1 of the text defines the terms used within the law stating that “[i]n accordance with this law, the terms and expressions used in the first article of this convention shall be understood as follows, unless otherwise defined by the context” (USAID/AWARE Model Law 2004: 11). This statement is followed by 22 definitions of terms used in the text. For example, concepts such as “Acquired Immune Deficiency Syndrome
(AIDS), “Willful Transmission”, “HIV Risk Behaviour” and “Medical Confidentiality” are operationalized (see Appendix B).

Articles 2-37 in the Model Law provide draft legislative language in 8 broad fields, each organised as a chapter containing multiple articles: (1) Education and Information; (2) Safe Practices and Procedures; (3) Traditional Medicine; (4) Voluntary Counseling and Testing; (5) Health and Counseling Services; (6) Confidentiality; (7) Discriminatory Acts; and, (8) Willful Transmission of HIV (see Appendix C for selected text excerpts from the Model Law).

For the purposes of illustration I will take the last article of Chapter 7 (Discrimination Acts), Article 35, and the first article of Chapter 8 (Willful Transmission of HIV), Article 36:

![Article 35](USAID/AWARE 2004: 11)

**Figure 5: USAID/AWARE Model Law excerpt (Article 35 and 36)**

(USAID/AWARE 2004: 11)
This excerpt from the USAID/AWARE Model Law above (Figure 2) illustrates how draft text is provided for legislators to copy, paste and adapt as needed. Article 35 makes visible how users of this text are asked to ‘fill in the blank’ (or, more specifically, the x’s) regarding prison sentencing: “ranging from xxxx to xxxx”. We will see in later portions of this analysis, how country-specific laws based on the USAID/AWARE Model law take and adapt this language. Article 36 will also be explored in further depth within this project given its centrality to much of the debate around this omnibus standardizing initiative. What is key to recognize here is the way in which articles in the Model Law reference one another (Article 36 referencing Article 35) helping to position this as a comprehensive package of laws that work together to address issues of HIV prevention, treatment and care.

**Creating a best practice text: (re)writing model law**

We now need to take a step backwards to better understand the development of this best practice text. I argue that providing the context of how this model law was written gives important insight into the institutional spaces from which this text emerged and make explicit that while the model law process was created within an institutional genre of best practice, no such best practice guidelines actually appear to have informed the writing or revision process of the USAID/AWARE Model Law. From September 8-11, 2004 Family Health International’s (FHI) and Action for West Africa Region-HIV/AIDS (AWARE) held a regional workshop in N’Djamena, Chad,
to adopt a model Law on STIs and HIV/AIDS for West and Central Africa. More than 40 participants from the 18 countries in the region were part of the United States Agency for International Development (USAID) funded initiative. The workshop was organized in collaboration with the Forum of African and Arab Parliamentarians for Population and Development (FAAPPD), the West Africa regional program (WARP)/USAID, the West Africa Health Organization (WAHO), the Centre d'Etudes et de Recherche sur la Population pour le Développement (CERPOD), the Economic Community Of West African States Parliament (ECOWAS) and the Legal Network of Chad Parliamentarians for Population and Development. One UNAIDS staff member in West Africa who has been involved in this legislative issue for the last five years put it this way:

...heads of state made a kind of commitment and the parliamentarians also wanted to be part of the movement – part of the response to HIV. The only way they had [...] was to be part of the law - the legal initiatives. So, they decided to meet in N’Djamena to develop this law. It was supported by USAID... (Berthilde Gahongayire, UNAIDS, Dakar, Senegal).

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54 The 18 counties in the West and Central Africa Region are: Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

55 The Forum of the African and Arabic Members of parliament for the Population and Development (FAAPPD) is an intergovernmental organization of non-profit African and Arabic members of parliament. The FAAPPD account 61 member countries in Africa and in the Arabic States. The United Nations Population Fund (UNFPA) has been supporting the Forum since its inception in 1997, along with other core partners: the Japanese Government (through Special Trust Fund for NGOs’ and Parliamentarians’ activities), USAID (through its regional Project AWARE) and the Health Policy Initiative (HPI). FAAPPD also lists the following organizations as key partners and collaborators: the Asian Forum of Parliamentarians for Population and Development (AFPPD), the European Parliamentarian Forum (EPF), the Inter-American Parliamentary Group on Population and Development (IAPG), “Parliamentarians for Global Action” (PGA), the Latin American Forum, the Caribbean Parliamentarian Movement, and the Canadian National Committee. UNAIDS is also listed as an organization with which FAAPPD has formed a partnership (FHI 2004).

56 The workshop also involved members of the national networks of parliamentarians for Population and Development, national HIV/AIDS control programs in the region, United Nations (UN) agencies, the Sahelien network of parliamentarians, and the executive secretary of the Economic Community of West African States (ECOWAS).
As Gahongayire states, many parliamentarians, among other policy actors, wanted to be “part of the movement” to transform the legislative landscape in the region. It is important to recognise the work of creating this best practice text to gain some insight into the origin of the document and the evolution of some problematic articles it contains.

Prior to the 2004 meeting in Chad to finalize the USAID/AWARE Model Law a consultant was hired to prepare a draft of the Model Law. A consultant named Martin Laourou wrote the initial draft of the best practice text. Laourou is a statistics engineer and holds a doctorate in demography and has an extensive background working within the West African context for Futures Group’s component of AWARE-HIV/AIDS.57 While some CHALN informants where openly critical of the work of Laourou who “hastily drafted” the “dangerous” USAID/AWARE Model Law, others deflected blame from the USAID/AWARE consultant:

I don’t think the importance here is necessarily to blame or to say why the consultant did a poor job—no, I think because we do not know exactly…maybe he prepared a wonderfully worded, carefully drafted document that went into the consultation and the fears and prejudices of the participants took over and the final outcome document took out the wonderful amendment that he had put in. This could have been the case, but we really don’t know what the document was that came into the consultation, but at least we know the outcome (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

Patrick Eba points to an important aspect of the reform process of the model law text questioning how was this text actually modified and created? What draft text came into the 2004 meeting to coordinate the work activities of actors? However, it is worth noting that Eba was the only informant from UNAIDS or CHALN who made room for

57 Background information provided by informants. Additional information on Laourou’s professional background retrieved from http://www.spoke.com/info/pF3Dxe2/MartinLaourou. Laourou appears to have a different professional training from the lawyers who are key writers in the writing of the CHALN Model Law and SADAC Model Law.
the possibility that earlier iterations of the USAID/AWARE Model Law were “wonderfully worded” or “carefully drafted”.

A review of earlier drafts of the USAID/AWARE Model law reveals that the text did undergo numerous changes through the process of review and consultation. An examination of these texts highlights some of the key articles in the USAID/AWARE Model Law which underwent changes and the specific nature of the textual changes which resulted, in part, from the 2004 consultation process in Chad. I argue that undergoing these work processes of consultation and review of model laws is a new form of work that this best practice genre demands of actors (see Appendix D).58 These textual comparison examples illustrate that the creation of model laws is a work process which places new, highly technical demands upon actors: both the work required to write and rewrite model language and the activation of this language at the state level when making HIV-specific laws based upon the model text.59

While the purpose of this work is not to blame specific legislative drafters, parliamentarians or lawyers, it is important to consider the process by which the USAID/AWARE Model Law came to be supported and promulgated by influential policy stakeholders in West Africa. Mapping legislative processes and the “hurried” processes of the USAID/AWARE Model Law is necessary.60 One informant put it this way:

58 For the purposes of this analysis only 2 texts are compared here to contrast some key articles which underwent reform. More research with actors who wrote the original text and were in the room during the process of revision is required to get a richer picture of the process of actually changing language and building consensus.
59 More research is required to gain a richer picture of the specific work processes that led to the rewriting of the USAID/AWARE Model Law and resulted in the final iteration of the text.
60 A number of informants noted the seemingly rapid speed with which the USAID/AWARE Model Law was written, promulgated and activated at the state level across West Africa. The use of the word “hurried” specifically references the temporal characterization of this process by the Former Director of Research and Policy, CHALN, Canada.
I think that there are a whole range of areas where USAID policies have been problematic. I think it’s quite difficult to track the direct influence of USAID upon the model law text itself [...] I think what could be said is that the process was very hurried...and what I mean by that was that the drafting itself seemed to be done in quite a hurried way (Former Director of Research and Policy, CHALN, Canada).

Building on the comments above, it is important to recognise that the speed of translating the USAID/AWARE Model Law into a country specific law in Benin is positioned as a key feature of why its adaption and adoption of the Model Law should be viewed by the rest of West and Central Africa as best practice. In essence, we can see completing ideas of speed as problematic on one hand and a best practice on the other.

The stated rationale for the meeting in 2004 (Chad) was to gain consensus on the model law draft and make changes to the document as necessary. As I have argued above, an examination of earlier drafts of the Model Law gives partial insight into some changes that the Model Law underwent at least in part as a result of these consultations. When asked about the process to “ratify” the Model Law, one informant familiar with the process in N’Djamena, Chad made explicit that “ratification” was not a fair characterization of the meeting process: “Well, I think the choice of words would be…[we must be] slightly careful here, because first of all ‘ratify’ doesn’t really apply because of the very nature of the document that they adopted there when they met in N’Djamena” (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland). Eba explained that a model law is not “ratified” per se but instead was reached and agreed upon by some form of consensus by stakeholders at the meeting:

…to come back to the issue of wording and language, what they adopted was a non-binding document…it was just, let’s say, a meeting report if you want. It has this value. But because the people who were involved were extremely
influential people in their own parliament and because they had the backing of an organization that were really...that was really to provide monetary, technical and over support for the processes coming in the national level. The model law created what it did, which is a domino effect at the country level...(Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

Informants who were at the 2004 meeting—or whose legislative work experience has given them inside knowledge of the processes of model law reform—describe a process of debate, compromise and consensus that led to the final Model Law text.61

When discussing his knowledge of the model law meeting in 2004, Eba noted an important theme of importance to this analysis: “…to be able to really understand how this happened, if you want to see why there was this outcome you have to look at who were in the room…who was part of that negotiation and that discussion that led to the adoption of the document” (Human Rights Advisor, UNAIDS, Switzerland). To this point, informants discussed the “influential” positions, “high standing” and relative “power” of many of the parliamentarians who were at the meeting. In many cases the invited parliamentarians were chairs of the health committee or social affairs committee in parliament.62 When discussing the limited involvement of civil society in the 2004 meeting another UNAIDS lawyer put it this way:

…The AWARE project got money. The AWARE project put together the law...I don’t know, there were lots of different versions we heard of the process to put together the law. [...] there were lots of different views about the degree to which the civil society that participated in that meeting really understood what the law really provided and had had an opportunity to talk about some of the more punitive aspects of the law (Susan Timberlake, Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

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61 For example, one informant put it this way “…most people who are the consultation and to whom I happened to talked to were of the view that there was fierce debate and tremendous level of opposition and discussion at the AWARE …N’Djamena meeting and that the document that came out of it is the result of the best level of consensus they could reach” (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

62 For a list of all parliamentarians in attendance at the 2004 meeting see USAID/AWARE 2004.
In addition to claims about the lack of civil society involvement, informants discussed issues related to the engagement of parliamentarians in this process. Informants saw the influence of these key parliamentarians at the national level in their home countries, coupled with the USAID funding and promulgation strategy to support changing state laws, to be key factors to the success of the USAID/AWARE model law to be activated and inform state laws across the West African region.

Descriptions of the “power” and “influence” of many of the parliamentarians and policy stakeholders “at the table” must be contrasted with other adjectives used to describe the parliamentarians. Lawyers, policy analysts and those working for NGOs familiar with these key stakeholders discussed the “lack of knowledge” and “lack of competency” these parliamentarians had with regards to issues of HIV/AIDS and human rights. In short, many of these parliamentarians are people who have the power to influence legislative reform in their national parliaments but in the view of international human rights lawyers (many) have low levels of HIV knowledge on various fronts. For example, informants described that many parliamentarians involved in this Model Law process lacked basic biomedical knowledge (e.g. how HIV is transmitted) and experience with the field or language of human rights (e.g. knowledge of the key human rights documents internationally or what a “human rights approach” might consider).

In discussions with some informants USAID has been positioned as a kind of “evil” or “imperializing” force in the creation of USAID/AWARE Model Law—including but not limited to the push to criminalize HIV non-disclosure. However the data collected in this study reveals not so much the malicious desire to create bad laws
but rather the ways in which USAID supported the best practice genre of standardization, including legislative replications, through the funding of AWARE. USAID says that the United States of America is “committed to promoting economic growth in West Africa through a dynamic and coordinated regional assistance program” (USAID/West Africa). USAID/West Africa is described as a “regional hub” designed to provide various services to USAID missions in the region (e.g. development planning and management, legal and financial services) and works in partnership with West African governments and other regional institutions such as The Economic Community of West African States (ECOWAS). USAID’s work in West Africa is coordinated along four identified priority areas: Trade & Investment and Infrastructure, Conflict Mitigation & Reconciliation, Health & HIV/AIDS and Agriculture & Environment. Understanding these fields of work is key to understanding the social organization of USAID’s interventions in the region.

A recent open letter from Henderson M. Patrick, USAID/West Africa Mission Director, provides background on the economic mandate of the USAID Mission:

USAID/WA is working closely with the Governments of the region and other international donors to help ensure the success of the regional socioeconomic development efforts. The region is making significant progress in consolidating democracy, developing the economy along free-market lines, combating corruption and trafficking in persons, fighting HIV/AIDS, and protecting the environment. Donors agree that the West African region now has its best chance in a generation to institute political accountability, liberalize the economy and achieve poverty reduction targets. As a result of its demonstrated commitment to the principles of investing in people, ruling justly, and economic freedom, seven countries in the region have so far been selected as Millennium Challenge Account (MCA) eligible; two at Threshold level and five at Compact. Burkina Faso recently moved into the compact stage and Mauritania will begin its threshold program in the coming months. The success of the Niger Threshold program, and the new agreements with Burkina Faso and Mauritania, continue to show the importance of USAID in the West Africa region (Patrick 2011: 1).
In this letter the USAID director makes explicit the efforts of the organization to “consolidate democracy” and develop regional economies along “free-market lines”. I argue that this letter not only gives important background on the organizing economic logic of USAID/West Africa but also the ways in which countries are presented as successes (e.g. those selected as MCA eligible) to demonstrate the importance of USAID’s work in the region.

USAID/West Africa’s coordinated work activities in Health and HIV/AIDS is described using the language of best practice replication:

This program aims to respond effectively to shared health problems in the region by strengthening the capacity of public sector institutions and developing networks of competent, non-governmental organizations (NGO) to coordinate national and regional interventions to problems such as, malaria and the HIV/AIDS epidemic. The program documents, disseminates, and replicates best practices in HIV/AIDS, reproductive health, (RH) and, child survival and infectious diseases and, reinforces regional and selected national programs (USAID/West Africa 2011).63

With this review provided, it is important to provide additional background of key institutions, including USAID, in the coordination of national and regional HIV-related best practice interventions.

**Institutional experience in best practice replication**

Discussing the process of USAID/AWARE Model Law creation and reform with informants provided important insight into other contextual factors that must be taken into account within this analysis. I argue that the key institutions reviewed have experiences with other best practice replications. A number of informants used language such as “legal vacuum”, “desert” or “forest…to be developed” to discuss the

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lack of HIV-related legislation in the West African region prior to 2004—this, as we will see in chapters that follow, is not where the legislative metaphors end. Creators of the Model Law provide the following rationale for supporting the creation of this omnibus HIV text:

[i]n 2003, no country in the region [West and Central Africa] had adopted an HIV/AIDS law that protected the rights of PLHIV and mandated measures to protect others against infection, such as public education about HIV transmission and the testing of donated blood. The model law that AWARE-HIV/AIDS helped to draft was a key tool to facilitate the adoption of comprehensive HIV/AIDS laws throughout the region, each tailored to a country’s specific social, political, and cultural environment (FHI 2008: 19-20).

While no such omnibus HIV-related legislation appears to have existed in the region prior to 2004, institutions including FAAPPD and AWARE had experience with previous model legislation related to reproductive health. In this section I explore the language and logic of disseminating and replicating “best practices” in West Africa to respond to the HIV epidemic. I also review two examples of past experiences of some key institutions which may have informed the process and product of USAID/AWARE Model Law. While many examples could be given, I focus on two that emerged as important to the past and current work of informants: reproductive health model legislation (AWARE; FAAPPD) and modeling male circumcision interventions for HIV-prevention in Africa (TFGI; USAID).

The recognition of transnational best practice interventions as ideological is important to explore especially considering the lack of cohesion commonly acknowledged across the 18 West African countries member countries—15 Economic Community Of West African States (ECOWAS) member countries and Cameroon, Chad, and Mauritania—including diversity of population size, governance structure,
economic systems, language, and existing policies (AWARE-RH 2010; Nguyen 2010). A history of violent conflicts in the region which has resulted in the diasporic movements of people within and outside the region has also been recognized as an important challenge to legislating across the region. To this end, many common challenges across the diverse region have been identified by AWARE partners including the generally poor health of populations, high illiteracy, low status of women, economic uncertainly and civil and political strife (AWARE-RH 2010). An ideology focused on economic development and best practice interventions supports the interventions of USAID and partners. The purpose of this review is not to provide a comprehensive picture of the legal or cultural landscape of this region. Instead, this section builds from textual analysis and my informants’ expert knowledge to provide some sense of the contemporary context from which the HIV model law under investigation emerged. Recent anthropological scholarship in West Africa is an important complement to the work I do here to provide broader context to issues of development and HIV that are only touched upon in this analysis (Nguyen 2010).

Informants pointed me to the textual process of reproductive health model legislation in West Africa that started prior to the HIV Model Law. In the passage that follows, these interrelated factors of a lack of legislation in the region and the importance of understanding the reproductive health model legislation, are discussed:

…it was USAID funded program that did not only draft the N'Djamena model legislation in West Africa that started prior to the HIV Model Law. In another example of assembling “best practice” information, while working at the WHO and conducting research in Geneva and Vienna (Summer 2010) I was frequently engaged in conversations and work activities related to the a guide published by the Open Society Foundations’ Public Health Program called What Works for Women and Girls: Evidence for HIV/AIDS Interventions. The guide and related information is available at http://www.soros.org/initiatives/health/focus/hiv/news/what-works-20100811. It is through many conversations and interviews with WHO and UNAIDS staff that I came to understand both evidentiary hierarchies and best practice logic for transnational HIV interventions.
law, before that in […] in 2002, they led the drafting and adoption by countries in West and Central Africa of what they call the Reproductive Heath Act - that was the model law under reproductive health… and that was again a process that led and brought together a number of parliamentarians in the region because they were supporting broadly parliamentarian leadership on health issues. So, they started with looking at reproductive health issues and try to support parliamentarians first in terms of the understanding of reproductive health issues… so they had a number of workshops in the region, training parliamentarians on reproductive health issues. It generated tremendous involvement by parliamentarians into these issues at country level but also at regional level. The background to that is that West and Central Africa is still some sort of a forest, everything is still to be developed when it comes to addressing a number of legal issues, especially as they relate to health because generally in that region health related legislation date back to the French colonial era. There have been very little or no legislative reform on health related issues whatsoever in that part of the world. So, the project by AWARE-HIV to amend reproductive health at least to adopt reproductive health legislation in their region was the first attempt to do that in the region (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

Eba, who has experience providing legal guidance on various model laws in the African context including the USAID/AWARE Model Law and the SADC Model Law, provided important additional insight into the background and experience AWARE and regional parliamentarians had experience with model law processes prior to the USAID/AWARE Model Law:

…generally the key parliamentarians who have a certain degree of power and influence in the national parliaments, but also in the countries. So, that makes it easier after a consensus is adopted for them to run with it at the national level. So, they had clear experience doing that before it came to the issue of HIV. So when in 2004 they tried to do the same around HIV related issues it came it was against the background where there was no or very limited legislative reform on HIV issues in the region again, so there is nothing. It’s like they are starting from nothing (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).65

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65 This informant went on to say: “So that is clear the need in a way for countries to adopt legislation around diseases. I mean, discrimination is not addressed; there is no clarity whatsoever regarding how HIV testing should be contested. There is no clarity regarding what should be the government obligations or the government… how can I put, control measures that are related to HIV… there is no clarity about how disclosure of HIV status should be conducted. So there is very little or if not no whatsoever form of legal or policy guidance on HIV related issues. So when AWARE comes in again on the issue of HIV related legislation it creates a tremendous sense of need in the region and so they put together parliamentarian people in the room support their work by hiring a consultant and that
The cover image of the best practice document above (Figure 6) highlights the regional scope and ambitions of AWARE-HIV/AIDS. The semiotics of the HIV ribbons are interesting to note: kinds of crosshairs which are depicted on multiple USAID, FHI and AWARE documents illustrating the standardizing targets of their best practice work across the region. As of 2008, AWARE-HIV/AIDS has identified and promoted a total of 19 best practices with 14 of the 18 targeted countries adopting at least one with “a total of 38 replications” (FHI 2008b: viii). In efforts to support “best-practice replications” a number of sub-institutions were created or supported including six consultant…and the people in the room who unfortunately did not have the sort of understanding of the epidemic and the sort of understanding of the legal responses need to effectively address HIV were in the room and with all their good will adopted finally original document that had a number of flaws, and so far as a critical areas of the epidemic are concerned but also in terms of what should be the legal and human rights standing on which such a response should be based…so, they are certainly committed, but the outcome document is not great” (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).
learning sites and more than 700 providers receiving training in HIV voluntary
counselling and testing (VCT), STIs and the prevention of mother-to-child
transmission of HIV (PMTCT) services, treatment and care (FHI 2008b: viii).  
Building on the semiotics comment above, Image 5 (below) is also used in the
AWARE-HIV/AIDS close out report to “symbolize partners and stakeholders from
across the region that AWARE-HIV/AIDS brought together to create an aligned,
effective, and harmonized response to the epidemic” (FHI 2008b: 2-3).

Image 5: The art and craft of best practice replication
Sewing awareness ribbons photograph used as metaphor in best practice reports
(FHI 2008b).

To summarize, Eba and others explained that AWARE, with the support of USAID and others, wanted to push legal reform in two areas: reproductive health and HIV. As we will see with the USAID/AWARE Model Law, the Reproductive Health Act has been cited as an important achievement of West African countries. For example, at a 2010 meeting in Halifax—as part of pre-G8 meetings—the minister of health from Mali discussed both “best practices” to improving women’s and children’s health and the achievement of the Reproductive Health Act (Touré 2010). FAAPPD notes the success of its work that has led to 12 countries in West and Central Africa to adopting laws on reproductive health (Benin, Burkina Faso, Chad, Côte d'Ivoire, Equatorial Guinea, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, and Togo) informed by the work of Model Law on Reproductive and Sexual Health (FAAPPD 1999).

I now turn to another “model” example that is currently being framed as a biomedical best practice in HIV prevention. The Futures Group International (TFGI) was responsible for the policy component of AWARE-HIV/AIDS and implemented this USAID funded program as part of a consortium of three key partners including Family Health International (FHI) and Population Services International (PSI) (see Appendix A). It is important to underscore that like other institutional partners, TFGI has been involved in many USAID consulting projects. For example, in another instance of “model creation” TFGI has developed a “Decision Makers’ Program Planning Tool” (DMPPT) designed to calculate the costs and impacts of male circumcision (MC) as an HIV-prevention intervention (Bollinger et al. 2009). This Excel-based model, referenced as the “MC Model”, is accompanied by an in-depth
“how to” guide with the model and sub-models being available online for free download. Just as the model law under investigation has been met by resistance from social movement actors and international NGOs, so too has the movement towards MC as an HIV-prevention intervention. I have seen this resistance take multiple forms including activities at the IAC in 2006, 2008 and 2010—from political t-shirts to booths organized by NGOs such as Intact America (http://www.intactamerica.org/) who advocate for “children’s rights” and “foreskin rights” while problematizing MC both as a cultural practice and as an HIV prevention intervention. Some of these social movement actors refer to themselves as “intactivists”.

Academics and human rights lawyers have also been critical of the rapid and “hasty” push towards some biomedical interventions to address HIV/AIDS including MC. Viljoen and Precious (2007) quote a speech I remember well from the closing session of the 16th International AIDS Conference, in Toronto, Canada, given by Stephen Lewis the then UN Special Envoy for HIV and AIDS in Africa. When Speaking of male circumcision Lewis argued:

Circumcision, as a preventive intervention, should not be subject to bureaucratic contemplation forever. We have enough information now to know that it is an intervention worth pursuing. What remains is a single-minded effort to get the word out, respect cultural sensitivities, and then for those who want to proceed, make certain that we have well-trained personnel to do the

67 The MC Model can be downloaded at http://futuresgroup.com/resources/software/male-circumcision-decisionmakers-tool/ (Accessed 2 January 2011). Material published by Futures Group notes that “[t]he model considers different policy options including target populations (all adult males, young males, adolescents, neonates, high-risk males, etc.) and different rates of scaling up MC coverage. Outputs of the model include cost per MC performed, number of HIV infections averted, and cost per infection averted. Total costs can be based on detailed facility-level inputs on the costs of service provision or on assumptions about the average costs per male circumcision performed”. When review the economic-epidemiological model it is interesting to note what the model does and does not account for (i.e. the impacts of MC on sexual pleasure, issues of consent, questions concerning the cultural appropriateness of this biomedical intervention).

68 Some have even argued that circumcising babies should be a crime. For example, see http://www.neontommy.com/news/2010/12/should-circumcisions-babies-be-crime (Accessed 2 January 2011).
operating (quoted in Viljoen and Precious 2007: 1).

While echoing the cries to take seriously the emergency of the HIV/AIDS epidemic, Viljoen and Precious explain that “[w]hat appears to creep into the statement above, though, is what is becoming a widely held perception that in cases of public emergencies, human rights are secondary concerns” (2007: 1). Viljoen, and other human rights lawyers I interviewed, are working to advance claims that meaningfully addressing the HIV epidemic necessitates that human rights issues are never “side-stepped” or a “secondary concern” but rather at the centre of all interventions including processes of legislative reform (Frans Viljoen, University of Pretoria, Centre for Human Rights, South Africa).

I use the two examples reviewed in this section to highlight a number of key factors held across the institutions responsible for the creation and promulgation of the USAID/AWARE Model Law. These national and international institutions have used a kind of “best practice” logic or ideology which has supported not only this Model Law internationally but other public health interventions from those working on more distal or structural determinants of health (changing policy related to reproductive health) to more proximate, biomedical interventions (supporting the rollout of male circumcision as an HIV-prevention strategy in Africa). While this project is concerned with a more focused examination of text-mediated work practices, it is important to consider how this research may speak to the (growing) trend of international donors and agencies to disseminate both financial capital and recommendations of best practices to policy makers, governments and NGOs (Lieberman 2009). Analysis focused on transnational neoliberal rationalities and forms of rule offers further insight regarding the active
production of best practice texts and “why some policies travel better than others” (Peck 2011: 21).

With important conceptual ties to the work on women’s rights and reproductive health mentioned above, it is important to note that a number of informants referenced that they believed the inclusion of provisions for criminalizing HIV non-disclosure and/or transmission were in part the result of campaigning by women’s organizations and successful feminist legal activism in West and Central Africa. This belief notwithstanding, while I have been able to trace the ongoing activities by feminist legal activists and key institutions in sub-Saharan Africa working to critique such provisions (Chapter 4 and 5), this analysis does not reveal any specific pathways of influence that women’s organizations had in 2003 and 2004 trying to push for such provisions in the USAID/AWARE Model Law. More research is needed to better capture the specific ways institutions, including feminist legal institutions, may have played a role in supporting the call for specific provisions in the USAID funded Model Law.

**Positioning Benin as a best practice process (2005)**

AWARE-HIV/AIDS’s organizational focus on processes of best practice definition, selection and dissemination is consistent in many respects to the work of other organizations working to “scale up the response to HIV” globally (FHI 2008). However, AWARE-HIV/AIDS’s claim of innovation in the field of coordinating best

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69 Peck (2011) argues: “New generations of global policy success stories, best practices, and models are not simply found objects; they are now being actively co-produced across the distended networks of the fast-policy complex. Rhetorically, of course, there is continuing deference to such “ideas that work,” as if they were rationally cherry-picked from far-off fields. In fact, their production and consumption constitute elements of a (partly) circular process of fast-policy integration. Deference to best-practice models, to evaluation science, and to pragmatic lessons is occurring within the ideological envelope of rolling neoliberalization, where it assumes the form of a reproductive technology for government-assisted market rule” (14).
practice replications is adding an additional “critical step”. Rather than end the best practice work process by documenting and disseminating information on identified practices, AWARE-HIV/AIDS “introduced a very significant innovation” in that they committed themselves to “provide support to national AIDS coordinating bodies in the region that expressed interest in replicating or applying the best practices identified, and would work collaboratively with development partners and donors in doing so” (FHI 2008: 2). Work in Benin is the model exemplar of this best practice innovation in relation to the activation of the USAID/AWARE Model Law.

The USAID/AWARE Model Law text was widely promoted to policy actors building a kind of legislative momentum in the West and Central Africa region. For example, in a USAID press release titled “SUCCESS STORY: A Specific Law on HIV/AIDS” (2005) the outcomes of the 2004 AWARE regional workshop are highlighted and the successful passage of the Benin state law in 2005 is positioned as a best practice to emulate. The text makes extensive use of the story of one HIV-positive woman living in Benin:

Antoinette is a widow who has been living with HIV/AIDS for some years now in Benin. The death of her husband saw her educating her six children with dignity in an increasingly difficult environment. *Her rights and those of her children* are often violated. On a daily basis, she faces all sorts of stigmatization and discrimination associated with HIV/AIDS. The situation has brought on her untold hardship. She lost her job and was denied access to her husband’s property. Penniless, she can no longer cater for herself. Her life, although difficult prior to her illness, has now become a living hell (USAID 2005: 1; *emphasis added*).

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70 This “innovation” in the process of best practice replication is to allow countries to “embark on this course with confidence, without wasting time and resources” (FHI 2008: 2).
Figure 7: USAID press release (Benin)

Release highlighting the first adaption of the USAID/AWARE Model Law to country specific law in Benin (USAID 2005).

The text outlines why creating new HIV-related laws will be beneficial to women. For example, the law is framed as a rights issue for women and children. The press release also reviews the network of organizations and key stakeholders involved in passing and lobbying for the introduction of legal changes at the country-level. This text ends with the following call to expand the application of the law to other countries within Africa:

Now, Antoinette has a specific legal tool that will help her improve her situation […] less vulnerable, she will care for herself and raise her children better. But she is already thinking about the situation of her sisters in other African countries who do not yet have this opportunity…(USAID 2005: 1).  

71 The press release states: “In Benin, and as in a lot of West and Central African countries, no specific law exists to cater for the HIV/AIDS pandemic to protect the rights of people like Antoinette […] The idea was to make available to the countries a flexible model law that allows them to legislate while taking into account their social, political and cultural environment. This model law, is accompanied by an action plan for its adaptation, adoption and implementation, and constitutes a normative setting, that contains the answers to reconcile the rights and needs of Antoinette in relation to her state of health. In August 18, 2005, the Benin National Assembly adopted Law 2005-31 on prevention, care and control of HIV/AIDS, less than eleven months after the N’Djamena meeting. Under the coordination and impulsion of the Network of Parliamentarians in Benin for Population and Development, the HIV/AIDS
The language of human rights and women’s rights used in this press release is difficult to ignore. Amartya Sen (1999) notes that the “rhetoric of rights is omnipresent in contemporary political debates” (211). Sen argues that these debates often exist within a context of discursive ambiguity: “in particular whether the reference is to institutionally sanctioned rights that have judicial force, or whether the appeal is to the prescriptive force of normative rights that can precede legal empowerment” (211).72

When discussing the dissemination strategy of the USAID/AWARE Model Law and subsequent state laws across West Africa, one informant described what he saw as a “domino effect” of new HIV-specific laws:

This is where it becomes interesting because not all the countries that were there and not all the countries for which the model law was actually passed...still there are some countries that were not even involved. But after they heard some parliamentarians are adopting the legislation elsewhere, they thought, ‘oh this is a good idea...we don’t even have a law that is HIV, we should draw from that experience.’ This is how sometimes the domino effect goes broader than what it was intended (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

This metaphor of the “domino” or “contagion” of laws across the region is made visible in the maps at the end of this chapter and a key tenet of the anti-criminalization discourse discussed in the next chapter.

72 Extending Sen’s discussion in Development as Freedom, we can ask if rights only have instrumental relevance in a legal context or if they that have some form of “intrinsic normative importance” (1999: 211). In a discussion of coercion and reproductive rights Sen takes up the work of Jeremy Bentham who saw rights in instrumental terms. Looking at the UNAID’S press-release we can see how the concept of “rights” is invoked as part of what Bentham might see as fulfilling particular “instrumental roles in the pursuit of objectives”—to promote the work of USAID and others while building momentum to pass other HIV omnibus laws across the West African region (Sen 211-213). Seeing the (apparent) utility and ambiguity produced when people invoke “rights” language for the promotion of a legislative agenda does not preclude an analysis which considers the normative importance of rights.
In explicating why Benin’s passage of its country specific law should be viewed as a best practice of USAID/AWARE Model Law adaption and adoption, 16 strengths of the process have been enumerated by USAID and AWARE stakeholders:

1. The law was written and voted in record time (11 months);
2. All 40 participants received a copy of the draft law 48 hours before a validation workshop so they could supply suggestions, proposals and amendments;
3. Flawless involvement and support of all the development partners solicited;
4. The funding of the validation workshop was done by BHAPP in record time;
5. The National HIV/AIDS Control Program (NACP) actively participated in the development of the law and was involved in the entire process;
6. There was a round table for the media regarding the development of the law;
7. The model law played an important role in the development process of the bill;
8. The commitment of the Chairman of the Network, major partners and other stakeholders was real;
9. The presence of the Minister of Public Health and the coordinator of the NACP at the National Assembly during the voting process was effective;
10. There was a sense of patriotism and commitment in the National Assembly, which resulted in a unanimous vote for Law N0. 2005-31 of 18 September 2005 by all 83 Parliamentarians;
11. The law offers a legal framework for every activity concerning HIV/AIDS in the Republic of Benin;
12. The process of publicizing the law is ongoing;
13. There is commitment on the part of the Parliamentarians to popularize and disseminate the law.
14. The support of the West Africa Health Organization (WAHO) was useful to the Beninese National Assembly in promoting a model Law on HIV/AIDS;
15. The leadership was generally high profile;
16. The level of political commitment was appreciable (AWARE-HIV/AIDS 2006: 17).

AWARE-HIV/AIDS also notes “pieces of useful information” that successful replication requires:

- Convinced, committed, devoted, enterprising, enthusiastic and available people;
- Advocacy specialists who can accept failure and convert it into positive experiences;
- Involvement and support of all stakeholders;
- Quality Leadership;
- Availability of funds;
- Political will on the part of decision-makers (AWARE-HIV/AIDS 2006: 17).
As we can see, the speed of the process is held up as a central achievement in this best practice process. This Benin success story is replicated across multiple texts, including FHI’s 2008 Best Practice report (below). All best practices have a check box next to them—(almost) calling out to actors to activate the best practice and “check the box” so as to effectively address matters of HIV/AIDS at the country level. It is important to note a kind of erasure of AWARE and UNAIDS’s involvement in the creation of the USAID/AWARE Model Law as stated in the summary below. As already noted, because the originator of the adaption of the Model Law were parliamentarians in Benin, this “best practice” is framed as something that originated at the country level which ignores the manner in which the text was funded and created transnationally.\footnote{In the same vein, AWARE-HIV/AIDS financed and provided logistic support for highly successful missions by “Ambassadors of Hope” that visited most countries in the region to advocate for adoption of an HIV law. Usually, representatives from the networks of parliamentarians, religious leaders, and PLHIV served as the ambassadors. AWARE-HIV/AIDS “financed and provided logistic support for highly successful missions by “Ambassadors of Hope” that visited most countries in the region to advocate for adoption of an HIV law. Usually, representatives from the networks of parliamentarians, religious leaders, and PLHIV served as the ambassadors; sometimes representatives of the networks of women, journalists, and youth joined them. The parliamentarian on the mission was often a high-ranking official who attracted media attention, which assisted the process of arranging meetings with representatives of national AIDS control bodies, senior health officials, parliamentarians, and other important in-country stakeholders. In addition, AWARE-HIV/AIDS provided support to enable parliamentarians who had been engaged in passing such laws to share their experiences with their counterparts in other countries. Once a country enacted such a law, AWARE-HIV/AIDS helped to craft strategies and action plans to ensure its effective implementation” (25).}
Despite a “best practice” innovation of replication being articulated, the process of model law activation differs depending on the country one is examining. This being said, some key text-mediated processes can be distilled. Figure 9 represents a simplified model based on key institutional stages articulated in texts produced by TFGI (2008). It is important to note that additional stages are added to this process in some countries such as a vote by the senate or an adoption of the legal text by Cabinet Ministers. Further, the extent to which the Model Law text is adapted varies a great deal depending on the country under examination. For example, TFGI notes that Togo’s law has 71 articles as opposed to the USAID/AWARE Model Law which has
37 (TFGI 2008: 46). To this end, THGI argues: “it is not only the content of the model law which determines the country-specific laws, but rather the strength of relations between diverse actors in the political scene in each country that determines country-law formulation” (TFGI 2008: 46). In Chapter 6 we will take a more focused look at the reform process in Sierra Leone to understand how the USAID/AWARE Model Law’s adaption or “domestication” led to outrage and international intervention by NGOs and UNAIDS.

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
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| 1.   | Formulation of Draft Text  
|      | Partially derived from the USAID/AWARE Model Law and the support of a national legal consultant |
| 2.   | Examination and Validation of Draft Text  
|      | Conducted at workshop of development partners and key stakeholders |
| 3.   | Dissemination to additional stakeholders  
|      | Amended text forwarded to other national stakeholders involved in HIV related work for remarks |
| 4.   | Search for National Consensus on Validated Legal Text  
|      | Often conducted at national consensus workshop |
| 5.   | Submit for Examination and Vote  
|      | Conducted in parliament |
| 6.   | Promulgation of adopted law  
|      | Officially promulgated by president of the republic (head of state) |

**Figure 9: Model Law to State Law**
Main stages of adopting USAID/AWARE Model Law to country-specific Laws (Adapted from TFGI 2008: 45).

Informants also noted other allied marketing strategies that were used including detailed promulgation plans, newspaper ads and published copies of county-specific laws in French and/or English. For example, a FAAPPD informant provided me with a copy of a French brochure disseminated in Chad that highlights their 2007 HIV law
based on the USAID/AWARE Model Law (Figure 10). The purpose of Figure 10 is simply to illustrate the varied kinds of texts that have worked to support the “success” of the USAID/AWARE Model Law. This being said, much disagreement exists among informants regarding the extent to which everyday publics were actually aware of the new HIV omnibus laws in countries where such laws had been passed. As was frequently articulated by human rights lawyers and activists that I interviewed, a law “on the books” does not mean that everyday publics will be aware of such laws or have their rights protected by such laws in practice (Pound 1943).

Figure 10: Promotion of new laws (Chad)
Tri-fold brochure disseminated in Chad to raise awareness about the country’s new omnibus HIV law (2007).
Mapping the success of a best practice intervention

As reviewed in the discussion of research methods, this work attempts to “write the social” and map complex, textually mediated institutional processes in a way that is akin to cartography. Time series maps are presented below to provide an overview of the passage of HIV-specific omnibus laws in many West and Central African countries over a short period of time (2005-2010). According to USAID and AWARE texts and informants, the legal reforms depicted in these maps demonstrate the success of USAID/AWARE’s best practice interventions. For others, including the institutional actors discussed in subsequent chapters (UNAIDS, CHALN, ARASA etc.), this replication is the result of a highly problematic set of text-mediated relations. The graph and maps which I have created are only a starting point to understand the current state of HIV legislation in West and Central Africa. It is also important to note that some of the countries which passed HIV-legislation are currently in the process of revising their legislation.

As discussed above, when describing the HIV legislative terrain in West and Central Africa a number of informants used varied metaphors to describe the region—the terrain was described with seemingly contradictory ecosystems ranging from a policy “desert” to a “forest” in need of development. Map 1 highlights that none of AWARE’s targeted 18 countries in West Africa had HIV omnibus legislation in 2004. Map 1-6 illustrate the passage of new HIV state laws in West and Central Africa informed by the USAID/AWARE Model Law to provide an overview of the “success”

Both of these metaphors can conjure images of development as “progress”. Thoughts of the wild west and cowboy culture on one end to deforestation on the others are ways one can play with these ecosystem descriptions (see Geary 2011).
achieved with 13 of 18 targeted countries having HIV-specific laws passed as of the end of 2010.

Map 1-6: Legal landscape in West and Central Africa (2004-2010)
Map 4: Legal Landscape in West and Central African Countries by the end of 2007

Map 5: Legal Landscape in West and Central African Countries by the end of 2008

- Targeted country for USAID/AWARE Model Law
- HIV/AIDS Law passed at country level
When the Central African Republic (2006) and the Democratic Republic of Congo (2008) are counted (countries that have passed HIV-omnibus legislation but were not part of the 18 targeted West African countries by AWARE) a total of 15 countries have passed laws based on this text in the region. A number of key resources focusing on the criminalization of HIV exposure and/or transmission acknowledge the widespread influence of the USAID/AWARE Model Law throughout sub-Saharan Africa informing HIV-related laws that have passed or are being considered in Burundi, Djibouti, Kenya, Mauritius, Mozambique and Tanzania (Bernard 2010; 2011a; 2011b; Eba 2008). Future research is required to understand the role of the USAID/AWARE Model Law text in the process of legislative creation beyond the West and Central African region. Obviously, what is reported in this work is an
ethnographic slice of a much larger, evolving transnational story of global legal reform processes. A number of online resources, including the *Global Criminalization Scan*, are currently mapping both the passage of new HIV-related laws internationally and reported cases of the application of these laws (focusing on cases of criminalizing HIV non-disclosure).\(^{75}\)

Moving forward, as part of a “task order project” under USAID TASC3 IQC (2009 – 2012), TFGI will “design, coordinate, facilitate, and provide high-quality technical support to a variety of public and private health entities in West Africa”.\(^{76}\)

This project extends previous work conducted under the flagship predecessor programs Action for West Africa Region (AWARE), AWARE-RH, and AWARE-HIV/AIDS.\(^{77}\)

For shorthand, most informants note this extension of AWARE’s mandate as “AWARE II”. As such, future analysis is required to see the continued work of AWARE and its transnational partners related to legislative creation and reform.

Finally, to build upon the overview of USAID’s role in the Model Law creation, it is worth noting how USAID articulates its ongoing relationship with Africa:

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\(^{75}\) Updated information available at [http://www.gnpplus.net/criminalisation](http://www.gnpplus.net/criminalisation) and [http://criminalhivtransmission.blogspot.com/](http://criminalhivtransmission.blogspot.com/).

\(^{76}\) More information available at [http://yaounde.usembassy.gov/media/pdfs/usaid-general-guidance-notes2.pdf](http://yaounde.usembassy.gov/media/pdfs/usaid-general-guidance-notes2.pdf)

\(^{77}\) When describing institutional activities it is also noted that “[a]s a consortium member with prime Management Sciences for Health, Futures Group leads activities to: Identify barriers to health policy implementation at regional and country levels and develop strategies for removing them; Mobilize stakeholder groups at national and regional levels to advocate for political commitment, funding, and implementation of policies, guidelines, and standards for family planning and reproductive health, HIV and AIDS, and maternal and child health services; Strengthen the role of regional networks and the West African Health Organization (WAHO) to develop, implement, and monitor regional policies for selected best practices, and encourage national leaders to make real commitments to key health issues as a means of achieving national development goals; Help countries in the region achieve an enabling policy environment to reduce unmet need for family planning services and increase resources and support for national family planning and reproductive health programs; Leverage resources for policy implementation through public-private partnerships, government support, donor funding, and other sources”. Texts describing current work projects note that “Futures Group is building on its successes as an integral team member of the AWARE-HIV/AIDS predecessor program led by Family Health International”. Retrieved from [http://futuresgroup.com/current-projects/2010/08/tasc3-aware-ii-support-for-investing-in-people-through-health-action-for-west-africa-region/](http://futuresgroup.com/current-projects/2010/08/tasc3-aware-ii-support-for-investing-in-people-through-health-action-for-west-africa-region/).
While Africa's future is up to Africans, the United States will continue to play a major role with our African partners in shaping that future... Our partnership with Africa is based on our mutual desire to boost economic growth and prosperity for all, to achieve peace and security, and to promote democracy and good governance (Dr. Rajiv Shah, USAID Administrator). 78

The quote above also highlights tensions of international intervention, economic development and sovereignty that will be explored throughout the chapters that follow.

Conclusion

In this chapter I have provided an overview of the USAID/AWARE Model Law focusing on key components, origins and the evolution of this text. I argued that the development, dissemination and activation of the Model Law has been largely coordinated by the institutional genre of best practice and gave a rich picture of how this model law can has been positioned as a best practice policy (a text to replicate) and best practice process (using Benin as an example of a country expeditiously and effectively using the omnibus model text and, as such, was positioned as a “best practice” process of the relations of use which should regulate future activations of the USAID/AWARE Model Law). Finally, I argued that the Model Law could be viewed as a text that limits the possibilities of what can be done and a text that opens up a set of new demands upon policy actors creating new forms of work.

