

UNAIDS 2019

Bringing justice to HIV

Advocating for the just application
of criminal law to HIV

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UNAIDS in Focus

The UNAIDS in Focus series features snapshots of the Joint Programme's work enabling people living with and affected by HIV around the world to realize their human right to health.

UNAIDS advocates for a holistic, multisectoral approach to AIDS, with a long history of working across sectors and building multistakeholder partnerships. As a joint programme, it uniquely leverages the capabilities and comparative advantages of each of its 11 United Nations (UN) cosponsoring organizations (Cosponsors), as well as those of civil society, governments and other partners.

This series of case studies captures compelling stories of how Cosponsors, the UNAIDS Secretariat and a wide range of partners join forces to overcome challenges and build solutions at the country, regional and global levels to address the needs and protect the rights of people living with, affected by and at risk of HIV. The case studies depict a wide array of interventions that make a difference, such as creating a coalition of lawyers to provide pro bono services to defend people living with HIV from discrimination, implementing a partnership in South-East Africa to ensure the continuity of health services for communities suffering from drought, or supporting countries in western and southern Africa to scale up prevention and treatment coverage in countries lagging most behind in their response.

By using evidence-informed and people-centred approaches, UNAIDS acts as an advocate, convenor and broker to address obstacles at the global, regional and country levels (including legal environments and social determinants) that are hindering access to essential, quality and sustainable care, treatment, support and prevention services. The UNAIDS in Focus series shows how the Joint Programme puts its mission into practice, delivering results for people everywhere in order to achieve zero new HIV infections, zero AIDS-related deaths and zero discrimination.

When the application of the law undermines human rights

“By reinforcing stigma, HIV criminalization makes it more difficult for those at risk of HIV to access testing and prevention. It also makes it more difficult for those living with the virus to talk openly about it, and to be tested, treated and supported.”

Justice Edwin Cameron

Beyond Blame, 17 July 2016

Since the beginning of the AIDS epidemic, many countries have adopted HIV-specific laws or invoked general criminal law provisions to prosecute people living with HIV who have allegedly done the following:

- ▶ Failed to disclose their HIV status prior to sexual relations (HIV non-disclosure).
- ▶ Exposed others to HIV (HIV exposure).
- ▶ Transmitted HIV (HIV transmission).

In 2016, 72 countries had HIV-specific legislation allowing for the criminalization of HIV non-disclosure, exposure or transmission, and many countries also criminalized HIV under general law. Prosecutions of people living with HIV under these laws have been reported in 61 countries as of 2015 (1).

The purported aim of such legislation is to punish high-risk sexual behaviour and thereby prevent HIV transmission. However, there is no evidence that such application of criminal law is effective for HIV prevention. On the contrary, evidence indicates that fear of prosecution discourages people from testing for HIV, talking openly to their physicians and disclosing their HIV-positive status (2, 3).

In many cases, application of the law in the context of HIV does not take into account current evidence that effective treatment significantly reduces the risk of HIV transmission from people living with HIV to their sexual partners (4). Of equal concern is that criminal law is frequently applied in ways that discriminate against and dehumanizes people living with HIV, or in a manner that violates their rights.

Cases of injustice: discrimination and disproportionate sentences

“I struggled a lot because I was associated with being a murderer, a killer, and society shunned me. My self-esteem is gone and this has tarnished more than 30 years in the nursing profession, which I loved so much.”

Rosemary Namubiru
Nurse and HIV criminalization survivor, Uganda

“When HIV is criminalized”,
Interview by IAS

In 2014, Rosemary Namubiru was prosecuted in Uganda under Section 171 of the Penal Code of Uganda for negligent acts likely to spread the infection of disease. A 64-year-old woman living with HIV who had been a pediatric nurse for 30 years, Ms. Namubiru was prosecuted following an accidental needle-prick injury at a Kampala clinic while trying to inject a two-year-old. The child did not acquire HIV, but Ms. Namubiru was sentenced to three years in prison. She also faced prejudice and verbal abuse from the public and the press, including threats of violent reprisal and murder. The media called her the “killer nurse” after her arrest and publicized her HIV status, reinforcing entrenched discrimination against people living with HIV.

