



GUIDANCE FOR PROSECUTORS

on HIV-related criminal cases

Acknowledgments

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“Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”

— UN Guidelines on the Role of Prosecutors (1990)

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FOREWORD

In the early days of the AIDS pandemic, driven by fear, misinformation and myths about HIV, many countries took legislative measures to respond, including through criminal law. Most of these laws were exceedingly broad, both in their express provisions and in the way they were interpreted and applied. We are seeing similar fear and misinformation spreading in response to COVID-19. While there are significant differences between HIV and COVID-19, both show that pandemics act upon the fault lines of racial, social and economic inequalities and can be perpetuated by punitive laws and policies which are counterproductive and have no scientific basis.

Today we know much more about HIV and scientific developments mean that HIV need not be a death sentence. With effective antiretroviral treatment, people with HIV can live long full lives. Advances in treatment mean that people living with HIV can now achieve viral suppression, which prevents transmission of the virus to others. Many of these advances have been possible because of the tireless advocacy of people living with HIV and civil society on issues of access to medicines, HIV-related stigma and discrimination, and HIV criminalisation.

HIV science should inform the application of criminal law in cases related to HIV. It has the potential to limit unjust prosecutions and convictions. Despite this, HIV criminalisation continues in many jurisdictions; 92 countries and jurisdictions still criminalise HIV exposure, nondisclosure and/or transmission. We have seen many instances in which rights have been violated and lives have been irreparably harmed by overuse of prosecutions, including many cases with no basis in science. Such misuse of criminal charges does damage to the HIV response more broadly, by perpetuating misinformation, fear, stigma, discrimination and violence against people living with HIV. It also has deterred marginalized groups such as gay men and other men who have sex with men, sex workers, injection drug users and transgender people from seeking care out of fear, putting their health and well-being at risk. Women living with HIV bear a significant risk of prosecution under HIV criminalisation provisions because women are often the first to know their HIV positive status (a prerequisite for most HIV criminalisation prosecutions), due to increased interaction with the health services, including provider-initiated testing and counselling during antenatal visits. The intersection of HIV criminalisation and criminal provisions that sanction women's choice of work and their access to sexual and reproductive health services perpetuate gender-based violence, gender inequality and increase the vulnerability of women and girls to HIV.

The Global Commission on HIV and the Law called on countries to repeal punitive laws, policies and practices and enact protective ones to promote public health and human rights for effective HIV responses. One of the central concerns taken up by the Commission was the continued misuse of criminal law in dealing with alleged HIV transmission, exposure and non-disclosure. It issued a clear recommendation that any use of criminal law must be strictly limited to instances of actual and intentional transmission. In 2018, 20 of the world's leading HIV scientists developed the *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* to address the use of HIV science in the criminal justice system. Yet, people living with HIV continue to be prosecuted in a much wider range of circumstances, including those where the risk of HIV transmission or exposure is scientifically nil.

This Guidance is addressed specifically to prosecutors, given the essential role they play in stopping the misuse of criminal law by discharging their professional obligations with full regard to science, human rights and the public interest. It is also intended as a resource for lawmakers who legislate, judges who interpret laws and adjudicate these cases, people living with HIV who bear the brunt of HIV criminalisation, and the public defenders and advocates who represent those charged under these laws. Ultimately, we hope that this Guidance will be useful in the implementation of the UNAIDS Global AIDS Strategy 2021-2026 – a road map to achieve the SDG 3 target of ending AIDS as a public health threat by 2030.

In the words of the Global Commission on HIV and the Law: 'The law can be a human good that makes a material difference in people's lives. It has the power to bridge the gap between vulnerability and resilience to HIV'. We hope that this Guidance will make a meaningful contribution to the use of the law as a force for human good in the context of HIV.

Mandeep Dhaliwal

Director

HIV, Health and Development Group

UNDP



“The International Association of Prosecutors welcomes this guidance for prosecutors. It highlights the serious responsibility of exercising prosecutorial discretion in a manner consistent with the high standards of impartiality and objectivity championed by the IAP. It will be of assistance to prosecutors in handling HIV-related criminal cases in keeping with the best available science and with a commitment to the human rights of all parties involved.”

— Gary Balch, General Counsel, International Association of Prosecutors



“As a former prosecutor, and now a judge, this Guidance is a critical resource not just for prosecutors and defence lawyers but also for courts that preside over matters of HIV criminalisation, coming at a time when our justice systems are grappling with reconciling the letter of penal codes and developments in HIV science. It is imperative that the rule of law and human rights standards are adhered to throughout the criminal justice process and prosecutors have a significant role to play in achieving these.”