Chapter 4: A VIRUS NOT A CRIME

The social organization of the anti-criminalization discourse

...the pivotal issue for us in the end was the insight that criminalization would not assist in catching that near-mythical, evil, transmitter-perpetrator, but that it would be used against women. And, that in fact has been the case. This isn’t a figment, that the... laws have been used primarily against women.

(Edwin Cameron, Constitutional Court Justice, Johannesburg, South Africa)

Introduction

In this chapter I explicate the substance of the anti-criminalization discourse and the transnational relations through with it has been coordinated and produced. I argue that a global discourse has taken shape as a response to the increasing use of criminal law governance strategies to prosecute HIV-related sexual offenses and the rise in new HIV-specific criminal laws in and beyond sub-Saharan Africa. This is a complex discourse which critiques the criminalization of HIV non-disclosure on numerous fronts and is differentially activated by stakeholders to suit both various local and macro-regional contexts (e.g. concerns in a given country or region) and audiences (e.g. general public, activists, parliamentarians and lawyers).

A number of text-mediated activist and policy work processes have contributed to the social organization of this discourse and the production and dissemination of a counter narrative to the idea that criminalizing HIV non-disclosure is an effective and just public health response. I argue that a diverse group of transnational stakeholders—activists, lawyers, judges, journalists, academics, and people infected with and affected by HIV—are playing important roles in the ongoing development and strengthening of

79 The majority of these cases are in Europe and North America (Bernard 2011).
the anti-criminalization discourse. Their intersecting work activities collectively try to “change the story” regarding the criminalization of HIV non-disclosure.\textsuperscript{80}

In this chapter I trace the social and textual relations which have produced this discourse by arguing that processes of coordination have relied on the labour of transnational stakeholders and the creation of key texts (e.g. UNAIDS 2008b; OSI 2008) which have been relayed via anti-criminalization ‘nodes’ (Urry 2000) within existing networks of international agencies (e.g. UNAIDS), conferences (e.g. IACs) and the internet (e.g. \textit{HIV criminalization blog}). I argue that these nodes (or anti-criminalization ‘hubs’) have helped to coordinate the (restricted) flow of persons and/or texts which have been used to shape this discourse. By highlighting restricted flow I simply wish to underscore that while transnational networks of actors, organizations and technologies have been enabled through scapes which have reconfigured time and space, restricted access exists (e.g. who can not travel to a conference due to barriers such as monetary constraints, travel restrictions; what can be posted on-line due to restrictions imposed by website coordinator etc.). Through an examination of key texts and social movement initiatives we can see discourse at work: how arguments have been made and subsequently reproduced and adapted to coordinate the claims made by critics of criminalization.

As such, rather than isolated work activities, this analysis demonstrates the ways in which actors, and the texts they produce, cross transnational boundaries and are (re)produced in various forms from international conference presentations and small meetings to reports, academic publications and various online activities such as

\textsuperscript{80} For an example of concerted efforts by civil society to “change the story” in various areas of social and ecological justice see \textit{smartMeme’s} work to change narratives which inform dominant culture and the everyday imaginations of publics (http://www.smartmeme.org/).
email correspondence and blogging. In Chapter 5 I build upon this analysis to reveal the ways in which this discourse has coordinated the consciousness and activities of a group of lawyers and policy actors across time and space in their work to critique the USAID/AWARE Model Law. This mapping is consistent with a social organization of knowledge perspective which recognizes the role and rule of professional and legislative discourses in the everyday world.

**What is the anti-criminalization discourse?**

The work of a transnational group of actors has sought to critique the idea that the criminalization of HIV non-disclosure in alleged cases of transmission or exposure is an appropriate public health response. For example, they reject the idea that criminalizing people living with HIV/AIDS through new HIV-specific laws is a just response that will serve as a deterrent to spreading HIV. The work they produce frequently invokes human rights claims and underscores the idea that responding to HIV and AIDS with criminal law powers has “failed to acknowledge the fact that HIV and AIDS are, and should be understood as, public health issues first and foremost, rather than as problems necessarily capable of effective legal resolution through the criminal law” (Weait 2007: 3). Limited social science scholarship has addressed the claims made by the critics of criminalization. In a compelling consideration of how the legal concept of “significant risk” in Canada serves to coordinate modes of criminal law governance and negatively impact public health objectives, Mykhalovskiy (2011) notes:

Critics frame the criminal law as a *blunt instrument* that is ineffective at regulating the complex sexual activities that figure in HIV transmission. They
emphasize that the vast majority of people with HIV (PHAs) take precautions to prevent HIV transmission and suggest curtailing the use of the criminal law, often citing conduct that intentionally and successfully transmits HIV as the relevant threshold (Burriss & Cameron, 2008). A number of critics claim that criminalization disrupts access to HIV testing, education and support services (Wainberg, 2009) and erodes public health norms that support mutual responsibility for HIV prevention (Cameron, Burriss, & Clayton, 2008). Others emphasize that criminalization heightens HIV-related stigma (GNP+, 2010), while undermining action on the underlying social factors responsible for HIV transmission (Open Society Institute, 2008) (668; emphasis added).

This passage from Mykhalovisky (2011) begins to elucidate some of the key claims made by critics of this form of criminalization. It is worth noting that references to the “blunt instrument” of the criminal law is a popular turn-of-phrase for many informants who use it to help denote the inefficacy of a legal governance tool which lacks precision. This go-to metaphor conjures up images of the need for a scalpel (or nothing at all) over a sledge hammer. According to the anti-criminalization discourse, not only is the application of the criminal law not an effective response to addressing (the vast majority of) alleged cases of HIV transmission or exposure, but such applications along with sensational media reporting of ‘HIV criminals’ produce increased stigma, disproportionally impact marginalized subjects and undermine prevention efforts including HIV-testing initiatives (Shevory 2004; Wainberg 2009; ACCHO 2010).

The text *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission* (OSI 2008) is a useful place to begin in order to provide an overview of the substance of this discourse. While no single text can be said to represent a discourse in its entirety, the *10 reasons* document not only cites key texts and informants in the field and is widely referenced by activists, academics and policy actors, but its writing was informed and endorsed by a large group of national and international organizations including many of those whose work is central to critiquing
the USAID/AWARE Model Law. In fact, the text begins by acknowledging the trend of new HIV-specific laws internationally as well as the application of existing criminal laws:

Recent years have seen the creation, particularly in parts of Africa, Asia, Latin America, and the Caribbean, of HIV-specific laws that criminalize HIV transmission and exposure. At the same time, particularly in Europe and North America, existing criminal laws are increasingly being used to prosecute people for transmitting HIV or exposing others to HIV infection (OSI 2008: 1).

The document, which is published by the Open Society Institute (OSI) for a broad public audience in 9 languages, uses the genre of ‘10 reasons’ to give a pithy and accessible enumeration of various factors that make the criminalization of HIV exposure or transmission highly problematic:

1. **Criminalizing HIV transmission is justified only when individuals purposely or maliciously transmit HIV with the intent to harm others. In these rare cases, existing criminal laws can and should be used, rather than passing HIV-specific laws.**
2. **Applying criminal law to HIV exposure or transmission does not reduce the spread of HIV.**
3. **Applying criminal law to HIV exposure or transmission undermines HIV prevention efforts.**
4. **Applying criminal law to HIV exposure or transmission promotes fear and stigma.**
5. **Instead of providing justice to women, applying criminal law to HIV exposure or transmission endangers and further oppresses them.**
6. **Laws criminalizing HIV exposure and transmission are drafted and applied too broadly, and often punish behavior that is not blameworthy.**
7. **Laws criminalizing HIV exposure and transmission are often applied unfairly, selectively and ineffectively.**

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81 For example: ActionAid International Secretariat, (South Africa), AIDES (France), AIDS & Rights Alliance for Southern Africa, (Namibia), Aids Fonds, (Netherlands), Amnesty International, Asia Pacific Network of People Living with HIV/AIDS, Ave de Mexico (Mexico), Beijing AIZHIXING Institute (China), Canadian HIV/AIDS Legal Network (Canada), the Center for Reproductive Rights (United States), Global Network of People Living with HIV, Human Rights Watch, International AIDS Society, International Community of Women Living with HIV/AIDS, Open Society Institute, Terrence Higgins Trust (UK), The ATHENA Network and UN Plus (OSI 2008: 29-31). For an up-to-date list of all organizations that have endorsed the declaration, as well as copies of the 10 Reasons in Russian, English, French, Polish, Chinese, German, Italian, Portuguese and Spanish, see www.soros.org/health/10reasons.
8. Laws criminalizing HIV exposure and transmission ignore the real challenges of HIV prevention.
10. Human rights responses to HIV are most effective (OSI 2008).

This text acknowledges the concerns of civil society and government actors who have pushed to apply the criminal law in cases of HIV exposure and transmission but strongly contends that the use of such criminal law powers represents an unjust and ineffective response.

Other key texts provide an overview of the anti-criminalization discourse through tailored arguments and considerations for policy actors and parliamentarians (World Bank 2007; UNAIDS/UNDP/IPU 2007). For example, UNAIDS/UNDP/IPU’s *Taking Action Against HIV: A handbook for parliamentarians* echoes many of the arguments made in the 10 reasons document and invokes the genre of good or best practice to provide a checklist for parliamentarians to use when considering the issue of criminalizing HIV transmission or exposure (Figure 11).
Figure 11: Anti-criminalization checklist for parliamentarians
(UNAIDS/UNDP/IPU 2007: 217-218)

The five checkboxes above are aimed to coordinate parliamentarians thinking with respects to the issue of criminalizing HIV transmission or exposure. The list outlines
that public health laws are a possible alternative (with criminalization being a last resort), that HIV-specific laws are unnecessary and that no criminal sanctions should exist where there was disclosure of one’s status and consent to have sex, where significant risk of transmission does not exist, or where intentionally or recklessness does not exist (UNAIDS/UNDP/IPU 2007: 217-218).

It is also worth noting that the anti-criminalization discourse has a number of interesting linguistic tools and metaphors which can be traced. For example, I have already noted that critics frequently frame the criminal law as an ineffectual and “blunt instrument”. Another example that has been discussed in the academic and activist literature and at many conferences and symposiums is the notions of both the “contagion” and “creep” of criminalization. In fact, Elliott—who authored the UNAIDS (2002) report discussed below—appears to be the first to have used this term in relation to HIV exposure and transmission issues. Elliot explained what this notion of “criminalization creep” tries to capture when he and others have used it in academic articles, community forums and activist activities:

I’m referring to the increasing use of the criminal law to deal with conduct that either transmits HIV or risks transmitting HIV or is perceived to risk transmitting HIV...and the increasing application happens in a number of different ways. It happens in obviously a growing number of prosecutions, which is what you would just normally expect over the course of history as you have a law on the books that there is an interest in applying, obviously there will be an increase in accumulation of prosecutions. The increasing adoption of HIV specific criminal provision statutes in a number of countries and that’s certainly something the N’Djamena model law has contributed to very significantly in Southern Africa. The ever widening application of provisions in the law, whether an HIV specific law or a law of general application, like, the law of assault for example in Canada to not just a growing number of cases but a growing number of facts or circumstances where the prosecution seeks to

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82 Elliott’s 2010 Edmonton address (which preceded community forums in Toronto and Ottawa) was titled *Criminalization Creep: Legal Developments, Community Responses.*
obtain a conviction, so pushing the boundaries outwards from the things that are clearly at the higher risk end of the risk spectrum to things that quite arguably don’t pose enough risk that there should be any thought to using the criminal law (Director, CHALN, Canada).

It is the global “creep” of new HIV-specific laws and the application of existing criminal laws that anti-criminalization activism is responding to. In reviewing the utility of this “criminalization creep” rhetorical strategy Elliot summarized that he saw this as a “handy way of describing this conglomeration of phenomenon about how the law is being interpreted and used in different ways.” It is worth highlighting the rhetorical strategies of argumentation actors use when making their claims of the social. The apparent success of the rhetorical strategy, along with metaphors of “legislation contagion” may be that they have had discursive uptake. For example, many informants used the notion of legislation/prosecutorial “creep” and the “contagious” nature of bad laws (in all but one case referencing the USAID/AWARE model law).

As the examples above illustrate, the anti-criminalization discourse has been (re)produced through various mobile texts which have been targeted towards populations including parliamentarians and key policy actors. A review of a few of these key texts gives insight into the central features of the anti-criminalization discourse and some of the ways in which it has been mobilised transnationally. While the texts I have reviewed are a good place to begin so as to understand this content of the discourse, it is necessary to step back and consider some of the early work that was done in this field to understand the development and evolution of this discourse. After reviewing some important theoretical work to contextualise this review of discursive assemblage I will explicate some of the relations through which this discourse has
been produced and begin to chart how it has coordinated peoples’ consciousness and activity across time and place.

**Theoretical reflections: flows across time and scapes**

In order to help make sense of what has enabled the transnational development of the ant-criminalization discourse the consideration of some key sociological and anthropological work is helpful. I review my theoretical (re)reading of scapes as a concept which denotes both *structure* (Urry 2000) and disjunctive *suffix* (Appadurai 1996). This reading highlights economic, social, and political patterns of fixity and fluidity in late (post) modernity. Review of this scholarship is helpful for this and subsequent chapters because my cartographic work accounts for the transnational movement and creation of the anti-criminalization discourse and pre-operative legal texts including the USAID/AWARE Model Law. To start, Urry (2000) distinguishes between *scapes* and *flows*: “Scapes are the networks of machines, technologies, organizations, texts and actors that constitute various interconnected nodes along which the flows can be relayed” (35; *emphasis added*). Scapes maintain a relative *structure* and serve to “reconfigure dimensions of time and space” (Urry 2000: 35). Dominant scapes include: transportation of people by air, sea, rail, motorway roads, other roads; transportation of objects via postal and other systems; wire and co-axial cables; microwave channels used by cellular phones; satellites for radio and television; fiber-optic cable for telephone, television and computers (Urry 2000: 35). While Urry (2000) writes of the transportation “of people” and “of objects” as *scapes* he is speaking of their transportation *in potentia*—or the potential power these *scapes* have to relay the *flows* of people and objects and information. I wish to make this point
explicit—distinguishing between what makes mobilities possible (underlying structure) and the actual movement (or actualized potential). In this chapter I argue that the anti-criminalization discourse was shaped through networks which enabled the coordination of both texts and persons.

Institutions involved in the “globalization of scapes” range from the United Nations and the World Bank, to Friends of the Earth, Nobel Prizes and the English language (Urry 2000: 35-36). Smith’s understanding of “institution” focuses upon the “clusters of text-mediated relations organized around specific ruling functions” (DeVault and McCoy 2006: 17; see Oberleitner 2007: 6-22). “Institution” represents governmental structures (material) while “inform[ing] a project of empirical inquiry, directing the researcher’s attention to coordinated and intersecting work process” (DeVault and McCoy 2006: 17; see Lowndes 1996). Institutions cannot be mapped-out in their entirety, however particular strands or patterns may be examined within institutional complexes. Smith explains that:

83 On this last institutional example, we will see throughout this project the ways in which the institutions and traditions of language—including the English and French linguistic traditions and various discursive and rhetorical disagreements—must be considered. Organizations involved in the creation (USAID, FAAPPD, AWARE etc.) and contestation (CHALN, UNAIDS, ARASA etc) of USAID/AWARE Model Law would also fall into Urry’s reading of the globalization of scapes (Urry 2000). Given the institutional focus of this analysis, it is worth noting the “slippery” nature of the term ‘institution’ (Lowndes 1996: 182). Since the sixteenth century ‘institution’ has been associated with governmental practices (Lowndes 1996: 182). Under the umbrella of ‘old institutionalism’ (branches of which are found in sociology, political science, and economics) institutions were understood as material structures: they were constitutions, cabinets and courts; they were parliaments and party systems. In short, institutions were the government (Lecours 2005: 5). This material definition is preserved by some scholars under ‘new institutionalism’ within political science. In fact, Lecours echoes Thelon’s (1999) argument that the most “fundamental divide” among new institutionalists concerns the division between materialist and normative/ideational conceptions of institutions (Thelon cited in Lecours 2005: 7). Lecours (2005) argues that new institutionalists are giving “renewed importance” to classical questions: “What are institutions? What is their impact upon on action? How are institutions formed and transformed? What methodological and epistemological questions best suit institutional analysis?” (5).

84 The focus in new institutionalism will remain primarily on government institutions. However, it is important to note that Smith (2005) uses the term ‘institution’ more broadly within institutional analysis; here we take the insights of institutional ethnography and focus upon particular institutions and institutional relationships.
Institutions exist in that strange magical realm in which social relations based on texts transform the local pluralities of people, place and time into standardized, generalized, and, especially, translocal forms of coordinating people’s activities. Texts perform at that key juncture between the local setting of people’s everyday worlds and the ruling relations (Smith 2005: 101; see Eastwood 2006: 182; Eastwood 2005). 

This analysis is not concerned with a single network or constellation of UN agencies but rather I seek to provide a complex consideration of global human rights institutions, non-governmental organizations and government agencies operating from the grassroots to transnational policy arenas. Understanding institutions in this way allows institutional ethnographers to conceptualise institutions not as objects of study per se, but as “functional complexes” within ruling relations:

By “functional complexes” is meant nothing more than the observables of complexes of organizations and discourses that are focused on functions such as education, science, law, health care, government profitability, and so on. [...] Actuality isn’t bounded by institutional categories; in the real world, the social relations that are significant in organizing people’s ordinary participation do not conform to what can be represented institutionally (Smith 2005: 68).

This way of understanding institutions allows me to consider the complexes of organizations and competing criminalization discourses as viewed from the standpoint of people who participate in such institutions in varied work capacities. As such, this is an analysis of the creation of the anti-criminalization discourse occurs from the perspective of people’s ordinary participation in the everyday world.

Conversely, flows are positioned as the “peoples, images, information, money and waste that move within and especially between national borders” (Urry 2000: 36). These flows generate: 1. “new inequalities of access/non-access” which transcend the

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85 For example, Eastwood (2005; 2006) presents an institutional ethnographic account of United Nation document production to consider how such global health institutions may become ethnographically accessible. Much of the work of this broader project considers the complex work processes of institutions that have challenged and problematized USAID/AWARE Model Law while simultaneously working to further other HIV-related omnibus model laws.
jurisdictional bounds of particular societies/states; 2. new opportunities and desires (for example, for communication, travel, purchase of consumer goods and forming ‘new social groups’); and, 3. new risks (e.g. the spread of HIV and AIDS, global ecological risks, loss of national sovereignty as “various scapes and flows by-pass national governments”) (Urry 2000: 35-36; emphasis added). My research considers a related dimension: new laws and transnational model legislative processes (e.g. the spread of USAID/AWARE Model Law and the money by USAID to fund such legislative processes) which involves inequalities of participation and application, desires for (and rejection of) legislative assistance, and risks related to HIV and AIDS, sovereignty and legal reform. Further, the ways in which a discourse such as the anti-criminalization discourse flows must be critically considered alongside counter discourses such as those which describe “evil” and “wilful” transmitters as the norm (e.g. many news media accounts; see Shevory 2004).

I now add a complementary reading of ‘scapes’ to build upon Urry’s discussion of global mobilities: scapes as disjunctive suffix. Appadurai (1996) proposes a framework to explore disjunctures in the global cultural economy. The five dimensions of “global cultural flow”, as he describes, are (a) ethnoscapes; (b) technoscapes; (c) financescapes; (d) mediascapes; and (e) ideoscapes. Appadurai’s work has been celebrated for “describing these imagined worlds that traverse the borders of the nation state, [he] offers a critical vocabulary without naively celebrating border crossings and transversals” (Braziel and Mannur 2005: 25). While disjunctures have occurred

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86 Appadurai explains: “[t]he suffix –scape allows us to point to the fluid, irregular shapes of these landscapes, [ethnoscapes; technoscapes; financescapes; ideoscapes and mediascapes] shapes that characterize international capital as deeply as they do international clothing styles. These terms with the common suffix –scape also indicate that these are not objectively given relations that look the same from
throughout history in the flows of peoples, machinery, money, images and ideas, Appadurai’s model of “global cultural flows” allows us to consider the extent to which these flows (e.g. the movement of the anti-criminalization discourse) are complicated and enabled by processes related to globalization with trajectories that continue to change: paths are “increasingly nonisomorph” and “the sheer speed, scale, and volume of each of these flows are now so great that the disjunctures have become central to the politics of global culture” (Appadurai 1996: 37). This being said, my research and discovery process reveal the work coordination and asymmetries between states and policy actors (e.g. the United States and countries in West and Central Africa; the flows of HIV funding, model legislative texts and international human rights lawyers). It is important to note that Appadurai’s work has also inspired the use of critical theory to understand postcolonial legal environments (see Comaroff and Comaroff 2006). With this short theoretical review provided, the dynamic assemblage and flow of the anti-criminalization discourse may be explicated starting with some early work by critics of this mode of governance.

**Early work in the development of the anti-criminalization discourse**

Interviews with informants reveal important work that was done prior to the USAID/AWARE Model Law consultation in Chad (2004) to help produce the anti-criminalization discourse and problematize the criminalization of HIV transmission or exposure. For the purposes of discussion I highlight two salient examples based on every angle of vision but, rather, that they are deeply perspectival constructs, inflected by the historical, linguistic, and political situatedness of different sorts of actors: nation-states, multinationals, diasporic communities, as well as subnational groupings and movements (whether religious, political, or economic), and even intimate face-to-face groups, such as villages, neighbourhoods, and families” (1996: 33).
early activist and policy work of my informants. First, the work of the South African Law Commission who produced the *Fifth Interim Report on Aspects of the Law Relating to AIDS - The need for a Statutory Offence Aimed at Harmful HIV-related Behaviour* (April 2001), is important to consider. This is an important example of work by legal stakeholders, activists and civil society which deplored the anti-criminalization discourse at the country-level but was unable to successfully mobilize it transnationally to prevent the macro-regional trends towards criminalization across much of Africa.

To begin, informants based throughout sub-Saharan and Western Africa discussed how they have worked with civil society groups and various governmental and non-governmental organizations on issues related to the criminalization of HIV exposure and/or transmission since the late 1990s. Examples of their work make evident that concerns over the potential impact of the criminalization of HIV non-disclosure are not new—they have been raised by key civil society groups and judicial stakeholders prior to the controversy that has surrounded the USAID/AWARE Model Law. In a particularly salient example, Justice Cameron explained that he first had experience with the issue of the criminalization of HIV exposure and/or transmission when he chaired the Law Commission Committee into HIV and the Law for a period of 7-8 years in the late 1990s to the mid 2000s. This work involved an exhaustive examination of the legal landscape and resulted in five published reports which are available online through the South African Reform Commission: “I think they’re the most thorough studies of HIV anywhere on the African continent, and perhaps anywhere in fact, by any official body.” Justice Cameron explains that “the most

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significant part of our work was to resist this first order intuitive impulse to enact a criminal statute. We had tremendous pressure […] from parliament where the Portfolio Committee on Justice was pressing for such a law.”

Cameron also explained pressure was exerted by women’s organizations supporting a law criminalizing HIV non-disclosure. This pressure is acknowledged, and such claims to “protect women” are refuted, in documents which have produced the anti-criminalization discourse (OSI 2008). Reflecting on the deep regret that this work was not considered in the USAID/AWARE Model Law process Justice Cameron laments: “this was before this whole West African process…it’s a terrible pity that our report wasn’t more widely disseminated”. Of particular relevance to this broader project, Cameron recalls a 2-day meeting with nearly 100 activists and civil society members connected to the fields of HIV and women and children’s rights in 2001 to discuss the criminalization issue:

By the end of the second day, there was consensus amongst everyone that such a law would in fact be a pernicious thing, because, we went beyond the first order intuitive thinking. I can see what happened in that meeting in [Chad] and the 2 subsequent meetings that you referred to. People think, ‘oh, we need to do this and we need to do that, and of course, the law should stop those perpetrators.’ It’s a stigmatizing conception of HIV transmission that the perpetrator-based model of HIV transmission – which does occur, it’s important to recognize there are people who know they have HIV and either recklessly or deliberately infect others – but in the overwhelming majority of cases, more than 99% of cases, it’s two people who don’t know they have HIV where further transmission occurs. So, that model is itself a stigmatized conception of HIV transmission and it perpetuates stigma, it instigates more stigma. So, it’s a terrible pity that that happened and it shows the risks of unreflective legal intervention. I think there are general deductions to be made and lessons to be learned from the unreflectiveness… (Edwin Cameron, Constitutional Court Justice, Johannesburg, South Africa).

Cameron provides a clear articulation of how he mobilized the anti-criminalization discourse to make claims about the stigma perpetuated by HIV-specific laws and the
“pernicious” nature of developing such a law in their country. The quantification aspect of Cameron’s claimsmaking has interesting parallels to the competing claims made about the relative positive aspects of the USAID/AWARE Model Law examined in Chapter 5.

Secondly, it is important to note an early policy options paper commissioned for UNAIDS (2002) by Elliott, Director of the Canadian HIV/AIDS Legal Network. Given my focus on the coordinating genre of best practices in Chapter 3, it is worth underscoring that this policy options paper is identified as a “UNAIDS Best Practice Collection: KEY MATERIAL” (UNAIDS 2002). This dense text proposed key elements that can assist in the development of human rights focused public policy in the field of HIV transmission globally. While this report was able to prevent neither the increasing use of the criminal law globally nor the successful uptake of omnibus HIV laws across West and Central Africa, this text helped set the policy groundwork for future consultations and UNAIDS recommendations (UNAIDS 2008b) and is an important early articulation of the anti-criminalization discourse targeted at policy actors. Many of the claims made in the UNAIDS (2002) report on the problematic nature of criminalizing HIV transmission or exposure are reproduced in other UNAIDS documents, including the much cited UNAIDS Policy Brief (2008) which makes a clear and persuasive case that the criminalization of HIV transmission or exposure.

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[88] Overall the text: proposes some principles that should guide thinking about, and development of, law and policy on the question of criminal law and HIV/AIDS; identifies a number of public policy considerations that states should take into account when making decisions about the use of the criminal law; considers the alternative to criminalization presented by public health laws; discusses if and how the criminal law might be justifiably applied, considering in particular: (a) whether HIV-specific legislation is warranted; (b) which acts that transmit HIV or carry the risk of transmission could be subject to criminal sanctions; (c) what degree of mental culpability should be required to impose criminal sanctions; concludes with recommendations to governments, police, prosecutors, judges and public health authorities regarding the appropriate use of criminal sanctions and coercive public health measures.
exposure does not serve the two main goals of those who advance this position: (1) imposing criminal penalties to *punish* harmful conduct and (2) lead to behaviour change so as to *prevent HIV transmission*. This is an important example of how early texts help to shape the directions for future meetings and texts. For example the UNAIDS International Consultation on the Criminalization of HIV Transmission (November 2007) used the 2002 UNAIDS Policy Brief report as its key “starting point” for discussion:

Participants noted that the document [UNAIDS 2002] contains most of the essential background material, much of the necessary policy discussion, most of the options for consideration and decision, and many sensible and balanced conclusions and recommendations. Participants therefore agreed that the consultation should build on the 2002 policy options paper and focus on what value can be added to it (UNAIDS 2008b: 2).

Other key reports were also drawn upon at this 2007 consultation including the Report of the WHO European Region Technical Consultation on the criminalization of HIV and other sexually transmitted infections (October 2006)\(^\text{89}\) and the report of the AIDS and Rights Alliance for Southern Africa (ARASA) and Open Society Initiative for Southern Africa (OSISA) - Civil Society Consultative Meeting on the Criminalization of the Wilful Transmission of HIV, Southern African Development Community (SADC) (June 2007).\(^\text{90}\)

As already demonstrated, a number of early activities related to the anti-criminalization discourse—from community consultations in South Africa to UNAIDS commissioned reports—were important early forms of discourse work which was conducted prior to the development of the USAID/AWARE Model Law in 2004. These examples open up an important consideration of the ways in which the anti-


criminalization discourse has taken a transnational character in its organization and
circulation. I argue that one key coordinating site for this discourse has been at
International AIDS Conferences (IACs) organized through the International AIDS
Society (IAS).

**Conference as node: International AIDS Conferences as space from which to shape and disseminate the anti-criminalization discourse**

I have already demonstrated how some key anti-criminalization texts have
informed the organization of subsequent texts and established the “starting point” for
conversations at meetings and consultations. Building upon this analysis, the
International AIDS Conferences (IACs), run by the International AIDS Society (IAS),
offer fascinating (if dizzying) sites for investigating the interconnected anti-
criminalization work of academics, judges, lawyers, policy analysis, activists,
journalists and civil society engaged in conceptually allied work over time and space.
As such, I argue that IACs have served as a key node in the development and relaying
of the anti-criminalization discourse transnationally. Akin to a kind of airport hub on
the move (moving from Toronto to Mexico City to Vienna to Washington over the past
eight years), the IACs have served as sites where institutionally situated actors—and
the texts they produce—flow to a given conference destination.

While I argue that these conference spaces have been key to the development
of the anti-criminalization discourse (along with other national and international
meetings aside from the IACs) it is important to underscore that these spaces can also
be alienating and restrictive on numerous fronts—a number of informants noting both
the importance of these conferences to their work and feeling overwhelmed by the
“circus” atmosphere. As I already discussed some key arguments that were presented at IACs in 2006, 2008 and 2010 in relation to the criminalization of HIV non-disclosure—when reviewing the key institutional sites from which my problematic emerged—I do not present this material again here. Instead I will note some additional insights from the process of field research and informant interviews related to the IAC.

While many of the actors who connect in this large conference venue also correspond online—sharing information via email or downloading from institutional websites or blogs dedicated to this issue (discussed later in this chapter)—conference sites such as the organised by the IAS have remained an important part of activism and networking in this area. Many informants noted that the problematic issues related to criminalizing HIV non-disclosure received international attention in Mexico City at the IAC 2008. Reflecting upon her work in relation to the IAC in Mexico, one informant explained:

[…] I think, particularly in Mexico [IAC 2008] I think Mexico gave a lot of profile to criminalization. I know that I alone spoke on 4 or 5 different occasions about criminalization and transmission at the Mexico conference, and there was a lot of focus. […] There was a lot of focus on criminalization…and I think the International AIDS Society conferences are huge and I think if you think you’re going to go there to learn about all the various news developments around HIV your mistaken because you find it difficult to get to all the things you need to get to because it’s just so big and so chaotic. I think one of the benefits that these conferences do have is they have the capacity to put issues on the agenda…and I think that the Mexico conference certainly put criminalization quite firmly on the international HIV and human rights agenda (Michaela Clayton, Director, ARASA, Namibia).

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91 I argue that while key delegates and organizers have worked to make space at the IAC for showcasing material related to the criminalization of HIV transmission or exposure barriers still exist at the conference with respects to the kinds of material presented (e.g. a biomedical focus with limited space for critical social science and humanities perspectives) and who can attend (e.g. those with the economic and institutional support to do so).
92 Abstracts from International AIDS Society conferences are available online in a searchable abstract archive at http://www.iasociety.org/.
The idea of giving “profile” to an issue was key to Clayton, who along with other stakeholders saw the 2008 conference as a landmark conference for drawing attention to the issue of criminalization. Further, the conception of consciousness raising is tremendously important here—how a presentation can potentially awaken someone to an issue and help inform her/his future work activities in an area of HIV activism.

Talking with informants more about their varied work activities related to criminalization allowed me to see that conference “agenda setting” is an important component of ongoing work related to developing the anti-criminalization discourse.

Expanding on her example above, Clayton noted:

[...] I was on the track...the human rights track, ‘track f’ I think it was. I was on the program committee for the track, so I was involved in the selection of all of the abstracts and stuff...and I think it was also a conscious effort of people sitting on that program committee to make sure that issues that required attention got it in terms of the abstract that was selected. There were issues of criminalization, sex work, punitive laws, what are the other...I mean I think they were the key issues. Certainly there’s been a concretive effort on the part of a number of players predominantly civil society players [...] not just from Southern Africa but obviously from Canada—Richard Elliot sat on that committee as well...and I mean, criminalization [important to us], unfortunately Canada sets a really bad example. [So] people from the north and from the south that are concerned about this and keep on making sure that it’s on the agenda (Director, ARASA, Namibia).

Clayton’s work experience makes clear that getting something “on the agenda” in this instance should be conceived of as a work activity which requires transnational coordination and institutionally located actors sympathetic to furthering the anti-criminalization discourse. Her quote above also highlights the social organization of knowledge at conferences along various tracks (e.g. the ‘human rights track’).

93 It is also worth underscoring that when ARASA’s director noted that “unfortunately Canada sets a really bad example” she was speaking of the stats Canada has of having one of the highest prosecution rates of HIV-positive persons for non-disclosure in the world (see Mykhalovskiy et al 2010; Mykhalovskiy 2010).
Positioning the issue of criminalization as a “human rights issue” through transnational activism and claimsmaking (e.g. OSI 2008) has allowed actors to make space in this IAC track for the relaying of information about the criminalization of HIV transmission or exposure. In short, the framing of this as a human rights issue at the international level has been key to making IACs important nodes along which anti-criminalization flows may be relayed.

In addition to a concern with having issues of criminalization represented on conference panels, informants also worked to ensure that the final conference report strongly featured issues of criminalization and drew connections across the research presented at the conference:

AIDS 2008 established the use of criminal laws to prosecute PLAs who transmit HIV or expose others to HIV infection as one of the most pressing issues facing the global AIDS movement. Presentations coalesced around the argument that criminalization of HIV transmission is bad public policy, and emphasized that there is a lack of evidence demonstrating that the application of criminal law will prevent HIV transmission, and the very real possibility that it will heighten stigma and discrimination. Justice Edwin Cameron’s plenary presentation on the issue provided an incisive and sobering global overview of the growing trend towards criminalizing HIV transmission, even in cases where transmission does not occur, and the multiple ways in which this undermines an effective response to HIV (IAS 2008: 31).

Further, the report notes that “[r]ather than proliferating HIV-specific laws with a dubious relationship to HIV prevention, various presenters argued that criminal law be applied only to cases of intentional and actual HIV transmission” (IAS 2008: 31-32).

The momentum built at IAC 2008, and the success of the anti-criminalization discourse in encouraging further research and social movement activities in this area, has contributed to further work in this area at IAC 2010 according to informant accounts.
It is important to see how momentum has been built around collecting evidence in this field after the success of the 2008 IAS conference. Because IACs have become key sites to disseminate the latest evidence and activist materials related to the anti-criminalization discourse, a review of such materials gives insight into how the

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The poster can be downloaded at [http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en_1.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en_1.pdf). It is worth noting that 2 of my UNAIDS informants also gave me copies of this poster, along with other materials, when our interviews were completed. See Eba et al (2008) for more country specific review to assess HIV-specific laws criminalizing HIV transmission or exposure in sub-Saharan Africa (7).
The claims-making process has evolved in this field. For example, turning to IAC 2010 the UNAIDS poster above was available at the conference and highlights both “protective laws” and “punitive laws” internationally to provide a broad overview of selected laws which can support (columns A-B) or block (columns C-H) universal access to HIV prevention, treatment, care and support. This is but one example of how the specific anti-criminalization discourse discussed in this chapter is connected to broader concerns with HIV related laws. Column E reviews laws which specifically criminalize HIV transmission or exposure. The published material notes that 56 countries, territories or entities have laws which specifically criminalize HIV transmission or exposure while 63 do not have such specific laws. Other countries, including the United States, have states with and without HIV specific laws (UNAIDS 2011: 38). Limited empirical research in the United States has examined the effect of these laws upon populations most at risk of HIV infection (Burris et al. 2007).

Focusing only on laws which specifically criminalize some instances of HIV transmission or exposure fails to recognize contexts in which no HIV specific law

95 Delegates are limited only by their luggage weight restrictions with respect to the amount of material they take home with them from IAS conferences—copies of journals and articles, CD-ROMS and USB sticks filled with papers and reports, brochures, calendars, t-shirts, activist and academic posters are everywhere. I even managed to fit my red sex workers’ rights umbrella in my carry-on along with many, many free condoms.

96 An empirical study of 490 people who have elevated risk of HIV infection (MSM and IDUs) in Chicago and New York City found that living or not living in a state with criminal laws explicitly regulating the sexual behaviour of HIV-infected persons had little impacted on self-reported sexual behaviour: “Our data do not support the proposition that passing a law prohibiting unsafe sex or requiring disclosure of infection influences people's normative beliefs about risky sex. […] Because law was not significantly influencing sexual behavior, our results also undermine the claim that such laws drive people with and or at risk of HIV away from health services and interventions” (Burris 2007: 1).

97 In terms of lack of sufficient evidence—a recurrent theme in this analysis—for 80 countries, territories or entities UNAIDS notes that no data was available; for 10 countries, territories or entities contradictory information exists regarding the criminalization of HIV transmission or exposure (UNAIDS 2010).
exists in this area but other criminal laws are being applied to prosecute people for non-disclosure. For a clear example germane to this analysis, the UNAIDS (2010) publication noted above indicates that no specific laws exist in Canada to criminalize HIV transmission (see Canada, column E). However, actors involved in the anti-criminalization discourse in Canada are producing academic literature, policy analyses, and organizing social movements to limit the use of existing criminal law and develop prosecutorial guidelines in what I consider a kind of harm reduction textual activism. Empirical research regarding the effects of Canada’s “significant risk” test on the work of health and social service providers as well as people living with HIV has been conducted to help fill the significant research gap in this field (Mykhalovskiy 2010; Mykhalovskiy 2011). It is worth noting that much of the policy and social scientific work in this field has involved counting work: on one hand counting the number of HIV-related criminal laws and on the other the number of criminal cases.

This is a clear example of needing to look not only at the law “on the books” but the complex ways in which HIV-specific laws and other existing criminal laws are being applied in the everyday world. In fact, material presented by Bernard notes a fascinating contrast between where HIV-specific transmission or exposure laws exist and appear to have limited formal application (e.g. much of West and Central Africa) and where no HIV-specific laws exist and the criminal law is being used (e.g. Canada, The United Kingdom). This is an interesting tension which is later discussed in

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98 More research is required to understand how the concept “significant risk” is understood in the everyday world to further understand the meaning ascribed to this vague discursive shell.

99 Maps are available on Bernard’s blog (http://criminalhivtransmission.blogspot.com; Accessed 15 February 2011) at the bottom of the screen under the heading “Where prosecutions for HIV exposure and/or transmission have been reported”. This (working) data/set of maps was also presented by Bernard at the Limiting the Law (2010) community forums in Toronto and Ottawa that have already been discussed.
relation to the USAID/AWARE Model Law. This evidence makes explicit that counting cases is an important albeit insufficient part of assembling evidence in this field.

**Internet spaces: blogs, activism and e-work**

Just as the IACs have been important nodes in assembling persons and information related to the anti-criminalization discourse, I argue that internet-based technologies and information sources have been key to organizing the work of actors in this field. The role of media or mediascapes more generally in this complex discursive terrain emerged as an important aspect to consider in order to account for their coordinating function. As I have already noted, the anti-criminalization discourse has been shaped as a partial reaction to the sensational and stigmatizing depictions of ‘AIDS monsters’ relayed through mass media sites in much of North America and Europe. I argue that to understand the successful organization of this discourse it is important to consider how information and commentary is assembled online and contributes to a narrative which critiques the criminalization of HIV transmission. To focus this discussion, I consider the work associated with the *Criminal HIV Transmission* blog\(^{100}\) which was started in 2007 by Edwin Bernard. I connect this discursive work to other on-line narratives and work activities which both support and critique the development of an anti-criminalization discourse.

Herring et al. (2004) describe blogs as “a hybrid of existing genres, rendered unique by the particular features of the source genres they adapt, and by the particular technological affordances” (10; see Devitt 2009). I argue that it is important to

\(^{100}\) This blog can be accessed at [http://criminalhivtransmission.blogspot.com/](http://criminalhivtransmission.blogspot.com/).
consider the “inter-genre-ality” of the anti-criminalization blog (e.g. assembling and commenting on media narratives, linking to other websites etc.) (Devitt 2009)\(^1\) while not losing side of the broader social contexts which gave rise to this form of e-activism. The banner for this blog, reads: “Criminal HIV transmission: A collection of published stories, opinion, and resources about so-called ‘HIV-crimes’.” Bernard explains his work this way: “[I] try and make sense of really quite confusing and sometimes stigmatizing and inaccurate media stories and try and make sense of them and try and contextualize them.” Bernard discussed the evolution of the website, his increasingly sophisticated use of Google News Alerts to track stories of HIV criminalization, and the e-work of compiling the blog.\(^2\) Of particular relevance to our discussion here, he also elucidates how he thinks about his blogging work and how others have been making use of the blog in their own academic and activist activities:

...really it’s only in the last few months that I started to realize that I guess I am an activist and my blog is being used not just by advocates and researchers but by activists...they’re using my blog to point out all the miscarriages of justice and the injustices...and I think that’s almost like...that feels more like activism, sort of pointing out the human rights violations. Whereas, the social science research looking at the public health impact, I think it’s really important, but that’s worrying about people who aren’t living with HIV...and it’s not that I don’t worry, of course, I am very concerned about the public health too and

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1. See Devitt (2009) for an overview of how genre scholars have studied the form of blogs including their reverse chronology, regular updating and links to other websites. She also discuss limits placed on bloggers such as the software used: “blogging software delimits another genre. When bloggers choose one instance of the blogging software genre—most commonly the blogging freeware called Blogger—they choose an entire set of forms and, with them, a set of potential actions. Those forms both enable and limit (Devitt 2009: 45).

2. Bernard explained: “I always used the Google news search engine and then realized you could set up Google news alerts. Then I became more sophisticated about the kind of key words. I think the first one was something like, ‘HIV’ and ‘arrest’ or ‘HIV & police’ or something...and now I have five or six different key words...and the first alerts were just online news stories and Google has grown so now all my alerts are, you know, new stories, websites, blogs...and sometimes I catch things in other people’s blogs usually with a very different framing and they maybe hadn’t been that I’d missed through...because it was maybe through a tiny newspaper that Google had missed and they’ve talked about it...and then I actually googled that person’s name...the person that had been arrested name and then I can usually find more stories and it comes together as some kind of narrative and trying to make sense of it”. 

about HIV prevention but I guess as a person living with HIV, I’m more politicized in terms of our rights and in terms of using my blog as a tool. I keep calling it an advocacy tool, but I think there is a sense of activism about realizing that we just have to use whatever methods we have at our disposal and, you know, knowledge...the old slogan ‘knowledge is power’ is as true today as it was in the 80s. My blog seems to be not just...it’s evolved as it’s not just about tracking cases and prosecutions but it has started to connect researcher’s and advocates and activists around the world and I feel like...I’m not sure whether it’s the blog or if it’s just me that’s sort of the hub… (Edwin J. Bernard, journalist, Berlin).

Given the focus on knowledge production and dissemination in this broader project, it is interesting to reflect on the work of actually running this website and the future for this information ‘hub’. Bernard noted some interesting tensions in the division of labour in the construction of this anti-criminalization discourse. He articulated the need for an international network of people working in this field who can meet and learn from each other: “I want to move to the next level and use all of my knowledge and all of my contacts to actually sort of galvanize an anti-criminalization...an international anti-criminalization movement that’s really...that’s what the blog has done - it feels like it sort of moved me from a journalist to an activist!” Despite receiving personal attack for his work as a “sympathizer” of so-

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103 While Bernard is currently based in Berlin, I first met him at the IAC 2010 in Vienna. He was subsequently interviewed in Toronto where he had traveled to present some of this work on community panels in Toronto and Ottawa.

104 Bernard expands on this point: “…and I think there could be a more efficient and more productive way of moving forward...and I’d like to make my blog much more of an advocacy tool, rather than just tracking every single case, I’d like someone else to be tracking all the cases and I’d like to be talking more about how we move forward or back on criminalization. I feel I’m at a bit of a crossroads right now, that because the blog is so time consuming and because I’ve been working so hard on criminalization issues and I’m also trying to make a living, I’m finding I cannot...I’ve got 51 Google news alerts in my inbox right now from the last two weeks. I just can’t keep tracking every single case and prosecution...and it would be so great to actually find an NGO or some funding to actually support this, which I think everybody agrees it’s really important work and in a way everyone sort of assumes that I’ll just keep on doing it. But I’m not sure...It’s not that I don’t want to, it’s just that...I think almost everyone can set up Google news alerts and just track cases” (Edwin J. Bernard, journalist, Berlin).
called HIV criminals, Bernard remains committed to this form of activist journalism.105

Bernard also discussed the importance of engaging with others working to problematize the criminalization of HIV exposure and/or transmission and the “eye opener” of learning that Justice Cameron had made use of his work in high profile speeches on criminalization.106 Just as Bernard had influenced the work of others engaged in anti-criminalization work, he too has been informed by the work of a diverse group of actors working in the field. For example, he discussed the “inspiring…call to action” he felt listening to Pearshouse in Mexico City (IAC 2008). Further, some of the turns of phrase and metaphors invoked by Bernard, point to the influence of others who are writing on the subject. For example, Bernard links discussion on his blog about criminalization to the USAID/AWARE Model Law in Africa and uses the language of “legislation contagion” originally used by Pearshouse:

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105 This lengthy excerpt richly describes the mix of “guilt and gratitude” which continues to motivate Bernard’s work: “I had an open mind about the role of the criminal when I first started blogging and I wanted to see what kind of behaviour was being prosecuted. It didn’t take long to see so many of the arrests and so much of the impact was negative for both people living with HIV and the public health [...] I’ve lived with HIV for over 25 years, went through everything that one goes through in the 80s and 90s, losing friends and believing that I was going to die…and then I came up to life. I was a journalist, changed my career, and instead of writing about celebrities, write about HIV. So what motivates me and my HIV related work whether it was writing about treatment, or whether it was about writing about criminalization and human rights, is a personal sense of a combination of guilt and gratitude. I’m here and I have the tools and the ability and the privilege to be able to help other people and that sometimes means that I work too hard because I just to make sure that everything that needs to be done is done. In terms of motivation, there’s a whole variety of things. But I think what I’m really loving, particularly I’m realizing over these last couple of weeks is how I really am maybe not just part of a global advocacy movement, but a potential leader and I can actually use that to help other people and connect with people and that feels very exciting— whether it’s the best career choice, I don’t know and it seems like I’ll have to do a lot of work in terms of finding people to fund this work if I want to make it the focus of my work... (Edwin J. Bernard, journalist, Berlin).