In 2009, a court in Iowa, in the United States of America, convicted Nick Rhoades of criminal transmission of HIV for having sex with a partner without disclosing his HIV status. At the time, Mr. Rhoades had a very low viral load, and both parties agreed that a condom had been used. There has never been a case of HIV transmission from a person with Mr. Rhoades’ viral load level in any clinical trial, and when a condom is used correctly, there is no possibility of HIV transmission. Although Mr. Rhoades did not transmit HIV to his partner, he was sentenced to 25 years in prison and required to register as a sex offender for life.

These cases are not isolated incidents. A global analysis of HIV criminalization cases identified at least 913 HIV-related arrests, prosecutions and convictions in 49 countries between October 2015 and December 2018 (1). In many regions, people living with HIV continue to be prosecuted and imprisoned for acts that represent no or very negligible risk of HIV transmission, such as biting and spitting. The use of criminal law against people with low viral loads or people who mindfully exercise precaution such as with correct condom use not only represents a miscarriage of justice, but it also contradicts current scientific evidence and risks undermining HIV prevention messages that emphasize using condoms.

In many countries, laws or prosecutions related to HIV non-disclosure, exposure or transmission do not apply basic legal principles relating to criminal law, such as an intent to commit a crime or proof that the person being prosecuted is responsible for the accuser acquiring HIV. Laws and prosecutions that fail to take into account these critical principles of legal and judicial fairness are likely to result in miscarriages of justice.

In spite of such challenges, progress has been made. In collaboration with civil society groups, UNAIDS has intervened on behalf of such individuals, securing the releases of Ms. Namubiru and Mr. Rhoades, and continues to champion the repeal of HIV criminalization laws.

UNAIDS promotes fair and evidence-informed laws

Over the years, UNAIDS has called on countries to ensure that any application of criminal law related to HIV achieves justice in cases of proven intentional transmission while still safeguarding public health goals and human rights. Through a series of guidance documents, UNAIDS has provided key recommendations to countries on this issue.

UNAIDS calls on countries to do the following:

- ▶ Limit criminalization to cases of intentional transmission: that is, when a person knows his or her HIV-positive status, acts with the intention to transmit HIV and does in fact transmit it (5).
- ▶ Avoid introducing HIV-specific laws to address the criminalization of HIV non-disclosure, exposure and transmission.
- ▶ Apply general criminal law in a manner that is consistent with international human rights law obligations.

Finally, UNAIDS has provided specific guidance for appropriately addressing the issues of risk, harm, intent, defense and proof in any application of criminal law in the context of HIV (6).

UNAIDS' commitment to ending unjust HIV criminalization is part of our vision to address punitive laws and policies that block effective responses to HIV, as outlined in *On the Fast-Track to end AIDS*, the UNAIDS 2016–2021 strategy.

Partnerships for enabling legal environments

“Equality, inclusion, and non-discrimination are at the heart of the 2030 Agenda for Sustainable Development. Evidence-informed and rights-based laws and policies that protect rather than punish, when combined with programmes to reduce stigma and discrimination, can be cost-effective tools for accelerating combination prevention and treatment and ending the AIDS epidemic as a public health threat by 2030.”

Achim Steiner
Former UNDP Administrator

5th Anniversary of the Global Commission on HIV and the Law: Lessons for the 2030 Agenda
Jul 13, 2017

UNAIDS is uniquely positioned to lead partnerships towards effective HIV laws. In cooperation with people living with HIV, scientific and legal communities, international nongovernmental organizations, and civil society groups, the UNAIDS Secretariat and Cosponsors support countries in transitioning to legal environments that advance the HIV response and safeguard human rights.