— Zione Ntaba, Judge of the High Court of the Republic of Malawi.



“Continued training, capacity development and awareness-raising for judges are key to ensuring that we use the law to protect the rights of key populations and people living with HIV and effectively adjudicate based on human rights principles. Engaging national institutes responsible for the training of judges can assist in this process. This Guidance is very timely for the implementation of efforts in our region.”

— Dr. Olga Shapovalova, Head of the Department of Training of Teachers, National School of Judges, Ukraine & retired Judge of the Supreme Court of Ukraine



“It is essential that the complex issue of HIV criminalisation be approached with the utmost respect for human rights and dignity, and it is frustrating that this still needs to be said. GNP+ welcomes this publication. It is important for sensitizing and building relationships with prosecutors. It provides important guidance for avoiding unnecessary and unwarranted prosecutions in the first place. It also adopts an intersectional lens in laying out what is at stake in prosecutions, taking into consideration the complexities of lived experience of people living with HIV, especially women, and other key populations. We urge prosecutors to make use of it in avoiding the overreach and misuse of the serious sanction of the criminal law.”

— Rico Gustav, Former Executive Director, Global Network of People Living with HIV (GNP+)

HIV-RELATED CRIMINAL PROSECUTIONS: 10 PRINCIPLES FOR PROSECUTORS



General principles

- 1 Prosecutions should be informed at all stages by the most reliable evidence
 - 2 Prosecutors should ensure that the rights of the complainant, the defendant and witnesses are respected throughout every stage of the prosecution
-



Deciding whether and how to prosecute

- 3 Prosecutors should pursue prosecutions in only limited circumstances, as HIV is most effectively addressed as a public health matter
 - 4 Prosecutors should establish a sufficient evidentiary basis for a prosecution
 - 5 Prosecutors should consider whether a prosecution in a given case is in the public interest
-



Pre-trial and trial considerations

- 6 Prosecutors should generally consent to pre-trial release, absent exceptional circumstances
 - 7 Prosecutors should avoid arguments that could be inflammatory, prejudicial or contribute to public misinformation about HIV
 - 8 Prosecutors should ensure the correct interpretation of science and its limitations, if seeking to prove actual transmission of HIV
-



Sentencing considerations

- 9 Prosecutors should ensure there is no discrimination in sentencing
- 10 Prosecutors should ensure sentencing is not disproportionate

EXECUTIVE SUMMARY

In many jurisdictions around the world, people living with HIV face criminal prosecution if accused of transmitting HIV, exposing another person to a potential or perceived risk of HIV infection, or not disclosing their HIV-positive status (e.g. to a sexual partner). Usage of the criminal law in such ways is commonly referred to as “HIV criminalisation.” Some jurisdictions have passed specific laws to criminalise HIV non-disclosure, exposure and/or transmission of HIV, while in others, prosecutors and courts have applied existing, general criminal offences.

Because of the impact of HIV criminalisation on human rights and public health, existing international guidance recommends limiting the use of the criminal law to exceptional circumstances where a person acts with the specific intent to infect another – and actually does so. Yet in many countries, the law often continues to stray beyond this limited use recommended by both international experts and human rights bodies, and certainly the vast majority of prosecutions to date around the globe are not constrained to these limited circumstances. There is mounting evidence and concern that an overly broad use of the criminal law, and of similarly coercive and punitive measures in relation to HIV and other infectious diseases, is not effective public health policy and in fact can do more harm than good.

Given such concerns, as well as the complexity of issues raised by HIV-related criminal cases, prosecutors have an important role to play in avoiding the overreach and misuse of the serious sanction of the criminal law in relation to HIV, as well

as ensuring the wise use of scarce prosecutorial resources. They can ensure that any prosecutions in relation to alleged HIV non-disclosure, exposure or transmission are conducted in a fair and objective manner, are based on the most sound and recent medical and scientific evidence, guarantee the rights and dignity of all those involved in a proceeding, and are grounded in the public interest.

This guidance document therefore presents 10 key principles that should assist prosecutors in handling a prosecution – or potential prosecution – involving an allegation of HIV non-disclosure, exposure or transmission. Each principle is accompanied by a more detailed commentary examining the specific application of the principle by prosecutors in the course of their handling of a potential or ongoing prosecution. Each principle and its accompanying commentary is grounded in a consideration of the best available scientific evidence, applicable international human rights standards, as well as the widely-agreed professional standards governing the function of prosecutors within the criminal justice system.