106 It is important to note that Bernard also discussed other limitations of the blog including the dominantly English language focus of news stories he has reported on. This obviously has implications on the amount of coverage the blog gives to Francophone West African media stories regarding criminalization. Other more technically focused limits of the blog were also discussed, such as not being able to search for multiple keywords together: “I would have loved to do ‘Africa + Advocacy’ to then sort of see anti-criminalization articles all in one place” (Edwin J. Bernard, journalist, Berlin).
I’ve obviously ended up being acutely aware now that there was this *legislation contagion*, I started to be much more...I started to look more at what was going on in Africa, and was able to help contextualize why it seemed this whole series of countries discussing...I mean there was so much discussion, a lot of my blog is editorials discussing, ‘oh what a great idea is it,’ but also it was very nice to see actually so many editorials pointing out all the potential harms of passing, enacting the criminalization statutes (journalist, Berlin; *emphasis added*).

Building on Bernard’s comments above, it is important to exemplify just how the anti-criminalization blog works to coordinate information on the criminalization of HIV transmission and act as a kind of information ‘hub’. Figure 12 represents a simplified model to exemplify how a media story that was published on 14 May 2008 online (from *The Dallas Morning News*) is published the next day on Bernard’s blog with commentary. The story is subsequently reproduced and cited on other websites, in published reports and in high profile speeches working to further the anti-criminalization discourse.

Bernard previously allowed some comments to be posted on the blog but he explains that he “actually didn’t allow pro-criminalization comments on [the] blog. I thought that’s not what my blog’s about...the rest of the Internet is all about that”. He explained he would get hundreds of comments from both people who were “pro criminalization” and “HIV denialists”. This point echoes the concept of restricted flow discussed in relation to the IACs. After some particularly personal attacks on his morality, Bernard disabled the comment feature. One of the reasons for this had to do with how his work on the blog and his other public speaking and writing activities were being referenced on other websites. Bernard explained how he became alerted to the ways in which his anti-criminalization work was being referenced:
Informant: …if a Tweet references you, you can actually see it...and it was from this horrendous website [website name].
Interviewer: [nodding] That is the most atrocious...
Informant: Okay, you know about it.
Interviewer: I feel like I can’t even reference in academic work for fear that someone will go to it because it’s so...I don’t even know what to do with it.
Informant: When I discovered it two years ago that was exactly my reaction and I bookmarked it and I looked through it and I think I was almost physically sick...and I thought, do I blog about this or will that just do more harm than good? ...because does it give it oxygen? So I didn’t...and then following that week of...I guess it was that Guardian interview and I had also given a lot of interviews to BBC world service the day before, so my name was out there and I was basically...I wasn’t the only person representing the anti-criminalization point of view but I was probably the most public figure...and so I found that there was an entry now for me on this [website] as a “criminalization sympathizer” (Edwin J. Bernard, journalist, Berlin).
Bernard’s subsequent work and speaking activities have led to further postings on this website including his panel presentation “Where HIV is a crime, not just a virus” in Vienna (IAS 2010).

This issue of posting pictures and information about “criminalization sympathizers” and persons accused of transmitting or exposing HIV to websites links to an important issue addressed by many informants regarding the role of the media in furthering stigma about HIV. Many Canadian, European and African stakeholders noted the importance of recognizing the role of the media in perpetuating ideas that criminalization is necessary to control the spread of HIV and prosecute wilful transmitters. Richard Elliott linked this to the idea of the “criminalization creep” described earlier:

there’s an adjunct to the criminalization creep, which is the use by police of press releases with identifying information including photographs and names of people who are accused of HIV transmission or exposure under whatever the legal formulation is. That is certainly something we have witnessed in Canada over the last years (CHALN, Canada).

A limited amount of academic scholarship has focused on the role of the media in the criminalization field. For example, in a critical examination of the prosecution of Nushawan Williams in the United States, Shevory (2004) claims that “legal repression has reasserted itself” (111). Shevory presents a complex look at the media spectacle which constructed Williams as an “AIDS Monster”. Rather than a movement towards the “increasingly satisfactory realization of legal and political rights” consistent with dominant (Western) narratives of progress “[s]ociety now shows less willingness than in the past to find a balance between the rights of the infected and the interests of the community” (Shevory 2004: 111). Mykhalovskiy et al. (2010) argue: “The
mainstream media emphasize the question of individual moral responsibility for HIV transmission while sidestepping the difficult question about what the appropriate circumstances are for applying criminal law to a complex social and medical problem” (7; see Mykhalovskiy and Sanders 2008). Recognizing the potentially harmful role of dominant media discourse of criminalization for people living with HIV and public health goals more broadly, some NGOs and collectives working on this issue have designed media talking points\(^\text{107}\) on criminalization and are focusing on the problematic and harmful role in the media in perpetuating gender inequities (Welbourn 2008), stigma and racism (ACCHO 2010).\(^\text{108}\)

To conclude this section I note how Bernard’s work as a self-described ‘hub’ in this activist work led me to be interviewed by a journalist about my research. After interviewing Bernard I was contacted by a journalist to discuss my research and, more specifically, the criminalization provisions that were in the USAID/AWARE Model Law. Bernard, who is also quoted in the article and is frequently contacted by journalists and academics for information, had referred the journalist to me. This journalistic example—itself posted on a well-respected HIV activist blog run out of New York called Housing Works\(^\text{109}\)—is interesting on a number of fronts. This highly


\(^{108}\) For other work by activists and educators at the International Community of Women Living with HIV/AIDS see a list of resources by ICW on why they are concerned over trend to criminalize HIV transmission. Available at www.icw.org/node/354. See also, International Planned Parenthood Federation, International Community of Women Living with HIV/AIDS, Global Network of People Living with HIV/AIDS (2008).

\(^{109}\) This HIV activist blog can be accessed at http://www.housingworks.org/blogs. Also see this blog for a recent story on the introduction of an anti-HIV Criminalization Bill by U.S. Congresswoman Barbara
reflexive example demonstrates how Bernard acts to connect players doing research and activism in the field of HIV and criminalization and also how this discourse becomes furthered and connected to other issues of HIV and the law. Here is an excerpt from the article “In Kato’s Africa, USAID Money Spurred Spread of HIV Criminalization Laws” below:

When police found Ugandan gay rights activist David Kato bludgeoned to death last month in his Kampala home, the news brought renewed public attention to the well-documented U.S. roots of Uganda’s now infamous anti-homosexuality bill. What’s gone unnoticed in recent years, however, is U.S. patronage of other anti-human rights legislation in Africa that promotes both homophobia and the persecution of people living with HIV. The U.S. Agency for International Development, while publicly denouncing laws that specifically criminalize HIV, has in fact financed their recent rapid dissemination across the African continent. Millions of dollars in USAID funds have helped spur what the Canadian HIV/AIDS Legal Network is calling a “legislation contagion” that jeopardizes human rights in Africa. […] “Many informants discussed the speed at which the model law was drafted and disseminated,” said Daniel Grace, a doctoral candidate at the University of Victoria, British Columbia […] Women, said Frederica Stines, Africa program officer at the International Women’s Health Coalition, will be the overwhelming victims of this criminalization creep. They are more likely to know their HIV status; more likely to be the victims of rape; more likely to be thrown out of their homes because of their status; and less likely to be able to insist on condom use. “Criminalizing is not prevention,” said [Frederica] Stines, who has more than a decade of experience promoting reproductive rights in Africa. “Who wants to know their status if they could be arrested?” […] “Laws do not just happen,” said Grace. “While the purpose of [my] research is not to blame specific legislative drafters, parliamentarians or lawyers, it is important to hold actors accountable and to make visible the processes by which ‘dangerous’ provisions have been passed across the [African] region” (Turkewitz 2011: 1).

This example not only implicates me and this research project in troubling the idea that the criminalization of HIV transmission or exposure is a good idea, but demonstrates how a discussion of this issue is linked to other issues of HIV and the law such as the criminalization of homosexuality. The article also rightly points out the

Lee (D-CA), retrieved from http://www.housingworks.org/activism/detail/repeal-existing-policies-that-encourage-hiv-criminalization.
seeming hypocrisy of the United States government in their simultaneous denunciation and support of this form of criminalizing persons with HIV. Finally, phrases such as “criminalization creep” and “legislation contagion” are again reproduced in this media narrative, demonstrating how rhetorical tools or strategies are produced and ‘taken up’ over time.

Figure 13: Model Law making news as a “double-edged sword”

The article notes that: “Robert Clay, director of USAID’s Office of HIV/AIDS, denounced the very provisions included in the law sponsored by his agency. “Criminalization of HIV/AIDS is not supported by the U.S. government,” he said. When asked to address the discrepancy between the model law and USAID’s stance, he said the U.S. merely funded the AWARE project—and that the model produced at the N’Djamena conference is not representative of the agency. “We know stigmatization, stigma and discrimination, are really a driver of this epidemic,” he said. “And we need to make sure that we don’t have those types of laws on the books.” […] Criminalization of HIV/AIDS is, in fact, supported by the U.S. government. By criminalizing transmission, African nations are simply following their peers in the West. By 1988, at least eight U.S. states had introduced HIV-specific laws, according to HIV and the Criminal Law. Other wealthy nations followed suit (Turkewitz 2011: 1).
Finally, Bernard’s blog also links to critical commentary and news stories about the USAID/AWARE Model Law such as a story in PlusNews calling new HIV-laws in West Africa a “double edged sword”. This example is particularly salient to our discussion of the coordinated work involved in trying to “change the story” regarding criminalization. Key anti-criminalization actors are quoted in this story which calls the USAID/AWARE Model law a “far from model law” and highlights how women are disproportionately impacted by this law. Such claims stand in stark contrast to the “protective” arguments advanced by USAID as reviewed in Chapter 3.111

After reviewing the significance of the IACs and anti-criminalization blog in creating spaces for networking and the dissemination of information related to the anti-criminalization discourse, I now move on and argue that both of these nodes have been important sites to showcase and further coordinate activist initiatives in this field. Rather than isolated activist activities, I demonstrate how specific anti-criminalization texts build upon one another and are subsequently relayed at conference sites and online.

Making noise: the work of advocacy and making a (gender-based) case

A number of national and international advocacy campaigns have been working to raise public attention to the harmful aspects of criminalizing HIV transmission or exposure (OSI 2008; ARASA 2009). I argue that the 10 Reasons campaign already reviewed (OSI 2008) has important connections to the text-mediated work processes related to the campaign 10 Reasons Why Criminalization of HIV

Exposure or Transmission Harms Women (ARASA 2009). In fact, with this example I demonstrate how a campaign has taken up the gendered dimension of criminalization which has been part of the broader evolving anti-criminalization discourse (UNAIDS 2002; UNAIDS 2008; OSI 2008) and organizes an anti-criminalization campaign specifically around the argument that criminalizing HIV exposure or transmission disproportionally harms women. This is an important example to understand how the anti-criminalization discourse can be mobilised to support not only different county contexts depending on the legal landscape but also key transnational activist concerns.

First, it is important to reiterate that the 10 Reasons to Oppose Criminalization of HIV Exposure or Transmission (OSI 2008) document highlights some broad human rights and public health concerns with criminalization while elucidating gendered dimensions to this criminalization issue:

The push to apply criminal law to HIV exposure and transmission is often driven by the wish to respond to serious concerns about the ongoing rapid spread of HIV in many countries, coupled by what is perceived to be a failure of existing HIV prevention efforts. These concerns are legitimate. Recently, particularly in Africa, some groups have begun to advocate for criminalization in response to the serious phenomenon of women being infected with HIV through sexual violence or by partners who do not reveal their HIV diagnoses to them. While these issues must be urgently addressed, a closer analysis of the complex issues raised by criminalization of HIV exposure or transmission reveals that criminalization is unlikely to prevent new infections or reduce women’s vulnerability to HIV (OSI 2008: 1).

The quote on the inside cover of the text by a member of parliament in Zimbabwe (2007) also underscores the complexity of the gendered dimensions to this issue: “The concerns of women's organizations that are pushing for criminal law approaches to HIV need to be addressed clearly and positively. In particular, action needs to be taken against domestic violence and women's subordination” (Member of Parliament,
Priscilla Misihairabwi-Mushonga, Zimbabwe quoted in OSI: 2008: I; see Jürgens, Cohen and Cameron 2009). Evidence for the links between violence as a cause and consequence for HIV was cited by many informants familiar with this campaign and broader work being conducted to underscore violence against women as an HIV issue deserving of both discursive attention and health funding (WHO 2010).112

The links between gender based violence (GBV) and HIV have been the source of debate in the academic literature. Violence is conceived of as a determinant of women’s health and their likelihood of becoming infected with HIV. However, some recent literature finds no association between intimate partner violence and HIV in 10 developing countries (Harling et al. 2010). Yet, by only looking at population level statistics such calculations fail to adequately consider the situations in which GBV is both a cause and consequence of HIV113 It is important to account for the ways in which dominant paradigms of epidemiological risk-factor analysis camouflage model limitations through statistical sophistication.114

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112 Adding to this call for action, one WHO official explained to me that violence against women had not always been thought of as a health issue at the World Health Organization with such arguments being marginalized until recently. Using a social-ecological model this text places examples of possible entry points for combination HIV-prevention programs including, at the country level: women’s inheritance laws; laws against marital rape; national standards for post-rape care; protecting sex workers from violence by police (WHO 2010: 26).

113 Critical intersectionality scholarship may help to inform both quantitative and qualitative research which explores these two health issues while foregrounding a discussion of power and intersecting forms of marginalization and privilege (Hankivsky and Christoffersen 2008; Grace 2011). Others have linked violence against women to other diseases such as cervical cancer (Coker et al 2009).

114 Such considerations are important to critically interrogate the kinds of population health data that are engaged with to support arguments for HIV related legislative interventions. Intersectional approaches to researching health inequalities that offer ways of (re)thinking how surveys are conducted and the benefits to mixed-method research may offer a contribution to more critical public health data including research related to GBV and HIV. I argue that intersectional, mixed-method approaches to research provide an important critique of research practices that privilege particular knowledgeable actors, such as doctors, and uncritically make use of reified categories in survey research, such as sex/gender, MSM, ‘race’/ethnicity, and SES (Coburn 2004).
As a number of informants noted, and as became clear during my work at the WHO, seeking HIV funding to support work on GBV is a strategic decision made (in part) to access financial and institutional resources. The issue of reframing important health and social issues as “HIV issues”—from violence against women to homelessness—presents important questions regarding the strategic positioning of research projects and subjects which cannot be adequately addressed here. However, many informants working in this field agreed that violence against women must be addressed in its own right—including its complex social and structural determinants—and not merely as a way to prevent the spread of HIV.

Reason 5 in this OSI text is of particular relevance: “Instead of providing justice to women, applying criminal law to HIV exposure or transmission endangers and further oppresses them” (OSI 2008: 12; see Armin 2008). In this section of the advocacy tool it is argued that while there has been some support for using the criminal law to protect women with regards to HIV transmission or exposure “applying criminal law to HIV transmission does nothing to address the epidemic of gender-based violence or the deep economic, social, and political inequality that are at the root of women’s and girls’ disproportionate vulnerability to HIV” (OSI 2008: 12). The document notes that laws are more likely to be used to oppress women. Three main arguments are presented here. First, because women are more likely to engage with the health system (e.g. through pregnancy and childbirth) they are more likely than their male partners to know their HIV status. Second, laws criminalizing HIV

\[115\] The advocacy tool puts the argument this way: “…particularly as governments move towards provider-initiated HIV testing and counseling in pre-natal settings. Where laws criminalizing HIV exposure or transmission are in place, to avoid the risk of being prosecuted for exposing their partner to HIV, women who test HIV-positive have to disclose their HIV status to their partners, refuse to have
transmission or exposure would “provide another tool to oppress” women as it is more likely that women will be blamed for “bringing HIV into the home” by their intimate partners, their families and communities. Third, in some country contexts women can be prosecuted for vertical transmission or mother-to-child transmission with some laws being drafted broadly enough to include women who transmit HIV to a child during pregnancy or breastfeeding. On this last point, the document states:

For millions of women living with HIV/AIDS—but often denied access to family planning, reproductive health services, or medicines that prevent mother-to-child transmission of HIV—this effectively makes pregnancy, wanted or not, a criminal offense. There are many more effective ways to prevent mother-to-child transmission of HIV, beginning with supporting the rights of all women to make informed decisions about pregnancy and providing them with sexual and reproductive information and services, preventing HIV in women and girls in the first place, preventing unwanted pregnancies among all women, and providing effective medication to prevent mother-to-child transmission of HIV to HIV-positive women who wish to have children. (OSI 2008: 13-14).

The idea of “criminalizing pregnancy” was raised as a key point by a number of informants engaged in the creation and dissemination of both the OSI (2009) and ARASA (2009) 10 reasons campaigns. For these informants, this is a clear example of how text-mediated ruling relations reach into the everyday with oppressive impact.

We now turn to ARASA’s work to better understand an anti-criminalization campaign focusing on gender-based arguments on why criminalization is problematic. I argue this example of activism helps to demonstrate how the various anti-criminalization texts and nodes I have discussed work together to help coordinate a
campaign. When asked to explain this purpose of the campaign, Johanna Kehler put it this way:

To make noise. […] It was raising once yet again very clearly that stigmatization, discrimination, criminalization in the context of HIV, looks always extremely different if it comes to women than it comes to men. I think that’s one of the main messages. We keep on saying the pandemic is gendered, and the pandemic is feminist, but if it comes to actually developing program or implementing program we seem to forget that very same statement (Director, AIDS Legal Network, Cape Town, South Africa).

Others used more colourful language to describe the campaign’s goal of “raising shit” when drawing attention to the (potential) further gendering of the HIV epidemic thorough the use of criminal modes of disease control.

It is useful to list the enumerated claims made in the campaign. Many of these points link to the OSI (2008) campaign while bringing issues of gender, gender-based violence and marginality into increased focus:

1. Women will be deterred from accessing HIV prevention, treatment, and care services, including HIV testing;
2. Women are more likely to be blamed for HIV transmission;
3. Women will be at greater risk of HIV-related violence and abuse;
4. Criminalization of HIV exposure or transmission does not protect women from coercion or violence;
5. Women’s rights to make informed sexual and reproductive choices will be further compromised;
6. Women are more likely to be prosecuted;
7. Some women might be prosecuted for mother-to-child transmission;
8. Women will be more vulnerable to HIV transmission;
9. The most ‘vulnerable and marginalized’ women will be most affected; and,
10. Human rights responses to HIV are most effective.

The campaign was developed through a process of community and NGO consultations and has been disseminated at various forums internationally. Below is an endorsement poster for IAC 2010 conference delegates to sign and support the 10
Reasons Why Criminalization of HIV Exposure or Transmission Harms Women

(ATHENA 2009).

Image 7: Sign below the arrow: endorse the 10 reasons here!

Large endorsement poster for IAS 2010 delegates to sign. Beyond the posters that are used in conference and meeting venues, individuals are being encouraged to read the 10 Reasons (ATHENA 2009) and endorse the document by visiting the websites of the following organizations: ATHENA Network (www.athenanetwork.org), the AIDS Legal Network (www.aln.org.za) or ARASA (www.arasa.info) (2010, Vienna, Austria).

In addition to an electronic version of the gender-focused 10 Reasons document being available on all of the aforementioned institutional websites and Bernard’s blog116, the text has also been translated into various forms including booklets, posters, and

calendars. For example, the poster (Image 8) depicted below claims “Women say NO…to criminalization. We need supportive legislation…not criminalisation!” As has already been noted in this chapter, and is further examined in chapters to follow, many women and women’s organizations based in Africa have said, and continue to say, YES to the criminalization of HIV transmission or exposure. As with many issues of HIV and criminalization the so-called “united” women’s community has been divided historically on this and related issues including sex work/prostitution (Berger 2004; Pisini 2008; Grace 2008c).

Image 8: The talk and text of the 10 reasons anti-criminalization campaign
Thabi Khyzwayo, staff member of The Legal Network, stands beside campaign materials for The 10 Reasons women say no to criminalization campaign (2010, Cape Town, South Africa, The AIDS Legal Network offices).
For the purposes of this discussion, it is important to note the OSI anti-criminalization campaign materials provide more lengthy discussions of the rationale for why criminalization is an ineffective public health approach and violates human rights (OSI 2008). While they do not cite literature to support claims that are made within the body of the text, they do provide a list of resources for further information—both policy analysis and academic publications—at the end of the text (see Burris et al. 2007; Burris and Cameron 2008; Cameron, Burris and Clayton 2008; UNAIDS 2008b; 2008d; Weait 2007). The report also notes Edwin J Bernard’s Blog Criminal HIV transmission as a key resource as well as meeting reports (ARASA and OSI 2007) and publications providing legislative analysis produced by the Canadian HIV/AIDS Legal Network (CHALN 2007; CHALN 2008).

Johanna Kehler discussed the links between anti-criminalization advocacy specifically related to HIV transmission or exposure and other advocacy work that is being done related to HIV, the law, and subjects with intersecting forms of marginalization and oppression. She explained the gender-focused 10 Reasons campaign was a natural extension of their HIV work:

As a human rights organization we were always concerned, involved, advocating around criminalization, exclusion, discrimination based on sex on gender on who has sex with whom and when and how. For us this was always an issue for years and years and years. So with criminalization legislation coming up all over the continent and African model law it was just normal, automatic, this can’t be because this is now really a gross violation of women’s rights, of people’s rights (Johanna Kehler, Director, AIDS Legal Network, Cape Town, South Africa).

For example, this 10 reasons campaign links to the South African focused campaign work which asks: “Who have you discriminated against lately?”. One poster in the Cape Town office reads: “They, them…the gays / the blacks / the nigerians / the
coloureds / the poor / the masses / the chicks / the rich / the dykes / the boere / the
prostitutes / the queers / the disabled / the feminists / the ordinary people / the moffies /
the whites / the fundamentalists / those AIDS people...”.

While *The 10 Reasons women say no to criminalization* campaign materials do not provide a list of sources that were consulted to develop the campaign’s 10 reasons, informants noted many of the same studies and policies referenced by OSI (2008) informed the development of this advocacy tool. In fact, when talking with stakeholders involved in the development of this gender-focused campaign the theme of evidence related to this advocacy work arose. For many, this issue of evidence appeared to be a key, even contentious issue. For example, in an interview with the director of a South African based legal network about this advocacy campaign highlighted the role of evidence in the NGOs advocacy work. She discussed the work of having to make evidentiary claims that criminalizing HIV transmission or exposure is problematic in the general sense and that it poses particular problems for the everyday lives of African women:

*Interviewer*: What are you hearing from the women you are working with in reaction to the model law in West and Central Africa? Where is the…

*Informant: Please* don’t say evidence! [laughter]

*Interviewer*: No, I wasn’t going to ask that. But please tell me why I should not say evidence? […]

*Informant*: I think the voices are coming from various areas. One, really important voice is the woman at the community level, who struggle on a daily basis to not get further violated on the pure basic fact that she is living with HIV. […] But, as an organization we get a lot of voices - since part of our services is legal assistance – so, we get women calling in and saying that I have disclosed, or actually I have not disclosed because the nurse who knew my HIV-positive test result disclosed on my behalf, and now this and this and this is happening to me, is there anything I can do? And this is why I said please don’t say

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‘evidence’, because often even in situations like this where we hope, believe, that we are on the same page […] you get outright asked but you can’t prove it. And anecdotal evidence…it doesn’t matter that I personally spoke with a 100 women. I still get told that I don’t know that I am talking about because I don’t have the evidence (Johanna Kehler, Director, AIDS Legal Network, Cape Town, South Africa).

Johanna Kehler also noted that women’s groups in Africa remain somewhat divided on the issue of criminalizing HIV transmission or exposure.118 As was noted in the OSI campaign, many civil society groups and women’s groups have, and continue to argue, that laws which criminalize HIV transmission or exposure are necessary to protect women. This is an important contemporary tension to note in that disagreement persists among people working in this legislative field.119

Others conceded that it was difficult to make evidence-based arguments in this work of furthering the anti-criminalization discourse. When asked about the technical, text-mediated work process of engaging with evidence to build the 10 Reasons campaigns, Clayton explained:

There’s a problem. One of the big problems that we have is very little evidence about the impact that criminalization of transmission or exposure has on HIV in terms of whether or not it actually impacts negatively on access to prevention treatment support services. There’s only been a couple of studies done on this […] and so evidence has always been lacking and that something that we are painfully aware of and something that we are trying to work on at the moment is to try and gather that…and work more closely with social scientists and people working to try and gather the evidence we need to show that criminalization is a bad idea. To be quite honest, a lot of what we say is on the basis of what we think is right. Not necessarily what evidence shows to be right. It’s...do you know what I mean? It’s a...there’s little evidence showing what we say is right.

118 It is important to again reiterate that the notion of a “united” woman’s movement on this issue or HIV-related issues more generally is highly problematic (Grace 2008c). This being said, it seems that a shift has occurred by ASOs and CBOs to increasingly recognise the ways in which criminalizing HIV transmission or exposure may negatively impact women.

119 For example, when I first interviewed Johanna Kehler after she spoke on a panel with other African-based ASOs and women’s organizations the IAS (2010) in Vienna she reflected that not even the panel “human rights oriented” groups were “on the same page” when it comes to recognizing that criminalizing HIV transmission or exposure is problematic for women.
But until somebody show’s to the contrary we’re not going to back down. \textit{[laughs]}. (Director, ARASA, Namibia).

The evidentiary problem noted by Clayton is further expanded upon to as to see how this work of criminalization critics has led to a Global Commission to assemble evidence in this field.

**Coordinating evidence: The Global Commission on HIV and the Law**

Social scientists and (academic) lawyers primarily based in Canada, the United States and the United Kingdom have been contributing to research on the (potential) public health impacts of criminalizing HIV transmission or exposure (Galletly and Pinkerton 2006; Burris 2007; Adam 2008; Mykhalovskiy 2010; \textit{see also} Horvath Weinmeyer and Rosser 2010). A limited amount of empirical research regarding HIV-related legislation and the transmission of HIV has also been conducted in the African context (Shu-Acquaye 2008).\textsuperscript{120} Many of my informants engaged in the ongoing development of the anti-criminalization discourse, including advocacy campaign work, discussed the role of evidence in their work. Most used the concept of evidence to

\textsuperscript{120} Related to this point, a body of research on law and (dis)order explores the relationship between colonial heritage and shifts towards a global legal order (for example, \textit{see} Camaroff and Camaroff 2006 for a comprehensive collection of contemporary critical theory in this field; \textit{also see} Feldman 2008 for review of anthropological research related to AIDS and culture within Africa). While I have found less academic scholarship that addresses questions of criminalization in the African context, some research has been conducted with lawyers, judges, and ‘lay’ publics specifically addressing questions of criminal law reform (Shu-Acquaye 2008). For example, when asked if the intentional transmission of HIV should be criminalized, Justice Vera Ngassa, President, Court of First Instance, Kumbia said: “Definitely. The act constitutes an assault, sometimes occasioning death. However, this is left to interpretation and discretion. With our sexual tradition, criminalization by the formulation of specific and gender specific laws is the only way to curb the wanton spreading of the virus” (Shu-Acquaye 2008: 74). These comments by Justice Vera Ngassa contrast to the already noted work by Justice Cameron. References to culturally-specific sexual traditions are also highlighted in much of the anthropological scholarship (Feldman 2008). Such arguments regarding culture will be discussed in subsequent chapters on USAID/AWARE Model Law reform processes.
reference empirical research conducted by social scientists, epidemiologists and lawyers.

For example, we saw how evidence was engaged in the advocacy campaign work of OSI (2008) and ARASA (2009). My point is not to critique the limited use of evidence to construct public health messaging, but simply to explicate that this evidentiary tension is a real challenge for many of the actors involved in their legislative and advocacy work. Many informants underscored the need for increasing empirical research in this field. While the need for more research, specifically in respect to studies focused on the everyday impact of laws on intersectionally marginalized persons in the African context was made known, it was clear that informants working in this advocacy and policy sphere believed that criminalizing HIV transmission or exposure was a violation of human rights and is bad for public health goals. The statement of Burris et al. (2007) in their analysis of the influence of criminal laws on risk behaviour echoes the sentiments of many of my stakeholders who are working with limited or no social science research in their country or regional context:

> The criminalization of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good; if it has done even a little harm the price has been too high. Until the day comes when the stigma of HIV, unconventional sexuality and drug use are gone, the best course for criminal law is to follow the old Hippocratic maxim, “first, do no harm.” (Burris 2007: 49).

Susan Timberlake, Senior Human Rights and Law Adviser at UNAIDS put it his way:

> There’s out there a raging debate about the impact of punitive laws and the debate that all the people on one side say that punitive laws have a negative impact in terms of people getting tested, disclosing their status, using provision and not taking treatment… and all the people on the other side say that these laws are a great deterrent, that they foster justice and prevent people from doing
harm…and neither side has evidence, okay. So, we would love to use evidence, but we don’t have evidence. Now, what we do have is, you know, anecdotes and people living with HIV speaking from their own experience… (Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

The work of Timberlake and other UNAIDS staff and lawyers based in Geneva, Switzerland and Dakar, Senegal will be further examined in the chapters that follow.

This reference to anecdotal evidence was also made by Justice Cameron, in a discussion of the limited empirical data in this area:

Well, you’ll know of the studies – there are studies in England and in North America that are somewhat inconclusive about the effects of laws. Scott Burris has collected a lot of them in the criminal area. Somewhat inconclusive about the effects of laws… I personally think, through my acquaintance with the epidemic, inhibitory laws do have a chilling effect. This law in Kenya for example. I have no doubt making exposure, without defining it, criminal, has an inhibitory effect on someone who’s at risk of HIV – ‘should I have a test? If I test positive, I’m going to be criminalized if I expose.’ But, it’s mostly anecdotal evidence. It’s hard to go further than that (Constitutional Court Justice, Johannesburg, South Africa).

Cameron noted the important contributions by researchers to this advocacy and policy work while acknowledging the limited empirical research in this field. Given Cameron’s reference to the work of Burris in the quote above it is important to underscore the valuable review of this issue of criminal law the two have provided within the literature:

Criminal law has been invoked throughout the HIV epidemic to deter and punish transmission. The public health community has not favoured its use, but neither has it taken a vigorous stand against it. Meanwhile, governments continue to adopt HIV-specific criminal laws, and individuals with HIV continue to be prosecuted under general criminal law. Criminal law cannot in this area draw reasonable lines between criminal and noncriminal behaviour, nor prevent HIV transmission. For women, it is a poor substitute for policies that go to the roots of subordination and gender-based violence. The use of criminal law to address HIV infection is inappropriate except in rare cases in which a person acts with conscious intent to transmit HIV and does so (Burris and Cameron 2008: 578).
When interviewed, Justice Cameron also noted the work of Weait (2007) who, with a focus on England and Wales, explores the complex relationship between public interest in preventing the spread of HIV and protecting the human rights of persons living with HIV/AIDS (see Dodds, Bourne and Weait 2009; Dodds and Keogh 2006).\footnote{Weait (2007) argues that “in the developed west and north, where [people living with HIV/AIDS] have—at least in theory, but not always realized in practice—an expectation that care and treatment will be available, questions about criminalizing transmission and the legitimacy of exercising other coercive state powers are, in a sense, a luxury that can be explored. The consequence of that exploration has been to affirm, a matter of general principle, that [PLHAs] constitute a vulnerable population for whom human rights protection is critically important, but those rights are not absolute and may be limited or qualified for the wider ‘public good’” (195-196). Building on the ‘public good’ aspect explicated in this quote, debate exists in the literature concerning in which cases prosecuting people for transmitting (or exposing) someone to the HIV virus is warranted. Also see Gallety and Pickerton (2006) who argue that criminal HIV exposure and/or transmission laws contradict public health efforts to prevent the onward transmission of HIV.}

In the absence of rich empirical data on this legislative and human rights issue many informants noted how they sought to make arguments based on best available evidence and “collective experience” and “collective wisdom”. Clayton, building on aforementioned insights, put it this way:

[…]. The stuff we say about criminalization comes from a sort of collective experience of a bunch of people who have been working in HIV and human rights for a long time. It sounds terrible actually, but it’s a kind of gut feeling that what we say is right is that if you criminalize transmission then people are going to be deterred from being tested. I mean it’s kind of logical. [laughs] […] It doesn’t stand up against scientific interrogation but it’s quite logical (Director, ARASA, Namibia).

Many informants “flipped” the issue of evidentiary-burden and pointed to the lack of evidence to support that criminalization was a good approach for public health.

Reports and briefs issued by UNAIDS were often referenced by informants—some of whom had been involved in the writing of these UNAIDS texts—to argue that HIV
specific laws to criminalize HIV transmission or exposure are not justified and that the criminal law *rarely* has a role to play:

> There is no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it (UNAIDS 2008b: 1).

This issue of anecdotal evidence, or what should be constituted as evidence, was an issue for many informants in their advocacy work. Comments made by Johanna Kehler regarding the need for evidence-based policy are of particular relevance and provide a useful concluding thought for this chapter:

> I think one needs to have evidenced-based policy development and I think one needs an evidenced-based approach to law. But I think it is high time that we revisit how we define this evidence. But in a real life situation, a woman in rural [regions of West and South Africa] whose rights have been violated, even if…she is not considered a research evidence source […] But you go – I mean, I am not picking on you, as a researcher to the woman and take her story and than it becomes ‘evidence’. And then it becomes evidence. And so it is not the evidence per se, but how we collect evidence, and what we do with it, and what we do with the human being in the process which is the question. Because of course we need to prove somehow where we get our ideas from or did I just cook them up while I was doing my garden work. But the point is that we have anecdotal evidence for years, but that is not evidence (Director, AIDS Legal Network, Cape Town, South Africa).

The topic of evidence-based policy to which the informant above references, raises important questions regarding the role of evidence in legislative processes. Informed by a critical appraisal of work centered on evidence-based medicine (EBM), analysis in subsequent chapters builds on this issue of creating and activating evidence while further problematizing the “evidence-based” paradigm (Carr-Hill 1995; Eriksson 2000; Trinder and Reynolds 2000; Mykhalovskiy 2003).
June 24, 2010 marked the launch of the UNDP/UNAIDS *Global Commission on HIV and the Law* (Global Commission) in Geneva, Switzerland. The activities of the newly formed Global Commission were also noted in a number of IAC 2010 panels including the session depicted below. The aim of Global Commission is to “increase understanding of the impact of the legal environment on national HIV responses…to focus on how laws and law enforcement can support, rather than block, effective HIV responses” (UNDP/UNAIDS 2010a: 1). I argue that this Commission represents yet another key ‘node’ in a network of institutions involved in the furthering of the anti-criminalization discourse. As such, the Commission’s website also serves as another key ‘hub’ of information for activists, academics and policy actors in this field.\(^{122}\)

The press release for the Global Commission states:

> Nearly 30 years into the epidemic, however, there are many countries in which negative legal environments undermine HIV responses and punish, rather than protect, people in need. Where the law does not advance justice, it stalls progress. Laws that inappropriately criminalize HIV transmission or exposure can discourage people from getting tested for HIV or revealing their HIV positive status. Laws which criminalize men who have sex with men, transgender people, drug-users, and/or sex workers can make it difficult to provide essential HIV prevention or treatment services to people at high risk of HIV infection. In some countries, laws and law enforcement fail to protect women from rape inside and outside marriage – thus increasing women’s vulnerability to HIV (UNDP/UNAIDS 2010a: 1).\(^{123}\)

Some of the stakeholders (judges, lawyers, activists and academics) involved in challenging aspects of USAID/AWARE Model Law and the furthering of the anti-

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\(^{122}\) For more information visit: [http://www.hivlawcommission.org/](http://www.hivlawcommission.org/).

\(^{123}\) Given our focus on comparative model laws at the end of this text—including model laws focused on women’s rights and HIV—it is worth highlighting that the Global Commission notes: “…many examples where the law has had a positive impact on the lives of people living with or vulnerable to HIV. The law has protected the right to treatment, the right to be free from HIV-related discrimination in the workplace, in schools and in military services; and has protected the rights of prisoners to have access to HIV prevention services. Where the law has guaranteed women equal inheritance and property rights, it has reduced the impact of HIV on women, children, families and communities” (UNDP/UNAIDS 2010a: 1).
criminalization discourse are involved in the work of this Global Commission. For example, *Commissioners* include Justice Edwin Cameron\(^{124}\) (10-15 members total) and the *Technical Advisory Group* includes Michael Kirby, Scott Burris, Richard Elliot and Matthew Weait (18 members total).

**Image 9: Leaders against the criminalization of HIV transmission (IAC 2010)**
This panel provides a good example of how the development of the anti-criminalization discourse must be viewed in relation to the work of problematizing the criminalization of sex work, homosexuality and drug use or possession. The panel above shows Michel Sidibe, Joao Goulao, Gill Greer, G. Festus Mogae, Tim Barnett and moderator Stephen Lewis (2010, Vienna, Austria).

\(^{124}\) Stephen Lewis is also a Commissioner. When asked if he would endorse the call for Prosecutorial Guidelines for cases of HIV non-disclosure in Ontario during the question period of the global leaders session (Figure 4.3) he said that while he had previously declined to do so because while he was sure people knew where he stood ideologically after having been appointed to the Global Commission he “wanted to maintain the façade and charade of independence [some audience laughter] during the course of that [Global] Commission and then would sign happily after [audience applause]”. He was also handed a hard copy of the report after the session by Eric Mykhalovskiy (Mykhalovskiy et al 2010).
Richard Elliott underscored the potential significance of the Global Commission’s work to furthering the anti-criminalization discourse and issues related to other HIV-related model laws that is discussed in the chapters that follow:

if they’re going to make recommendations about how laws should be changed in certain areas then when there are good examples to look to, including model laws that have been developed they should certainly look to those and I would hope would endorse many of those approaches that are found in model laws like this one [CHALN Model Law] or stuff on the SADC law that’s good...and I think also the role of the commission in addressing whatever issues that it ends up picking up would be also to warn countries off adopting bad laws and bad model laws, so I think problematizing the N’Djamena model law, for example, will quite possibly be something that will come out of the Global Commission’s work, like if they take out the issue of criminalizing transmission or exposure, which I expect they probably will. I hope that their recommendations will be ones that are at odds with the very broad problematically vague provisions in something like the N’Djamena model law. So whether they name it explicitly and say, well we refute that and it’s bad, or whether they more generically say these kinds of things should not be in your law and that contradicts what the model law holds, then they’ve basically [repealed] it. We’ll see. The Commissioners are probably independently minded folks and they’re not just going to do what some people on the [Technical Advisory Group] might recommend to them (CHALN, Canada).

To conclude, it is worth returning to the central argument that the anti-criminalization discourse challenges: that criminalization is an effective and just public health and/or punishment-oriented strategy. This is a heated discursive field. Many informants explained that in the course of their anti-criminalization work—researching for papers, presenting at forums, and engaging in activist activities—they were faced with challenging, emotional discussions with people about this criminalization issue. The often contentious discussions surrounding the role of the criminal law in prosecuting people for HIV transmission or exposure is addressed later in relation to the USAID/AWARE Model Law. Here I provide some preliminary insight into the
difficulty this issue poses for many actors who are trying to further the anti-
criminalization discourse.

For example, to explain how she works to “take the standpoint” of those she is
talking with about the problems with criminalizing HIV transmission, one informant
drew on her own experience of first thinking about this legal issue:

Well, I just think it is very emotional issue and I think the first time you talk
about it, you actually put yourself in the situation of, oh my god, if my
boyfriend was HIV positive and he just doesn’t tell me…so personally, this is
the first thing I thought. I just put myself in the situation and was like, yeah, I
guess you may want to have justice in a way…(Cecile Kazatchkine, senior
policy analyst, CHALN, Canada).

Kazatchkine explained the work of discussing examples with people and trying to have
conversations in which people can put aside emotion and prejudice: “it is an issue that
is dividing many people, and there are again lots of gray zones and in fact people may
agree on very extreme cases”. Like others, Kazatchkine explained how she talked
through cases at both ends of the criminalization continuum with people—on one end
“someone who intentionally tried to infect someone and actually managed to infect
someone and transmit the virus” (what Justice Cameron notes as the “near mythical
cases”) to on the other “a women who has been abused by her husband and this is why
she couldn’t say otherwise, she would have been beaten or something […] that’s kind
of like another extreme”. On this one “extreme case” on the continuum, Kazatchkine
echoes some of the gender-based arguments surrounding this issue previously
discussed (OSI 2008; ARASA 2009; see Maman et. al 2000; Stoever 2009). As
Kazatchkine explains: “the law applies actually to the middle as well…and this is
where all the debate kind of…then it’s very difficult to actually find position and go
beyond the emotion and [...] looking at some evidence to try to make like a current, coherent response” (CHALN, Canada).\(^\text{125}\)

Another informant discussed that at first assessment people often think that criminalizing HIV transmission is a good idea and something that protects human rights and women’s rights:

At first [assessment], yes. You can think as human not being a lawyer? Think as human. Somebody says, if somebody transmits HIV to somebody else, he’s punished. It’s okay. Stop there. But, if he don’t go beyond and see what are the conditions for this criminalization but he thinks [it’s] a good thing. They [in West Africa] thought it was a good thing because somebody who gives the deaths needs to be punished (Berthilde Gahongayire, UNAIDS West Africa, Dakar, Senegal).

This insight of thinking like someone who is not a lawyer is also a recurrent tension in this broader project in that the model law processes under analysis involve diverse stakeholders, many of whom have no formal legal training or knowledge of the language of law (see Gibbons 2003). While I am not laying claim to any global universality about the issues of criminalizing HIV transmission, these recurrent themes of dealing with the emotional reactions of publics, and the work process of trying to persuade someone to think differently about this issue, were echoed by informants in discussing legal issues in Canada, the United States, the United Kingdom, Southern Africa and Western Africa.

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\(^\text{125}\) In adding the important dimension to how evidence informs these conversations, Kazatchkine notes: “if you add to that evidence that actually a broad use of a criminal could be really negative and counterproductive and actually do more harm than good then…and then you are starting to review your first position and your first instinctive position and this is why I think education and evidence research I can feel you reflection around this may actually lead to change of mind…and I have the impression that it happens, like, when you talk about this issue with someone…just some friends who ask me ‘what do you do’? …and if I start this conversation, I just say everything and I don’t stop…and at first they are like, ‘criminalization is [good]’ and then they are like, ‘oh yeah, okay…it’s more complicated.’ So, when you actually explain to people and use…just open your view on things and look at it a bit further than the first objectives of the criminal law that would be to punish and to deter—because then you will also have to think, does that really deter? …and then you’re like, ‘oh no, apparently not really…so really like, why should we do that then?’ So, if it’s just for vengeance, maybe that’s not the role of the criminal…so yeah.
Many informants noted that when talking with people often their “gut reaction”, “first instinct” or “first assessment” is that criminalizing HIV transmission was a good idea. Informants demonstrated how this tension—what Justice Cameron calls “first order intuitive thinking”—was something that they have had to talk through in their everyday lives and work activities. As the chapters that follow show, those involved in furthering the anti-criminalization discourse have had varying degrees of success in influencing publics transnationally to think differently about the use of criminal law in prosecuting HIV positive persons.