During the past decade, UNAIDS has brought together partners in advocacy activities to ensure justice in the application of criminal law to HIV.

In 2012, the United Nations Development Programme (UNDP) established the Global Commission on HIV and the Law on behalf of the UNAIDS Joint Programme. The Commission’s flagship publication—HIV and the law: risks, rights & health—makes specific recommendations to policy-makers, civil society and development partners for ending the overly broad criminalization of HIV.

UNAIDS has also forged strong partnerships with civil society organizations that exercise leadership on HIV and the law. The Global Network of People Living with HIV (GNP+) and the HIV Justice Network work with partners worldwide to map HIV criminalization and its effect on people’s lives. The GNP+ Global Criminalization Scan—which was initiated in 2005 in Europe and subsequently expanded across more than 200 countries and judicial territories—documents laws, judicial practices and case studies around the criminalization of HIV transmission and exposure. GNP+ and the HIV Justice Network published *Advancing HIV justice: a progress report of achievements and challenges in global advocacy against HIV criminalisation* (2013), *Advancing HIV justice 2: building momentum in global advocacy against HIV criminalisation* (2016), and *Advancing HIV Justice 3: Growing the global movement against HIV criminalisation* (2019) with support from UNAIDS and UNDP. These reports provide a global overview of the progress and challenges relating to HIV criminalization. In Africa, UNAIDS works closely with organizations such as the AIDS and Rights Alliance for Southern Africa and the Southern African Litigation Centre to support efforts to address HIV criminalization.

UNAIDS plays a crucial role in influencing global efforts to end HIV criminalization and create enabling legal environments by doing the following: (a) developing evidence- and expert-informed guidance; (b) uniting scientists, medical experts, people living with HIV and the legal community; and (c) providing financial and technical support to the civil society organizations working to address HIV criminalization worldwide. These collaborative efforts have contributed to progress in countries around the world.

Results for people living with HIV

In Sierra Leone, the HIV Act of 2007 explicitly provided for the criminal prosecution of a woman who transmits HIV to her child during pregnancy, delivery or breastfeeding.

Community groups raised concerns that the threat of legal consequences could discourage women from seeking HIV testing and treatment or maternal and child health care. UNAIDS worked with parliamentarians and civil society groups in Sierra Leone and the wider region to call for changes to the legislation. These joint advocacy efforts resulted in legal reform, and mother-to-child transmission of HIV is now excluded from the country's HIV-specific laws.

In France, general criminal law has been applied in cases of HIV exposure and transmission, resulting in at least 23 convictions. In 2015, the French National AIDS Council, France's public health authority on HIV, reviewed HIV criminal law and prosecutions in the country. Referring to the UNAIDS guidance note on ending overly broad criminalization, the Council published recommendations focused on ensuring a fair legal process for people living with HIV by promoting the education of judges and police and encouraging the use of scientific evidence. The use of UNAIDS guidance in the Council's process resulted in recommendations for the justice system that uphold human rights and are aligned with evidence-informed HIV prevention practices.

UNAIDS has contributed to bringing visibility to cases such as those of Rosemary Namubiru and Nick Rhoades. In the case of Ms. Namubiru, former UNAIDS Executive Director Michel Sidibé intervened with national authorities at the highest level in favour of her release. UNAIDS also supported human rights and civil society organizations in providing legal and other support to Ms. Namubiru's case. As a result of these collaborative efforts, the High Court of Uganda commuted Ms. Namubiru's sentence, and she was released from prison after serving 11 months.