Arriving “late to the party”: the work of becoming aware

Becoming aware of the USAID/AWARE Model Law is itself a text-mediated process of consciousness-raising that gives insight into the relations organizing both the dissemination of this model text and the transnational response to its creation and uptake. As one African-based activist told me, “I arrived late to the party!” 126 She was not alone. Like others working in the (self-identified) field of HIV and Human Rights, she did not only “arrive late” but, in many respects, crashed the party three years after the USAID/AWARE Model Law had been disseminated and state laws based upon the text had already been passed. 127 As explicated in this chapter, some human rights lawyers participating in reform activities were met with varying degrees of discursive resistance in their subsequent intervention work. Before individuals and collectives could begin their work of contesting (aspects of) the USAID/AWARE Model Law they had to become aware of its existence. The ways in which lawyers, judges and

126 African-based Activist interviewed in IAC 2010, Vienna, Austria.
127 I say “crashed” simply to note that the celebratory/congratulatory atmosphere of successfully passed HIV laws was interrupted by the work of actors who said there were major problems with the USAID/Model Law and the state laws which this text inspired.
activists alike came into initial contact with this specific legislative issue—either the USAID/AWARE Model Law text itself or commentary on its existence and/or problematic provisions—speaks to the textual character of this Model Law more generally. All of the informants discussed below engage in work related to HIV and the law; all work on legal issues in the African context and/or internationally.

However, none of the informants discussed here were aware that the making and marketing of USAID/AWARE Model Law was underway until state laws had already been passed based on the model law—becoming aware of this legislative process in late 2006, 2007 or 2008.128

For most informants, initial exposure to USAID/AWARE Model Law came through electronic means: through email list forwards and in the course of internet research related to their everyday work activities. For Justice Cameron, exposure to the Model Law came in the form of an email forward and subsequent conversations with colleagues in the field of HIV and the law: “…[I] became aware of the [model] law sometime after the first model statute [state law] had incorporated the criminal provisions. […] I became aware through colleagues, through [email] lists that a really monstrous criminal provision had been enacted” (Constitutional Court Justice, Johannesburg, South Africa). Another informant recalls finding the Model Law text almost by accident during the course of his legal research. He remembers “stumbling over it on the internet as a document that was reporting to do model legislation on HIV” (Former Director of Research and Policy, CHALN, Canada). This informant

128 In fact, the only persons I interviewed who were aware of the USAID/AWARE Model Law were those who were involved in funding/organizing the creation and dissemination of the Model Law and were at the 2004 meeting.
describes the work of reading the text with “a critical eye” and legislative mind\textsuperscript{129} and “then sort of gradually having it...sharing it with people”. Lawyers and policy advisors at UNAIDS offices in Geneva, Switzerland and Dakar, Senegal echo that they become aware of the legislative process in West Africa years after it had been underway:\textsuperscript{130}

\ldots about the same time, UNAIDS became aware of what had happened—and here we’re talking about 2007 or so...and the fact that in a very short period of time not only was this model law being circulated and claims being made about it, that it was a rights respective effort, but the countries were actually taken seriously, and the countries were actually passing legislation based on this law. I think that UNAIDS, and I think that most organizations outside the region of West Africa, were a little bit slow to realize what [was] happening (Former Director of Research and Policy, CHALN, Canada).

Michaela Clayton, Director of ARASA, explained that not only did she learn about the USAID/AWARE Model Law late in the process, but noted how many institutionally-situated actors in the field of HIV and the law, including those working at UNAIDS, appeared to be unaware of the legislative reform processes that had begun in West Africa\textsuperscript{131}. “It was actually quite strange because I sit on the UNAIDS Human Rights reference group and you think it was something that we would of kind of known about, but it seemed like it just never quite hit the radar” (Director, ARASA, Namibia). Clayton expanded upon this point recognizing possible reasons for this delayed response to the Model Law:

\ldots from 2004-2006 around there, I think people were...It didn’t really permeate in terms of people kind of being aware of it...and I remember when I first became aware of it I read this thing and I was completely horrified that it had been there for so long and that nobody had actually done anything about it or known anything about it, particularly in...I mean, I think in Africa it has lots to do with the fact that West Africa is pretty much...well, Francophone and

\textsuperscript{129} This is also an important work process to be subsequently examined in this project.
\textsuperscript{130} In some respects, contradictory information was presented by some informants regarding the awareness of UNAIDS and other UN agencies of the legislative process underway in West Africa in 2004.
\textsuperscript{131} Clayton’s exposure came through her involvement providing legislative and “technical expertise” at meeting which will be explored in subsequent chapters.
Anglophone Africa are pretty separate. Obviously, largely because of the language barrier. You know, information flows quite easily for example between East Africa and Southern Africa but between West and North Africa and Central Africa it doesn’t…and I think it’s very much a language thing that we just don’t…they don’t speak English, we don’t speak French so…It’s a huge barrier. But that doesn’t explain why bigger sort of international institutions like UNAIDS for example had really not picked up on it until much later after it had been adopted (Director, ARASA, Namibia).

For others, it was only after some of the work of probematizing the Model Law had begun that they become alerted to the significance of this textual work process. For example, as noted in the methodology chapter, it is not until Edwin Bernard—a journalist who had already been writing about the passage of HIV-related laws in Africa—was alerted by presentations by CHALN at IAC 2008 that he became aware of the textual process which had informed the rapid legal reforms he had been reporting on. Still, others international HIV legislative players remain unaware of the model law process underway in West Africa. As such, it is important not to overstate the present awareness of this specific Model Law process among those working in HIV and global health legislation in and beyond the African context. On this point, a number of informants were knowledgeable about some HIV-related model law reform processes in Africa (e.g. the SADC Model Law process in Southern Africa) but were unfamiliar with the West African process. As such, in some cases the

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132 This discussion also relates to the awareness of people more generally about the existence of new HIV state laws throughout West Africa.

133 As explained, my informants were selected because of their knowledge of the legislative process (or related processes) under investigation. Many informants who were unaware of the West African model law process sought clarification during the interview and asked me to forward additional information to them including the results of this interview. The comparative model law chapter—with a focus on model laws by USAID/AWARE, CHALN and SADC—will highlight that while many institutional players are involved in multiple model law work processes, others have more specific work activities related to one model law (e.g. Svend Robinson, Senior Advisor, Parliamentary Relations and Special Initiatives, The Global Fund, Geneva, Switzerland).
interview itself become a site of awareness and knowledge-exchange about the USAID/AWARE Model Law processes.134

Finally, it is worth noting that many informants expressed disappointment and regret that they had not been engaged in the USAID/AWARE Model Law process earlier so as to (possibly) prevent some of the problematic aspects of the legislation. For example, Justice Cameron put it this way

So, it was sort of a shame that that had happened from the very beginning because I think […] it was possible to bring them on through a discussion of the sensitivity of legislating around these issues…and precisely the same way it was possible to do it with legislators in any other part of the world that the sensitivity and the urge to legislate in a knee-jerk way was not specific to West Africa…and that we weren’t actually talking about distinct cultural issues and that actually laws…HIV laws from around the world are littered with the same sorts of mistakes you see inside of the Model [Law] (Constitutional Court Justice, Johannesburg, South Africa).

As Justice Cameron notes it is important to recognize that the USAID/AWARE Model Law is in good company with other model laws and state laws having problematic provisions. Like Justice Cameron, many informants alluded to the possibility of what could have been prevented through broader consultation with technical and human rights experts in the field. The theme of “what if…” or “if only…”—a kind of alternative, imagined history of this model law process—was an interesting theme in the narratives of many informants.

**Conclusion**

My informants positioned their textually-mediated work processes of legislative contestation in various ways—“making noise”, “dissenting” and “raising

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134 This discussion of the work of becoming aware of the USAID/AWARE Model Law links to discussions of the extent of awareness among African civil society regarding these model laws.
shit”—linking their work to social movement literature in and beyond HIV/AIDS activism (see Carroll 1997; Brown and Zavestoski 2004; Boyd et al. 2009). With this review of the difficulty of changing hearts and minds and the challenge of creating evidence-based policy in this legislative field, we can now turn to some of the specific work practices related to USAID/AWARE Model Law creation, reform and challenge. My aim in this chapter has been to make the discursive work of dissent visible; to highlight the different, albeit related forms of work related to the development of the anti-criminalization discourse while connecting these activities to broader issues related to HIV and the law including homosexuality, drug use and sex work. Gender related claims were highlighted in the ongoing development of the anti-criminalization discourse. This chapter provided an important background to understand the specific text-mediated work processes involved in this often emotional and contentious issue. In the next chapter we see how many of the actors involved in the ongoing development and furthering of the anti-criminalization discourse played roles in challenging problematic aspects of the USAID/AWARE Model Law in their work as lawyers, human rights advocates and policy advisors.

As such, the central aim of this chapter was to explain the key features of the anti-criminalization discourse and explore some of the diverse transnational work activities and networks furthering this narrative. I have argued that a set of social and textual relations have produced this discourse through the creation of key texts (e.g. UNAIDS 2008b; OSI 2008) which have been relayed via ‘nodes’ (Urry 2000) in complex trajectories (Appadurai 2006). In doing so, I have made explicit the text-mediated processes by which claims were reproduced online and in various
conference, meeting and activist activities so as to help build momentum around this being a necessary focal issue in global HIV and human rights activism. As demonstrated in chapters that follow, the disagreement this group of actors had with the USAID/AWARE Model Law and the “creep” of country-specific laws across West and Central Africa has contributed to a diverse range of transnational social movement and legislative interventions including intervention during a series of consultations in West Africa in 2007 and 2008.
Chapter 5: LEGISLATIVE INTERRUPTUS

Consultation, critique and claimsmaking

...it was an incredibly difficult meeting because here were these West African parliamentarians and policy makers saying, ‘you know four years ago we were told that this is what we needed to do and we thought that we were doing the right thing and now you guys come here and tell us that this is a load of crap and that we need to change all these laws’. The sentiment amongst the parliamentarians was... ‘what the hell were you guys talking about? Four years ago we bent over backwards to pass these laws because we were told this was the right thing, and now you are turning around and telling us this is nonsense and we actually need to change the law. I mean how stupid are we going to look going back to our parties and saying, excuse me, that law we passed four years ago, it’s actually a load of rubbish and we need to change it?’

(Michaela Clayton, Director, AIDS & Rights Alliance for Southern Africa, Namibia)

...from what we saw at the consultations, a lot of people had no clue about what the [USAID/AWARE Model Law] contained. Even parliamentarians who had passed the law and were very proud they’d done so—and a lot of them were very proud that they’d done so. So, it was a really challenging situation, but the good thing of it was that it opened up a whole range of discussions that needed to be had.

(Susan Timberlake, Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland)

Introduction

As previously explicated, the USAID/AWARE Model Law is a guidance text written in legislative language and framed as a “best practice” response that parliamentarians should expeditiously pass so as to effectively address issues of HIV prevention, care and treatment in their respective countries across West and Central Africa. As the quotes above from two human rights lawyers involved in the consultation and reform process illustrate, parliamentarians and legislative stakeholders who had passed the Model Law were proud that they had been a part of
this political response: this was viewed by some parliamentarians as a major professional accomplishment even if they were not well informed about the content of the Model Law and subsequent state laws they had promoted. In this chapter I argue that a subset of global stakeholders involved in furthering the anti-criminalization discourse were involved in a messy and somewhat contentious process of legislative drafting, consultation and critique.

I have already discussed the ways in which model laws (the written texts) fall into the first area of legal language Gibbons (2003) outlines: the “codified and mostly written language of legislation and other legal documents such as contracts, which is largely monolithic” (15). This chapter further examines Gibbons’ second broad area of legal language: “the more spoken, interactive and dynamic language of legal processes” (Gibbons 2003: 15). I argue that consultations and meetings about the USAID/AWARE Model Law (pre-operative texts) and state laws (operative texts) between lawyers, parliamentarians and other policy actors involve complex claimsmaking activities and can be conceptually positioned as part of this second broad field of legal language (Gibbons 2003; Tiersma 1999). In doing so, within this chapter I map the discursive strategies through which critics of the USAID/AWARE Model Law drew attention to the social organization of claimsmaking work within the context of asymmetrical relations of power in West Africa.\(^\text{135}\) I argue that this mapping highlights issues of textual challenge, discursive dissent and rhetorical strategy and makes visible how some stakeholders have sought to interrupt and even reverse what

\(^{135}\) See Hale and Gibbons (1999) for review of how consultation discourse, like courtroom discourse, can be thought of along two “intersecting planes of reality”: primary consultation reality (e.g. consisting of the consultation events themselves and the people present including parliamentarians and lawyers) and secondary reality (e.g. the events that are the subject of the consultation such as the passage of new laws and the problematic process of legislative development) (see Gibbons 2003; Giltrow et al. 2009).
they construe as dangerous aspects contained in the USAID/AWARE Model Law. Through an exploration of the intervention work of lawyers and activists in the model law process I pay focused attention to the discursive strategies through which they conducted their work and the challenges they encountered in their capacity as organizers, presenters, workshop leaders and “technical (legal) advisors” at consultations in West Africa in 2007 and 2008.

This chapter is organized around key claims made by policy actors: a indicating regional actors (e.g. state and non-state actors136 from West and Central Africa including parliamentarians and AWARE stakeholders) and b indicating outside actors (e.g. lawyers and policy advisors from UNAIDS, CHALN and ARASA). I use conceptual dyads of claims (e.g. claim 1a and 1b) made by these groups to organise my mapping of diverse work activities and text-mediated discussions related to legal language and model law/state law reform processes. I conclude this chapter by drawing on participants’ work experiences related to Sierra Leone’s Prevention and Control of HIV Act (2007) and subsequent reform processes to amend this legislation and remove problematic elements of the new omnibus law. Issues of criminalizing HIV transmission, including vertical transmission (e.g. mother to fetus or child transmission) are discussed. I argue that this review allows us to move from a transnational or regional discussion of Model Law reform processes to a focused look at claimsmaking work at the country level where omnibus HIV laws have already been passed.

136 See Davies (2010: 48-54) for a review of the meaning and role of non-state actors in global health governance.
Conflicting claims about the work that needs to be done

When discussing their work as “technical (legal) advisors” informants primarily drew upon their experiences working at consultations held in West Africa in 2007 and 2008: the Consultative Meeting on The HIV Legal Frameworks Addressing Human Rights and Gender (Dakar, July 24-25, 2007) and the Capacity building workshop on human rights and Gender in HIV legal frameworks (Dakar, April 16-18, 2008). This transnational group of non-state actors also spoke to their role in writing pieces of legal analysis which responded to the USAID/AWARE Model Law and have helped to solidify their thinking in this legislative field (CHALN 2007; UNAIDS 2008d). I use key claimsmaking tensions experienced at these consultations as a way to organise this discussion of text and talk in order to explore the complexity of the discursive strategies through which actors worked to promote and critique the use of the omnibus HIV model law.

Overarching claims about the USAID/AWARE Model Law (1a and 1b)

Overarching Regional Claim 1a: This is a good model law and its activation needs to be further supported.

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137 These meetings were also hosted in the context of some growing criticism of provisions in the USAID/AWARE model law by some national and international women’s organizations and ASOs. Through the course of research I was able to read many letters/ correspondence which were exchanged between 2007 and 2008 regarding problematic aspects of the USAID/AWARE Model Law (Slattery 2007; Sidibe 2008*; Hull, Mworeko and Ahmed 2008). In reflecting on the written exchanges of stakeholders, Berthilde Gahongayire, UNAIDS West Africa, explained that: Informant: we received a lot of criticism from activists, human rights activists. We received a lot, a lot of criticism. They wrote to our Executive Director [Michal Sidibe] and to UNDP, UNIFEM…saying that really, it was a problem. So, we started to work with the countries, but it was not that easy at the beginning, because the parliamentarians thought we were criticizing them (UNAIDS West Africa, Dakar, Senegal). *I list Sidebe as the author of this letter (Deputy Executive Director, UNAIDS) which responds to a letter from Elisa Slattery (Legal Advisor, Africa program, Centre for Human Rights, New York) since the letter is signed by him and sent from his office. However, through the course of interviews I learned that the author of this letter is Susan Timberlake, Senior Human Rights and Law Advisor, UNAIDS. It is worth noting that this letter, as well as other texts such as meeting reports, served as valuable memory aids and prompts during the course of my interview with Timberlake.
Overarching Outside Claim 1b: Something needs to be done to address the highly problematic nature of this text in order to prevent the activation of its imprecise, dangerous language and minimize the legislative harm that has already been caused.

Among some of the early meetings to discuss how to respond to the USAID-funded Model Law, the former Director of Research and Policy at the CHALN met with Susan Timberlake of UNAIDS and devised a strategy to “work out what could be done...because obviously it was a very sensitive period of time” (Former Director of Research and Policy, CHALN, Canada). The recognition of country sensitivity to outside criticisms was discussed by CHALN and UNAIDS:

[…] [in] these countries [West and Central Africa], you know the atmosphere was not conducive to outside criticisms to the model legislation. There was already a certain sense of momentum behind the effort...and it’s obviously a very difficult environment to go in and say to legislators who have recently passed law that has been sold to them as model and progressive law, that actually there are some really serious problems about the law that has just been passed, or has just been drafted and about to be passed. Obviously, at a number of different levels that is a sort of very difficult message to deliver and I think that both UNAIDS and the Legal Network [CHALN] at that stage were determined that it was something that had to be taken on (Former Director of Research and Policy, CHALN, Canada).

We have already reviewed some of the key ways these actors have ‘taken on’ the USAID/AWARE Model Law in some of their discursive work activities furthering the anti-criminalization discourse. I now explain some specific work activities of UNAIDS and CHALN stakeholders to make explicit how the USAID/AWARE Model Law is problematic.

One of the strategies devised by UNAIDS and CHALN lawyers and staff was to develop alternative language to the USAID/AWARE Model Law (UNAIDS 2008d). In reviewing this text I present an introduction to some of the specific thinking and technical training which has organized the work of lawyers conducting this critical
work extending beyond the anti-criminalization issues already discussed. This is not a full alternative HIV-model Law per se (such as those discussed in Chapter 6) but rather a critical text which makes explicit the problems with the USAID/AWARE Model Law and provides alternative draft articles. To understand the alternative language proposed by UNAIDS stakeholders it is necessary to review some of the basic arguments and provisions presented in this alternative language text while highlighting the focused example of provisions dealing with the transmission and/or exposure of HIV. This review helps to inform our discussion of Sierra Leone later in the chapter and builds upon the anti-criminalization discourse discussed in Chapter 4. Reviewing the UNAIDS (2008) text makes explicit some of the specific ways in which (model) laws are “coded in language” (Gibbons 2003). While the UNAIDS text alone has not led to the creation of an alternative model law endorsed by stakeholders in the region, it does revel the key kinds of legislative claimsmaking human rights lawyers engaged in while participating in meetings in 2007 and 2008:

...because written texts retain their form and wording – at a later date it is their meaning that may become open to doubt. Once something is written down, its form becomes accessible afterwards. This means that a particular wording can be reproduced exactly upon demand, in particular writing facilitates the retention of successful wordings (Gibbons 2003: 23).

The UNAIDS recommendations for alternative language in response to the USAID/AWARE Model Law involves a discussion of subject matter that is: (i) in the model law and deemed to be problematically worded or conceived with attention to:

138 Gibbons expands upon this point to explain the development of “form books” giving kinds of model legal language: “If a form of words is admitted as adequately meeting a particular legal objective, for instance a particular wording is accepted in court as constituting a binding promise, this is a good reason to re-use the wording for subsequent promises, in fact it serves as a form of precedent. Once legal actions are committed to paper they can be consulted and relevant elements reproduced. In the law this has led to the development of Form Books, which provide tried and tested forms of words, which lawyers piece together to construct operative documents. It is not in the interest of lawyers to produce new wordings because this may expose them to challenge” (2003: 23-24).
Education on HIV/AIDS in learning institutions, article 2 of USAID/AWARE Model Law; HIV testing issues, article 17, 18 and 24; Partner notification, article 26; prohibition of discrimination and vilification, chapter VIII; criminalization of HIV transmission, articles 1 and 36, and prisons, article 8 and (ii) issues that are omitted, ignored or rendered invisible in the model law: attention to women’s rights and discussion of other vulnerable groups such as MSM and IDUs. This is a response text organised around key problems deemed to be problematic. Through reviewing these provisions and ignoring issues in the USAID/AWARE Model Law, the UNAIDS alternative language document notes four measures to prevent HIV infection and to support the human rights of those living with HIV:

(a) access to HIV information and education on how to avoid infection, or re-infection;
(b) access to HIV prevention goods and services;
(c) social support to encourage and sustain behaviour change; and
(d) a social and legal environment that enables people to practice or negotiate safe sex and otherwise take precautions to protect themselves against infection; protects people from discrimination and sexual violence; and ensures access to treatment, care and support, if infected (UNAIDS 2008d: 1-2).

Just as many informants discussed the importance of listening to the voices of those infected by and affected by HIV, the alternative language document references the right of people to be engaged in a discussion of alternative language due to the insight and experience they can provide: such involvement “in the process of consultation in law reform is also a specific expression of the right to ‘take part in the conduct of public affairs’” (UNAIDS 2008d: 4). The document notes the importance of recognizing the GIPA principle—the greater involvement of people living with HIV/AIDS—which was recognized formally by many governments at the 1994 Paris AIDS Summit (UNAIDS 2008d). While GIPA is frequently referenced as a “best
practice” in HIV/AIDS policy processes, it is worth critically interrogating what such forms of meaningful involvement can and do look like in highly technical legislative reform processes.¹³⁹

Learning how lawyers and policy analysts read the USAID/AWARE text and have created alternative model language is central to understanding the work process of legal challenge and reform. In essence, it is important to consider the ways in which lawyers think and read.¹⁴⁰ A focus on language is central to understanding this text-mediated work:

₁³⁹ Many academics and activists have replaced “greater” with “meaningful” involvement (MIPA or GIPA/MIPA) of infected and affected publics to reflect the need to move beyond tokenistic forms of participation (Robins et al 2004; Mallouris et al 2010; International HIV/AIDS Alliance 2010).

₁⁴⁰ Just as researchers have sought to understand “how doctors think” (see Groopman 2007 for an interesting albeit physician-centric text), in order to understand the work processes of human rights lawyers, the complex ways in which they read laws and think about legal reform must be examined. Such considerations may help to inform more participatory processes of dialogue and consultation across fields of expert and ‘lay’ knowledge.
The quote above well exemplifies the kind of precision lawyers are looking for when crafting the law and critiquing aspects of the USAID/AWARE Model Law. Gibbons underscores the importance of precision when talking about the influential role of legislation and other operative texts:

Precision in their wording is very important. If their wording is too restrictive, they place undue and unwanted limits on our lives. If their wording is too loose, this may license undesirable behaviour or lead to unwanted outcomes. According to Bhatia (1994) precision is the driving force for the unique characteristics of legal documents. Precision is not necessarily extreme clarity – it may also involve selecting the appropriate level of vagueness or flexibility (2003: 38).

The two excerpts below (Figure 14 and 15) exemplify how informants read different texts and discussed their work in relation to the coordinating function of the USAID/AWARE Model Law. Here we see two competing definitions (and spellings) of “wilful transmission”: the definition found in the USAID/AWARE Model Law (USAID/AWARE 2004) and the proposed language recommendations for alternative language to problematic articles (UNAIDS 2008d).

![Willful Transmission](image)

**Figure 14: Defining “Willful Transmission” (USAID/AWARE)**


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141 See Gibbons (2003) for a detailed review of “the pursuit of precision” including how an overview of complex function expressions which contract legal expressions (e.g. subsequent to) with everyday words (e.g. after) so as to reduce ambiguity (36-73).

142 As noted in the methods chapter, texts were used during the course of interviews to clarify concepts, direct the attention of informants, and understand how specific texts and language were activated in the process of legislative creation and challenge.
Figure 15: Defining “Wilful Transmission” (UNAIDS)
Excerpt of proposed alternative language to USAID/AWARE model law and related state laws (UNAIDS 2008d: 20).

Figure 15 clearly illustrates a narrowing of the possible application of the criminal law in cases of HIV non-disclosure to the rare cases—what Cameron calls “near mythical”—where a person has the deliberate intention of transmitting HIV. This example also highlights that non-state actors have worked to limit the cases under which perceived injurious experiences (PIEs)—becoming infected with HIV—would be subject to criminal prosecution (Felstiner, Abel and Sardt 1980/81).

To expand upon this example, the UNAIDS (2008) text takes a clear anti-criminalization stance and underscores the need to focus on human rights:

143 See Felstiner, Abel and Sardt (1980/81) for a fascinating review of the emergence of disputes including a discussion of the importance of “naming” in the dispute claimsmaking process: “naming may be the critical transformation; the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision” (635). Through this review the authors provide a valuable framework on “the emergence and transformation of disputes—the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding” (Felstiner, Abel and Sardt 1980/81: 632). While critics of criminalization do not deny that HIV is an “injurious experience” they do resist that HIV-specific laws are necessary and that individuals should be criminally blamed for transmission where wilful intent does not exist.
punitive approaches that involve mandatory HIV testing, disclosure or treatment, or that criminalize HIV transmission, exacerbate already existing HIV stigma and discrimination and drive people away from HIV prevention and treatment into greater fear, secrecy and denial. As a result, people may be afraid to be tested, afraid to disclose their status and afraid to take up HIV prevention and treatment lest it reveal that they are HIV positive – all of which maintains a spiral of more infection, less treatment and more infection. Laws that comprise such punitive approaches attempt to enforce by law behaviour which in fact must be supported to change by information, community mobilization and social support, and respect for human rights (2).

In doing so, this text directs policy actors to review other human rights focused texts that can give guidance on appropriate legislative responses to HIV including UNAIDS/OHCHR’s *International Guidelines on HIV/AIDS and Human Rights* (2006) and UNAIDS/UNDP/IPU’s *Taking Action Against HIV- A handbook for parliamentarians* (2007; see World Bank 2007). The UNAIDS/UNDP/IPU (2007) handbook for parliamentarians echoes many of the arguments made in the alternative model law language document. For example, the text invokes the genre of good or best practice and provides a checklist for parliamentarians to use when considering the issue of criminalizing HIV transmission or exposure.

One of the first messages UNAIDS and CHALN staff worked to (re)articulate at these 2007 and 2008 meetings was that countries need not pass HIV omnibus laws in order to address HIV/AIDS effectively: not only was legal reform not a sufficient step it was not always necessary to engage in sweeping legal reform processes. In short, they argued that it is important to recognize that a broad onslaught of rapid legislative reform may not be an effective approach to address this global health epidemic. The argument that in the “fight against HIV”\(^\text{144}\) sweeping (omnibus)

\(^{144}\) A frequent militaristic turn of phrase that is used by USAID/AWARE staff and reproduced in legislative articles and meeting reports (see USAID/AWARE 2004: 20). Of metaphors applied to illness and treatment, Sontag wrote military metaphors were those she was “most eager to see
legislative reform may not be necessary “was a totally new, fresh perspective at those meetings. There was a pre-established notion that in the fight against HIV […] a country must pass a law, and a country that does not pass a law is deficient. That was absolutely the starting premise of, I think, that entire [USAID/AWARE] project” (Former Director of Research and Policy, CHALN, Canada; see the anti-criminalization checklist for parliamentarians UNAIDS/UNDP/IPU 2007: 217-218).

To explain this point further, UNAIDS and CHALN presenters noted that many counties have undertaken law reform studies and decided not to create broad, omnibus legislation. Berthilde Gahongayire explained the difficulty of facing resistance and informing stakeholders about the problematic nature of the USAID/AWARE Model Law at the first meeting in 2007:

This is the first conversation which really showed that the parliamentarians felt [resistance to reforming the USAID/AWARE Model law] because they thought [we] were against them, were criticizing them, their work… now you can tell them that it was not that good - it was difficult. It was really kind of… I can’t say a fight but we [met] a lot of resistance at the beginning (UNAIDS West Africa Staff, Dakar, Senegal).

Gahongayire also articulated the challenge of organizing the consultations along various clusters across the legislative lifecycle: countries which had already passed HIV-related laws, countries considering passage of state laws, and those that had rejected passing laws/are not currently considering the passage of HIV-related laws.

One challenge of organizing possible sites and opportunities for intervention is the

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144 Sontag was concerned with the “effect of the military imaginary on thinking about sickness and health” (1990: 182). In concluding AIDS and its Metaphors in the late 1980s, Sontag famously wrote: “…the crisis created by AIDS is not a “total” anything. We are not being invaded. The body is not a battlefield. The ill are neither unavoidable causalities nor the enemy. We—medicine, society—are not authorized to fight back by any means whatever…About that metaphor, the military one, I would like to say, if I may paraphrase Lucretius: Give it back to the war-makers” (1990: 183).

145 Similarly, as discussed in relation to the criminalization of HIV transmission or exposure, countries have decided not to move forward with passing legal reform.
shifting targets across the West African region—with countries in various, continually changing, stages of legislative development, revision and rejection.

In order to further map the different operating premises of stakeholder groups participating in these meetings, I consider the kinds of contrasting questions that were posed. While lawyers from NGOs (including CHALN and ARASA) and UNAIDS sought to problematize this pre-operative model text, others were concerned with the focusing upon the work needed to further promote the activation of this text (AWARE; FAAPPD; West African parliamentarians). As such, as part of their overarching claimsmaking work UNAIDS, CHALN and ARASA lawyers aimed to problematize the content and processes related to USAID/AWARE Model Law. Through presentation to the legislators and other stakeholders in attendance, questions were raised such as:

- Do you need law reform?
- If you do need law reform what forms of law reform do you need?
- Do you need HIV omnibus legislation? If so, why?
- If you don’t need law reform, well what do you need to respond to HIV-related issues?
- Do you need far more progressive policies for instance? Far more involvement of medical health care practitioners and access to HIV prevention and treatment?\(^{146}\)

This line of questioning is important to consider so as to understand the nature of “the more spoken, interactive and dynamic language of legal processes” (Gibbons 2003: 15). The former Director of Research and Policy at CHALN added that he doubted asking these questions was particularly successful at the early stage of the meetings.

One impediment to this work process of problematization—a textually-mediated work

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146 Questions (slightly paraphrased) as articulated by informants working at UNAIDS and CHALN participating in the USAID/AWARE Model Law Meetings in 2007 and 2008 (Former Director of Research and Policy, CHALN, Canada; Senior Human Rights and Law Adviser, UNAIDS, Geneva).
activity involving speeches, open forums for discussion and texts such as PowerPoint presentations—is the different set of operating assumptions and questions that legislators wanted to address at these meetings. It appears that many legislators with whom UNAIDS and CHALN were engaged believed the UNAIDS/AWARE Model Law was a good model: it was something to be proud of and a necessary step to address the HIV epidemic in this region. For example, one USAID/AWARE consultant noted quite simply that the AWARE team had done a “very good job” in passing so many laws; this was “a very big achievement” (Policy Advisor/Consultant USAID/AWARE, West Africa).

It held for many that the Model Law would be transferred into concrete “action at the ground level” and successfully implemented; that “these laws would be transferred to courts and the courts would, for instance, take the criminal law provisions and sort of, so-to-speak ‘get the baddies.’” This premise—that the USAID/AWARE model law was a progressive piece of legislative reform which would lead to important changes “on the ground”—led legislators to ask for help in the work of continuing to promote the USAID/AWARE Model Law:

*How can you at UNAIDS and CHALN help us in disseminating the model law? How can we make sure that these laws get to the courts and the other ministries inside our countries? We need information at this stage about the law to get out to the community.*

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147 This argument that the model law would lead to unproblematic reform at the ground level was made by a number of informants (AWARE; FAAPPD) (see USAID/AWARE 2004).
148 This is the perception of many informants. Here the Former Director of Research and Policy, CHALN, is quoted articulating the general view parliamentarians and some AWARE staff. Some AWARE-HIV/AIDS and FAAPPD informants articulated a similar position consistent with the Former Director of Research and Policy’s assessment.
149 Questions (slightly paraphrased) as articulated by informants working for UNAIDS, AWARE and FAAPPD).
Clearly, actors were reading the USAID/AWARE Model Law differently, maintaining conflicting perspectives about the work that needed to be done in and beyond these meetings. As such, it is not difficult to understand why many described the consultations as “tense”, “difficult” and “frustrating”. The former Director of Research and Policy, who gave presentations at the 2007 meeting in Dakar, explicated what this clash of ideas, operating premises and questions looked like:

So, when we [CHALN and UNAIDS] were coming in with presentations [that] were quite critical of the national laws and the Model Law, the legislators were saying ‘no, no, no you haven’t understood the process...we are at a stage that we have completed the law enactment and what we want now is help from UNAIDS and your organization as well if you like to disseminate these laws. What we want now is to make sure that these laws get to the courts and the other ministries inside our country and what we need now is information about the law to get out to the community’. And one of the very first things that we had to do was to push back on that saying ‘I’m sorry I don’t think that many of these laws should be disseminated.’ I think that the most progressive thing for many of these laws is that they are not shared with the population, but that they are actually reformed first...and that you...that I think it would actually be a backwards step for the fight against HIV for these laws to come in and be implemented as they are currently drafted’...and that was obviously a very, very difficult message out to deliver (CHALN, Canada).

Adding to the difficulty described above, Timberlake, who provided technical legal guidance at the 2008 consultation, also described the discursive challenges of this work:

*Informant:* It was a difficult meeting.
*Interviewer:* What was difficult?
*Informant:* The discussion. I mean, first of all people did not admit…the parliamentarians did not like anyone casting any aspersions on their law. They didn’t like people from outside doing that. You know, there was a lot of real serious back and forth and people getting on the defensive, you know. So, it was a very difficult meeting (Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

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150 Words used by multiple informants including those at UNAIDS, CHALN and AWARE.
Informants made explicit that both of these consultations and related work activities involved a series of challenges. Focusing on linguistic tensions including but not limited to, those related to technical legal language reveals the important rhetorical strategies advanced and barriers encountered by “technical (legal) advisors” during these consultations. Through research in this field I encountered not only dense legal and medical language—specialized vernaculars used by professionals engaged in legal and biomedical interventions—but also a host of metaphors, allegories and concocted quantifications which were used to explain/underscore/exemplify the importance and/or danger of this HIV Model Law. Rather than provide a semantic analysis of the function of figures of speech I wish simply to make explicit the importance of understanding and tracing how shared and competing narratives enter into the work process of contesting the USAID/AWARE Model Law. A focus on language and knowledge allows for a further mapping of key discursive tensions experienced at Model Law meetings at 2007 and 2008.

**Claims about the development of the text and its “model” character (2a and 2b)**

*Regional Claim 2a: This is a community created model law developed through a regional partnership.*

*Outside Claim 2b: This is a USAID/AWARE created text that should not be viewed as a “model” at all.*

Smith explains that “‘[r]eferring’ is a concerting of consciousness through symbolic communication that gives presence to an object for participants in the emerging course of a social act” (2004: 114). Smith uses a wonderfully everyday observation to exemplify subject-object-subject relations (2004: 117). A child started tugging her mother’s skirt and exclaiming ‘a cat, a cat, look mama, look, a cat’. Her
mother, who had been talking to another adult, eventually turned to see a cat across the street which had brought her daughter such excitement. After looking in the direction her daughter had been pointing, her mother responded ‘yes, Karen, a cat’.

Smith explicates that:

> The social ‘grammar’ of naming and identifying or referring to objects called for a missing complement, the others ‘recognition’ in her assent, her glance towards the object and her repetition of ‘its’ name. Once the mother had ‘completed’ the sequence by registering that she had seen the cat Karen indicated the sequence was completed to Karen’s apparent satisfaction (2004: 117).

What is not present in this example is contestation over the naming of the object in question. The mother eventually turned to see the object (cat) and agreed with the claim made in crescendo by her daughter. Evident in the work processes of many actors engaged in the creation, activation and reform of USAID/AWARE Model Law is the work of not only getting the (sustained) attention of stakeholders to engage in a discussion of the Model Law but also the work of “referring” and “naming”; pointing is work and naming is problematic.

When I began research in this legislative field I found that the text at the centre of my inquiry—what I have been referencing as the USAID/AWARE Model Law—was being called many names. This difference frequently had me asking of my texts and informants—the former of which rarely talk back—“are we talking about the same thing here?” At first I believed this to be an issue that simply posed some research challenges as I sought to understand a transnational legislative, text-mediated work process that was referenced in different ways. For example, through the course of research and informant interviews I found the model law to be referenced as: Model
Law; HIV/AIDS Model Law; AWARE HIV/AIDS Model Law; USAID Model Law; HIV Draft Law; Chad (Model) Law and N’Djamena (Model) Law. What I soon learned through the course of research was the importance of acknowledging the naming politics for many stakeholders. In fact, challenging the way in which the text is referenced is an important discursive strategy human rights lawyers engaged in with parliamentarians and West African stakeholders to help reorient their thinking about the process by which the text was created and the extent to which the text should be held up as a “model” or “best practice”.

To start, a number of informants noted that there was some disagreement, even confusion in their work due to the different ways in which the USAID/AWARE Model Law text has been referenced. As noted above, this is a model law of contested name. The former Director of Research and Policy, CHALN, explained how this disagreement of the naming or referencing of the Model Law was an issue of politics and must not be dismissed as a silly semantic footnote. He explained that “the actual title itself was quite a contested term and an interesting sort of sub-set to the story. It was a very, very conscious political choice of ours to refer to it as the AWARE-HIV/AIDS Model Law in the publications that Legal Network put out”. This policy analyst and lawyer explained the desire of CHALN to draw attention to the point of origin of the model law. People involved in the creation of the Model Law, including AWARE HIV/AIDS staff at the 2007 and 2008 consultations, “were very, very

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151 Sometimes references include "HIV", "AIDS" or "HIV/AIDS"

152 Of course, the diversity described here only references name variations within the English language—when French variations are considered the list becomes even longer.

153 It should be noted that some inconsistency exists with respects to how CHALN documents reference the USAID/AWARE Model Law. Further, it is important to highlight that CHALN staff are responsible for writing many of the UNAIDS texts on the Model Law—they are contracted to do so—and these documents most often reference the text and related reform process as the N’Djamena Model Law (UNAIDS 2008d).
adamant that it shouldn't be referred to as their law, it should be referred to as the N’Djamena model law...and they were insistent that it was a consensus document reflecting the will of West African politicians” (Former Director of Research and Policy, CHALN, Canada). This informant argued that AWARE and FAAPPD stakeholders sought to overstate claims of legitimacy by trying to discursively stress the representative and collective will which shaped the Model Law. He said their desire to name the model law the “N’Djamena Model Law” was a rhetorical strategy that neither accurately reflected the legislative process of creation nor the final model law product:

[...] ...time and time again in the meeting we would refer to it as the document coming from AWARE-HIV/AIDS, and time and time again they would sort of push back and say, ‘this is actually not our document at all, we no longer own this...this is to be handed on to the countries...and they hand [it] over to the national legislators’ was sort of their rhetorical way it went. We would have to push back on that saying, ‘Yes it has been handed over, it’s now not necessarily your product anymore that you as an organization and the funders that are promoting this particular effort continue to claim that model law with all of the implications that it is—as we talked about before, the reflecting the wisdom of and the best possible legislative template.... and we think that’s there. ‘So you can’t in a way,’ we sort of said, ‘we can't have it both ways...either it is your model law that you were to continue promot[ing] or it is a model law that is simply [a product] that the other countries can take from or not as they see fit. But you can't continue to fund, you know, countries that will make efforts to promote your particular model law while claiming that it is an act of free [and] sovereign nations’. So, it was a very, very sort of...even the title of this project was quite a contentious one through the length of advocacy (Former Director of Research and Policy, CHALN, Canada).

I argue that the rhetorical “push back” the CHALN lawyer describes underscores the importance many UNAIDS and NGO stakeholders placed on how the Model Law was discursively framed.

The interview with this informant ended with a discussion of the ubiquity of USAID’s insignia and motto: “we felt it was a very contrary position to be holding at
the same time you were promoting it as model legislation and you were funding country level implementation at adoption effects from USAID in the name of the American people...‘from the American people’ on everything!” (Former Director of Research and Policy, CHALN, Canada). This informant further described how he and his colleagues saw this distancing from the document as disingenuous and ignoring “the actual mechanisms by which this was being promoted” including those described in Chapter 3. However, it is important to note that this informant stressed the importance of funding\textsuperscript{154} human rights based legal reform and reiterated that through the process of problematization and consultation he found it interesting that “time and time again we would be caught on the semantics of the name”.

On a related point, many informants described that in their discussions of referencing the USAID/AWARE Model Law at these consultations and their broader work in this field they struggled with the use of the word “model”. Quite simply, this was not a “model” law for some informants—despite what published documents had

\textsuperscript{154} This rich informant interview led to further clarification on this point of \textit{what’s in a name} while recognizing the intelligence of the stakeholders involved in these consultations: “there's nothing wrong with funding law reform efforts around HIV. That’s an extraordinarily important thing to be doing in terms of the epidemic. But to be overstating, [...] the inherent goodness, so to speak, of the law at the same time as sort of saying, 'you know, this doesn't come from us...' was contradictory...and so we made a point...we continued to sort of hold the line that, no this was coming from this particular NGO and that we weren't going to sort of mask those processes of influence that were going to be open about them and that we were also going to exaggerate the claims to which this was locally owned while the organization is absolutely based in West Africa...and many of the politicians were initially immensely proud of what they had done. The politicians and the policy makers we were talking with were capable of so much more nuanced and intelligent discussion and articulation of positions and almost a reflection of debate about these issues than they were being given. They were being given, 'here's what you need to do...here's the model law, and go forth and pass it.' [...] and that's where I feel that there were enormous missing steps in the law reform process about how you bring in local organization's to debate the issues and work out policy positions and how you put the arguments to policy makers and allow them to hear both sides of the arguments about why it is not necessarily model to criminalize, for instance, to criminalize transmission” (Former Director of Research and Policy, CHALN, Canada).
named it—and should not be referenced as such. The Senior Human Rights and Law Adviser for UNAIDS put it this way:

Informant: That’s why I call it the N’Djamena law. It’s an attempt at a model but it’s a failed attempt.
Interviewer: Oh, I see what you mean, it’s not like a ‘model’ model law…not an ideal model law.
Informant: I mean a model law means it’s an ideal law—it’s a model. It’s a law of such caliber that it can stand as a model to be used. But it’s not a model (Susan Timberlake, UNAIDS, Geneva, Switzerland; emphasis original to informant).

In the next chapter I further explore the issue of using the label of “model law” to describe two additional HIV-related legal texts. This review helps to underscore that players involved in different model law projects—both as creators of model law and those who are providing critique of problematic legislative provisions—have struggled with the label and discursive significance of the word “model” in their work. While it is important not to overstate the disagreements over naming the USAID/AWARE Model Law, it is germane to this analysis to underscore that naming and referring are negotiated process pregnant with embedded meaning and part of the rhetorical strategy of claimsmaking.

I am reminded of the discursive tensions Harold Varmus, former National Institutes of Health Director and Nobel Laureate in Medicine, discussed when working to “help resolve a contentious and increasingly public fight over the naming of the

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155 One UNAIDS Lawyer based in West Africa argued that from a legal perspective the USAID/AWARE Model Law could instead be seen as a “Gentlemen’s agreement: “I have to admit that as a lawyer, it’s not a law. Not even [a] model law…that’s something very, very important. Its what we called a ‘gentlemen’s agreement’, you know? Gentlemen[’s] agreement by which parliamentarians met trying to discuss having a common synergy and understanding how they can eventually put the agenda of human rights in the context of HIV” (UNAIDS Lawyer, West Africa; emphasis added).
AIDS Virus” (2009: 128). Elements of personal ambition, professional recognition and revenue heightened the stakes of this process of naming. Varmus reviews the four different options for naming the virus and highlights how these names:

reflected different views about the nature of the virus, the manner in which it should be classified, and its significance as an agent of disease. These issues, as well as the lure of gossip and fights over priority attracted the attention of scientists, physicians, AIDS activists, government officials, and the general public (Varmus 2009: 129-129).

As we have seen in our review, recognition of the flows of money, the movements of stakeholders involved in the Model Law’s creation (e.g. to reference “USAID” and/or “AWARE” or “N’Djamena” in the name) and the textual nature and overall quality of the law (e.g. to reference it as a “model” law or not) informed the processes by which various stakeholders talk about the USAID/AWARE Model Law. This discussion also links to important critical scholarship in the fields of knowledge production and naming related to issues of health, science and research. Other important research in this tradition has examined significant issues of naming such as the original acronym

\[\text{156} \] This retrovirus had been partially characterized over the previous two years after it had been isolated from people with AIDS and grown in cultured cells (Varmus 2009).

\[\text{157} \] Varmus involves the four leading name options which were presented: (1) lymphadenopathy virus (LAV); (2) the third “human T cell leukemia virus” (HTLV-III); (3) HTLV-III/LAV (supported by a “camp of compromisers”) and (4) finding a new name—which would involve a work process with many more options—eventually leading to human immunodeficiency virus (HIV) (Varmus 2009: 129-130). Obviously the naming process discussed in relation to the HIV-related Model Law was different in that I am reviewing a more informal process of competing references to a text and legislative process rather than a structured naming process with options presented alongside scientific rationale.

\[\text{158} \] Building upon Conrad (1975), Fujimura (1988) discusses how knowledge production has become standardized with the “molecular biological bandwagon” in cancer research. For Fujimura, a “bandwagon” exists when large numbers of researchers, organizations and laboratories focus their resources on a specific approach to an issue. Fujimura discusses the work of science and the discursive construction of scientific information. Oncogene researchers were involved in the construction and marketing of a “theory-methods” package in their approach to cancer research. In their efforts to define a common object of science (cancer), tumour virologists and molecular biologists gained acceptance by other researchers, funders, suppliers, and stakeholders in their definition of the situation: in short, cancer as a DNA-related disease Fujimura (1988) also considers how popular media was used to market the “theory-methods” package. I find an important connection with the work of Jordanova (1995), who argues that the term ‘medical knowledge’ is not neutral since it implies the validation of knowledge based on scientific, medical practices (361-362).
and name for AIDS: GRID or gay-related immune deficiency (Sontag 1988; Kayal 1993). Scholars have argued that this framing of AIDS as a “gay plague” fuelled stigma and anti-gay attitudes and policy initiatives (Kayal 1993: 7; see Watney 1987). This issue of stigma and homosexuality is further discussed in the next chapter in relation to informants’ work of talking and writing about homosexuality and men who have sex with men (MSM) in contexts with high levels of stigma, discrimination and criminalization of homosexuality. To conclude, the contemporary (ir)relevance of using ‘AIDS’ to describe epidemiology, testing, treatment and legislative intervention is an historical and context-dependent issue of language worthy of further analysis.  

Claims about the relative merit of the Model Law (3a and 3b)

Regional Claim 3a: The Model Law is “mostly good” (e.g. 95% good).

Outside Claim 3b: The Model Law is flawed and overly emphasising “positive” provisions obfuscates the highly dangerous nature of this text.

As discussed earlier, many parliamentarians appear to have had a view that positioned the USAID/AWARE Model law as unproblematic: they were operating from the belief that sweeping (omnibus) legal reform was necessary and the Model Law they had endorsed had been and would continue to be the key text to facilitate these reform processes. Over the course of interviews, data collection and participant observation for this project (e.g. at community forums and panels at IAC 2008 and

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159 For example, it is worth noting that some Canadian based informants made reference to the recent removal of ‘AIDS’ from organizations dealing with issue of HIV/AIDS in Canada such as the formerly named British Columbia persons with AIDS Society (BCPWA) now Positive Living BC. For example, in a recent interview Brian Chittock, of AIDS Vancouver, explained that “Because of the drugs and treatments that are available today, most people are only HIV-positive…A lot of the clients, especially the newly diagnosed individuals have no relationship to the word AIDS, and it has no meaning to them” (Dalton 2011: 11). This has led the board chair of the newly named Positive Living BC to say the term AIDS is not “an archaic term” in the BC context (Dalton 2011: 11). Again, highlighting the context of language use and change is extremely important here given this transnational research project and different, unequal experiences in accessing testing and treatment globally.
the quantification of the “good”/“bad” elements of the USAID/AWARE Model Law and subsequent state laws became a common rhetorical strategy used to lay claim to the relative merits and dangers of new legislation. When asked about the extent to which this kind of rhetorical dynamic played out in the 2008 meeting, a lawyer from the CHALN replied:

Right. No, that’s absolutely fascinating that you heard that because it was absolutely where we sort of agreed to disagree. By the end of the second meeting, as I said, it was a far greater awareness of the, of the problems inside the model laws and the national laws that have been passed...and it was explicitly put in the exact same way that you described. ‘You say the model law is 50% bad and 50% good...We say the model law is 95% good and 5% bad...So let’s focus on the 5%’...and our response was ‘Okay let’s focus on the 50%’...and it was this sort of gray area where we had to sort of agree to disagree. But I think what was important there was that that was a rhetorical position, and that really what had happened was that there was recognition of those problems...and that was why when we had...and I remember very, very clearly...having that criticism thrown at me after one of my many presentations was, ‘you keep on being very critical of this but you’re only focusing on the 5% that’s bad...’...and I had to respond, ‘I'm sorry I think its vastly more than just 5% of the law I think it’s about half of the law if I have to make that sort of an estimation.’...and then say, I seem to remember that most of the people in the room burst out laughing....we were sort of arguing whether it was 5% or 50%! (Former Director of Research and Policy, CHALN, Canada).

As we can see, even when parties were convinced that some aspects of the Model Law and subsequent state laws were flawed, efforts were made to rhetorically frame these problems as minimal by parliamentarians and AWARE. This informant continued to explain what this exchange looked like in the meeting, noting the significance of working though this disagreement with how to frame the quantitative goodness of the USAID/AWARE Model Law:

But looking back on it, I think that was a breakthrough, because we had moved from a position of absolute defensiveness to a recognition that there were problems inside the law...and so either way you respond to that you say ‘okay well let’s focus on the supposedly 5%, and it’s quite a large percent,
so here’s what’s inside that 5%, and here’s what we recommend you changing, so that you can get to position where your law is 100% good.’ But certainly I think that throughout the process of law reform of the model law, there had to be a sort of very sensitive rhetorical play at that sort of a level, that it was my role to come in to some of those meetings and be extraordinarily critical of the law, and then...but to have that as a sort of intervention from the outside...and then to allow those in the meetings to digest some of that information and to work to a position where they were able to accept some problems of the law (Former Director of Research and Policy, CHALN, Canada).  

Building on this discussion, Richard Elliott, Director of the CHALN, also noted how such quantification of perceived overall quality has entered into discussions and work processes related to model law and state law reform:

[…] let me just say something first about the claim that the law is ‘x’ percent good. I think it’s not in question that there are some good provisions in the N’Djamena model law; it’s not bad from start to finish. It’s just that there are enough provisions in it that are poorly drafted, and/or shouldn’t be there or enough things that are missing from it that really should be there if you wanted a law that you could really say that’s model...So, the claim that this law is 85% good, for example, I’m not sure if I could give it a precise quantification, but I’m not sure that that’s good enough. Well, whatever number you put on it, whether you think its 75% or 85 or 90 or whatever, our view is been, and my view remains, that it’s not good enough the way it is, and it’s not difficult to actually make it significantly better so you should do that (Director, CHALN, Canada).

While such quantification-play may be seen as meaningless to some—simply rhetorical positioning—in describing this dialogic tension informants noted why recognizing such discursive contentions was important to understanding the deeper issue of the pride of parliamentarians who saw the model legislation they had passed as progressive reform. Further, many human rights lawyers who were involved as non-
state technical legal experts underscored that the USAID/AWARE Model Law violates human rights on numerous grounds (regardless of what number one allocates to its “goodness”) and, as such, while arguably progressive language exists in model and state laws these positive articles are undermined and subverted by the dangerous aspects of the Model Law.

**Claims about sovereignty (4a and 4b)**

*Regional Claim 4a:* We have sovereignty to make the laws we want and need not listen to you.

*Outside Claim 4b:* We respect your sovereignty but it is important you respect human rights principles including those articulated in declarations you have already signed.

I have just argued that one of the discursive strategies used by human rights lawyers and UNAIDS staff was to challenge the way in with the Model Law was referenced so as to discursively reframe its process of development and status as a “model” document. Another rhetorical technique used to challenge the USAID/AWARE Model Law involved invoking human rights language and texts. Many informants noted that other human rights texts and international guidelines were referenced in their work of critiquing aspects of the USAID/AWARE Model Law. For example, Berthilde Gahongayire, UNAIDS West Africa, explained that at the 2007 and 2008 consultations different international human rights texts were invoked to help make the case that the USAID/AWARE Model Law was problematic and that countries had already committed themselves to human rights declarations:

So, we had to go very slowly with them and to make them…emphasize that they needed to improve the law because they signed the *International Guidelines on HIV and Human Rights* [UNAIDS/OHCHR]. Some events, some provisions were against that, but, it was a lack or insufficient knowledge of the link between human rights and HIV that brought this. So, we had to be very careful because
every country had the possibility to say… and they even said that […] ‘we have the rights to do laws without your intervention or partners’. That brought us to be really diplomatic, really consensus, dialogue with them, and reach the same understanding and to show them ‘look, you have signed this’ (Berthilde Gahongayire, UNAIDS West Africa).

The balance between making appeals to these declarations and human rights texts while not wanting states to shut down dialogue and subsequently provoke claims to complete independence or sovereignty—saying, as noted in the quote above “we have the rights to do laws without your intervention or partners”—was a significant tension of diplomacy for those working to problematize USAID/AWARE Model Law.

The role of law in the HIV response has been outlined in the United Nations General Assembly Declaration of Commitment on HIV/AIDS (UN General Assembly 2001) and in the General Assembly’s Political Declaration on HIV/AIDS (UN General Assembly 2006). Just as informants referenced these UN Declarations, among others, the UNAIDS alternative language text cites these textual commitments and acknowledges positive provisions in the USAID/AWARE model law text consistent with these Declarations. However, this critical text argues that important elements of the Model Law do not adhere to the previously stated commitments of member states claiming that the USAID/AWARE Model Law:

represents a positive step towards the realization of commitments made in the Declaration of Commitment and the Political Declaration and captures many elements of law that should form support for national responses to HIV. However, there are some provisions in the N’Djamena law which could benefit from reconsideration and revision so as to best meet two critical concerns in the response to the HIV epidemic: that of protecting public health and that of protecting human rights (UNAIDS 2008d: 1).
This UNAIDS (2008d) document provides succinct background on other legislative responses to the HIV epidemic. While documents such as UNAIDS/OHCHR’s International Guidelines on HIV/AIDS and Human Rights “are not legally-binding on states, they are based upon previously-existing legal obligations in international human rights law and represent an internationally-recognized standard for governments to live up to” (UNAIDS 2008d: 3). On this point, it is important to consider the inter-textual hierarchies involved in this kind of work and the extent to which model laws and other signed declarations serve as kind of “boss texts”.

Tensions around English and French language were noted as a key linguistic problem for a number of informants. Legal analysts who have critiqued the content of the USAID/AWARE Model Law have noted the inconsistencies between the French and English versions of the text. For example, Kazatchkine discussed both the differences between common law and civil law traditions and the problems of English and French translation:

I have [noticed] the inconsistencies between English and French. I found that part of language, quite interesting actually because it shows also the limit of the model and because in law language is so important and something like

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162 By the concept of “boss text” I seek to operationalise a concept based on discussions with Dorothy Smith regarding how some texts maintain a particular ruling and regulating character—they may serve to direct other texts and coordinate and standardize work sequences translocally. While many of the declarations noted do not appear to be “boss texts” (despite the appeals of legislative significance made to them by UNAIDS and CHALN stakeholders) the USAID/AWARE Model Law itself may be considered a “boss text” which serves to direct the creation of state laws, often copied and pasted from the model text itself. In using the concept of boss text I am not saying that state actors do not have the ability to act otherwise—as we saw earlier not all West African countries have taken up the USAID Model Law text to transform their countries legislative landscape through omnibus legislative reform. In essence, I am making a distinction between a boss text in name or rhetorical strategy (such as a human rights declaration that some stakeholders think should guide other legislation) and a boss text in practice (such as the USAID/AWARE Model Law which should be adapted and changed through a consultation process at the state level but may serve a highly “bossy” role and become translated into state law with little reform to the original model text).
‘knowingly’, I have no idea how you...for example, ‘knowingly’ could mean something very important...like in English it could be a legal expression meaning a certain degree of intent, and be very concise, you know? But how do you make sure that when you translate it into French you keep exactly the same idea? Especially if your legal systems are not exactly the same. But I guess even in English countries or within the Francophone area, each country may also have a different legal system. But there is a big difference between civil law and common law, and I have the impression that that was also a difficulty...it’s like how do you use the same concept and the same...but applied to two different systems. How are you sure that you are going to translate exactly because maybe you can’t because maybe these two concepts are...these concept cannot be translate in others systems (Cecile Kazatchkine, senior policy analyst, CHALN, Canada).

Again, the importance of precision in the language of law is highlighted (Gibbons 2003). As such, it is worth underscoring that a number of lawyers and legislative analysts explained the transnational challenge of working across different linguistic and legal traditions.

However, more relevant to our discussion here is the reporting by a number of informants that they were challenged on their “right” to participate in the meetings. These challenges to the right to participate included a lack of fluency in French and, most often, being an “outsider” to the unique cultural contexts in which this legislation had been drafted. For a number of informants, this challenge created extra work in claiming spaces of legitimacy to speak—for example, the Former Director of Research and Policy at CHALN had to face challenges to his work in providing technical legal guidance at these consultations. Reflecting on this issue of language, culture and the right to speak, Clayton provides some thoughtful and even humorous comments on this issue:

…not only were you dealing with issues of sovereignty but also issues of...issues of, well ‘four years ago another bunch of people from outside come and tell us that this is a brilliant thing to do and we did that and now we’re in shit’. So, it’s like the sovereignty was kind of compounded. But there was definitely a lot of,
particularly from the...there were a number of issues that came into play. Obviously with North African countries there’s an issue of religion in terms of countries with a strong Muslim population obviously have a very different take on HIV and human rights. So, there were issues of religion. But there were definitely issues also of “how dare you come in here and tell us how to do our stuff”...and I think that’s, quite honestly, I think that’s one of the reasons that they invited me a resource person is because I’m from Africa. Even I’m white and I come from the bottom of Africa. It’s kind of...I think that was probably the thinking behind some of it, so it wasn’t just a bunch of UNAIDS people from Geneva (Director, ARASA).

In Clayton’s quote above the tension of sovereignty is once again highlighted and draws attention to the role of asymmetrical power relations. This candid reflection on claims regarding ‘outsiders’ crossing boundaries and providing expert advice illustrates how matters of geography, language, religion and ‘race’/ethnicity complicate who gets a seat at the table, who is listened to at the table, and the varied degrees of ‘outsiderness’ people construct.163

Adding important context to this discussion, Kate Nash underscores the importance of looking at international law and human rights to examine questions of state sovereignty: “the most direct challenge to state sovereignty is international law. [...] In international law the rights and duties of individuals as human beings now override their rights and duties as citizens of sovereign nation states” (2000: 56; see Held 1995).164 Further, Held argues that conventions and declarations such as The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

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163 It is worth noting that Munck (2007) describes that the political domain of the “early globalization debates” which concentrated analysis “around the ‘decline’ (even ‘death’) of the nation state” (7). While the state is not ‘dead,’—nor ‘alive,’ nor ‘un-dead’ for that matter—this project demands a critical attention to the study of politics and power. It is worth highlighting that theories of the demise of the nation-state—or “Le déprécissement de l’Etat” (the decaying state)—have been professed for more than 150 years (Le Galès 2001: 396). While states are considered resilient by some, others highlight their so-called “decay” with discussions of the “virtual state”, the “dismantling state”, and the “hollowing out of the state” (see Le Galès 2001 for review). The role of the state is of central importance to our discussion of sovereignty.

164 See Held 1995 for review of distinctions between state sovereignty and state autonomy. Held argues that modernity is, in part, shared between national, regional and international authorities.
undermine state sovereignty (Held 1995: 102-3). Scholars have considered the relative legitimacy of international institutions (e.g. the United Nations and World Bank) and international non-governmental organizations (INGOs) and transnational organizations and (e.g. Oxfam) intervening in the internal conflicts of sovereign states (Held 1995; McGrew 1997).

In this process of claimsmaking we have seen how international human rights declarations have been invoked to challenge state sovereignty. This argument appears to have some discursive traction with Futures Groups acknowledging the work and analysis related to Model Law-based laws across West Africa: “Analysis of the laws that have been adopted, however, have shown that some have elements that are inconsistent with international laws and accords” (TIGI 2008: 41). Even with this concession and acknowledgement of some problematic provisions and the work of international human rights lawyers and policy analysts, this Futures Group text echoes some of the quantification games reviewed earlier—placing emphasis on the positive provisions contained within the USAID/AWARE Model Law and related state laws (TIGI 2008). We also considered the work activities of activities of UN actors and members of non-governmental organizations involved in text-mediated interventions across the West and Central African region.

Adding to our discussion of sovereignty throughout this chapter, a few additional reflections are important. Berthilde Gahongayire, UNAIDS staff in West Africa who has expert knowledge of this process of consultation and challenge, clearly articulates the work related to this sovereignty challenge:

We [UNAIDS] had saw ourselves that there is a problem that needed to be addressed. But we needed also to follow a certain process - not going to
countries saying ‘this law is bad, change it or leave it or whatever.’ It’s because they put in front of us the sovereignty [issue].

*Interviewer:* Sovereignty?

*Informant:* ‘But you don’t…tell us what to do. It’s our law we know. So, you don’t have to come and tell us.’ So, we say ‘look we are not coming to impose something on you but we want discussion.’ But in the meantime all around the world the activists were writing, accusing, we’re not moving enough. But we said ‘we follow the process to bring these people to themselves, ask for assistance. (UNAIDS West Africa, Dakar, Senegal)

The claims made by some informants that legislation was passed by parliamentarians without them being aware of the contents of the text are highly troubling.

**Claims about intervention in countries were harmful HIV-specific laws exist but are not being applied (5a(i) and 5b(ii))**

*Outside Claim 5b(i):* If a law is not being applied it may cause more harm to try and revise it—“Let sleeping dogs lie”.

*Outside Claim 5b(ii):* Leaving a bad law on the books is highly dangerous and undermines human rights—“Wake sleeping dogs”.

Before turning to a focused discussion of Sierra Leone, I wish to say something about the conflicting claims made within the group of human rights lawyers and non-state actors I have been discussing to show how unpacking a metaphor invoked by many of these stakeholders reveals different perspective on when and how to intervene when problematic legal language is in place at the state level in operative texts such as legislation. While Susan Sontag is critical of the negative possibilities metaphors may have for those experiencing illness, she discusses the centrality of metaphors to how we think and make sense of the world (Sontag 1988; see Urry 2000: 21). It is worth noting the important sociological scholarship that has been conducted to trace the significance of metaphors and other figures of speech, including Namaste (2000) who explores substitution, comparison and interaction views of metaphor in the “erasure”
of transsexual and transgendered people.\textsuperscript{165} Adding to this discussion, James Geary (2011) explores the use and significance of metaphor across various forms of human action from art and advertising to politics and psychology. In everyday life metaphors can condition, influence and inspire: “[m]etaphorical thinking—our instinct not just for describing but for \textit{comprehending} one thing in terms of another, for equating I with an other—shapes our view of the world and is essential to how we communicate, learn, discover and invent” (Geary 2011: 3; \textit{emphasis original}).

I want to highlight one of the many interesting metaphors that was invoked by informants when discussing strategies for HIV/AIDS legislative reform inside and outside of these West African consultations: \textit{n’esveillez pas lou chien qui dort} or \textit{let sleeping dogs lie}. I argue that this is a proverb worth unpacking. One contentious issue that has been raised in discussions of the USAID/AWARE Model Law reform efforts has been the extent to which such reform is necessary if potentially dangerous, human-rights violating laws are not being applied in the everyday world. Basically, this argument asserts that law is only harmful if it is being applied in ways which are negatively impacting publics. The issue of the symbolic power of law, as well as the multiple ways in which laws may have unforeseen impacts on some intersectionally marginalized publics\textsuperscript{166} (e.g. as discussed in our review of the criminalization of HIV transmission or exposure) was raised in interviews and various meetings and panel discussions (IAC 2008, IAC 2010). Because of this tension, I highlight that people used the metaphor of “let sleeping dogs lie” to talk about the difficulty of legislative

\textsuperscript{165} See Namaste (2000: 95-98) for a succinct review of metaphoric frameworks of analyses.

\textsuperscript{166} My use of “intersectionally” marginalized publics is in keeping with the scholarship on intersectionality which examines the ways in which various oppressions and privileges intersect in complex ways in the everyday world (Hankivsky and Christoffersen 2008; Grace 2011).
reform work and the multiple transnational factors which must be accounted for when attempting to challenge omnibus HIV model law:

I mean, if you’re going to do law reform you got to be careful. You got to know the political landscape, you’ve got to have incredible champions within the system, you’ve got to work the system for months if not years, you’ve got to pick your moment, you’ve got to have the right executive on board. It’s just incredibly difficult to do…and the notion of a UN agency being behind that, I mean, a lot of the governments say we have no business being behind that, which is probably true but, we also certainly don’t have the capacity to be behind that. So, I would rather let bad legislation that isn’t enforced lie….let sleeping dogs lie…if there’s good legislation it’s not being enforced, try to get it enforced. The only time you should worry about law reform is if there’s really bad legislation that’s really being enforced, you see what I mean? (Susan Timberlake, UNAIDS, Geneva, Switzerland).167

Another informant, also urging for caution when working with West African stakeholders, instead noted the temporal problem with this legislative strategy: “To be honest I don’t think it’s a very good strategy. I think that when a new law is passed and it is one or two years old, the analogy of ‘let sleeping dogs lie’ can’t apply. You don’t know how it’s going to be applied. You can’t have confidence that it’s going just to be left off in terms of implementation” (Former Director of Research and

167 Another informant put it this way: “…‘Let sleeping dogs lie, don’t wake them up.’ I think there’s some truth to it. I also think that probably what is needed is a much more rigorous at the national level […] documentation of cases who are actually come forward because I don’t think that we actually have a clear picture yet of what cases come forward towards…because there are many cases who may come forward as in many other situations as well who never make it to the courthouse. […] So, why aren’t they making it to the courthouse? I think we really fairly blank still to an extent, in most countries which have these new laws on place on what is actually happening on the ground which makes it a bit difficult as well to keep on from an advocacy lobbying point of view if we don’t know if the law was ever used why not because the court didn’t accept it or the police station didn’t accept it or the person trying to lay the charge was, dunno, beaten to a standstill. I mean, where is the barrier to accessing this law, or do people actually think we don’t need this law? Wouldn’t that be nice. So, let it be there, if people don’t think they need it they will not use it. Then, yes….right? So, I think one can theorize on what one should do but I think probably step number one I would say is really figuring out what’s going on…and how do the…how did the few cases that are in court actually got there? …because we say, generally speaking, nobody knows about it, those laws are not applied. But then there are these showcases, like the one in ….So how did this case actually make it into the court? Obviously because it’s not the only case from a factual point of view” (Johanna Kehler, Director, AIDS Legal Network, Cape Town, South Africa).
Many activists and policy stakeholders are firmly against the idea of dangerous laws remaining in West African state laws due to the harm they may cause or the lack of evidence about how the law is being applied in the everyday world. For example, in referencing “egregious provisions” in Guinea’s and Sierra Leone’s HIV law an advocacy tool called Verdict on a Virus notes: “These laws must be changed. There is no turning away from the long and taxing effort required to roll-back these laws for people and organizations working on issues related to HIV and human rights in these countries. As a matter of urgency, national strategies need to be developed to change these provisions” (IPPF 2008: 14).

We must not allow sleeping metaphors to lie. Instead, through unpacking the meaning of these turns of phrase we can see the competing legislative strategies, understandings and positions varied stakeholders have articulated when invoking idioms and proverbs form the poetic to the polemic. Interviews with informants allowed me to ask what they meant when they used metaphors rather than construe meaning independent of the actor’s intent and understanding. As the next section of this chapter makes clear, Sierra Leone offers a complex case of competing claims, the

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168 This notion of potentially dangerous laws (e.g. criminalization of HIV transmission) being “sleeping dogs” in that they are not (yet) being heavily applied links to the aforementioned paradox of the high number of prosecutions for HIV transmission or exposure in countries with no HIV-specific transmission or exposure laws but an alarmingly high number of criminal prosecutions.

169 Building on my previous discussion of Sontag, it is worth noting that some articles in the USAID/AWARE Model Law use language consistent with militaristic metaphors. For example, Article 23 on Treatment of Sexually Transmitted Diseases proposes the following language: “The health department in collaboration with relevant government agencies, NGOs, and the private and the traditional sector shall take all necessary steps to strengthen the preventive measures, care, and control of sexually transmissible infections to fight against the spread of HIV infection” (2004: 20, emphasis added). As argued by many who have worked to resist aspects of this Model Law, such “necessary steps” may include cohesive interventions by the state such as overly broad applications of the criminal law that infringe upon basic human rights. Bechir N’Daw, a human rights advisor at UNDP who spoke at the Capacity building workshop on human rights and gender in HIV legal frameworks in Dakar, argued that “the law should not be perceived as a coercive tool but rather as an instrument to fight vulnerability and discrimination, and ensure access for all to HIV-related treatment, care and support services” (2008: 6, emphasis added). Further, these militaristic metaphors are used both by those who promoters and critique of the USAID/AWARE Model Law.
importance of the anti-criminalization discourse to “change the story” and the ongoing challenges with reforming problematic HIV-specific laws.

**Sierra Leone: Prevention and Control of HIV Act (2007)**

As we saw with the first successful law passed based on the USAID/AWARE Model law in Benin (2005) a press release was issued to celebrate and market the passing of Sierra Leone’s *Prevention and Control of HIV Act* (2007): “Seven down, eleven to go: Sierra Leone seventh country to adopt HIV/AIDS law with help from Constella Futures” (Constella Group 2007). The title of the press release alone echoes the sense of legislative momentum that was being built. What some discursively position as exciting momentum and progress others have framed as a dangerous “creep of criminalization”, “legislative contagion” and “domino effect” of omnibus model law. Through the process of textual analysis and informant interviews persistent questions and contradictions emerged regarding the creation of the Sierra Leone’s *Prevention and Control of HIV Act* (2007) and more recent efforts to reform this legislation. In fact, the “Sierra Leone example” or “Sierra Leone case” has been frequently referenced by anti-criminalization actors as part of their claimsmaking work.

This section provides an opportunity to better understand the work of critiquing this recent omnibus HIV law by focusing on the work of those seeking to reform the legislation. I first review some of the major problems with the Sierra Leone’s *Prevention and Control of HIV Act* (2007) as articulated by lawyers, policy analysts,

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academics and activists so as to outline their claims about this state law. I pay focused attention to the issue of criminalizing HIV transmission, including vertical transmission (e.g. mother to fetus or child transmission) to build upon the gender-based, anti-criminalization work explored earlier. With this review completed I consider some of the work of problematization and consultancy involved in reforming the HIV Act in Sierra Leone.

According to reports, Sierra Leone is dependent on nearly all of its HIV response funding coming from international donors—98% of funding coming form international donors in 2006-2007 (UNAIDS 2010: 18; see Lieberman 2009: 81-83). I find Lieberman’s notion of “quasi-coercive influence” useful in making explicit that while no (known) threats of military force on African states who have been noncompliant in relation to HIV legal reform or other HIV global governance initiatives have been made, other forms of coercion may exist due to asymmetrical relations of power (81). Speaking more generally about varying degrees and mechanisms for exerting authority in coordinating the global AIDS response, Lieberman explains:

...there is a degree of coercion in the sense that relatively poor and weak governments may be sensitive to the directives of aid and trade partners who can apply pressure for compliance through threats to reduce support […] Given the strong norms of state sovereignty that govern the international system, it is quite remarkable that international organizations and especially single governments such as the United States have their own staff, offices, and resources in countries around the world with the aim of directly shaping the knowledge, behaviour, and health of people around the world (2009: 81).

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171 Recent studies highlight that stigma regarding HIV remains high with only 5% of women and 15% of men expressing accepting attitudes of HIV Positive persons; only 45% of women and 50% of men are aware that HIV can be transmitted by breastfeeding; further, only 14 % of women and 24% of men are aware that taking ART prophylaxis during pregnancy can reduce vertical transmission or MTCT (UNAIDS 2010: 20).
Here we see the tension of sovereignty appear albeit as viewed from a different set of power relations. Connecting to our discussion in Chapter 3, it is worth recognizing that the language of “best practice” was present in how stakeholders in Sierra Leone first framed the success of the passage of the *Prevention and Control of HIV Act* (2007). For example, in a progress report to UNAIDS under the Best Practice section the document states that “Sierra Leone has implemented a number of initiatives that has made remarkable difference in the overall national response to the epidemic. This section catalogues a few lessons that are worth replication” (Sierra Leone 2008: 23). The text goes on to state the *Prevention and Control of HIV Act* is a key “best practice” worth replicating: “The country passed a law in 2007 in the highest legislative body of the land, parliament, which protects and promotes the rights of PLHIV and at the same time protects the uninfected population” (Sierra Leone 2008: 25).

Shortly after its passing, *The International Community of Women living with HIV* (ICW) wrote an open letter to Jamesina King, Chairperson, Human Rights commission of Sierra Leone to draw attention to the concerns of ICW and its allies regarding the Sierra Leone’s *Prevention and Control of HIV Act* (2007). The letter notes concerns regarding the negative impact of this new state law on the lives of women and girls and argues that in its current form the *Prevention and Control of HIV Act* will serve to “further increase the vulnerability of women and girls to HIV, violence, and stigma and discrimination and prevent and discourage women and girls living with HIV/AIDS from getting access to necessary care, treatment and support” (Hull, Mworeko and Ahmed 2008: 1). Echoing many of the concerns raised by
UNAIDS and CHALN with respects to the USAID/AWARE Model Law—and claims reviewed in ARASA’s (2009) gender-focused *10 reasons* text—the letter identified problematic provisions in the Sierra Leon’s *Act* which are counter to the stated objectives of the legislation and require reform to “better protect the human rights of women and girls”: (1) *Criminalization of mother to fetus transmission*; (2) *Criminalization of transmission*; (3) *Testing without consent*; (4) *Partner notification of HIV status*; and (5) *Lack of confidentiality* (Hull, Mworeko and Ahmed 2008: 1-3).  

Legislative analysis penned by the CHALN provides a human rights analysis of the USAID/AWARE Model Law in Sierra Leone and six other countries that had HIV-specific legislation passed before 2007: Benin, Guinea, Guinea-Bissau, Mali, Niger and Togo (CHALN 2007). In a rhetorical strategy similar to the “you signed this” discussion above, this legislative analysis makes use of rights language to position countries like Sierra Leone as already committed to the “right to health” and in need of honouring this commitment. In reviewing Sierra Leone’s *Prevention and Control of HIV Act* (2007), the text provides a detailed account of both progressive and potentially vague and dangerous language contained in the document. Again, I argue

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172 References the specific articles of relevance are made in the letter: (1) *Criminalization of mother to fetus transmission* (subsection 21(1)(a)-21(2)); (2) *Criminalization of transmission* (section 21 (1)-21(2)); (3) *Testing without consent* (subsection 12(1) – 12(2)(c)(ii)); (4) *Partner notification of HIV status* (sections 21(7), 21(8), and 14(1)) and (5) *Lack of confidentiality* (sections 15(c) and 18(1)(e)) (Hull, Mworeko and Ahmed 2008: 1-3).
173 A number of informants referenced the importance of this text, alongside the UNAIDS (2007) alternative model law language document, in their ongoing work challenging problematic provisions.
174 For example, the CHALN text notes that the seven countries under analysis have all ratified the following (a) international and (b) regional documents which recognize the “right to health”: (a) the *Convention on the Elimination of Racial Discrimination* (CERD) (1963), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979) and the *Convention on the Rights of the Child* (CRC) (1989) and (b) the European Social Charter (1961), the *African Charter on Peoples and Human Rights* (1981) and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1988). The text further expands on other relevant commitments made by Sierra Leone.
that this is an example of detailed legislative analysis focused on matters of linguistic precision in the language of law (Gibbons 2003). As lawyers at the CHALN explained, the difficulty is in knowing how a law will be interpreted and applied in the everyday world. For example, the issue of vague language around HIV education and fears that people may experience forced or coerced HIV testing are flagged as a potentially problematic articles in Sierra Leone’s Act along with many of the issues articulated by the ICW above. The CHALN text also critiques the HIV disclosure requirement in Sierra Leone’s *HIV Act* (2007) arguing the requirement is overly broad, does not account for the risk of HIV transmission involved and “unjustifiably infringes privacy and exposes PLHIV to stigma, discrimination, violence and other abuse” (CHALN 2007: 33). The difficulty of reading and interpreting Sierra Leone’s *Act*—e.g. when is it acceptable to breach confidentiality and warn persons at risk of HIV infection?—is highlighted: “[it] is drafted in a way that makes it difficult, if not impossible, for the reader to understand under what circumstances a physician can breach patient confidentiality and warn another person at risk, and potentially undermines the intent behind the legislation” (CHALN 2007: 33). Gaps in addressing gender in the

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175 On this point, one informant spoke about her experiences working with pregnant women in South Africa who felt they had not given consent to be tested for HIV despite laws which mandated informed consent prior to HIV testing.

176 For example, the CHALN (2007) text notes the problem with vague language in the Sierra Leone law that “could be problematic, depending on how it is applied in practice” (16). This reference to the unknown impacts of omnibus HIV-related state laws was a concern for many informants. The CHALN (2007) text explains that: “Article 3(2) of the law provides that the appropriate course content, scope and methodology at each educational level shall be determined ‘after consultation with the relevant stakeholders’. As with the corresponding provision (article 2) of the model law, it is important that educational programs provide complete, factual, and unbiased information about HIV prevention, including information about the correct and consistent use of condoms. It is to be hoped that such an approach is maintained in the practical application of the law” (CHALN 2007: 16).

177 At the risk of appearing overly picky, a number of typos can be found in the CHALN 2007 paper apparently the result of “copy and paste” block analysis due to the similar findings between legislative gaps and content across different countries. For example, the section on gender gaps in Sierra Leone’s analysis is apparently copied and pasted from the section on Niger above “Sierra Leone: The law of Niger does not mention women’s rights, nor does it address any of the specific social, cultural, economic
legislation are considered along with a detailed review of the related problems with the articles dealing with HIV transmission including provisions that criminalize vertical transmission.\textsuperscript{178}

In light of these concerns, some stakeholders in Sierra Leone, including Jamesina King, have recently committed themselves to a process of revising the new omnibus law. Informants differed with respects to how long they thought this process of consultation and revision should take.\textsuperscript{179} Representatives from Sierra Leone participated in discussions at the 2007 and 2008 meetings specifically around gender-related problems in the USAID/AWARE Model law and related state laws. For example, when asked about the presentation of evidence around gender-based arguments and problematic provisions Susan Timberlake explained:

It was right on the table. Presentations by people, including me, [were] trying to show the relationship between how protective law would help people to avoid transmitting HIV, versus punitive law…more the obligation to disclose would drive people into greater secrecy and denial. There was a lot of discussion about that. Some people bought it, some people didn’t. But you have to have time to think about those issues, and these people had not thought about it—I mean, and legal factors that make women more vulnerable to HIV infection and more prone to experience adverse effects as a result of HIV infection” (CHALN 2007: 58).

\textsuperscript{178} The CHALN (2007) document explains that “The law in Sierra Leone contains two distinct articles establishing an offence of “HIV transmission” (although in effect both articles establish offences of HIV exposure). Firstly, according to Article 21(1), a person who is infected with HIV (and aware of the fact) must “take all reasonable measures and precautions to prevent the transmission of HIV to others and in the case of a pregnant women, the fetus”, and also “inform, in advance, any sexual contact or person with whom needles are shared” of their HIV status. Secondly, according to article 21(2) a person who is infected with HIV (and aware of the fact) must not knowingly or recklessly place another person (and in the case of a pregnant woman, the fetus) at risk of becoming infected with HIV, unless that person knew of the fact and voluntarily accepted the risk of being infected. The contravention of either of these provisions is an offence (Article 21(3)). Under Article 21(1), no actual transmission of HIV is required” (48).

\textsuperscript{179} For example, one informant commented on the relative speed of the revision process saying: “Sierra Leone [has] already adopted a law. Now, they are in the process of revising this law. The issue is, if they have a final and consensus text they have just…the process will be very short because the law is already adopted. It is totally different when you have an initial process of adaptation. […] when it comes to Sierra Leone the process of the revising next time, but the adaption is supposed to be very quick because it is about a law which is already adopted. They don’t…they don’t need, for instance, regulation…regular text for the new law are revised…because they already have [a] regular text” (Policy Advisor/Consultant USAID/AWARE, West Africa).
there were a lot of them (Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

Again an issue of temporality and technical expertise is highlighted: the time and training or guidance it takes to think and reflect on complex issues related to the protective and punitive role of law. Building on this, Clayton drew on her work experience of providing technical advice to representatives from Sierra Leone at the 2008 meeting:

…the people that were there from Sierra Leone were actually very jacked up. They understood the issues, I think there was somebody from the attorney general’s office, I think there was somebody from the legal drafting...and so we actually used the group work as an opportunity to sit down and to go through the law that they had passed with a view to making specific recommendations about how it should be changed (Michaela Clayton, Director, ARASA, Namibia).

One of these people with whom Clayton worked at these workshops was Jamesina King. Clayton said that the group work for which she provided “technical advice” was “…very practical. I don’t think all the groups were like that because not all of them were in that situation where they actually wanted to work on any law. But I think that in Sierra Leone that was the situation and we actually did work specifically on their existing law and on making recommendations on how that should be changed”. Clayton hoped that the work they conducted at the 2008 workshop would inform Sierra Leone’s revised Prevention and Control of HIV Act. Given the problematization work of many NGOs and women’s organizations in relation to the Model Law generally and provisions in Sierra Leone more specifically, it is interesting

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180 Clayton explained: “I’d be interested to see...I actually haven’t seen the draft that is being debated at the moment. It would be interesting to see to what extent it does or doesn’t reflect the discussions we had in the working group” (Director, ARASA, Namibia).
to note that a number of informants argued that the push to criminalize vertical transmission originally came from some women’s organizations:

_Interviewer_: So, did you get any clues from that conversation about how the provisions that criminalize vertical transmission became into the 2007 law?  
_Informant_: [...] it was pressure from women’s organizations. As far as I recall...  
_Interviewer_: Pressure from women’s organizations to criminalize vertical transmission?  
_Informant_: ...to criminalize...yes, transmission. Isn’t that odd? (Michaela Clayton, Director, AIDS & Rights Alliance for Southern Africa, Namibia).

This claim, as noted in Chapter 4, adds important complexity to this discussion and demands further ethnographic inquiry. Many informants argued that the criminalization of vertical transmission in Sierra Leone was a result of “sloppy drafting”; others argue it was an intervention designed to dissuade HIV positive women from having children. When the former Director of Research and Policy, CHALN was at the 2007 consultation he discussed the issue of Sierra Leone and vertical transmission with many stakeholders:

I don’t remember any legislator in the meetings I was in saying that they thought it should be a criminal act. I don’t remember that position ever being vocalized— when it was around sex, absolutely. You have the criminalization on sexual transmission was defended by some. But I don’t ever remember any legislator, sort of, forcefully defending that [criminalizing vertical transmission]. I think it was an example...my own sort of inclination is that it was an example of very, very poor drafting (CHALN, Canada).

Reflecting on this process of reform, and the willingness of Sierra Leone stakeholders to engage in this process of consultation, a policy advisor/consultant for USAID/AWARE who was part of the initial consultation in 2004 and subsequent consultations in 2007 explained that “the main [lesson] is that the process [was] very

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181 Two informants presented this viewpoint but did not have specific knowledge of the legislative processes at work. In this case it is difficult to assess the rationale behind this provision.
fast. Usually they - the same process - takes six, seven or eight years” (Dakar, Senegal). The consultant continued:

Sierra Leone had to revise the law…they were going quickly in the process – [passing the law] in two years, or one year, and generally, a process, this kind of process, take longer than that […] [they will] try to revise the law in order to integrate the gender issue, in order to integrate or input [what] that they get from the different set of orders (Policy Advisor/Consultant USAID/AWARE, West Africa).

As such, it is valuable to reflect not only on the so-called “creep” or spread of HIV legislation but also the speed at which laws were passed. This USAID/AWARE consultant further reflected on the issue of speed:

*Interviewer:* Why did it happen so quickly? If the problem is that [the] law passed so quickly, why did it happen so quickly?
*Informant:* […] A main concern to get results before the end of the projects. One, the first result is the adoption for the law of the countries, the second result was to the adoption of the regular [state law] text and probably the project had pushed a lot on this (Policy Advisor/Consultant USAID/AWARE, West Africa).

Like Clayton, this informant noted that parliamentarians in Sierra Leone are very willing to engage in this revision process: “parliamentarian[s] are very committed…but the issue is now the process need[s] money to be implemented…and if you don’t have money from a project from another partner it becomes difficult to play out the process […] parliamentarians need also capacity building to sort the issues…they need to get technical assistance” (Policy Advisor/Consultant USAID/AWARE, West Africa).

Such supposed willingness to engage in reform process led to further work to amend Sierra Leone’s Act. In 2009 as part of a collaboration with UN partners, the National HIV/AIDS Secretariat (NAS) in Sierra Leone had a three-day National Stakeholders Consultative Workshop to address problems which were raised with the *Prevention and Control of the HIV/AIDS Act* (2007). At these meetings Dr. Brima
noted the challenge of HIV/AIDS to legislators and said the 2007 ratification of the Act was a result of guidance from the USAID/AWARE Model Law. Dr Brima also recognized that “A lot of gaps were identified by partners at both National and International levels…[conscious] of the fact that our LAW must have an international approval rating of non-[discrimination] in itself, partners in HIV/AIDS are here to lay the foundation for a series of activities that will lead to a people-friendly law” (Boltman 2009: 1).182

Echoing some of the language and rhetorical claims we saw in the anti-criminalization work of stakeholders, Lynda Kerley, Country Manager of Christian Aid Sierra Leone, said this recent 2009 workshop represented an important step to addressing the problems of criminalizing HIV transmission or exposure: “Rather than introducing laws criminalizing HIV exposure and transmission, legislators need to reform laws that stand in the way of HIV prevention and treatment” (Boltman 2009: 2). Finally, it is important to underscore that Sheku Koroma, Deputy Minister of Health and Sanitation, referenced the international work of human rights lawyers and activists with the Act facing legitimate criticisms for the criminalization of HIV especially with respects to women: “These I must say are fair criticisms that we took into good part and are now in the process of making it a just and better law” (Boltman 2009: 3).

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182 Boltman provided further information about this meeting, quoting Dr. Kargbo who said: “International organizations began to stress the broad social and economic impacts of HIV/AIDS, thus spurring multisectorial responses […] There are in existence very good laws as there are medicines, but given the specific nature of HIV, we need to formulate equally novel legislations that will contribute to the prevention of HIV.” Speaking of past legislative failures in relation to HIV/AIDS Kargho stated that “What we miss in the swing we get in the roundabout”” (Boltman 2009: 1).
According to many of my informants, however, the process of recognizing flaws in the 2007 Act and making changes has taken far too long. The UNAIDS 2010 Progress Report for Sierra Leone notes that with the enactment of the revised 2007 Prevention and Control of the HIV/AIDS Act “it is envisioned that there will be improved implementation of policies, laws and practices as well as an increase in the government’s response to support people both infected with and affected by HIV” (UNAIDS 2010: 24). In the closing of this UNAIDS 2010 report, however, the slow speed at which the revised HIV/AIDS Act has been passed was recognized alongside other important legal issues related to continued challenges of marginalized groups including MSMs, IDUs and sex workers: “the delay in enacting the [revised] Prevention and Control of HIV & AIDS Act still poses a challenge in reducing stigma and discrimination and protecting the human rights of the affected and infected…” (UNAIDS 2010: 37; see Wade et al 2005). Future analysis will be able to make sense of changes to Sierra Leone’s Act (2007) and the extent to which the revised Act reflects the work activities described by human rights lawyers and the linguistic precision they have modeled for stakeholders. Further, increased research is necessary to critically assess the extent to which revised laws lead to changes in the everyday world. As informants discussed throughout this research, the existence of (seemingly) progressive language in legislation (e.g. confidentiality and consent in HIV testing) does not necessarily lead to better practices on the ground.

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184 For example, during our interview in Cape Town Johanna Keller, Director of the Legal Network, noted that in her work with pregnant women in South Africa virtually none felt they had given
Conclusion

Many stakeholders involved in the passage of the USAID/AWARE Model Law in West Africa, including parliamentarians, apparently believed that they were responding to national and international calls to pass such omnibus legislation. As this chapter has elucidated, this belief was part of the myriad of discursive conflicts and difficulties in processes of consultancy and reform. As Patrick Eba stated:

_Informant_…clearly the bottom line is that parliamentarians were called to support the HIV response very strongly. Every time UNAIDS people and other people were talking about HIV to parliamentarians they say, ‘you have to do something, you have to help us with dissemination, you have to take leadership.’ Then they look at, ‘what can we do really?’ This is what parliamentarians do, is to adopt laws. ‘So we’re going to do that’ (Human Rights Advisor, UNAIDS, Switzerland).

While some informants articulated that there is simply “no excuse” to pass such obviously flawed legislation and that parliamentarians should have known better\(^{185}\), others instead focused on not the failure of individual legislators and policy drafters but the institutionally-produced failings of passing model laws so quickly and doing so without adequate capacity building in the region. As this chapter has illustrated, it is important to contextualize the disagreement and somewhat contentious exchanges that occurred at these reform-oriented consultations in 2007 and 2008 and the various textually-mediated activities described including the development of alternative model law language written by UNAIDS and the CHALN.