In Mr. Rhoades' case, the judge suspended his 25-year sentence, and Mr. Rhoades was released on probation (for five years) after one year of incarceration. Mr. Rhoades was invited by UNAIDS to address the UNAIDS Programme Coordinating Board and the United Nations Human Rights Council about his personal experience in order to raise awareness of the harm of HIV criminalization. To create momentum towards HIV criminal law reform in Iowa, Mr. Rhoades took his case to the Supreme Court after being denied a petition for post-conviction relief. After pressure from local HIV organizations One Iowa and the Community HIV and Hepatitis Advocates of Iowa Network—and lobbying from organizations such as the Sero Project—the State of Iowa repealed its HIV-specific criminal legislation in June 2014. The conviction of Mr. Rhoades was reversed.

Lessons learned for HIV prevention and human rights

“HIV is still one of the deadliest diseases in the world and it’s unforgivable that national governments have failed to address legislation that fuels the AIDS pandemic. Laws that criminalize HIV are anti-science, unjust and unconstructive.”

Michael Kirby, a former Justice of the High Court of Australia

UNDP press release,
July 13, 2017

Globally, the use of criminal law in relation to HIV threatens to undermine progress on HIV prevention and progress made towards ending AIDS as a public health threat by 2030. Through collaborative partnerships, successful legal reforms have been achieved in countries in all regions of the world. These reforms make clear that the legal barriers threatening progress on HIV must be addressed directly and that successful advocacy depends on the participation of people living with HIV.

The use of public health evidence and human rights arguments has resulted in progress against unjust HIV criminalization. Public health evidence has served to show that criminalizing HIV does not advance the response against the epidemic; rather, it undermines the response. Human rights arguments have helped to illustrate that criminalizing HIV is unfair, and that it often leads to the miscarriage of justice.

Efforts to address HIV criminalization have also brought together people living with HIV, lawyers, human rights activists, and medical experts and HIV scientists. United by the harm and injustice of HIV criminalization, these communities and groups are working together to ensure that the law in many countries is applied in accordance with the best available evidence relating to HIV. The UNAIDS Secretariat and UNDP have played key roles in supporting these efforts through convening, partnership building, providing support for civil society, and engaging parliamentarians and members of the judiciary.

United Nations Member States have recognized the importance of addressing the legal environments that affect HIV. In June 2016, the United Nations General Assembly adopted the 2016 Political Declaration on Ending AIDS. Governments expressed concern that restrictive legal and policy frameworks, including those related to HIV transmission, continue to discourage people from accessing prevention and treatment, and they are committed to intensifying national efforts to create enabling legal and policy frameworks towards eliminating stigma and discrimination and violence related to HIV (7).

The 2016 Political Declaration on Ending AIDS represents global resolve to improve the legal and policy determinants that influence progress towards ending AIDS as a public health threat by 2030. UNAIDS is committed to supporting countries in achieving all of the commitments in the 2016 Political Declaration on Ending AIDS, including by addressing HIV criminal law.

Next steps: towards a global consensus to bring justice to HIV

Experiences from countries that have produced expert-authored consensus statements on HIV-related risk and harm suggest that they can be an effective tool in addressing the unjust application of criminal law in the context of HIV. Such statements have recently been produced for Australia, Canada and Sweden, and they have helped shape the application of criminal law in relation to HIV in those jurisdictions.

Building on the experiences of these jurisdictions, UNAIDS—together with the International AIDS Society, the International Association of Providers of AIDS Care and HIV Justice Worldwide (a coalition of civil society organizations)—has supported a group of 20 of the world's leading HIV scientists and medical experts to develop a global expert consensus statement on the science of HIV in the context of criminal law. This consensus statement was released in July 2018 (8). It articulated the best available scientific evidence relating to the risk, harm and direction of HIV transmission for use in the context of criminal law.

It is expected that this statement—co-authored and endorsed by globally recognized HIV experts—will become the gold standard and authoritative source for assessing risk, harm and proof of HIV infection in the criminal justice system and in relation to law reform. Although this consensus statement will not end all unjust HIV prosecutions, it will be a powerful tool to support the continued efforts of the AIDS response to bring justice to HIV in every region and to uphold the human rights of people living with HIV.

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