Nancy Fraser argues “overcoming injustice means dismantling institutionalized obstacles that prevent some people from participating on par with others, as full

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\(^{185}\) For example, Richard Elliott, CHALN Director, clearly articulated this point of professional frustration with the passage of such poorly crafted legislation.
partners in social interaction” (2009: 16). In this discussion we must understand the institutionalized obstacles of language and particular forms of legislative knowledge as highly significant barriers to the meaningful participation of publics in model law creation and reform processes. Just as critiques have been lodged regarding the limited (meaningful) involvement of civil society in the creation of the USAID/AWARE Model law, Timberlake also noted similar critiques where made about the lack of involvement at these 2007 and 2008 meetings. Timberlake’s comments below highlights a tension which a number of informants raised related to a lack of knowledge about HIV and the law expressed by many participants at the meetings including parliamentarians and members of civil society:

we [UNAIDS] were criticized at the 2007 consultation, […] that civil society was not meaningfully represented, which was one reason we had the 2008, you know to try and fix that…and so, they were there but what was really clear was that they didn’t…in that sub-region, West and Central Africa, there’s not a strong civil society movement on HIV and it’s particularly not strong on law and human rights issues. So, the group that was there were wonderful well-meaning people but the level of the discussion was one that showed that a lot of people in the room had very low understanding of everything, you know, ways HIV transmitted…it was very basic (Susan Timberlake, Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

Informants who have a background in legal issues and HIV—two who have been working in the field for more than 20 years—discussed the difficult tension of dialoguing with publics who do not have similar training and work experience. For example, informants highlighted the need to build capacity with stakeholders who have a lack of background in the language of law (e.g. what does “wilful transmission” or “significant risk” mean?), human rights (e.g. what might a human rights based approach to HIV look like?) and basic epidemiology (e.g. what are the transmission
risks/modes of transmission of HIV?). This is not a critique of these non-legal experts but instead a recognition of the challenge of working across varied so-called expert and lay knowledge backgrounds. This issue of barriers created by legal knowledge (dominance) and specialized language (e.g. ‘talking the legal talk’) has important implications for participatory processes of decision-making and policy reform (see Gibbons 2003). Further, it is important to consider how the development of specialized knowledge influences the ways in which legislative stakeholders understand and approach questions of health, illness and human rights.

I have already noted the literature and appeals made to the GIPA/MIPA principles. As an extension of this conversation, many informants explained the importance of (technical) capacity building for both professional stakeholders (e.g. parliamentarians) and members of civil society (e.g. people infected or affected by HIV) in order to meaningfully participate in these meetings and contribute the creation and/or reform of legislation. While numerous barriers to meaningful participation in legislative were noted by informants—e.g. being a gay man in a context where HIV is criminalized and not able to speak about your concerns; not having the time to

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186 Timberlake put it this way: “for civil society to be able to advocate for protective legislation and fend off punitive legislation with parliamentarians, they have to really have their act together. All of us do, I do too…and parliamentarians are people of power and they think they know everything so you’re already dealing with a terrible power imbalance and so it takes a lot of knowledge, experience, skill, strategic thinking to move a parliament…and that wasn’t evident…and it wasn’t just parliament, we had parliament, civil society…we had three…and then we tried to have lawyers who worked on HIV related issues also in each country” (Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

187 For example, Wilkinson (1996) discusses that talking about social structure and health will seem as “remote as astrology” to some medical professionals and researchers given their specialized training (2). I argue that professionalized and ‘codified’ medical and legal knowledge—for example, that which is read about in textbooks, listened to in lectures and/or learned while in the ‘field’—serves as a kind of structure that is buttressed by discursive practices which (re)affirm its authority in the social world. Doctors and lawyers, for example, are trained to privilege particular forms of knowledge in their everyday work. Through training they learn specialized, technical language. Just as research is required to understand how the privileging of particular forms of knowledge, such as biomedical knowledge and disease categories, may have health implications for patients, we must consider how legal understanding and legislative knowledge informs the processes and impacts of legal reform.
participate due to paid work and/or childcare commitments—the most salient issue for many informants was a lack of specialized knowledge and language in the field. Just as researchers have examined the difficulty of new medical students to adopt the language and culture of medical school, we must consider models for capacity building and consultation which are inclusive of the various specialized knowledge which participants bring to the table.\textsuperscript{188} The relative power of lawyers and specialized policy actors to coordinate this process must be accounted for.

Rather than simply celebrate the work of international human rights lawyers such as those working for UNAIDS and CHALN—kinds of \textit{lawyers without borders} akin the much celebrated \textit{Médecins Sans Frontière}—it is important to critically interrogate the \textit{who} and \textit{how} of challenging legislation which is constituted as problematic: \textit{who} should do this work and \textit{how} should they go about the work of problematizing legislation, working with stakeholders and drafting alternative language for model laws and state laws. Just as processes of transitional legislative reform are problematic, must we not constitute international challenges to region and country legislation as similarly problematic or is this simply a necessary human rights intervention?\textsuperscript{189} These questions of sovereignty and transnational legislative

\begin{footnotesize}
\begin{enumerate}
\item[(188)] For example, Haas and Shaffir (1991) discuss an innovative method of medical training at McMaster University, Canada, and argue that it poses some challenges in gaining mastery of the technical and specialized professional language because the rapid inundation of a new language and complex medical terminology. Haas and Shaffir consider the issue of class and socialization: “The interactional nature of professional socialization and professional activity magnifies the importance of social skills and language competency that characterizes the middle-class” (1991: 23). For example, one student jokingly noted that “the hardest thing for me to learn here is the wine and cheeses” (1991: 23). More critical research is required to understand how to construct better models of transnational legislative consultation.
\item[(189)] Viewed in another way, this chapter has explored many discursive clashes related to USAID/AWARE model law, including stakeholders asking “what the hell?” with different forms and sites of frustration: while some international human right’s lawyers were asking “what the hell” were African parliamentarians doing passing such “flawed”, “rushed” and “sloppy” legislation, many African
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\end{footnotesize}
intervention will not be resolved here. Our next chapter gives us an opportunity to further consider the issue of who does the work of HIV-related transnational legal reform by looking at the USAID/AWARE Model Law in contemporary comparative perspective. This chapter allows for the further interrogation of questions of sovereignty, participation, language and the (limited) rule and role of law in the everyday world.
Chapter 6: BEST LAID PLANS

Three HIV-related model laws in comparative perspective

But they learned from us! I was telling them...because we started the whole process here [working to reform USAID/AWARE Model Law], before they started the model law [SADC Model Law] and I shared a lot of our documents to inform them through my colleague in Eastern/Southern Africa office. So, I think the errors from this region informed the other region.

(Berthilde Gahongayire, UNAIDS West Africa, Dakar, Senegal)

So, model laws can be very useful. They can, if properly reflective, can be very useful [reflecting on potential of SADC Model Law].

(Edwin Cameron, Constitutional Court Justice, Johannesburg, South Africa)

Introduction

As Gibbons (2003) notes, the law has a specific linguistic character, or technological order, and is “an overwhelmingly linguistic institution. Laws are coded in language and the concepts that are used to construct the law are accessible only through language” (1; see Halliday 2009). By positioning model laws as a genre of transnational legal writing—what I have previously described as pre-operative texts—it is possible to think about not the “rules” of this genre per se, but rather the similarities of situation and form across model laws as “signs of common ground among communities of readers and writers: shared attitudes, practices and habits, positions in the world” (Giltrow et al. 2009: 6). I argue that this analytic focus also reveals important variations across HIV-related model laws including the processes by which the texts were shaped by the intended user of the model.

As reviewed in earlier chapters, the USAID/AWARE Model Law has been positioned by many activists and human rights lawyers as a highly problematic textual shortcut which has successfully coordinated the work of parliamentarians. For
example, Susan Timberlake explained that model laws can result in “copy and paste” legislation by users who seek to bypass the work of consultation and domestication. However, the potential for model laws to be useful in the process of reforming state laws and, in doing so, creating healthy legislative environments must be considered.

I argue that in order to gain a richer understanding of the processes related to the USAID/AWARE Model Law it is valuable to review two other HIV-related model laws: (1) The SADC Model Law (2008) *Model Law on HIV in Southern Africa* and (2) The CHALN Model Law (2009) *Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS*. Through the process of research and discovery it became apparent that these two other HIV-related model laws were informed, in part, by the USAID/AWARE Model Law, and must be accounted for to present a comprehensive narrative of the limits, possibilities, dangers and lessons learned from transnational HIV model law creation and contestation. Building on analysis provided in previous chapters, I map work processes across the creation and reform of model laws. I argue that co-learning occurred across these legislative processes and highlight the many evidentiary and inclusion challenges encountered in the work of creating these different pre-operative texts.

I argue that these two additional model laws did not have the comprehensive funding and “best practice” dissemination strategy as the USAID/AWARE Model Law and have not been nearly as successful in reforming state laws. While these model laws were created through a more participatory and community based process of consultation, both texts also demonstrate processes of compromise and conflict over the use of legislative language and the inclusion of specific provisions or model
articles. Further, while the SADC Model Law is intended to be used by parliamentarians in reforming state law in a similar fashion to the USAID/AWARE Model Law, the CHALN Model Law intends different social relations of use in that activists and community based organizations are the targeted users of the model text.

**Overview of two additional HIV-related model laws**

It is necessary to provide an introduction to two additional HIV-related model laws. I review the SADC Model Law (2008) *Model Law on HIV in Southern Africa* followed by a review of the CHALN Model Law (2009) *Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS*. Table 1 provides an overview of these two model laws in comparative perspective with the USAID/AWARE Model Law giving a simplified overview of variation across this textual genre. It is important to reiterate that many stakeholders I interviewed participated in multiple model law process in various work capacities: as primary writers/drafters, consultants, workshop participants, members of funding agencies and in work activities related to problematizing the inclusion of some provisions in the model laws and/or subsequent state laws (e.g. the criminalization of HIV non-disclosure). In some cases informants were engaged in critiquing processes related to USAID/AWARE Model Law while writing or advocating for the SADC Model Law and/or the CHALN Model Law.
Table 1: Model laws in comparative perspective

<table>
<thead>
<tr>
<th>Model Law</th>
<th>USAID/AWARE Model Law</th>
<th>SADC Model Law</th>
<th>CHALN Model Law</th>
</tr>
</thead>
<tbody>
<tr>
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<td>Leading Institutions</td>
<td>USAID; AWARE</td>
<td>SADC; Centre for Human Rights, University of Pretoria</td>
</tr>
<tr>
<td>Temporality</td>
<td>Year created</td>
<td>2004</td>
<td>2008</td>
</tr>
<tr>
<td>Money</td>
<td>Funding source</td>
<td>USAID</td>
<td>SADC PF</td>
</tr>
<tr>
<td>Geography</td>
<td>Region or countries targeted for use</td>
<td>West and Central Africa</td>
<td>SADC Countries (in sub-Saharan Africa)</td>
</tr>
<tr>
<td>Text Contents, Format and Style</td>
<td>Focus</td>
<td>37 articles related to: HIV/AIDS education and information, safe practices and procedures, the use of traditional medicine, testing and counselling, health services and assistance, confidentiality, discriminatory acts and the intentional</td>
<td>48 articles with 9 parts including sections on: prevention, HIV testing and counselling, protection of the rights of people living with or affected by HIV, treatment, care and support and research and clinical trials</td>
</tr>
<tr>
<td>Table</td>
<td>transmission of HIV</td>
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<tr>
<td>Omnibus Model Law</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Explicit references to evidence sources and case law in the text</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Available online</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Available on CD-ROM</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Multiple options of model articles for use</td>
<td>No</td>
<td>Limited</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Language**

| Language(s) published in | English; French | English | English |

**Media**

| Marketing and Promotion Plan | Yes | No | No |

**Uptake**

| Success in leading to country-specific laws | 13 of 18 targeted countries; has informed other country laws in sub- | No country-level adoption; endorsement by the SADC PF | Articles/subsections of the Model Law being used in |

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190 The focused nature of the this Model Law on Women’s rights means that while it can be viewed as an omnibus model law it maintains a more focused character than the USAID/AWARE Model Law and the CHALN Model Law.

191 Detailed references with >1000 footnotes and references in the 8 modules of the CHALN Model Law (2009).

192 All articles only have one option except for the final section on enforcement (Part IX) with two options for selection.

193 For many articles different options are provided for the users of the model law to select based on particular domestic circumstances. Elliott explained: “we ended up putting different options in place so that legislators and activists in different circumstances could think about which one would work better given their existing structure of their criminal law” (Director, CHALN, Canada).

194 It is worth noting that some of the modules of the Drug-use model law produced by the CHALN have been translated by the Open Society Institute Global Drug Policy Program into French, Chinese and Farsi (CHALN 2006; see [http://www.aidslaw.ca/EN/modellaw/english.htm](http://www.aidslaw.ca/EN/modellaw/english.htm)).

195 However, CHALN staff did discuss how to disseminate hard copies and CD-ROMs of the Model Laws at key conference venues and workshops.

196 See Chapter 3 for a detailed review.

197 Some apparent confusion over the way of using or activating the SADC Model Law should be noted. For example, at a Joint SADC Parliamentary Forum and SADC Tribunal (Gaborone, Botswana, 2009) Justice Effie Owour, a retired Judge of the Kenyan Court of Appeal, sought clarification on how the SADC Model Law would be used. She asked Justice Mkandawire—who had previously presented on how the Model Law would become “soft law” and “possibly justifiable [enforceable in court]”—“Could you, in plain language, tell us how we move from where we are with a Model Law to a Soft Law? How do we make what we already have in our hands more effective?” Justice Mkandawire responded that while “some aspects of the Model Law indeed sound like hard law [but] that judges would use their discretion and pick out only those aspects they deemed relevant” (New Dawn 2009: 7).

The SADC Model Law (2008) *Model Law on HIV in Southern Africa* is an omnibus model law that is divided into 9 parts including sections on: *prevention* (e.g. information, education and communication; prevention of mother to child transmission), *HIV testing and counselling* (e.g. regulation of HIV testing; post-test counselling), *protection of the rights of people living with or affected by HIV* (e.g. non-discrimination; specific protection chapters for women and girls, children and prisoners), *treatment, care and support* (e.g. outlining specific state obligations) and *research and clinical trials* (e.g. consent and ethical issues). Like the other model laws referenced, this full text can be downloaded online from multiple institutional sites.\(^{199}\)

One informant involved in the process of research and development of the SADC Model Law explained her work in the drafting process that began in 2005:

...if you have this standard document called a model law that deals with HIV related issues, because you are having a model law you want to put everything in there [...] We looked at the most important issues that we thought would go into this model law. We wanted to look at vulnerable groups, we wanted to

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\(^{196}\) Saharan Africa

\(^{198}\) Botswana, Malawi and Zambia

\(^{199}\) Rather than having the entire Model Law used to reform or create omnibus HIV laws, the CHALN Model Law is being used by NGOs and in-country stakeholders on various reform efforts in Botswana, Malawi and Zambia: “Richard Piershouse was working with [NGOs in Botswana] in the passage of their domestic violence act. We’re hoping to do some more work with them, because there’s an exception for marital rape in that act. I am now currently working with a group in Malawi on marital property and we submitted a proposal to work with a group in Zambia” (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

look particularly at the issue of testing because that was a big issue, there was a lot of discussion around the whole issue of criminalization, when this process with SADC PF started it was after the West African model law [USAID/AWARE Model Law] so there was already a lot of hype around that and it was definitely one of the key issues. And from there we did an extensive literature review—what is the international standard? And then we started drafting (Nyasha Chingore, Centre for Human Rights, University of Pretoria).

Chingore highlights the work of being comprehensive, responding to the issue of criminalizing HIV transmission or exposure which gained discursive dominance in the region, and wanting to be in keeping with international standards. The SADC Model Law process was an initiative of the SADC Parliamentary Forum (SADC PF) with The AIDS and the Human Rights Research Unit (Centre for Human Rights and Centre for the Study of AIDS, University of Pretoria) providing technical advice and assistance of drafting and revising the language of the model text. This work has been conducted in collaboration with other institutions and individuals throughout sub-Saharan Africa including Law Reform Commissions and organizations of PHAs.

Viljoen and Precious (2007) argue that “[m]odel legislation in a particular region, such as the SADC region, builds on existing best precedents, serves as guidance to legislators in the region and reinforces a commonality of approach” (12). Related to work explored earlier in Chapter 3, here we see the ideology of model law as “best practice” echoed. Making appeals to the “human rights standards” upon which model legislation must be based, a SADC position paper explains that human rights standards, such as those provided in international human rights conventions relevant to HIV and AIDS, which had been accepted or endorsed by SADC member states were considered in the process of legislative development of the SADC Model Law.200

200 Such texts include: The International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989), the Convention on the Elimination of All Forms of Discrimination
According to the stated objectives of the SADC Model Law (2008) the aims of this legislative text are to:

a. provide a legal framework for the review and reform of national legislation related to HIV in conformity with international human rights law standards;

b. promote the implementation of effective prevention, treatment, care and research strategies and programs on HIV and AIDS;

c. ensure that the human rights of those vulnerable to HIV and people living with or affected by HIV are respected, protected and realized in the response to AIDS; and

d. stimulate the adoption of specific measures at national level to address the needs of groups that are vulnerable or marginalized in the context of the AIDS epidemic.

The SADC region, with the highest number of HIV cases in the world, has arguably been the most active of the African regional communities in responding to the epidemic (Viljoen and Precious 2007). Viljoen and Precious note some key background information to provide context to the development of the SADC Model Law. Of relevance to our discussion of the ruling relations of model law texts,


Viljoen and Precious (2007) explain that: (1) In the SADC Treaty, member states commit themselves to uphold ‘human rights, democracy and the rule of law’. Initially silent on HIV and AIDS, after the 2001 amendment the SADC Treaty now includes a commitment to ‘combat HIV/AIDS and other deadly or communicable diseases’ as one of the objectives of the organisation; (2) The SADC Protocol on Health was adopted in 1999 and entered into force in August 2004. At the time of writing nine of the 14 SADC member states are parties to the Protocol. According to article 10 of the Protocol, state parties shall harmonise HIV and AIDS policies, standardise surveillance systems and exchange information. State parties shall ‘endeavour to provide high-risk and transborder populations with preventative and basic curative services for HIV/AIDS/STDs’; (3) The SADC Secretariat has established an HIV and AIDS Unit within its Department of Strategic Planning, Gender and Policy Harmonisation. The mandate of the HIV and AIDS Unit is to ‘lead, coordinate and manage SADC’s response to the epidemic through the operationalisation of the HIV and AIDS Strategic Framework (2003 - 2007) and the Maseru Declaration’; and (4) The SADC Parliamentary Forum (SADC PF) has also been active with regard to HIV and AIDS; in 2004, the SADC PF published a survey of legislative efforts to combat HIV and AIDS in the SADC region. Both the HIV and AIDS Unit of the SADC Secretariat and the SADC PF
under its founding Treaty SADC countries articulate the objective to “harmonize’ socio-economic policies in the region (Viljoen and Precious 2007: 12). If activated, these are powerful “boss texts” indeed. More work is required to better understand the contexts in which model laws have greater textual persuasion or higher standing in inter-textual legislative hierarchies. Drawing on this objective of “harmonization”, Viljoen explained during interviews how such a goal is aligned with the aim of (semi) standardizing legal responses to HIV through the development of SADC Model Law. Viljoen and Precious state: “[b]y pooling the resources, knowledge and capabilities of member nations in the SADC, the development of one comprehensive HIV and AIDS model legislation would be both possible and beneficial” (2007: 12).

While the final version of the SADC Model Law does not speak to issues of the criminalization of HIV transmission or exposure, earlier drafts of the Model text did address this issue:

[…at the beginning [early drafts] we had a number of options, as you may know. That we said, ‘ok, criminalization could be’…Either we say nothing, or, if it should be in place it should have very circumscribed content, it should be very clear if it is deliberate, wilful and only for infection […] so it would be very clear. So that was our thinking and it elicited a huge debate of whether it was a good thing at all (Frans Viljoen, University of Pretoria, Centre for Human Rights, South Africa).

In the thematic, relational sections later in this chapter I demonstrate the importance of considering the work processes involved in determining what is in and what is not in a model law. This issue of the criminalization of HIV transmission or exposure being excluded from the final SADC Model Law also may be seen, in part, as evidence of

have produced information leaflets dealing with various aspects of the epidemic (material quoted from Viljoen and Precious (2007:11-12) with slight style alterations; see Mushayavanhu 2007; Eba 2007).

202 For example, why are some countries in West and Central Africa more likely to take up a model law than others?
the successful mobilization of what I previously described as the anti-criminalization
discourse by key policy actors including those working at ARASA. Further, this
example speaks to the importance of meaningfully engaging key stakeholders and best
available evidence in the process of model law making.

The actual uptake of the SADC Model Law to inform state law reform—or, more specifically, the lack of country uptake—was an issue raised by a number of informants. In an interesting example of the kinds of institutional actors involved in
advocating for the activation of the SADC Model Law, Svend Robinson, a former Member of Parliament in the Canadian House of Commons and now the Senior Advisor, Parliamentary Relations and Special Initiatives at The Global Fund, explained
how a limited group of actors are pushing for the activation of the SADC Model Law at the country level. In discussing his everyday work activities of “parliamentary
relations”—a title that proved somewhat difficult to operationalize—a
Robinson noted:

203 To add some background to this discussion a note about new forms of engagement and the work of “parliamentary relations” is important: Interviewer: […] the whole notion of the work of “parliamentary relations” is a little bit difficult for me to get my head around. What is the…I guess I want to get a rich sense of what parliamentary relations actually means… Informant: Well, it’s new. For example, The Global Fund, until I came, they never really engaged in any systematic way with parliamentarians. They engaged with governments, the civil society, with the private sector, but parliamentarians was sort of…I did a report for the fund as a consultant before they hired me, and I called them the “missing link”. Everybody kind of forgets about them. The civil society activists, many of them don’t trust the parliamentarians, government doesn’t want anything to do with them because particularly in areas of accountability and oversight there’s an extra set of eyes there that are watching over what government is doing and if you are an opposition member that could be a problematic as well. But, I see…The Global Fund see’s really potential a number of very important areas in which parliamentarians can play a key role—one of them being, human rights. How can we mobilize and engage elected people to speak out and to act both to change laws, in the context for example, and to block potential changes which are destructive—criminalization of transmission, for example, homosexuality. I’ve engaged with a number of African parliamentarians around, for example, the Burundi law…I met with the head of the HIV AIDS committee there, and there’s been very active engagement with Senegal and a number of different countries. The head of the Global Fund met with the President of Malawi seeking the release of the two men who were imprisoned. So, I mean, when you look at the potential role of the members of parliamentarians, more oversight and accountability over how funds are being spent.
I spoke to the SADC parliamentary forum [...] So, I met with their group, talked a lot again about human rights issues, talked about the model law, how they could kind of move the model law forward...met with the [SADC PF] secretary general, Esau [Chiviya] [...] ...and some of the key leadership people in the SADC parliamentary forum, cause they’re very keen to move forward this, basically it’s a model that’s very much focused on prevention...and to work with civil society as parliamentarians to move prevention forward, and that’s an important part of the Model Law as well. So, there have been a number of meetings like that with African parliamentarians, the reality is that there is still this massive gap between this law that exists, this model law that exists, and the reality on the ground in the SADC countries, right....because for the most part, the Model Law is still a draft and it has not been implemented, I don’t think in any country (Senior Advisor, Parliamentary Relations and Special Initiatives, The Global Fund, Geneva, Switzerland).

For Robinson, meaningful engagement with parliamentarians is a “missing link” in addressing human rights globally. Robinson provides some insight into the kinds of meetings, conferences and closed-door tête-à-têtes that have been a part of his work, to discuss issues related to the SADC Model Law. This matter relates to the limited academic scholarship that has viewed the work practice of Global Fund actors through sociological analysis informed by institutional ethnography (Kapilashrami 2011). Before continuing to unpack the SADC Model Law I provide some introductory comments to the CHALN Model Law—a text with a similar textual character but designed with a somewhat different social relations of use.


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204 Kapilashrami’s (2011) work, presented at the 1st International HIV Social Science and Humanities Conference (Durban, 2011), is informed by institutional ethnography and examines the implications of the practices of global public-private partnerships in health, including text-mediated activities the Global Fund, for health systems and HIV management in India.
focused model law divided into two volumes: (1) Volume 1, *Sexual and Domestic Violence*—with articles and information on (a) rape and sexual assault and (b) domestic violence and (2) Volume 2, *Family and Property Issues* addressing (a) marriage, (b) domestic partnerships, (c) property in marriage, (d) divorce, (e) inheritance and (f) implementation provisions. This sub-Saharan focused project is described by the CHALN as one which draws together international human rights law and illustrative examples from various jurisdictions as the basis for a legal framework to respect, protect and promote women’s rights in the context of HIV/AIDS. It is intended as a tool to assist advocates and policy-makers as they approach the task of reforming or developing laws to meet the legal challenges posed by the HIV epidemic (CHALN 2011: 1).

The CHALN has a range of experience in the field of model law creation and reform activities. As noted in my discussion of research methods earlier, work by CHALN lawyers to realize the progressive potential of model laws in relation to drug use and HIV/AIDS at IAC 2006 first alerted me to the idea of model law and the importance of considering legal reform as a distal determinant of health. For example, the name of the drug use model law (*Legisulating for Health and Human Rights: Model Law on Drug Use and HIV/AIDS*) enforces this distal determinants theme and consists of 8 modules addressing drug related issues such as criminal law reform, sterile syringe programs and prisons (CHALN 2006).

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205 This information can be accessed at the CHALN, retrieved from [http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=972](http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=972). At this site one can also download complete copies of the CHALN Model Law.

206 Elliott explained that drug laws “were and still are impeding the effective responses to HIV...and there has been a certainly wide recognition that you need to change the law...drug law, for example, and the HIV epidemic is only throwing that into starker relief because the consequences of the bad drug laws were just becoming that much more extremist because there was yet another harm they were doing fueling HIV epidemic and so activists were pushing for legislative reform so we said, let’s give [them] a tool because a lot of the criticism about things like drug laws, which is where we ended up starting with this [model law], is that the existing laws are bad and have all of these
laws, consistent with the CHALN Model Law discussed in some depth within this chapter, positions much HIV/AIDS lawyering work as a kind of transnational legislative activism.\textsuperscript{207} In this drug-related model law, like the women’s rights model law, human rights are foregrounded as the rationale for why such a guidance text is required:

Many countries with injection-driven HIV/AIDS epidemics continue to emphasize criminal enforcement of drug laws over public health approaches, thereby missing or even hindering effective responses to HIV/AIDS. There is considerable evidence that numerous interventions to prevent HIV transmission and reduce other harms associated with injection drug use are feasible, effective as public health measures and cost-effective. Despite such evidence, millions of people around the world who use drugs do not have access to such services because of legal and social barriers. International human rights law establishes an obligation on states to respect, protect and fulfill the right to the highest attainable standard of health of all persons, including those who use drugs. Other human rights are equally relevant in the context of the HIV/AIDS epidemic. When human rights are not promoted and protected, it is harder to prevent HIV transmission, and the impact of the epidemic on individuals and communities is worse (CHALN 2006: 1).

\textsuperscript{207} The CHALN established a project advisory committee in 2005 and “developed a plan to produce model law that would assist states in more effectively addressing the HIV epidemic (and other harms) among people who use drugs, based on evidence of proven health protection and promotion measures, and in accordance with states’ human rights obligations” (CHALN 2006: 2). The HIV/drug-related model law resources published by the Legal Network (Legal Network Model Law) consists of eight separate modules addressing the following issues: (1) Criminal law issues; (2) Treatment for drug dependence; (3) Sterile syringe programs; (4) Supervised drug consumption facilities; (5) Prisons; (6) Outreach and information; (7) Stigma and discrimination, and (8) Heroin prescription programs (CHALN 2006). This Model Law is: “designed to be adaptable to the needs of any of a wide number of jurisdictions…It is hoped that this resource can be most useful for those countries where injection drug use is a significant factor driving the HIV epidemic, and particularly for developing countries and countries in transition where legislative drafting resources may be scarce” (CHALN 2006: 3). This is a model law with an even more expansive potential global terrain than USAID Model Law. Funding for the Legal Network Model Law project was provided by UNAIDS, the International Affairs Directorate of Health Canada, the John M. Lloyd Foundation, and the Open Society Institute (CHALN 2006).
As has been the mantra at many meetings I have attended, the global “war on drugs” has failed, is ideologically driven, violates human rights and spreads disease.

Informants described the genealogy of UNAIDS and CHALN actors being involved in the crafting of HIV-related model laws. One human rights lawyer put it this way:

It actually arose out of basically the same phenomenon or dynamic that both the Legal Network and UNAIDS were observing which was, that we were not surprisingly repeatedly getting approached often by civil society contacting us and saying, “we’re dealing with this issue that’s come up, parliamentarian so and so [has] introduced a particular bill that’s going to do this or that and you know either we think its a good idea and we’re supportive, and can you give us some more information that will help us support the case? […] Or if we don’t like it and can you help us with some information in order to counter this legislation? […] And so this was happening over and over again, because HIV was making its way onto the legislative agenda of more and more countries as the epidemic went on (Richard Elliott, Director, CHALN, Canada).

The result of these work requests by in-country actors (both parliamentarians and civil society) for legislative assistance was that discussion occurred between UNAIDS and the CHALN about whether they could address this phenomenon “…more efficiently by actually producing something sort of proactively” that could be useful for realizing better laws in place in various countries (Richard Elliott, Director, CHALN, Canada). This lawyering work aimed to address the needs that were being articulated “over and over again” and create a text through a participatory processes that could be used by policy actors and civil society to “…actually push for better laws in places where there was clearly a need to change existing laws” (Richard Elliott, Director, CHALN, Canada). Elliott explained that “there was a growing push for countries to just adopt one law dealing with the AIDS issue and all the different facets of it, rather than this
more piecemeal approach of dealing with different areas of law and what HIV meant for them”.

It is important to reiterate that while the CHALN Model Law is comprehensive, it is a much more focused and narrow model law in that it specifically deals with a subset of women’s rights issues in the area of HIV/AIDS as compared to the broader fields covered in both the USAID/AWARE Model Law and the SADC Model Law. In fact, only some CHALN staff explicitly refer to this test as a “model law”. Before the CHALN started drafting model laws on drug use and women’s rights they engaged in some discussion and reflection with UNAIDS about whether they should do something that would be a model HIV/AIDS law that would try to be comprehensive and address “everything” (e.g. it would have omnibus textual character), or whether it would be better to focus on specific sub-areas of law.

Elliott noted that UNAIDS and CHALN staff “had concerns about the whole omnibus AIDS law approach. […] …we did something somewhere in between, which I think was the right call in the end. […] So they’re almost like mini-omnibus AIDS laws, if you will”. The reference to the CHALN Model Law (2009) as a “mini-omnibus law” addresses that CHALN worked to focus on the specific issues related to women’s rights and developed within that rubric a fairly extensive set of provisions that touch on a range of issues linked to women’s vulnerability to HIV. Once CHALN and UNAIDS stakeholders decided that this “mini-omnibus” approach was the legislative strategy to take they worked to unpack the area of women’s rights and HIV to figure out what specific issues were going to be addressed. Stakeholders explained
that in doing such an exercise you have to give some thought to which issues are amenable to being dealt with in the form of (model) law. As Elliott summarizes:

there’s a whole bunch of human rights issues related to HIV, including those areas, that it’s hard to actually get at with law...and especially if you’re talking about law on the books, which of course is only part of law, the law of how it’s applied and interpreted on the streets for example and in the courts is a whole other piece of it. So, we were taking a few slices of law related to HIV, and identifying then to some specific populations the issues within that, and then within that the exercise was to come up with better law to be on the books...and knowing that was only a part of the thing. So, then which things does it make sense to put in here? ...and some of the issues that are dealt with in both the model law resources, are some of them are much more amenable to be dealt with by statute than other issues...because some human rights violations of human rights issues are really just cultural things that the law has a more diffused kind of role in influencing but aren’t the sort of things that just passing a law in a statute book is necessarily going to do anything about (Director, CHALN, Canada).

This issue of the (potential) impact of laws in the everyday world—will it be applied? Will it actually make a difference in the lives of everyday publics?—was a central question for many stakeholders. I return to these important, persistent questions in Chapter 7.

While the USAID/AWARE Model Law and the SADC Model Law both have “target counties” where the texts are aimed, the CHALN Model Law does not have such a specific list of countries per se for potential state legislative reform. Instead, the text is generally targeted towards sub-Saharan Africa. However, the original intention was to create a text with applicability beyond the Southern African region: “the original idea was broader geographical scope, so I remember someone saying, ‘oh maybe we can use it in South Asia.’ [...] if you look at the citations they are mostly sub-Saharan African, Anglophone countries—not even, we barely said any Francophone African countries, so...quite limited” (Sandra Ka Hon Chu, Senior Policy
Analyst, CHALN, Canada). Through the course of research and dialogue among CHALN staff and community partners the geographic scope became narrowed. The above comment also links to the important issues of linguistic tensions in legislative work, specifically French-English debates, as discussed earlier in relation to the USAID/AWARE Model Law. Linguistic differences create barriers to legislative standardization which must be accounted for.

Staff at the CHALN familiar with the CHALN Model Law describe the text as a “tool” or “resource” to be used for activists and NGOs interested in reforming or adding state laws. For example, Sandra Ka Hon Chu builds upon some of Elliott’s description of this textual tool: “the idea we had behind this [text] is the activist is going before parliament or arguing the case in court, and then he or she has access to a number of different decisions or laws or some kind of social science or public health research that they can cite” (Senior Policy Analyst, CHALN, Canada).

Cecile Kazatchkine explains the CHALN Model Law like this:

…the project of the Legal Network on this [CHALN Model Law] is not meant to be copied, like, the model law maybe in N’Djamena. I think the process is very different […] this is really a resource with like a lot of links and a lot of references… […] The idea is not that you have to translate, you know, exactly and it will obviously depend on every country but it gives something to start with, I guess. This is how I see it…and it’s actually a tool for local organizations to bring to…for advocacy and that if they believe the way to go for work in their country is to actually make change in the legislation, then it

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209 One CHALN lawyer explained how the process of research led to this more focused geographic focus: “I think that was learning that we had over the course of doing it because I know that, Richard [Elliot] for instance, our executive director…and maybe Richard Pienshouse who was our former Director of Research and Policy, had in mind something more ambitious […] [They] thought, okay this is a model law and we use it not only in Africa but maybe in South Asia where these is issues of property grabbing or inheritance and sexual and domestic violence…and in the course of our research, Alison [Symington] and I realized we can’t even, I mean, you can’t generalize this to the continent let alone [even more broadly]” (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

210 Sandra Ka Hon Chu expanded on this point: “Or even if you’re in the house or the floor of parliament and say, we need to do this then you can just cite it. You have some justification from why you want to change something. This was actually double in length before and we had to cut, just because we realized people wouldn’t read it. (Senior Policy Analyst, CHALN, Canada).
will have a kind of something to use for advocacy…and they can bring and then people can work on. But there is an idea of what things could look like and then people have to work on it, and decide what they want to have for their country and what would be more useful (Policy analyst, CHALN, Canada).

Kazatchkine’s comments echo the sentiment that model laws should not be “copied and pasted” as Susan Timberlake of UNAIDS has previously described. The articulation of Kazatchkine underscores different social relations of use for the CHALN Model Law when contracted with the USAID/AWARE Model Law: the former should be thought of as a kind of advocacy “tool” or “resource” to be used by stakeholders including grassroots NGOs in their legislative reform efforts. To conclude, non-state actors such as lawyers at the CHALN are not opposed to model law in *form or principle* (e.g. the idea that a model law can and should be drafted in some circumstances with assistance by outside agencies or governments, be circulated transnationally, and be activated by policy stakeholders to shape state-specific laws).

Instead, informants from CHALN involved in developing the CHALN Model Law (2009) have serious concerns when the *content* of any AIDS-related model law violates human rights (e.g. specific provisions in the USAID Model Law which violate or ignore the human rights of women) and lacks precision (e.g. contains problematically vague draft articles).

**Key tensions for consideration across model law processes**

In this section I now consider some of the complex ways in which these model law processes are relational and the extent to which key work tensions can be observed across these varied legislative activities. I review some of the ways in which learning happened across the model laws process with key stakeholders engaged in multiple
activities of creation and contestation. The complex issue of engagement with evidence—including the inclusion/exclusion of particular legislative provisions such as the criminalization of HIV transmission or exposure is discussed. This final section provides an important opportunity to trace some of the key work processes and boardroom/backroom discussions in model law development (including what is not in the model law) that one would be unaware of by simply reading the model texts.

“…they learned from us!”: how models (and missteps) inform one another

It is important to consider how model law and state law processes are relational within and outside specific model law processes. We have already seen how the success of passing some state laws in West Africa based on the USAID/AWARE Model Law contributed to building momentum across the region in what some human rights actors have dubbed the “creep of criminalization”. Adding to this relational perspective, informants who drafted and revised the SADC Model Law and CHALN Model Law were informed by the USAID/AWARE Model Law process. It is important to note key differences between these model law examples while highlighting the extent to which the USAID/AWARE Model Law process—including the negative reaction and problematization of (aspects of) the Model—informed stakeholders involved in CHALN Model Law and SADC Model Law development.

The USAID/AWARE Model Law influenced the writing and revision process of the SADC Model Law. One clear site of influence was the consultation of the USAID/AWARE Model law text during the drafting of the SADC Model Law:

_Interviewer:_ So, when you were actually working on writing the [SADC] model law in Southern Africa, did you look to the document [USAID/AWARE Model Law]?
Informant: Yeah we had the N’Djamena model law with us so we…every time, you know, the discussion was getting a bit tough we were pointing out to some of the parliamentarians, look at what happened in West Africa, we made sure [we did not] repeat some of the mistakes…(Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

Eba’s example illustrates moments in which the USAID/AWARE Model law entered into the SADC Model Law drafting process. A number of informants familiar with the SADC Model Law process highlighted how the “mistakes” made in West and Central Africa informed how they thought about the drafting and revision processes of the SADC Model Law. One informant from West Africa who was familiar with both the USAID/AWARE and SADC model law processes put it this way:

But they learned from us! I was telling them…because we started the whole process here [working to reform USAID/AWARE Model Law], before they started the model law [SADC Model Law] and I shared a lot of our documents to inform them through my colleague in Eastern/Southern Africa office. So, I think the errors from this region informed the other region (Berthilde Gahongayire, UNAIDS West Africa, Dakar, Senegal).

Returning to the work knowledge of Eba, the primary drafter of the SADC Model Law, this conception of learning from model law errors in other regions was supported:

…the idea of model law is that it has to start as a model. It has to be something that embodies everything that is good out there. This is what it has to be about, but unfortunately not always [have] so-called model laws [lived up] to the idea of a model. The N’Djamena model law is a clear example of that and I think the context[s] are different. The N’Djamena model law thing happened before the SADC one so the experiences and what happened wrong there were taken on board (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

The influence of the USAID/AWARE Model Law process upon the CHALN Model Law’s development is less clear. As this broader project has illustrated, many actors were involved in multiple model law processes. This is, in a sense, a relatively small community of legislative and community actors. A number of informants
explained that while drafting part of the SADC Model Law or CHALN Model Law they engaged with stakeholders working on the other model law process through community consultations held in Southern Africa. The Former Director of Research and Policy at the CHALN gave a clear example of how SADC Model Law writers were involved in CHALN Model Law activities:

We were in touch with them during the [writing of the SADC Model Law] and Frans [Viljolen] and Patrick [Eba] came along to some of our consultation meetings when they were doing their draft of the model law for SADC at the same time...and Franz and Patrick and I, and a couple of my colleagues, we would have these conversations [about] What don't you say? How do you avoid the...legislators who will rush to legislate on the [seemingly] obvious issues? How do you temper that? How do you generate country level thoughtfulness about that? ...and while I think we obviously didn't want to do the sort of project that SADC actually did develop, or Franz developed for SADC, I think the SADC model law, I think it’s a great effort...it is sort of very nuanced and thoughtful in it—in the way its been carried out. I think its a nice counterpoint to the West Africa model law (Former Director of Research and Policy, CHALN, Canada).

The quote above also illustrates how these legal actors engaged in discussions about how to create thoughtful, complementary model laws. It is worth clarifying that by “obvious” issues, the former Director of Research and Policy at the CHALN was referencing the need to avoid including problematic provisions such as the criminalization of HIV exposure and/or transmission.

It is important to conceptualize that these model law work processes intersect in complex ways and must not be conceptualized as discrete, parallel legislative processes. While models are often conceptually neat, model law processes are complex and messy. In summary, while the SADC Model Law process was informed (in part) by the “mistakes” of the USAID/AWARE Model Law, actors involved in both the CHALN Model Law and SADC Model Law appear to have benefited from dialoguing
with each other about their respective model law processes. The influence and relative power of a small group of transnational actors involved in multiple model law processes of creation and critique must be considered further so as to acknowledge the institutional privilege of this constellation of legislative players.

**Evidence, erasure and engagement**

Issues in evidence-based arguments regarding the inclusion/exclusion of particular legislative provisions in a model law text were already discussed in relation to the USAID/AWARE Model Law. Informants across these model legislative processes discussed the issues of what constitutes “evidence” and the ways in which best available evidence was engaged to make decisions about the inclusion/exclusion of particular legislative provisions. Many informants highlighted the difficulty of writing articles/provisions on contentious issues where there was a limited evidence base.

A good example of this evidentiary tension is the issue of the criminalization of HIV transmission/exposure. As we have already seen, this has been a heated issue in relation to the USAID/AWARE Model Law. At first glance, this is an issue that is not of direct relevance to the SADC Model Law as no specific article criminalizing HIV exposure/transmission exists in the text. While the SADC Model Law does not contain provisions that criminalize the exposure or transmission of HIV, I argue that not including provisions in a model law text is often a complex, textually mediated work process. Interviews with informants involved in the writing and revision process of the SADC Model Law shed light on how the (often) contentious issue of criminalization involved consulting civil society experts, best available research and written materials
to “make the case” that criminalization provisions should not be included in the SADC Model Law:

I think generally what we looked at when it came to a very critical issue, was to look at what exists in the literature around these issues. When we look at the criminalization of HIV transmission, for instance, if you look at the model law for South Africa it doesn’t mention any criminalization of HIV transmission because in fact this is not where such an issue should be addressed. But getting there was quite a process because a lot of parliamentarians…they needed to show clearly that this is not right, this shouldn’t happen and those of which should be punished. But what was done was to highlight some of the evidence and some of the fears and concern about criminalization especially vis-à-vis its impact towards public health responses, you know, like it may deter people from testing, it may send out wrong messages, it may even lead to human rights violation and all those when they were highlighted and articulated in a way that parliamentarians could connect with it and make sense of it then they thought well, maybe this is something that we have to very cautious of and maybe we shouldn’t include it in the model law. So this is how the discussion evolved…[informant provides examples of some articles he consulted during the writing of the SADC Model Law; includes some printed copies of papers that critique criminalization] (Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

The 2009 ARASA report notes that the final version of the SADC Model Law does not contain provisions on criminalization of HIV transmission largely as a result of strong lobbying on behalf of ARASA and other NGOs in the region. To have criminalization provisions excluded from the SADC Model Law required work and activation of the anti-criminalization discourse. Clayton explained the work of not having criminalization provisions in the SADC Model Law: “…we certainly had to work very hard with parliamentarians with the SADC parliamentary forum to get them to make sure that there was no criminalization provision in the law. It wasn’t something that everybody agreed on from the onset” (Director, ARASA, Namibia). Clayton, who also has experience with vocalizing a critique of criminalization
provisions in relation to the USAID/AWARE Model Law, reflected upon her work discussing “controversial aspects” which arose during the SADC Model Law process:

*Informant* … my function at this particular gathering of parliamentarians [2007, Dar es Salaam, Tanzania] which was convened by SADC parliamentary forum, was to present to the parliamentarians who were there about, as I said, the controversial aspects. So, why the law doesn’t provide partner notification, why there’s no criminalization provision, like, what are the pros and cons of criminalization, what are the pros and cons of partner notification...what were the other sort of key aspects. You know, to try and get people to understand why the provisions were as they had been drafted in the model law, as opposed to the sort of...the kind of things they would’ve liked to see...they liked criminalization of exposure and transmission, criminalization of mother to child transmission, criminalization of provisions for mandatory partner notification...mandatory disclosure.

*Interviewer:* Okay. So, just so I get a clear picture of this...

*Informant:* So, my job essentially was to persuade them, to provide information about why criminalization is not a good idea from a public health perspective in the context of HIV and from a human rights perspective. Why partner notification is not a good idea.... So, to act as a resource person in trying to persuade parliamentarians why it shouldn’t be that way (Director, ARASA, Namibia).

Clayton’s comments about the work of convincing legislative actors that the criminalization of HIV non-disclosure is problematic also speaks to the apparent evolution in thinking of some NGOs on the perceived “intuitive” (dis)advantages to criminalization. This issue was echoed by Frans Viljoen who explained that these contentious discussions entered into the SADC Model Law work processes with many parliamentarians “zoning in” on issues of criminalization:

Even within the women’s movement, even within the NGOs, even in Southern Africa, there was initially an idea that criminalization was a good idea, right? […] There was support for it at the national level. There was a debate going on and you had efforts to criminalize. […]. There was a strong sense, a sentiment that criminalization was intuitive, and I think it is very easy for parliamentarians, as illustrated in West Africa [USAID/AWARE Model Law] symbolically to be able to do something. And one of the easiest things to do – and it plays into a popular sentiment – is to criminalize. So you can get the ‘tick’ [informant ticks imaginary form with hand movement]—you’ve done something (University of Pretoria, Centre for Human Rights, South Africa).
Viljoen argued that while for many of the provisions in the SADC Model Law there was little engagement by parliamentarians, issues such as criminalization, sex work and homosexuality caused much debate. In fact, in describing the work process of revising drafts of the SADC Model Law, Viljoen concluded that “[s]ome of the debates were really taken over by criminalization issues” (University of Pretoria, Centre for Human Rights, South Africa).

For other “contentious issues” Vjoen explained the work process of “watering down language” in the SADC Model Law to make polarizing, morally-laded issues more palatable to some parliamentarians. Like others, Viljoen highlighted what could be understood as the everyday pragmatics of model law making. One clear example of this is the issue Viljoen explained of weakening language in the SADC Model Law regarding the criminalization of both sex work and homosexuality:

(4) The State shall consider the decriminalisation of commercial sex work and consensual sexual relationships between adult persons of the same sex as specific measures that may enhance HIV prevention (SADC Model Law 2008: 13, emphasis added).

In this example, those involved in the drafting and revision process of the SADC Model Law noted that this final language reflects the inclusion of “shall consider” (which earlier drafts did not include) so as to make the language “easier” or “less difficult” for parliamentarians opposed to such measures.

Another related issue is that while the SADC Model Law appears to say little about protecting the rights of “members of sexual minorities”211, drafters of the law explained—in another pragmatic move—that by defining “sexual minorities” and

211 The text defines this group as: “members of sexual minorities” include men who have sex with men, lesbians, homosexuals, transgendered and bisexuals persons, whether they define themselves as such or not” (SADC Model Law 2008: 9).
listing this as one of the “vulnerable or marginalised groups” in the interpretation/definition section of the law, references throughout the SADC Model Law are made to the much less contentious catch-all concept of “vulnerable or marginalised groups” which, “refers to members of groups such as children, women and girls, sex workers, injecting drug users, refugees, immigrants, sexual minorities, prisoners, internally displaced persons, indigenous and mobile populations” (SADC Model Law 2008: 9).

The extent to which a model law can both be “model”—providing ideal legislative language based on equity and human rights principles—and “pragmatic” (something that actually could be passed by state-actors across a region) demands further consideration. As discussed in relation to the notion of intervention pragmatics (through the unpacking of when to wake “sleeping dogs” and challenge problematic state laws) here we see an issue of strategy in the process of model law creation. It is important to reiterate that although the work process of drafting and revising the SADC Model Law took these factors into account it has still not been translated into state law. I argue that such empirical realities call into question concessions made in “watering down” aspects of the SADC Model Law which may not be consistent with a human rights agenda.

For example, it is important to consider the implications of tempering language. I argue that this “pragmatic” move of using catch-all, palatable phrases such as

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212 For example, we can see this in the section of the SADC Model Law addressing HIV and AIDS education and information: “(e) challenge stigma and discrimination and address misinformation about HIV, people living with HIV and members of vulnerable and marginalised groups; (f) promote the acceptance of people living with HIV and members of vulnerable and marginalised groups; and (g) devise appropriate messages and strategies targeting vulnerable and marginalised groups” (SADC Model Law 2008: 10). See Aguinaldo’s (2008) work on gay oppression and the ways in which “homophobia is killing us”. 

“vulnerable groups” risks the (quasi-) legislative erasure of the needs of some of the most stigmatized and vulnerable populations from the policy and legislative discourse. My conception of legislative erasure is informed by the work of Namaste (2000) who considers how lives of marginalized and stigmatized groups, including transsexual and transgendered people, are rendered invisible. I am not questioning the fact that addressing stigma-laden issues of homosexuality, and structures of heterosexism, remain a real challenge in and beyond the sub-Saharan African context. What I wish to draw analytic attention to is the extent to which such so-called “pragmatic” moves serve to support the discursive marginalization of sexual minorities despite evidence of the impact of HIV/AIDS on their lives. Further, I argue that in positioning the law as a distal determinant of health, legislation must take seriously other social and structural determinants of health such including, but not limited to, heterosexism and patriarchy.

At this juncture it is worth reiterating a central challenge across these model legislative processes concerning the who and how of involvement: who should have a seat at the table and how should they be meaningfully engaged? This can be cast as an issue of (lay) expertise, power, and evidence. Across the model laws reviewed, the issue of how people infected with or affected by HIV should be involved in the model law process arose. All of the model law processes discussed involved drafts of model texts being presented to groups of actors for review and feedback. However while some placed civil society and NGOs at the centre of the development of their model law (CHALN Model Law) for others, parliamentarians were the focus stakeholders and other kinds of knowledge and interests were more peripheral to the process (SADC Model Law). The process of eliciting feedback, and the extent to which civil
society was meaningfully engaged in drafting and revising the model laws, was contested. Eba provides a valuable recap of some of the problematic ways in which civil society was not meaningfully engaged in the process of creating the USAID/AWARE Model Law:

…what is clear is that citizens’ involvement in legislative processes in most of West and Central Africa is a token involvement. To a large extent legislating is the work of a few ‘enlightened’…a few who are close to the decision making process, that are not necessarily here to the citizenry on those important issues…and this is the background in which not just the N’Djamena model law has to be looked at but all single legislative process in those parts of the world has to be appreciated against that. So, I think fairly to look at this broader framework and broader contextual reality will not give it a necessary limit to appreciate what happened in the context of this N’Djamena model law. They use civil society as [a] rubber stamp. They are participants into the process, they will hear them, they will call them, but not necessarily take their views into account and that has led to a situation where civil society is very cautious about how they engage…look at the person living with HIV and as part of this discussion everybody else…parliamentarians, everybody says we have to criminalize HIV transmission…you have to criminalize exposing people to HIV and if you come as a small person with HIV generally with no important economic or social status in society, people living with HIV at least in many of those countries…those who have come out and spoken about HIV status are those who are of marginal societies…and these individuals are not listened to and as a result they are frightened and they cannot voice some of their genuine concerns. So I think this is the background against which one has to reflect and try to understand. I think we have to locate this discussion into a broader understanding of what legislative process is in those countries and how people really participate, if at all they do participate…(Patrick Eba, Human Rights Advisor, UNAIDS, Switzerland).

We must take seriously the extent to which lived experience is constituted as valuable evidence/meaningful contribution that informs legislative processes. How principles such as GIPA/MIPA play out in legislative consultations, and how feedback is recorded and integrated into revised legislation must accounted for. On this last point there is a lack of defined processes with respect to how model laws should be written to reflect the lived experiences of people in the everyday world. I argue that in
highly technical legislative reform processes such as the development of model laws, all stakeholders, including parliamentarians and PLHIV (again, not mutually exclusive categories) should be given the opportunity to have their technical capacity built should they wish to participate in these legislative processes. Such participation must not be simply to “rubber stamp” pre-written language or to legitimate legislative processes. Policy actors must reflect on how to mitigate various barriers for participation for some publics. Just as researchers must be committed to ethical practices of engaging informants, processes of participation must be (re)conceived as ethical spaces for sharing and co-constituting knowledge.

I argue that such legislative processes of consultation could be informed by the alternative sociological strategy of institutional ethnography which has directed this project (Grace 2011a). For example, PLHIV must be positioned as active subjects who are knowledgeable practitioners of their everyday work practices and can speak to the ways in which institutional and legal failings contributed to their HIV infection and barriers to seeking testing, treatment and support. This comment aligns with ongoing research in which I am working to unpack the heavy semantic load of illness experience narratives of newly diagnosed PLHIV to make explicit areas for institutional and policy reform (Grace, Kwag, Steinberg and Rekart 2011).

Making important connections between the three different model laws discussed in this chapter, Richard Elliott also explained that criminalizing transmission and/or exposure is often justified by an “appeal to protecting women, which you can sort of understand on some levels. But is a very convenient dodge I think for many parliamentarians” (Director, CHALN, Canada). By “convenient dodge” Elliott is
making an argument, in line with other human rights lawyers I interviewed, that such a
claims-making strategy avoids actually dealing with the systematic, structural
determinants that put women at risk for being infected with HIV or not getting care
and treatment if they are living with HIV:

…if they really wanted to change those things then they would often have to
challenge some very deeply ingrained cultural norms, religious institutions
sometimes, and so in order to make that even more comprehensible or feasible
for parliamentarians if you have a tool that actually pulls together in one place.
Here is something [CHALN Model Law] that you actually could do if you really
are interested in preventing women from getting infected by HIV. The
criminalization stuff is largely a sideshow with a bunch of potential downsides,
including for women...and this is what you really need to be focusing your
energy on so, it was in us doing the model law on women, violence against
women and property rights and so on was really partly an outgrowth of some of
the original thinking that had been done in relation to the N’Djamena model
law… (Director, CHALN, Canada)

Elliott’s work experience across engaging evidence to contest the USAID/AWARE
Model Law on one hand while utilizing (related) evidence in the crafting of the
CHALN Model Law gives him particular knowledge of this issue. For example, Elliott
makes explicit two forms of evidence that were used in the process of writing the
CHALN Model Law. First, lawyers would identify a particular issue that needed to be
dealt with in the national law (e.g. violence against women) and would then look for
examples elsewhere where the law had already dealt with this issue, for better or for
worse. Where they thought it was good law they would try to use that in formulating
provisions of the Model Law statutes and cite those examples as evidence of “best”,
“good” or at least “promising” practice. Where it was a bad or problematic law that
was in place, they either would not cite it, or if it was something that seemed to enjoy a
fair bit of “currency” or support then they would take some time to explain why that
particular approach was not as good as the one that was being proposed in the CHALN Model Law.

The other kind of evidence that was activated during the drafting of the CHALN Model Law is related to the idea that “human rights claims on their own are only going to get you so far, so [CHALN lawyers] also wanted to show that there are good reasons why this particular legal issue is related to HIV and in what way, and therefore, why you need to legislate about it and in what way…” (Richard Elliott, Director, CHALN, Canada). Elliott explained that there was evidence about, for example, how the law plays out to either contribute to or reduce people’s vulnerability to HIV, so CHALN lawyers wanted to make sure to incorporate that into the resource so that there was a rationale based in evidence for law makers to say:

well why are you saying we should adopt a provision that says ‘x’?, ‘well because here are some countries that have done that and this has been the experience and here’s what generally the scientific literature tells us about the factors that affect people’s vulnerability […] determinant of health is something that the law can act on and here’s why you should try and make the law active this way’ (Richard Elliott, Director, CHALN, Canada).

Building on the evidentiary tensions and work processes explained above, an interesting concluding example that came up in discussions of the CHALN Model Law was evidence on the inclusion of articles on regulating polygamy:

Well I think our challenge was that there wasn’t…in some areas of this in these two volumes, there wasn’t a lot of evidence—period. So, I think we just said here to sort of…we were looking at the UNAIDS international guidelines for the basic principles…like mandatory testing we know that there’s evidence that it impedes people from doing these things or those things…and that was the starting point, but there were a lot of areas where we just didn’t know what was a human rights position on polygamy, for instance. There’s a sort of harm reduction approach that was adopted where we regulate it, but we had these internal debates within the office—is it inherently a bad thing for women? But maybe not…I mean, Big Love was playing at the time, we’re like…you just don’t know…human rights position on that that I know of, that we could find,
like, a concrete, yes or no, it’s good or bad for women. So those were the challenges in…what else was there. I remember polygamy being a huge one and getting emails from human rights scholars. I got an email from a Georgetown feminist scholar who said, ‘I can’t believe you are putting this in a human rights document—what you call as a human rights document, you’re endorsing polygamy in some ways by providing an option to regulate it’…and then from others saying, ‘are you crazy these women are just going to continue the practice and not have any…there will be no oversight so they will be worse off’…and there’s a lot of debate about cultural relativism and all that, so I don’t…I think there are certain things where we sort of had some starting point and we were…mandatory testing bad, obviously sexual assault bad…but there were a lot of things that we just had to discuss and discuss and we had debates within our consultations and with other’s outside of that (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

This is one of many contentious issues that the CHALN Model Law has addressed by providing *multiple options* in the model text. The model text notes:

Polygamous marriage contravenes women’s right to equality with men and may increase women’s risk of HIV infection. The following provisions provide options to either prohibit polygamy outright, or to regulate polygamy (so that women in polygamous marriages are not denied legal protection within marriage and upon divorce) (CHALN 2009a; 1-16, V2).

To coordinate legislative reform along both cases noted above—countries that want to prohibit polygamy outright *or* to regulate polygamous marriages—two versions of Article 9 are drafted (Figure 16 and 17).
Article 9. Polygamous marriage

[Two options for Article 9 are provided below — 9A and 9B. One or the other should be selected, but not both.]

Option 1: Article 9A. Prohibition of polygamous marriages

(1) A person shall not contract a marriage of any form if he or she is already married under any legally recognized form of marriage.

(2) Any person who willingly causes a polygamous marriage by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Figure 16: Option 1—Prohibiting Polygamy (CHALN)
(CHALN 2009a; 9A, 1-16, V2, article spreads of two pages; see original text for cited evidence and commentary).

Option 2: Article 9B. Polygamous marriage only with agreement of both spouses

(1) For the purposes of this Act, a customary or religious marriage is polygamous where one or both spouses are married to a third party or third parties at the time of marriage.

(2) A customary or religious marriage is potentially polygamous where:

   (a) neither party is married to a third party at the time of marriage; and

   (b) both parties to the marriage freely and fully consent at the time of marriage to the subsequent marriage of either spouse or both spouses, which shall be demonstrated by the completion and submission of a prescribed consent form to the Registrar General prior to the marriage.

Figure 17: Option 2—Regulating Polygamy (CHALN)
(CHALN 2009a; 9B, 1-16, V2; see original text for cited evidence and commentary).
The pragmatics and potential conflicts of drafting multiple options in model law texts, alongside how such articles coordinate the work of legislative actors in the everyday world, requires further research.

Tensions with finding research to support the inclusion or omission of particular provisions in the CHALN Model Law was not limited to the issue of polygamy. As Sandra Ka Hon Chu stated: “there isn’t enough research to indicate, you know, what is the best practice and there’s so much debate even in something as seemingly straightforward as sexual and domestic violence” (Senior Policy Analyst, CHALN, Canada). Again, we see invocations of the idea of “best practice” coordinating the thinking of model law drafters. Other contentious provisions discussed during the drafting of CHALN Model Law include property grabbing\(^{213}\), and evidence related to dowry or “bride price”\(^{214}\). CHALN staff explained that their work necessitated looking not only to “scientific” research evidence but to the lived experiences of women as articulated through oral histories:

> I mean, a lot of the times [we are] depending on oral history from grassroots’ groups that are saying, ‘this is happening to me, this is happening to me …,’ there’s no research…so we just did the best we could. We didn’t…it’s like you said, there was no…for the most part in the volume two that we worked on, there was very little evidence (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

\(^{213}\) As one CHALN lawyer explained: “I think there hasn’t been enough research to indicate that something was a best practice. So, especially in the area of inheritance, which is like, my sense is that there is new research emerging in that area, we don’t know enough about it. How much it happens, who actually does property grabbing…” (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

\(^{214}\) Sandra Ka Hon Chu, expanded on this discussion of the engagement of evidence and questions of cultural relativism: “How we addressed it in this resource was options…like we did things like, I remember lobelia, which is the exchange of money in people describing…I remember a number of women saying, ‘we like it and there’s nothing wrong with it.’ …and we sort of took a harm reduction approach and they likened it to engagement rings and how is it any different? So, we said…I don’t think we have a provision to prohibit it, but we said, ‘if you require it to…if you require the return to lobelia, in order to have a divorce and obviously it prevents a woman from leaving a potentially abusive relationship so’…I think we had options. We just did…we trusted the perspective of the activists mostly from the region, I think 90% of them were from the region to tell us whether that made sense and that was consistent with their understanding of human rights in their context” (Senior Policy Analyst, CHALN, Canada).
This focus on oral histories as evidence has important parallels to the material reviewed in Chapter 3 on the challenges of building an evidentiary basis when the work and experiences of NGOs in the everyday world is socially constructed as anecdote. Further, these two examples—excluding criminalization provisions from the SADC Model Law and including polygamy provisions in the CHALN model law—provide concrete examples of how (limited) research evidence is engaged to make decisions on the inclusion or exclusion of articles in a model law. These examples also highlight the heated and sometime contentious nature of writing model legislation.

Related to this discussion of engaging with evidence to include or omit particular legal issues in a model law, the tension of what a law should “not do”, “not say” or “not include” was raised by stakeholders working on both the SADC Model Law and the CHALN Model Law. The Former Director of Research and Policy at the CHALN, reflecting on his work in challenging problematic provisions in the USAID/AWARE Model Law and work writing sections of the CHALN Model Law, put it this way: “that sort of omnibus legislation is...I feel what is most important about that is what’s left out of the law...what the law doesn’t do. It’s just as important as

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215 Another controversial issue that ended up being excluded from the CHALN Model Law was female genital mutilation (FGM) or genital cutting. Elliott explained this decision to omit: “…we started trying to draft something on FGM because I remember an earlier draft we did have a section on the other harmful traditional practices. So we kept sexual violence, and domestic violence for sure as elements that were going to stay. But we had a third one on harmful, traditional practices. But in the end, I think, in the interest of completing the resource, which was already well overdue and not feeling like we could resolve that one with a degree of certainty about how the law should be drafted and if the law should be dealt with...should be used as a tool to deal with this. We left it out, because we weren’t satisfied that we had got it right enough to feel confident that we should put something out—that’s what I remember of the conversation. Ya, I think we still have a draft somewhere...and I know that it was something that provoked a lot of discussion at the consultations for example by experts. Some of them were from countries where this wasn’t a specific problem, and others were where it was much more commonplace—many women and girls had experienced this. Those kinds of customary practices are often very difficult to deal with by a legal instrument and the response really needs to primarily lie elsewhere” (Director, CHALN, Canada).
what the law *does* do. So, we sort of took a step back from drafting that sort of omnibus HIV law…” (CHALN, Canada; *emphasis original*).

**Conclusion**

Three HIV-related model law processes were considered in this chapter illustrating the diversity of texts in this legal genre. Legislative actors involved in critiquing aspects of the USAID/AWARE Model Law have been engaged in the process of legislative drafting and revision of other HIV Model Laws including the SADC and CHALN texts. I have argued that the USAID/AWARE Model Law must be viewed as part of a work process in relation to other model laws, human rights texts and transnational legislative processes to map the relational character of work processes of textual creation and challenge. As such, the situations that give rise to the creation of a model law of particular form include the creation of other model laws. Key work related tensions and challenges can be observed within and between model law processes of creation and dissemination. Through an analysis which considers the relationship of these varied model texts, insights and lessons learned about model law processes may be deduced. For example, in this chapter we have seen how different kinds of evidence are used and how everyday pragmatics informed the drafting and revision of model laws.

We have also seen the ways in which debates and discourses regarding the criminalization of HIV non-disclosure have been activated in the work processes of different model laws. Work-related issues across these legislative activities have implications for the future engagement of model law processes in addressing issues related to, and beyond, the HIV epidemic. More work is required to understand the
everyday pragmatics of model law and state law making moving forward. I argue that such analysis must account for who is engaged in the process of legislative creation and reform what is understood to be politically palatable and possible in the region. To ignore such questions risks creating model laws that will have little uptake in the everyday world and/or that ignore important human rights concerns.
Chapter 7: CONCLUSION

Model (f)laws and moving forward

Everything we do we want to be...we want it to be research to action, like, not just sit on a shelf somewhere and it be interesting. So, we’ll have to re-evaluate I think. I don’t know, what do you think about model laws?
(Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada)

One of the things we’ve been trying to address is how do things get like they are? Like how is it that you end up with a piece of legislation that is so crap?
(Michaela Clayton, Director, ARASA, Namibia)

Introduction

West and Central Africa went from an HIV-related policy “desert” in 2004 to a somewhat “harmonized” region thanks to the activation of the USAID-funded omnibus Model Law by parliamentarians in the region. The ways in which the USAID/AWARE Model Law came to be supported and activated by influential policy stakeholders is seen as a rapid achievement by some and a “hurried” and “dangerous” mess by others.\textsuperscript{216} I argue that “harmonization” is quite the euphemism: many new laws that have been created are problematic in numerous ways including provisions that human rights lawyers, activists and NGO workers in Africa have argued to have dangerous implications for marginalized publics and do nothing to address the social and structural drivers of the epidemic. At best, some of these new laws will not be applied;

\textsuperscript{216} A number of informants noted the seemingly rapid speed with which the USAID/AWARE Model Law was written, promulgated and activated at the state level across West Africa. The use of the word “hurried” specifically references the temporal characterization of this process by the Former Director of Research and Policy, CHALN, Canada.
at worst, they may lead to the criminalization of marginalized publics, increased stigma, violence and barriers to accessing testing, treatment and support.

I have argued that challenging the USAID/AWARE Model Law has involved diverse work activities by a transnational group of actors. Through this research I have provided “big picture” analysis based on the work experiences of my informants while mapping more focused, unexamined text-mediated work processes of legislative challenge in the everyday world. In doing so, I have explicated the creation and activation of the USAID/AWARE Model Law, how this project links to the global shifts to criminalize HIV exposure and/or transmission, how actors mobilized to respond to “dangerous” provisions in the legislation and how this transnational textual process links to other HIV-related model laws which also seek to reform country laws across transnational regions in and beyond sub-Saharan Africa. I have argued that both the content and process of model laws must be questioned, including the work of human rights lawyers and other non-state actors, while acknowledging asymmetrical power relations across omnibus legislative activities.

In this concluding chapter I reiterate some of the important findings from this ethnographic research and return to the sensitising concept of ruling relations and the theme of sovereignty to further consider the relational character of the text-mediated work process of legislative creation and contestation explicated in this work. In doing so, I build on some of the summative and relational work across model law processes that was given at the end of Chapter 6. I provide concluding remarks and review both the limitations of this project and key fields for future inquiry.
**Sovereignty, texts and ruling relations**

This study has mapped relations that rule to make processes of power understandable in terms of everyday transnational work activities. Campbell and Gregor (2002) explain that the “capacity to rule depends upon carrying messages across sites, coordinating someone’s action *here* with someone else’s action *there*” (33; *emphasis original*; see Gibbons 2003). In keeping with an institutional ethnographic tradition, this work has explicated how such messages are carried out through various kinds of text and talk—from the “boss texts” of model laws to the talk of human rights lawyers who have worked to critique model laws through alternative language documents, lectures and workshops with policy actors in West and Central Africa. The concept of sovereignty has been a recurrent thread in this work. In reviewing this issue across model law processes I argued that transnational model laws call state sovereignty into question irrespective of the extent to which policy actors acknowledge such work challenges.

As already discussed, issues of sovereignty were highlighted by a number of informants who articulated resistance to outside critique of the USAID/AWARE Model Law. As a policy advisor explained when reflecting on the development and controversy over provisions in the Model Law, “…the countries are sovereign…because of that they were involved in this process and try to adapt and adopt a law…and the process is a dynamic one” (Policy Advisor/Consultant USAID/AWARE, West Africa). Interestingly, the issue of sovereignty that arose from informants was related to the critiques of the USAID/AWARE Model law coming from outside of West and Central Africa. To expand on this point, UNAIDS staff in
West Africa also note tensions of sovereignty in their work to reform aspects of the USAID/AWARE Model Law:

*Informant:* We [UNAIDS] had saw ourselves that there is a problem that needed to be addressed. But we needed also to follow a certain process - not going to countries saying ‘this law is bad, change it or leave it or whatever.’ It’s because they put in front of us the sovereignty [issue].

*Interviewer:* Sovereignty?

*Informant:* ‘But you don’t…tell us what to do. It’s our law we know. So, you don’t have to come and tell us.’ So, we say ‘look we are not coming to impose something on you but we want discussion.’ But in the meantime all around the world the activists were writing, accusing, we’re not moving enough. But we said ‘we follow the process to bring these people to themselves, ask for assistance’ (Berthilde Gahongayire, UNAIDS West Africa, Dakar, Senegal)

The possible concerns of sovereignty in the drafting and dissemination of the model law itself—a process which received funding from USAID and sought to reform laws across West and Central Africa—did not appear to pose problems of sovereignty for informants directly involved in the USAID/AWARE Model Law process. I argue that the concept of model law itself poses serious challenges to the sovereignty of states developing their own laws. While processes of “domestication” are encouraged with model laws, in actual practice model laws can serve as kind of copy and paste documents with little or no in-country consultation. For example, in Chapter 5 I demonstrated the controversy over Sierra Leone’s HIV specific law (*Prevention and Control of HIV Act 2007*) and how non-state actors activated the anti-criminalization discourse to try and amend this legislation in order to remove problematic elements of the law including issues of criminalizing vertical transmission (e.g. mother to fetus or child transmission).

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217 For example, no one at USAID/AWARE or UNAIDS that were interviewed stated the USAID funding of this model law process was problematic or raised questions of sovereignty. This being said, a number of academics and activists that I have discussed this issue with more casually (for example, at IAS 2008 and IAC 2010 note the “colonial” nature of this process. Similarly, staff at the CHALN have noted the potentially problematic nature of the USAID funding of the West African Model Law.
In Clayton’s words at the onset of this chapter, more work is required to better understand how countries can end up with a “piece of legislation that is so crap”. (Director, ARASA, Namibia). Just as fostering meaningful engagement requires policy actors to have adequate support and capacity building in model law making, if these legislative processes are to move forward better support in the domestication of model laws at the country level is required. Model laws can serve as highly regulatory or “boss texts” that require technical assistance for appropriate domestication so as to avoid some of the dangerous consequences of rapid translation and modification at the state level. Further, I argue that more work is required to consider the different models for model law making including how the texts should be designed. For example, I demonstrated that while some models have a single version of the text, the CHALN and SADC Model laws have varying degrees of textual flexibility built into the tools to maximize the possibilities for context specific adaptations (see Table 1).

Limited concerns of violating state sovereignty were raised by informants involved in the SADC Model Law process. The most salient example was discussed by Frans Viljoen in his articulation of the ways in which claims to both sovereignty and imperialism were a challenge with respect to the ways in which he and other policy actors from the Centre for Human Rights in South Africa engaged in processes of consultation regarding the SADC Model Law. Viljoen explained: “We had deliberately tried to play our role down in the sessions because we may be seen to be ‘imperialist South Africans, coming with our superior, prescriptive views’ which was a danger” (University of Pretoria, South Africa). Rather than an non-state actor being involved in legislative funding and reform, as we saw in the example of the USAID/AWARE
Model Law, the issue became the role of South African stakeholders in advancing the SADC Model Law agenda at the macro-regional level and not wanting to be (perceived as) imperialist or dictatorial in the process. I argue that it is important to recognize the social construction of sovereignty violations across these model law processes with actors maintaining different perspectives based upon their institutional vantage points.

Adding to this discussion, a number of informants involved in the CHALN Model Law discussed how “sovereignty concerns” entered into their work processes. For example, when asked about issues of sovereignty and the (potential) colonial nature of model laws, including the CHALN Model Law, Sandra Ka Hon Chu said “of course, yeah, [being perceived] as colonial was a concern [nods]”. This lawyer and policy analyst discussed how lawyers at the CHALN negotiate being perceived as colonial or violating the sovereignty of countries with their model law work:

Our approach has always been, you know, we need to be approached for technical assistance and an organization that’s actually situated where the advocacy takes place, it’s going to take the lead. That’s what happened in Malawi, that’s what happened in Botswana...if we work in Zambia it will be the same way. We will provide assistance because we have the access and we have I guess over 15 years of stored up knowledge now of HIV and human rights. But obviously we don’t know the local situation and obviously nor should we and so they would take the lead and we would provide support. But I think that was a huge concern of mine, my colleague... (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

I have argued that both the creation of model law and the intervention of non-state actors in model law and state law reform processes pose important sovereignty-related challenges regarding the who and how of legislative intervention. For example, we considered in Chapter 5 and 6 the ways in which claims to sovereignty create challenges for human rights lawyers who seek to intervene in legislative activities.
These challenges are exacerbated by disagreement on who should have a right to speak and how commitments to human rights principles (e.g. as articulated in texts such as signed declarations) should inform legislative language. As such, I argue that conceptions of sovereignty and autonomy cause real work challenges in the everyday world of global health policy and legislation. Both the *claim* to sovereignty and the *impulse* to intervene in the legislative processes of other countries must be critically evaluated. Just as international law has condemned the violation of human rights “once the sole domestic domain of sovereign states” we must consider how the involvement of extra state actors in both model law creation and contestation represents another challenge to state sovereignty (Currie et al. 2007: 29). As Currie et al. argue: “as in previous centuries, the key question for the international community in the twenty-first century is probably not “whether sovereignty?” but instead “how much sovereignty?” (2007: 29).218

**Financescapes and dead (legal) aid**

In this work I have also raised the question of how capital relations are connected to questions of power, sovereignty and coercion. An important theme related to model law work processes has been funding and budget allocation. As discussed, the USAID/AWARE Model Law process was well funded by USAID with budgeting for a comprehensive promotion strategy that was outlined at the 2004 meeting in Chad (USAID/AWARE 2005). USAID’s funding of the production and dissemination of USAID/AWARE Model Law is consistent with an ideology of

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218 Currie et al (2007) recall that “Westphalian sovereignty was (in part) an ideological cure for the bloody conflicts that raged in Europe when states sought to interfere with other states” (29). See Currie at al (2007) for a comprehensive review of the theory and practice of international law.
legislative “best practice” standardization. It is important to consider the extent to which legal and policy reforms are associated with trying to ensure that funding is properly managed (or managed in accord with donor priorities). This connects discussions of financescapes to broader questions concerning sovereignty, colonization, and Eurocentric and/or Western models/approaches to law and legal reform. I argue that conceptualizing funding—or the movements of monies or financescapes as previously discussed—must range from the broadest considerations of how ideologies of economic development and globalization may be supported by USAID’s efforts to reform African law to the most fine grained implications of funding limitations impacting the textual layout and dissemination of a model law.

Informants discussed a number of key work tensions across model law processes that highlight connections between work processes and the mobilities of monies. I first focus on the issue of money and who does the work of promoting model laws. It is worth reiterating that the SADC Model Law and CHALN Model Law did not have detailed work plans which outlined (or budgeted for) media and promulgation strategies linked to set “targets” (e.g. reforming state law in ‘country x’ with a set of work processes and division of labour mapped). While the USAID/AWARE Model Law is problematic in many ways, I argue that its “success” was is in mapping and budgeting for such work processes. This point links to an important theme across the model laws that is intimately connected to money and ideologies of the division of labour: whose responsibility or role is it to move the model laws forward into state laws?
I suggest that the lack of uptake of the SADC Model Law at the country level may partly be due to a lack of funding and energies put into advocating for reform at the country level. Key drafters of the SADC Model Law spoke to their desire to have the text taken up by in-country stakeholders in sub-Saharan Africa. However, while these key policy actors who supported the drafting and revision of the Model Law were pivotal in the finalization of the model text, these actors are now largely involved in other activities in their work at UNAIDS and The University of Pretoria, Centre for Human Rights. The issue of whose responsibility it is to take model laws forward—and once turned into state law to monitor the extent to which laws have an impact in the everyday world—is a highly important question which demands reflection. Making such responsibilities explicit and budgeting for these activities must be part of such work processes. While funding activities certainly do not ensure success, a failure to take into account the everyday work and resource requirements to advance a legislative agenda has serious implications for the possibility that such models laws will prove to be useful legislative tools. As Adila Hassim recently articulated at South Africa’s 5th annual AIDS Conference—if we are serious about addressing the determinants of HIV status we must budget for the “cost of rights” (Hassim 2011).

Building on some of the lessons learned, it is important to highlight that across the model law process the issue of money coupled with “political will” was a key theme. In short, work processes must be funded if texts are going to be taken up by parliamentarians or civil society, but reforming law takes the engagement of key actors or policy champions committed to the legislative agenda. After providing some detail about the importance of relationship building with parliamentary stakeholders in-
county, Robinson summarized the issue of trying to assess the extent to which there was political will to advance the SADC Model Law:

So, really it’s a question of trying to get some sense of the extent to which these people are prepared to move forward in their own parliaments to advance the model law; building capacity so that they have a clear sense of what does this law mean, what are the controversial areas in the law, and then how can they also work closely with civil society in their countries to try to advance the law (Senior Advisor, Parliamentary Relations and Special Initiatives, The Global Fund, Geneva, Switzerland).

Discussions with informants, including those who did the primary writing of the SADC Model Law, made evident that the division of labour related to “moving forward” with the Model Law rests on the shoulders of SADC and in-country parliamentarians. Expanding on Robinson and others, I argue that it is important to consider how other work processes, such as capacity building activities, will be funded. Despite the endorsement of the SADC Parliamentary Forum, a lack of legislative action in the region has meant that this text has not been used in the creation of new HIV-related laws. In short, at present it is unclear if the SADC Model Law will actually lead to any omnibus legal reform at the country level.

Returning to the themes raised at the outset of Chapter 6, it is worth considering the extent to which institutions such as USAID and The Global Fund are able to leverage their status and financial resources to advance a policy agenda:

*Interviewer:* Right. So, when I talk to some people and read some documents [points to a number of key texts sitting on table] it seems in some ways that the Global Fund is in a position to kind of leverage its ability to give capital to individual states and to pressure legal reform. Is that…can you talk to that? *Informant:* Well that’s a very sensitive and challenging question because the Global Fund…one of the key principles of the Global Fund is…it’s kind of a country-driven process, so we don’t dictate to countries how they spend the money.219 […] So, we are also able to use our funding directly to fund key

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219 Robinson expanded on this point: “On the other hand, we do insist that there has to be this broadly-based process of deciding within the country what the priorities are. So, in each country there has to be
human rights based interventions. In some cases this can be, for example regional funding—there’s a regional grant that was just awarded to the SADC region and part of that grant is going to be going to facilitate the work of the SADC parliamentary forum in promoting the model law. That’s directly being funded. Those are examples of how we can leverage our ability to…I mean, we’re the biggest in the world when it comes to money, right? By far the biggest funder TB, by far the biggest funder Malaria…and certainly in Africa the biggest funder of HIV AIDS as well (Senior Advisor, Parliamentary Relations and Special Initiatives, The Global Fund, Geneva, Switzerland).

I see an important tension regarding the financial autonomy of countries and the kind of pressure to reform laws that may be felt at the country level. Robinson notes that the Global Fund does not “directly pressure to reform laws, I mean, that’s not what we’re about. We’re a financing instrument, right,” but he recognizes that “…to the extent that our financing, I mean, in some cases some of the groups that we finance may very well be as part of their work promoting prevention approaches that involve changes in the law.” What is not acknowledged in the articulations by USAID and The Global Fund stakeholders is the notion of asymmetrical power relations and the kind of “quasi-coercive influence” that exist in such HIV legal reform and global governance initiatives (Lieberman 2009).

I end this section with some more micro examples related to finances, text layout and promulgation. While issues arose in this field across the model laws
reviewed, I focus on the CHALN Model Law. Sandra Ka Hon Chu discussed the funding work of collaborating with African-based organizations who were interested in receiving technical assistance from CHALN lawyers and making use of the CHALN Model Law: “We’re not a funder […] usually it’s a budget line that we provide technical assistance…and because most of the funders won’t fund an organization in Canada for work in Africa, it’s usually that money flows to the organization that’s doing the bulk of the work…” (Senior Policy Analyst, CHALN, Canada). Trying to secure funding to provide this technical assistance was seen as an important work process that took a lot of time and energy for both Canadian and African NGOs. While some staff time at the CHALN is dedicated to finance and development—e.g. strategically seeking out financing opportunities—awareness of other funding calls come about more “sporadically”:

I’m on a number of list serves and sometimes there’s a call for…I just finished one yesterday […] They said ‘we’re looking to fund small projects on property inheritance in the context of HIV/AIDS in women’. So I said, ‘oh perfect!’ because that’s something that we wanted to do. We want to continue expanding the work in Malawi because I think it’s good work, and so I just popped in another funding proposal. But it depends on who…they’re sporadic and sometimes…like, the entire summer I didn’t see any call outs. So, I got an email for instance from someone in Tanzania, like 8 months ago maybe…and he was interested in expanding the work on women’s rights but we just haven’t seen anything that fits and he hasn’t had the time to look into funding himself (Sandra Ka Hon Chu, Senior Policy Analyst, CHALN, Canada).

This quote highlights not only the work of proposal writing and securing funding, but the ways in which a lack of funding limits the possibility for collaborating with some African-based partners who would like technical assistance to work with the CHALN and possibly make use of the CHALN Model Law at the state level.
Conversations with CHALN staff involved in the writing and dissemination work of the CHALN Model Law also gave insight into how funding decisions were taken into account in the designing and dissemination of the Model text. Staff highlighted a number of interesting funding considerations, some of which are quite technical. For a highly specific example, discussion occurred among staff regarding the decision to single-space the footnotes in the text to reduce paper and the size/weight of the text. The size/weight of the model law text was a consideration to reduce printing and mailing costs in addition to the general readability of the document (e.g. not wanting the volumes to be too long). For example, mailing a hard copy of the two volumes of the CHALN Model Law to sub-Saharan Africa costs approximately $60 CDN. The pragmatic issues of how model laws are disseminated and read are examples of how capital and textual relations must be considered.

Finally, Thörn and Follér (2008) discuss the ‘donor politics’ of contemporary HIV/AIDS funding and argue:

In the context of aid, cooperation is per definition shaped by the unequal distribution of wealth globally; ‘international aid’ means that organizations in the Global North provide resources to organizations in the Global South, who are the agents that are supposed to carry out the actions that the partners have agreed on. While it is likely that these power relations, which are part and parcel of the formation of the networks, will have significant influence on the process of co-operation, it is not a case of ‘simple’ reproduction of power. Receivers of aid can be expected to resist conditions put by donors and to

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220 Expanding on the issue of how funding informs the design and dissemination of the CHALN Model Law, Sandra Ka Hon Chu discussed electronic verses hard copy versions of the model law: “I don’t know, some people like to read I think. Especially, we were concerned about having people access a website, because of the download speeds in the certain regions so we’re like, let’s do CD-ROMS... But sometimes CD-ROMs don’t even... I mean, people don’t like opening CD-ROMS. Personally don’t like them. So, we said we’d always mail out when people request them, but to mail this to Namibia for instance, we spent $60 to mail it (Senior Policy Analyst, CHALN, Canada). This informant expanded on this example to note how funding limited the possibility of distributing dozens of copies: “For instance, a colleague from Kenya was like, ‘I just want to have 20 for my library, can you mail them to me?’ I said, ‘well no... one volume is $60 and I don’t know what 20 would cost’. So, I gave her one hard copy and I sent some CD-ROMs” (Senior Policy Analyst, CHALN, Canada).
create space for independent interpretation and action. Further, power struggles can occur within in the local context of receiving aid (292; emphasis original).

The unequal distribution of aid monies to address the AIDS epidemic creates asymmetries in capital relations between funders and recipients. More work is required to unpack the ideological impetus for the economic and legal development of sub-Saharan Africa for the US government to help make explicit what ties or mandates come with foreign aid monies. Echoing some of the insights of Thörn and Follér (2008) in this ethnographic study we have seen both the success of the US government to influence legal reform in West and Central Africa, varied sites of resistance (including resistance to human rights lawyers from CHALN, ARASA and UNAIDS) and power struggles within more local and macro-regional levels.

I argue that as part of the debate for aid effectiveness and conceptions of what has been popularly referenced as “dead aid” (Moyo 2009) we must consider the role and (limited) rule of legal aid in the form of omnibus model law development. I argue that the examples taken up in this work demonstrate a need to consider in which cases and it what ways the law should be addressed as a distal determinant of health.

Important anthropological scholarship in West Africa has recently made links between HIV/AIDS and not only the erosion or suspension of national sovereignty but the emergence of new forms of “therapeutic sovereignty”:

The term “AIDS exceptionalism” is often used to stress that the response to the epidemic must, and does, differ from other public health interventions. As a humanitarian emergency, AIDS now defines exception in epidemiological terms. But it has become an issue that many, in fragmented and partial ways, suspend national sovereignty. The emergency has mobilised a loose assemblage of transnational institutions and local groups that, in the exceptional case of AIDS, exercise powers that effectively decide who lives and who dies. AIDS relief efforts are thus political in the strongest sense, projecting the power of life or death, and doing so through an apparatus that has linked truth telling to
vast epidemiological machinery for sorting out people. What are the political formations that may result from this mobile and partial therapeutic sovereignty? May not a kind of “republic of sovereignty” emerge from its shadow?” (Vinh-Kim 2010: 13).

In future analysis I hope to contribute the insights furthered by Vinh-Kim to make sense of how legislative reform is related to creating the social determinants which give rise to forms of therapeutic sovereignty.

The case studies of CHALN and SADC Model Law raise important questions about the lack of effectiveness (so far) of models to be ‘taken up’ by policy actors at the country level. Further, even when model laws are effective in transforming state laws some of the laws they inspire may do more harm than good and disproportionately impact marginalized publics. I argue that the law often has problematically imagined subject positions—imagined persons who are divorced from the everyday ways the law may serve as a blunt instrument with differential impacts in the lives of publics. Even when laws are arguably good as written, the extent to which they are applied in the everyday world, including required budget allocations to implement the legislation, must be considered.

**Limitations and key fields of future inquiry**

In this project I have worked to reveal tensions across both the USAID/AWARE Model Law and other HIV-related model laws. Rather than uncritically celebrate the work of international human rights lawyers who have worked to challenge the USAID/AWARE Model Law and, in some cases, promote the use of other HIV-model laws, we must consider the who and how of involvement in legislative creation and challenge. Such a focus raises numerous questions requiring
further analysis: *Under what circumstances should non-state actors be involved in the process of legislative funding, creation and/or contestation? Are people most affected by an issue given the opportunity to meaningfully participate in the process of legislative reform? What might the meaningful engagement of people actually look like in these highly technical legal reform work processes? Are (omnibus) model laws actually a good strategy or simply a less-than ideal pragmatic textual reality used in under-resourced contexts?* Critically examining the work of international organizations and NGOs who intervene in legislative activities on human rights grounds and, in doing so, support a globalization of the human rights discourse, is an important direction for future inquiry.

This project has a number of key limitations that must be reviewed. The material presented in this dissertation must be understood as a small piece of a much larger, developing story. The significant albeit limited work experiences of my informants have led me to come to know a subset of work processes. For example, I have placed emphasis on the work of textual challenge and reform; however, more research is needed to better understand how model laws are activated by parliamentarians and state actors to create country-specific law. While I have presented limited material on this issue, such work process knowledge of some backroom/boardroom activities was outside the experiences of many of my informants and requires further consideration. Further, space limitations have led me to refine the scope of analysis in this text.

Due to the expansive terrain of this transnational field of legal reform, I provided limited discussion of detailed work processes of legal initiatives and
processes at the country level. For example, in Chapter 5 I gave a focused discussion of HIV-related state law reform processes in Sierra Leone and argued that this linked to some to the GBV and anti-criminalization advocacy work examined in Chapter 4.

Future work must update how legal reform activities in Sierra Leone have further developed since revising country-specific laws as well as to trace key developments at the country level of legislative reform across West and Central Africa. Further, while I presented comparative material on additional HIV-related model laws produced by SADC and CHALN, more work is required to unpack their complex processes of development and trace what influence they may have in future country law reform. This work must be connected to ongoing model law reform efforts globally including work in East Africa and the activities and evidentiary work of the Global Commission on HIV/AIDS and the Law (UNDP/UNAIDS 2010a; UNDP/UNAIDS 2010b).

Future analysis is required to better connect this research to how institutional funding priorities are set by outside funders such as USAID in regimes of global health intervention. Such analysis will be concerned with both financescapes and ideoscapes in order to further understand how rapidly moving “silver-bullet” models can become “viral carriers of ideologically sanctioned rationalities and logics” (Peck 2011: 14). While I have made connections to ideologies of best practice and Western priorities of standardization, I argue that understanding the everyday operating processes of

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221 While the content-focus of policies and models in Peck’s analysis are different than the HIV model laws considered in this project, the critical thinking he furthers related to the mobilities of “best practice” logic are of direct relevance to ongoing work in the filed of model laws. For example, Peck argues that: “Fast-policy regimes are evolving a distinctive epistemology of policy knowledge, based on the accelerated, knowing, and highly selective circulation of preferred programming technologies, “models,” and policy frames—which effectively become viral carriers of ideologically sanctioned rationalities and logics. Embedded within these enabling frames, it is commonplace nowadays to encounter consciously fast-moving, “silver-bullet” policies, or models, which serve in effect as pseudo-concrete condensates of favoured solutions” (2011: 14)
international organizations and international donors related to global health and development is a dynamic field which requires ongoing inquiry. Such analysis must render intelligible the differential impacts of market-centered, legislative and economic reforms (Rittich 2002; 2004). For example, Rittich (2004) argues that:

the instrumental value of law to development is now well established: whether under the rubric of the rule of law, good governance, or best practices, the legal and institutional environment of economic growth has become a site of intense interest and activity in the world of development (204; emphasis added).

As such, analysis is needed to further reveal apparent hypocrisies in the work of USAID—e.g. publically denouncing the criminalization of HIV transmission while financially supporting the spread of laws that do just that. Further, research is required to connect the activities of the US government in the USAID/AWARE Model Law process to other international legislative work, economic development activities and constitutional reform initiatives. Continued critical interrogation of the work of human rights lawyers and technical advisors, such as those working at the CHALN and UNAIDS, is necessary.

The United States government remains the largest donor country for international AIDS assistance accounting for 54.2% of all disbursements in 2010 totalling US$6.9 billion (The Kaiser Family Foundation/UNAIDS 2011: 2). However, a decline in assistance of over 10-percent has been observed in the 2009-2010 period making this the first time that year-to-year donor funding has fallen in over a decade of tracking these financescapes (The Kaiser Family Foundation/UNAIDS 2011; UNAIDS 2011). The use of model laws—as well as other “best practice” standardizations—may appear increasingly attractive to those seeking legislative reform in the context of
increasing financial constraint. If this is the case, legislative actors must take seriously the dangers of engaging in model processes rapidly without adequate capacity building, consultation and technical assistance in the domestication process at the country-level. Further, I have argued that those examples of model laws with little (CHALN Model Law) or no uptake (SADC Model Law) at the country level to date raise questions about the effectiveness of devoting financial resources to the development of texts which have little or no impact on reforming laws.

While I have revealed that the CHALN model law processes were certainly more participatory and grounded in principles of human rights as articulated by UNAIDS, the broader question of when non-state actors should (a) lead the creation of transnational legislative initiatives including model laws and (b) interfere or challenge the work processes of other legislative actors, demands further consideration. On a related point to the notion of hypocrisy, it is worth reiterating—as a number of my informants pointed out—that the high rates of criminalization of HIV non-disclosure in Canada and the United States, puts Canadian human rights lawyers in a somewhat precarious position when advocating for other countries not to criminalize on this issue. As one informant intimately involved in the process of creating the USAID/AWARE Model Law, stated “as if you guys should talk […] you Canadians can be quite loud.”

Throughout this work I have drawn upon varied interdisciplinary fields of scholarship to consider some of the key theoretical traditions to which my analysis has both been informed and may contribute. Scholarship by institutional ethnographers,

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222 This informant was specifically referencing the advocacy work of CHALN lawyers in contesting aspects of the USAID/AWARE Model Law.
critical political sociologists, linguists, lawyers and anthropologists were drawn upon in this analysis of the work of global health actors. However, more theoretical analysis and bridging of literature is required. Future work will build upon this project to further examine how this empirical study may contribute to the fields of the sociology of law and critical legal studies, political sociology, forensic linguistics and growing policy scholarship informed by intersectionality and critical social determinants of health perspectives.

Finally, while my project has been informed by the everyday activities of people working in global health and legislative reform, more analysis is required to understand how the law impacts the lives of everyday publics on the ground: how do HIV-related laws rule and regulate people’s lives? The extent to which articles in new country-specific laws based on the USAID/AWARE Model Law will be applied in the everyday world is unclear: in what ways does changing a law, for the better or worse, actually impact how people become infected with HIV and/or are able to access testing, treatment and support? While I have discussed this evidentiary issue in light of the work experience of my informants, more research is needed to better understand the ways in which laws should be positioned as distal determinants of health that are intimately related to other more proximal determinants including, but not limited to, experiences of violence and access to HIV treatment. I hope to build upon current critical scholarship at the “medico-legal borderland”—a decidedly interdisciplinary form of investigation examining the complex intersections of health and criminal regimes of governance—which “suggests multiple possibilities for analysis including investigation of new forms of social control, the intersection of criminal law and health
care governance and the emergence of hybrid health/crime subjects” (Mykhalovskyi
2011: 674; see Timmermans and Gabe 2003). Such work will allow me to contribute
to critical linguistic scholarship reviewed in this project (Gibbons 2003; Halliday
2009; Tiersma 1999) and explore how health-related matters, including instances of
HIV exposure or transmission, are transformed through socially embedded processes
(Felstiner et al. 1980/81).223 To return to the simplified text-work-text sequence given
at the outset of this work, I argue that stakeholders can benefit from considering key
questions and tensions across the model law process. Figure 18 (below) illustrates how
one can see some of the key questions raised in this analysis, alongside central issues
for continued analysis, by returning to a modified version of Figure 1.

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223 For an important example related to work knowing and naming HIV related rights and legal needs,
Weait (2007) notes the importance of ‘AIDS law’ handbooks and guidance texts early in the epidemic to
provide “the means by which PLHA might know their rights in areas such as housing, employment,
insurance, and immigration and also a means by which legal practitioners might be alerted to the
particular needs of a new and growing client base” (2).
Current efforts by informants involved with the Global Commission on HIV/AIDS and the Law is bringing together expert and ‘lay’ knowledges of HIV and the law so as to collect best available evidence including the testimonies of publics negativity impacted by legislation (UNDP/UNAIDS 2010a; UNDP/UNAIDS 2010b). Some of this work may help to elucidate the kinds of questions Figure 18 reiterates such as the (differential) impacts of laws on persons in the everyday world. I argue that this UN Commission must also be reflective on the socio-political impactions and power asymmetries involved in challenging model laws and state laws internationally.

The coordinating function of model laws must be addressed. As demonstrated in this project, the outside critique of state laws is often, and understandably, met with linguistic conflict of various technological orders in and beyond the formal language of the law. Further, in future work I am interested in mapping how the Global Commission may challenge both sides of the “criminalization creep” I described.
earlier: countries in sub-Saharan Africa with HIV-specific laws and limited formal application of the law and industrialized countries with limited or no HIV-specific laws but high rates of the criminalization of HIV non-disclosure.

For obvious reasons, legal reform initiatives are not subject to randomized control trials and researchers must continue to critically access the complex pathways between everyday experiences of vulnerability and marginalization and structural determinants of health. However, more than theory is necessary. We must, as CHALN lawyers frequently articulate, turn research evidence into policy and everyday practice. In future work I hope to build upon the data collected by the Global Commission to explore how legislative environments organize the everyday lives of people including their vulnerability to becoming infected with HIV and, if infected, accessing testing, treatment and support. This focus of inquiry will be in keeping with a more traditional application of institutional ethnography grounded in the standpoint of those living with or vulnerable to HIV and AIDS. Further, more sociological attention is required to understand the transnational factors contributing to regional and global trends in HIV-related legislative reform. I argue that the alternative research paradigm of institutional ethnography has important conceptual tools to allow researchers to take seriously the coordinating and ruling relations of institutions of global health and development.

**Final thoughts**

Justice Cameron argues that: “…model laws can be very useful. They can, if properly reflective, can be very useful” (Constitutional Court Justice, Johannesburg, South Africa). In this project I have demonstrated disagreements in the human rights
field on the potential positive impacts of model laws while arguing that part of being properly reflective about the genre of model laws requires that they be positioned as part of text-mediated, relational work processes. With a focus on the USAID/AWARE Model Law, and the introduction to two additional HIV-related model laws (SADC Model Law and USAID/AWARE Model Law), I have mapped key work processes of model law creation and challenge. While I explored analytically discrete aspects of this complex transnational process—from shaping an alternative discourse to engaging in legislative reform activities—I highlighted the relational and complex socio-political implications across model law activities. Additionally, I argued for the need to see the big picture of global shifts towards omnibus legal standardization alongside ethnographically-focused explications of linguistic conflicts and coordinations involving text-mediated legislative processes in the everyday world. I hope that the lines of inquiry I have opened in this study may help policy actors involved in model law processes, and legislative processes more broadly, to do the kinds of reflection work Cameron is advocating for regarding both the process and product of model law.

In closing, while I have not provided normative guidance or a “how to” model for model law creation, I considered key tensions within and across model law processes to explicate some of the possibilities and pitfalls of engaging in such transnational legislative reform activities. I also called into question the everyday pragmatics of making, activating and challenging model laws. I argued that those involved in model law processes must consider the social and political implications of their actions: from “watering down” model language in order to make model texts palatable or actionable for parliamentarians, to letting “sleeping dogs lie” when
problematic laws have been passed but (appear) to have little enforcement in the everyday world. I argue that both the creation of model laws and the intervention of outside actors such as human rights lawyers in model law and state law reform processes pose important sovereignty-related challenges regarding the who and how of legislative intervention. This analysis is a first ethnographic step in charting the role and rule of model laws and state laws in epidemic response, more than 30 years into the HIV epidemic.


http://www.awarerh.org/index.php?id=23&no_cache=1&sword_list[]=REPRODUCTIVE&sword_list[]=HEALTH&sword_list[]=ACT


and French. Retrieved from


Press


Harling G., Msisha W. and Subramanian S.V. (2010). “No association between HIV


Mykhalovskiy, E. (2010). HIV non-disclosure and the criminal law: effects of Canada’s "significant risk" test on people living with HIV/AIDS and health and


## Appendices

### Appendix A: Key institutions

<table>
<thead>
<tr>
<th>Institution/Organization</th>
<th>Year Estab.</th>
<th>Geo. Focus</th>
<th>Key work activities/domains</th>
<th>Connection to HIV-related Model Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Action for West Africa Region-HIV/AIDS (AWARE)</strong></td>
<td>2003 (5 year project)</td>
<td>18 West African countries</td>
<td>Disseminate promising and “best practices” in STI/HIV/AIDS; Advocate for policy change; Build capacity of regional institutions and networks and Develop health sector reform</td>
<td>Ran (with the involvement of 4 key AWARE stakeholders) the 2004 regional workshop to adopt the Model Law (Chad); funded key objectives related to the USAID/AWARE Model law including writing, promulgation and implementation</td>
</tr>
<tr>
<td><strong>United States Agency for International Development (USAID)</strong></td>
<td>1961</td>
<td>Work in &gt;100 countries</td>
<td>Agriculture, democracy &amp; governance, economic growth, the environment, education, health, global partnerships, and humanitarian assistance</td>
<td>Funding and institutional support of AWARE-HIV/AIDS (34.7 million dollars over 5 years); Part of funding used to support creation of USAID/AWARE ML; West Africa Mission of USAID (USAID/WA) launched 5-year AWARE project in 2003</td>
</tr>
<tr>
<td><strong>West Africa Mission of USAID (USAID/WA)</strong></td>
<td>1986</td>
<td>Head office: Washington, DC</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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225 USAID emphasizes the global significance of their work in relation to HIV/AIDS: “Since the inception of its HIV/AIDS program in 1986, the U.S. Agency for International Development (USAID) has been on the forefront of the global AIDS crisis, investing more than $7 billion to fight the pandemic. Today, with more than 33 million people living with or affected by HIV/AIDS, USAID is a key partner in the U.S. President’s Emergency Plan for AIDS Relief (PEPFAR), the largest and most diverse HIV/AIDS prevention, care, and treatment initiative in the world” (USAID 2011: 1).


227 AWARE-HIV’s close out report states that “AWARE-HIV/AIDS contributed the USAID/WA mission’s strategic objective of “Increased Adoption of Selected High-Impact Health Policies and Approaches in West Africa” and focused on the following key components: dissemination and replication of best practices; advocacy for policy change; capacity building; cross-border interventions; support for the West Africa Ambassadors’ AIDS Fund (WAAF)” (AWARE 2008: vi).
<table>
<thead>
<tr>
<th><strong>Family Health International (FHI)</strong></th>
<th>1971</th>
<th>Past and current work in &gt;110 countries 229</th>
<th>Conducts research, manages programs and provides services related to health and development; uses “rigorous, science-based approach” to address “causes and consequences of disease and poverty”230</th>
<th>Partners with USAID to support the creation and promulgation of the USAID/AWARE ML</th>
<th>FHI was responsible for overall program management and M&amp;E of AWARE-HIV/AIDS; led the project’s best practices and institutional strengthening components</th>
</tr>
</thead>
</table>

| **The Futures Group International (TFGI)** | 1971 | Past and current work in >100 countries | International development firm; committed to an “evidence-based, integrated approach” to policy and advocacy, research and strategic information, health markets and private sector engagement, modeling and economic analysis, health informatics, strategic consulting, and program management | Responsible for the policy component of AWARE-HIV/AIDS | Implemented AWARE-HIV/AIDS program as part of a consortium of three key partners including FHI and PSI |

| **Forum of African and Arab Parliamentarians for Population and Development (FAAPPD)** | 1997 | Africa and the Arab States (dived into 7 sub-regions)231 | Interparliamentary organization that works to identify, promote and facilitate the formulation and implementation of population and development policies and programmes designed to bring about sustainable | Support in drafting and adopting USAID/AWARE Model working closely with AWARE-HIV; 3 key stakeholders involved in 2004 meeting (Chad) | Drafting and adoption of a model law on sexual and |

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229 Information of FHIs “global footprint” retrieved from [http://www.fhi.org/NR/rdonlyres/ei66rhz2tuyqvisqgk6lkumltwys5jse7d3infqgbq4b5ohmk42o7rdocfaqkgv672afad2m/FHIMap2010grn.pdf](http://www.fhi.org/NR/rdonlyres/ei66rhz2tuyqvisqgk6lkumltwys5jse7d3infqgbq4b5ohmk42o7rdocfaqkgv672afad2m/FHIMap2010grn.pdf)


231 7 sub-regions are identified by FAAPPD: (a) North Africa; (b) East Africa; (c) Central Africa; (d) West Africa (e) Southern Africa; (f) Indian Ocean and Atlantic Ocean Islands ; and (g) Arab States.

232 For more information see the FAAPPD constitution, retrieved from [http://www.faappd.org.jo/CONSTITUTE.htm](http://www.faappd.org.jo/CONSTITUTE.htm)
<table>
<thead>
<tr>
<th>Population Services International (PSI)</th>
<th>1970</th>
<th>Presence in 67 Countries Head office: Washington, DC Mission is to “measurably improve the health of the poor and vulnerable people in the developing world, principally through the social marketing of health products, services and communications”</th>
<th>Implemented AWARE-HIV/AIDS program as part of a consortium of three key partners including FHI and TFGI</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1988</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(B) Involved in processes of reform and challenge of the USAID/AWARE Model Law and/or work related to other HIV model laws</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint United Nations Programme on HIV/AIDS (UNAIDS)</td>
<td>1994</td>
<td>Reports on data for 182 countries Head office: Geneva, Switzerland UNAIDS has five goals: Leadership and advocacy for effective action on the epidemic; Strategic information and technical support to guide efforts against AIDS worldwide; Tracking, monitoring and evaluation of the epidemic and of responses to it; Civil society engagement and the development of</td>
<td>Limited involvement in USAID/AWARE ML creation and promulgation</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td></td>
<td>Work with key stakeholders (including CHALN) starting in 2007 to reform aspects of the ML and subsequent state laws (supporting alternative language being written and working with key stakeholders at</td>
</tr>
</tbody>
</table>

234 PSI, like other organizations, works to lay claim to the success it has achieved saying it has its “programs directly prevented 177,000 HIV infections, four million unintended pregnancies, more than 300,000 deaths from malaria and diarrhoea and almost 40 million malaria episodes”. More information retrieved from http://www.psi.org/about-psi/psi-at-a-glance.
235 Some debate exists regarding the extent to which UNAIDS was aware of the process of creating and disseminating the USAID/AWARE ML prior to 2007. The end of this chapter reviews this issue in greater depth. As such, UNAIDS could be conceptually slotted into both section A and B of this table.
| **The Canadian HIV/AIDS Legal Network (CHALN)**<br>[http://www.aidslaw.ca/](http://www.aidslaw.ca/) | 1992 | Involved in Canada and internationally through consultation and policy analysis | NGO with special consultative status with ECOSOC<br>Mission: “promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization”<sup>238</sup> | Work with key stakeholders (including UNAIDS) starting in 2007 to reform aspects of the ML and subsequent state laws<br>Writing alternative ML language and critical policy analysis related to USAID/AWARE ML<br>Development of transnational CHALN ML focusing on women’s rights and HIV |
| **AIDS and Rights Alliance for Southern Africa (ARASA)**<br>[http://www.arasa.info/](http://www.arasa.info/) | 2002 | Southern Africa<sup>239</sup> | A regional partnership of NGOs working to promote a “human rights based response” to HIV/AIDS and TB in the Southern African region | Key ARASA stakeholders involved as technical legal experts to discuss and reform aspects of USAID/AWARE ML and state laws in West Africa<br>Advocacy work to critique USAID/AWARE ML and issues of criminalization and HIV (partners in this work include ALN)<br>Part of consultations for the SADC ML |
| **AIDS Legal Network (ALN)**<br>[http://www.aln.org.za/](http://www.aln.org.za/) | 1994 | South Africa (with some work on regional and global HIV issues) | A non-governmental human rights organization focusing on capacity building, education and training, research, networking, campaign, lobbying and advocacy that responds | Advocacy work to critique USAID/AWARE ML and issues of criminalization and HIV (partners in this work include ARASA)<br>Part of consultations for the SADC ML |

<sup>238</sup> More information is available at [http://www.aidslaw.ca/EN/about_us/what_we_do/mission_vision_values.htm](http://www.aidslaw.ca/EN/about_us/what_we_do/mission_vision_values.htm).

| Centre for Human Rights (CHR), University of Pretoria | 1986 | South Africa | Based at the Faculty of Law, University of Pretoria, and described as both an academic department and an NGO. Houses The AIDS and Human Rights Research Unit (AHRRU) which is a collaboration between the Centre for the Study of AIDS (CSA) and the Centre for Human Rights at the University of Pretoria | Where key human rights lawyers involved in the SADC Model Law drafting and revision process, and other SADC initiatives are based. |
| The Southern African Development Community Parliamentary Forum (SADC PF) | 1980 (SADC formed) | 15 Southern Africa Member States | SADC Started as Frontline States—a collective with the political liberation of Southern Africa as its objective; mandate shifted to include “economic integration” after independence was 

Supported the writing and dissemination of the SADC Model Law

SADC-PF HIV and AIDS Programme states Increased Legal Reform as Objective 2: “To accelerate the harmonization of legal |

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242 These member states include: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. SADC cites that this region has 257.7 million inhabitants and a GDP of $471.1 billion US. Retrieved from [http://www.sadc.int/](http://www.sadc.int/).

243 The stated mission of SADC is to: “promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy” with more information retrieved from [http://www.sadc.int/](http://www.sadc.int/).

244 These focus areas are: Policy development and harmonization of HIV and AIDS in the SADC region; Capacity building and HIV and AIDS mainstreaming; SADC Secretariat HIV and AIDS Workplace Programme; Scaling up cross-border initiatives; Facilitation of technical response, resource networks, collaboration and coordination; and, Monitoring and evaluation of global and regional commitments. The Swedish International Development Agency (SIDA) has been large funder of the SADC HIV and AIDS programme.
<table>
<thead>
<tr>
<th>achieved for Southern African</th>
<th>frameworks at national and regional level of HIV and AIDS declarations and related government policies/legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Key parliamentarians and civil society organizations created a new partnership in the SADC Parliamentary Forum SADC PF; The SADC PF HIV and AIDS programme has 6 strategic focus areas</td>
<td>SADC-PF HIV and AIDS Programme has partnered with many international (UNAIDS; USAID – Namibia office and Southern Africa regional office) and regional (ARASA) organizations</td>
</tr>
</tbody>
</table>

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246 The key subparts of this objective must be underscored to show connections to the processes and product of the USAID/AWARE Model Law: 2.1 Conduct consultative meetings in collaboration with the Centre for the Study of AIDS, University of Pretoria and PACT Zambia to develop a template for model legislation; 2.2 Conduct a sensitization workshop for MPs on purpose and importance of model legislation; 2.3 Lobby for model legislation at regional forum and national parliaments; 2.4 Develop model legislation on HIV/AIDS related issues and lobby for the adoption by all parliaments; 2.5 Generate priorities for policy and legislation review; 2.6 Promote harmonization of legal frameworks at national and regional level; 2.7 Support MPs to debate issues within model legislation and to table Bills. Retrieved from [http://www.sadcpf.org/hivaids/page.php?pn=Increased%20Legal%20Reform](http://www.sadcpf.org/hivaids/page.php?pn=Increased%20Legal%20Reform).
Appendix B: Definition of terms (USAID/AWARE Model Law)

Definition of Terms

Article I

In accordance with this law, the terms and expressions used in the first article of this convention shall be understood as follows, unless otherwise defined by the context:

- **Acquired Immune Deficiency Syndrome (AIDS):** a condition characterized by a combination of signs and symptoms caused by HIV, which attacks and weakens the body’s immune system, exposing the affected individual to other potentially fatal infections.
- **Anonymous Screening Test:** a sensitive procedure whereby the individual tested does not reveal his/her true identity. An identification number or symbol is used to replace the person’s name, thus allowing the laboratory conducting the test and the person undergoing the test to match the results of the analysis with the identification number or symbol.
- **Compulsory Screening Test:** HIV screening test imposed on a person or without his/her consent or with his/her vitiated consent obtained through the use of force, intimidation or any form of extortion.
- **Contact Tracing:** a method used to trace and care for the sexual partner of a person who has been diagnosed as suffering from a sexually transmitted disease.
- **Human Immunodeficiency Virus (HIV):** The virus that causes AIDS.
- **HIV/AIDS monitoring:** documentation and analysis of the number of HIV/AIDS infections.
- **HIV/AIDS Prevention and Control:** measures aimed at preventing non-infected persons from contracting the disease and minimize the impact of the disease on PLWHA.
- **HIV Positive:** result of a screening test revealing the presence of HIV or HIV antibodies in the person tested.
- **HIV Negative:** the absence of HIV or HIV antibodies in persons tested.
- **HIV Screening Test:** a laboratory test conducted on an individual to determine the presence or the absence HIV infection.
- **HIV Transmission:** infection of a person by another who is already infected. Infection usually occurs through sexual intercourse, blood transfusion or the sharing of intravenous needle, skin-piercing instruments or through mother-to-child transmission.
- **Willful Transmission:** transmission of HIV through any means by a person with full knowledge of his/her HIV/AIDS status to another person.
- **HIV Risk Behaviour:** frequent participation of a person in activities that increase the risk of transmission or acquisition of HIV.
- **Free and Informed Consent:** a voluntary agreement, of a person who accepts to undergo a procedure based on complete information, whether this agreement is written, verbal or implied.
- **Medical Confidentiality:** a relationship of trust existing or which should exist between a patient in general and PLWHA in particular and his/her doctor or any health
agent, paramedical staff, health worker, laboratories, pharmacies or people of similar status, as well as any person whose professional or official prerogatives allows him/her to have access to such information.

- **Persons Living with HIV**: a person, whose screening test, directly or indirectly, reveals that he/she is infected by HIV.

- **Pre-test Counselling**: information given to a person on the biomedical, social and behavioural aspects of HIV/AIDS and on the results of the test as well as the counselling needed before he/she undergoes the screening test.

- **Post-test Counselling**: information given to a person who has undergone an HIV screening test as well as counselling when he/she is given the results of the test.

- **Prophylaxis**: any agent or instrument, which serves to prevent the disease.

- **Voluntary HIV test**: refers to an individual who, after a pre-test counselling, willingly undergoes a screening test.

- **PLWHA**: persons living with HIV/AIDS.

- **Public Media Broadcast**: Radio broadcasting, TV, cinema, the press, posters, exhibits, hand bills, flyers, other written documents or pictures of any kind; speeches, songs and generally any information aimed at reaching the public.

(USAID/AWARE Model Law 2004: 11-12)
Appendix C: Select model articles (USAID/AWARE Model Law)

Chapter 1
EDUCATION AND INFORMATION

Article 2

Education and Information on HIV/AIDS in Schools

Based on official data provided by the Ministries of Health, Education, Youth and Sports and Culture, shall integrate programs on the causes, modes of transmission and ways to prevent HIV/AIDS and sexually transmitted infections, in the curriculum of the basic, secondary and tertiary levels of public and private schools and in the traditional school system.

If for any reason, the integration of these programs into the curricula is considered inappropriate, the aforementioned ministries shall develop special teaching modules on HIV/AIDS prevention and control.

The content of the teaching modules, its formulation, the methodology used and its adoption shall be adapted to each level of instruction, after consultation with Parent-Teacher Associations, associations of private schools and community groups, traditional and religious leaders, PLWHA, and related groups.

It is strictly forbidden to teach courses such as the one provided for in this article to minors without prior consultation with parents whose approval is required both for the content and the materials used for such courses.

Prior to authorization to teach lessons on HIV/AIDS, teachers, instructors and any other person involved in programs and teaching modules provided for in the first and second paragraphs of this article shall be trained on HIV/AIDS prevention and control, under the supervision of the Ministry of Health.

(USAID/AWARE Model Law 2004: 13)

[...]

Chapter VI
CONFIDENTIALITY

Article 26

Revelation to Spouses and Sexual Partners

Any person who has been tested positive for HIV is bound to reveal his/her HIV status
to his/her spouse or regular sexual partner as soon as possible provided that the period does not exceed six (6) full weeks, starting from the date he/she was notified of his/her HIV status.

Care service providers shall provide all the necessary psychological support to facilitate the disclosure of the HIV test result to his/her spouse or sexual partners. The hospital institution must ensure that this announcement is made and done in such a way as to take into account possible communication and comprehension problems of the patient and his/her spouse or sexual partners.

If the person whose HIV status has just been determined does not proceed to voluntary revelation as provided for in the preceding paragraph within the prescribed period, the doctor or any other qualified paramedical official of the hospital or health institution concerned after having informed the person whose HIV status is known, can proceed to disclose the information to the spouse or sexual partners, without infringing on the provisions relating to medical confidentiality provided for by existing laws.

(USAID/AWARE Model Law 2004: 21-22)

[...]

Chapter VII
DISCRIMINATORY ACTS

Article 29

Discrimination at Workplaces

Discrimination under any form against a person whose HIV status is real or suspected, with respect to hiring, promotion, dismissal and retirement is strictly forbidden.

Consequently any dismissal of an employee based on a real or suspected HIV status is illegal.

(USAID/AWARE Model Law 2004: 23)

[...]

Article 35

Sanction against Discriminatory Acts

Any discriminatory act anticipated in Chapter VII of the present law shall be sanctioned with a term of imprisonment ranging from xxxx to xxxx or the withdrawal of license.
Chapter VIII
WILLFUL TRANSMISSION OF HIV

Article 36

Sanctions against Willful Transmission of HIV

Any person who intentionally inoculates with substances infected with HIV/AIDS is guilty of wilful transmission of HIV.

Any PLWHA or otherwise, any doctor, traditional healer, pharmacist, and any other person working as a medical or paramedical, as well as any medical student, pharmacy student or worker, herbalist or trader in surgical instruments, shall be considered an accomplice of anyone who indicates, favours, grants or procures a means of committing the crime as stated in article 35 of this law.

(USAID/AWARE Model Law 2004: 24)
### Crafting model language: Prohibition of the Requirement to Undergo HIV Test

<table>
<thead>
<tr>
<th>Prohibition of the Requirement to Undergo HIV Test</th>
<th>Prohibition of the Requirement to Undergo HIV Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Earlier Draft of Model Law(^{247})</td>
<td>Final Draft of USAID/AWARE Model Law</td>
</tr>
</tbody>
</table>

**Article 18**

An HIV test shall not be a requirement for the following: securing a job, admission to school or universities, access to accommodation, entry/stay in a country, or the right to travel, access to medical care or any other services.

However, this prohibition is revoked:

a) when a person is indicted for HIV infection or attempt to infect another person with HIV;
b) when a person is indicted for rape;
c) when determining the HIV status is necessary to solve matrimonial conflict

d) In cases anticipated in article 17 paragraph 3 of the present law.
e) when a pregnant woman undergoes a medical checkup;


HIV test shall not be a requirement for the following: securing a job, admission to school or universities, access to accommodation, right to entry/residence in a country, or as a precondition to travel, access to medical care or any other services. The state shall encourage future spouses to undergo screening test before prior to\(^{248}\) marriage.

This prohibition however is revoked in the following cases:

a) Where a person is indicted for infecting or attempting to infect another person with HIV by whatever means;
b) Where a person is indicted for rape;
c) Where the determination of the HIV status is necessary to solve a matrimonial conflict;
d) In cases anticipated in article 17 paragraphs 3 of the present law.

(USAID/AWARE Model Law 2004: 17-18)

The example above illustrates how part of an article was *removed* during the process of consultation and editing in Chad, with the final version of Article 18 not including provisions which state that pregnant women who undergo medical checkups are subject to the same prohibition as someone who has been indicted for rape, infecting or attempting to infect another person etc. (*see* CHALN Model Law 2009; World Bank 2007: 3-6).

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\(^{247}\) This is an early draft version of the USAID/AWARE Model Law obtained during field research in West Africa with key policy actors. This early text was identified as being key to discussions at the 2004 meeting in Chad, however, more archival research is necessary to confirm if this is the text which was first brought into the meeting for review and discussion or was a later draft version of the text based upon participant feedback.

\(^{248}\) A number of grammatical errors can be noted in the English version of the final Model Law text including this redundant use of “before prior to”.
### Crafting model language: Revelation to Spouses and Sexual Partners

<table>
<thead>
<tr>
<th>Article 26</th>
<th>Spouses and Revelation to Sexual Partners</th>
<th>Revelation to Spouses and Sexual Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Earlier Draft of Model Law</strong></td>
<td>Any person who has been tested positive for HIV is bound to reveal his/her HIV status to his/her spouse or regular sexual partner as soon as possible provided that the period does not exceed six (6) full weeks, starting from the date he/she was notified of his/her HIV status. The testing centres shall provide all the necessary psychosocial support to facilitate the disclosure of the HIV test result and help the couple accept and adapt to the reality of the situation. The testing center shall be required to make the disclosure in the event of the expiration of the six weeks, provided all efforts are made to enable the partners to have full understanding of the situation.</td>
<td></td>
</tr>
<tr>
<td><strong>Final Draft of USAID/AWARE Model Law</strong></td>
<td>Any person who has been tested positive for HIV is bound to reveal his/her HIV status to his/her spouse or regular sexual partner as soon as possible provided that the period does not exceed six (6) full weeks, starting from the date he/she was notified of his/her HIV status. Care service providers shall provide all the necessary psychological support to facilitate the disclosure of the HIV test result to his/her spouse or sexual partners. The hospital institution must ensure that this announcement is made and done in such a way as to take into account possible communication and comprehension problems of the patient and his/her spouse or sexual partners. If the person whose HIV status has just been determined does not proceed to voluntary revelation as provided for in the preceding paragraph within the prescribed period, the doctor or any other qualified paramedical official of the hospital or health institution concerned after having informed the person whose HIV status is known, can proceed to disclose the information to the spouse or sexual partners, without infringing on the provisions relating to medical confidentiality provided for by existing laws.</td>
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</tbody>
</table>


This second example of crafting alternative language illustrates a substantial addition of language in the final Model Article that regulates disclosure to spouses and sexual partners. Some other more minor edits can also be observed including a slight rephrasing of the Article’s name. The first section of both drafts of the article remained relatively unchanged including the maximum time allowed for not disclosing one’s status (6 weeks after receiving one’s positive HIV test results). The second portion of the final draft of Article 26 demonstrates the addition of language to regulate the work hospitals must do so as to effectively communicate information to both the spouse.
and/or sexual partners regarding someone’s HIV status: “The hospital institution must ensure that this announcement is made and done in such a way as to take into account possible communication and comprehension problems of the patient and his/her spouse or sexual partners” (USAID/AWARE Model Law 2004: 21-22). The last paragraph in the final draft of Article 26 illustrates how the scope of disclosure work was more clearly outlined including who has the responsibility to, and under which circumstances can, disclose the status of someone with HIV to their sexual partners and spouses without infringing on medical confidentiality laws.

Crafting model language: *Willful transmission of HIV*

<table>
<thead>
<tr>
<th>Article 36</th>
<th>Willful Transmission of HIV</th>
<th>Sanctions against Willful Transmission of HIV</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Earlier Draft of Model Law</strong></td>
<td>Doctors, pharmacists and any other person exercising the medical or paramedic profession and traditional healers who knowingly transfused HIV infected blood, blood products or other organs or who use infected instruments shall have been deemed to commit wilful transmission and shall be sentenced according to the terms specified under the next succeeding article. Any person who is guilty of wilful transmission of HIV shall be sanctioned with ……</td>
<td>Any person who intentionally inoculates with substances infected with HIV/AIDS is guilty of wilful transmission of HIV. Any PLWHA or otherwise, any doctor, traditional healer, pharmacist, and any other person working as a medical or paramedical, as well as any medical student, pharmacy student or worker, herbalist or trader in surgical instruments, shall be considered an accomplice of anyone who indicates, favours, grants or procures a means of committing the crime as stated in article 35 of this law.</td>
</tr>
</tbody>
</table>

In this final example (Article 36)—a key Article considered on various fronts in this project—it is important to note that the earlier language of criminalizing the “wilful transmission of HIV” places emphasis on the work of health and medical professionals. It is also clear the Article was still in draft form, ending the last sentence with “shall be sanctioned with ……”. The final language of Article 36 appears to expand those who may be punished for wilful transmission, including “any PLWHA [person living with HIV/AIDS] or otherwise” who violates the provision (USAID/AWARE Model Law 2004: 24).

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249 Language was also changed from “testing centres” providing care and necessary psychosocial support to help facilitate the disclosure of the HIV test result, to “care service providers” having this responsibility.

ACTS

THE PREVENTION AND CONTROL OF HIV AND AIDS ACT, 2007

ARRANGEMENT OF SECTIONS

PART I—PRELIMINARY

Sections

1. Interpretation.

PART II—EDUCATION AND INFORMATION ON HIV AND AIDS

2. Government to promote education and information on HIV and AIDS.
3. HIV and AIDS to be in curriculum of educational institutions.
4. HIV and AIDS education as health care service.
5. HIV and AIDS education in workplaces.
6. HIV and AIDS information in localities.

PART III—SAFE PRACTICES AND PROCEDURES

7. Testing of donated tissue.
8. Testing of donated blood.
9. Guidelines on surgical and similar procedures.
10. Penalty for unsafe practices and procedures.

PART IV—TESTING, SCREENING AND ACCESS TO HEALTHCARE AND SUPPORT SERVICES

11. Prohibition against compulsory testing.
12. Consent to HIV test.
13. HIV testing centres etc.
14. Pre-test and post-test counselling.
15. Confidentiality of HIV tests.
16. Access to health care services.
17. Community-based services.
19. Livelihood programmes.
20. Insurance of persons with HIV.

PART V – TRANSMISSION OF HIV

21. Prevention of transmission of HIV.

PART VI – MONITORING OF PREVALENCE OF HIV

22. Monitoring of prevalence of HIV.

PART VII – DISCRIMINATORY ACTS AND POLICIES

23. Discrimination in the work place.
24. Discrimination in schools.
25. Restriction in travel and habitation.
26. Inhibition from public service.
27. Exclusion from credit of insurance services.
28. Discrimination in health institutions.
29. Denial of burial services.
30. Offence.

PART VIII – RESEARCH

31. Research.
32. Consent to research.
33. Offence.

PART IX – MISCELLANEOUS

34. Penalty.
35. Regulations

(Prevention and Control of HIV and AIDS Act, Sierra Leone, 2007: i-ii)
The Prevention and Control of HIV and AIDS Act, 2007. \[\text{Short title.}\]

Being an Act to provide for the prevention, management and control of HIV and AIDS, for the treatment, counseling, support and care of persons infected with, affected by or at risk of HIV and AIDS infection and for other related matters.

\[
\text{[ ] Date of commencement.}
\]

ENACTED by the President and Members of Parliament in this present Parliament assembled.

(Prevention and Control of HIV and AIDS Act, Sierra Leone, 2007: 1)
(2) The study shall be guided by the principle that access to health insurance is part of a person’s right to health and is the responsibility of the State and society as a whole.

PART V–TRANSMISSION OF HIV

21. (1) A person who is and who is aware of being infected with HIV or is carrying and is aware of carrying the virus shall—

(a) take all reasonable measures and precautions to prevent the transmission of HIV to others and in the case of a pregnant woman, the foetus; and

(b) inform, in advance, any sexual contact or person with whom needles are shared, of that fact.

(2) Any person who is and is aware of being infected with HIV or is carrying and is aware of carrying HIV antibodies shall not knowingly or recklessly place another person, and in the case of a pregnant women, the foetus, at risk of becoming infected with HIV, unless that other person knew that fact and voluntarily accepted the risk of being infected with HIV.

(3) Any person who contravenes subsection (1) or (2) commits an offence and is liable on conviction to a fine not exceeding five million leones or to a term of imprisonment not exceeding seven years or to both the fine and imprisonment.
Appendix F: Simplified overview of research and discovery activities

<table>
<thead>
<tr>
<th>Research and Discovery Activities[^250]</th>
<th>Dates</th>
<th>Key Locations</th>
<th>Key Institutions and Organizations[^251]</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Everyday experiences and contexts from which problematic emerged</td>
<td>Sept. 2002 - Aug. 2009[^252]</td>
<td>Toronto, Canada; Victoria, Canada; Mexico City, Mexico</td>
<td>McMaster; UVic; CHALN; IAS</td>
</tr>
<tr>
<td>(2) Completion and Defense of PhD research proposal and ethics application</td>
<td>Sept. 2009 - April 2010</td>
<td>Victoria, Canada; Toronto, Canada</td>
<td>UVic; UWW; CHAR</td>
</tr>
<tr>
<td>(3) Preliminary Interviews and Data Collection</td>
<td>May 2010 - June 2010</td>
<td>Victoria, Canada; Vancouver, Canada</td>
<td>UVic; UWW; CHALN</td>
</tr>
<tr>
<td>(4) Interviews and Data Collection (focus: Global Health Policy Context)</td>
<td>June 2010 - Sept 2010</td>
<td>Geneva, Switzerland; Vienna, Austria</td>
<td>Duke; WHO; UNAIDS; GF; IAS</td>
</tr>
<tr>
<td>(5) Interviews and Data Collection (focus: Canadian Policy Activities)</td>
<td>Sept 2010 - Oct 2010</td>
<td>Toronto, Canada</td>
<td>CHALN</td>
</tr>
<tr>
<td>(6) Interviews and Data Collection (focus: West and Central African region)</td>
<td>Oct 2010 - Nov 2010</td>
<td>Dakar, Senegal; Cape Town, South Africa; Johannesburg, South Africa</td>
<td>UNAIDS (West Africa regional offices); HLN; South African Constitutional Court; FAAPPD; AWARE</td>
</tr>
</tbody>
</table>

[^250]: It is important to reiterate that the research activities of this project were of an iterative and dynamic nature. The 8-phases or stages described in this section provide a simplified way to map the key research discovery and KTE activities of this project.

[^251]: For issues related to confidentiality, some of the HIV/AIDS organizations are not listed in this section to preserve the anonymity of informants and organizations. While some organizations were of key importance for the duration of the project (e.g. the University of Victoria and The Canadian HIV/AIDS Legal Network) this section highlights the key intuitions out of which I was based (where I was engaged in everyday work activities) as well as the institutions from which many of my informants were working related to the HIV legislative reform processes under investigation.

[^252]: This date range represents the time in which key activities and research was carried out that has informed this research project.
<table>
<thead>
<tr>
<th>(7) <strong>Final Interviews (including follow-up interviews), Data Analysis and Writing</strong></th>
<th>Dec 2010 - June 2011</th>
<th>Vancouver, Canada; Victoria, Canada; Durban, South Africa</th>
<th>IIRP; Follow-up interviews/clarification questions with stakeholders including those at AWARE, USAID, CHALN, USAID, UNAIDS (Geneva and Senegal) and FAAPPD; Presentation of preliminary findings and follow-up interviews in Durban (ISSHRC 2011)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(8) <strong>Final Dissertation Revisions, Dissertation Defense and KTE activities</strong></td>
<td>July 2011 onwards (*KTE dates determined based on needs and availability of organizations/community partners)</td>
<td>Vancouver, Canada; Victoria, Canada; Toronto, Canada; Dakar, Senegal (and possible other West-African countries); Geneva, Switzerland</td>
<td>IIRP; UVic, KTE activities will involve Canadian stakeholders (e.g. CHALN, OHTN) and international stakeholders (e.g. USAID, AWARE, UNAIDS (Geneva and Senegal) and FAAPPD).</td>
</tr>
</tbody>
</table>
Appendix G: Participant consent form

[Department Logo and address]

Participant Consent Form

HIV/AIDS, the Law and Human Rights:
Mapping legal reform in the third decade of HIV/AIDS

You are invited to participate in a study entitled HIV/AIDS, the Law and Human Rights (working title) that is being conducted by Daniel Grace.

I, Daniel Grace, am an HIV/AIDS researcher and am currently a PhD Candidate in the Department of Sociology at the University of Victoria, Canada. You may contact me either by phone at [phone number] or by email at [email address] if you have any questions about this research.

As a PhD Candidate, I am conducting research as part of the requirements for a Doctor of Philosophy in the Social Sciences. This research is being conducted under the supervision of Dr. William Carroll and Dr. Dorothy E. Smith. You may contact Dr. Carroll at [phone number] or Dr. Smith at [email address] if you have any further questions or concerns about this research.

Purpose of the research

The purpose of this research is to explore the processes by which HIV/AIDS state laws are being both changed and contested in the third decade of HIV/AIDS. My research thus far has made evident the need to examine the relationship between the law, human rights, and HIV/AIDS. Legal approaches to preventing the spread of HIV/AIDS—like the HIV-virus itself—do not remain within state boundaries. The processes by which “model laws” are created and disseminated (for example, USAID-funded Model Law in West and Central Africa) are of particular interest to my research. Few definitions of “model law” or “model legislation” exist in the literature reviewed. I seek to understand how HIV/AIDS model laws, specifically USAID-funded Model Law, have been created and activated.

Neither transnational model law processes in general, nor AIDS-related model laws in particular, have been examined in the sociological literature. In this project I will map complex work practices related to AIDS Model Laws to make sense of how transnational legal reform happens in the everyday world. This includes trying to understand how and why USAID-funded Model Law was created, adapted and adopted at the state level.
Participant selection
You are invited to participate in this study because you are over the age of 19 and have experience in the field of “model law” and/or HIV/AIDS related law at the state or international level. This may include, but is not limited to, work related to USAID-funded Model Law (West and Central Africa) and laws involving HIV/AIDS and drug use, prostitution/sex work, homosexuality and the criminalization of HIV exposure and/or transmission. Your experience may be from the standpoint of an employee at a community based organization, an activist, an academic or a person working in the legal and policy field. Your experience provides the expert knowledge on the relationship between HIV/AIDS, the law and human rights that is needed for this research.

What’s involved?
If you agree to participate in this research, your voluntarily participation will include:

- One to two audio recorded interviews of approximately 60-90 minutes (from which a typed transcription will be made); and,
- The review of copies of paperwork you may use in the course of your work (this may include: excerpts of legal or policy documents, model law texts, HIV/AIDS policies etc.).
- In some cases correspondence and questions may be conducted via email and/or telephone.

There are no known or anticipated risks to you by participating in this research. Nor are there any inconveniences anticipated beyond your contribution of time to the interview(s).

If necessary, your anonymity is protected to the extent that only Daniel Grace, as the interviewer, will be aware of your identity as relates to the content of your interview and/or observational data. However, your participation in the study may be known due to the specific nature of your institutional experience. Should you wish to protect your confidentiality, a pseudonym will replace your name in the transcript(s) and research publications, and no reference will be made to place names, service/organization names, or any other specifically identifying information that you might share in the interview.

☐ Yes ☐ No I am comfortable being identified by name and/or organizational affiliation in the publications related to this research (check yes). If you check no your anonymity will be preserved.

The potential benefits of your participation in this research include the opportunity to have your expert knowledge stemming from your experience contribute to a research study that will expand understanding of legal reform practices related to HIV/AIDS.

Voluntary Participation
Your participation in this research is completely voluntary. I will ask you if you are voluntarily consenting to continue your participation in the research at the onset of the interview(s) to ensure your consent throughout the data collecting phase of the research.

If at any point during the interview or the study you feel the need to withdraw, it is your right to do so without explanation or consequences. If you do withdraw from the study, any information you shared with me will be used in the research unless you choose to remove your interview data. In the event that you choose to withdraw from the study, I will ask your permission to allow me to use the information I have learned from you.
**Dissemination of Results**

It is anticipated that the results of this study will be shared with others in the following ways: this study will be written up in the form of a dissertation and will be distributed to a supervisory committee, staff and other students. A copy will be kept in the University of Victoria library. The thesis will be accessible online through the *Theses Canada Portal*. Results may also be used for academic and conference presentations and/or publications. The thesis will be accessible to participants and members of the public.

**Future use of data**

Paper copies of transcripts used in this research will be cleaned of identifying information and kept in a separate location from the signed consent forms, which will be stored in a locked cabinet in the researcher's home office. Audio recordings and digital copies of transcripts from the interviews will be kept in password protected files on the researcher’s computer.

[ ] Yes  [ ] No  
In addition to the use of the interview data being used for the researcher’s dissertation and related publications and presentations, I agree that the data may be used in the researcher’s future publications and studies including post-doctoral research.

**Should you have any questions or concerns about this research please feel free to contact:**

Daniel Grace, Researcher  [email address]  [phone number]  
Dr. William Carroll, Supervisor  [email address]  [phone number]  
Dr. Dorothy E. Smith, Supervisor  [email address]  

In addition, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria by phone 250-472-4545 or email ethics@uvic.ca.

Your signature below indicates that you understand the above conditions of your voluntary participation in this study and that you have had the opportunity to have your questions answered by the researchers.

<table>
<thead>
<tr>
<th>Name of Participant</th>
<th>Signature</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Researcher</td>
<td>Signature</td>
<td>Date</td>
</tr>
</tbody>
</table>

A copy of this consent will be left with you, and a copy will be taken by the researcher.