The development of this guidance document was informed by a review of relevant literature and consultations with people living with HIV, lawyers, prosecutors, judges, academics, human rights advocates, and representatives of international organisations. Given the diversity of legislative contexts, legal systems and roles that prosecutors play in those systems, certain elements may not be applicable in a given context, but all of the key considerations and principles it presents should be relevant to some degree in every jurisdiction.

INTRODUCTION

Some jurisdictions around the world have passed specific laws to criminalise HIV non-disclosure, exposure and/or transmission of HIV, while in others prosecutors and courts have applied existing, general criminal offences.¹ However, there is mounting evidence and concern that an overly broad use of the criminal law, and of similarly coercive and punitive measures, in relation to HIV and other communicable diseases, is not effective public health policy and can do more harm than good. As noted in the Global AIDS Strategy 2016-2021², stigma, discrimination and other human rights violations in the context of HIV both reflect and drive the inequalities that undermine HIV responses. The Strategy calls on countries to create an enabling legal environment by removing punitive and discriminatory laws and policies, including laws that criminalise HIV exposure, non-disclosure or transmission, as well as to introduce and enforce protective and enabling legislation and policies, and end the overuse of criminal and general laws to target people living with HIV and key populations.

The application of general criminal offences to deal with HIV transmission, exposure or non-disclosure — in other words, to circumstances that were not envisioned by lawmakers at the time of their adoption — often means there is little clarity as to the scope of the law, particularly if police, prosecutors and courts are inconsistent when interpreting and applying those offences. Even laws that specifically criminalise HIV transmission, exposure or non-disclosure are often vague and broad, either in their wording or their interpretation. Both a lack of certainty as to what may be prohibited and the unfair, broad use of penal sanctions, offend basic principles of criminal law. These considerations, as well as the complexity and sensitivity of HIV-related cases, underscore the important role of prosecutors in avoiding the overreach and misuse of the serious sanction of the criminal law.

In all legal systems, prosecutors contribute to ensuring that the rule of law is guaranteed, especially by the fair, impartial and efficient administration of

A NOTE ON TERMINOLOGY

In this document, the term “prosecutor” is used broadly to include any actor in the criminal law system who exercises some discretionary function in the course of the investigation and prosecution of activity that is, or is thought to constitute, a criminal offence. This is because the “prosecutorial function” is often structured differently in different legal systems.

For example, the degree to which a prosecutor is involved, if at all, in the investigative stage of a criminal case varies from one jurisdiction to another. In some jurisdictions, a specially designated law enforcement officer (or an officer of an independent investigative service) initiates and carries on an investigation into a possible criminal offence, and their role may include deciding whether a prosecution should proceed. In some jurisdictions, certain judges may play an investigative role as well as rendering a decision in a case.

justice in all cases and at all stages of the proceedings within their competence.³ Prosecutors have an active role in criminal proceedings, including initiating and advancing prosecutions only where they are satisfied that there is sufficient well-founded evidence to support a criminal case, among other considerations.⁴ The degree of prosecutorial discretion recognized in law and in practice, and the stages at which such discretion may be exercised, and how, vary across jurisdictions and legal systems. Where appropriate, and in accordance with national laws, prosecutors should also consider alternatives to prosecution.⁵ In some jurisdictions, prosecutors may also play a role in: investigating crime and/or supervising the legality of these investigations; negotiating plea and sentence agreements; the diversion of offenders to alternatives other than prosecution; supporting complainants; making sentencing recommendations; and supervising the execution of sentences and the treatment of persons in custody.⁶

As such, prosecutors have a central and pivotal role to play in HIV-related criminal cases. In particular, prosecutors can ensure that any prosecutions in relation to alleged HIV non-disclosure, exposure or transmission are conducted in a fair and objective manner, are based on the most sound and recent medical and scientific evidence, guarantee the rights and dignity of people living with HIV, and are grounded in the public interest. This document was developed to guide:

- policymakers in addressing their criminal justice system's approach to HIV non-disclosure, exposure or transmission cases
- heads of prosecution services (or other relevant authorities) who are responsible for establishing policies and guidelines or issuing instructions to prosecutors, according to the structure and rules of their legal system
- individual prosecutors in their day-to-day practice.

Other actors in the criminal justice system, including law enforcement officers, defence lawyers and judges, may also find the considerations and principles laid out in this document useful.

Concerns about HIV criminalisation

Among others, the UN Secretary General, 12 UN agencies, and the Global Commission on HIV and the Law have recommended that states, as part of their response to HIV, “remove punitive laws, policies and practices that violate human rights, including ... the broad criminalisation of HIV non-disclosure, exposure and transmission.”⁷

Because of the impact of HIV criminalisation on both human rights and public health, existing international guidance recommends limiting the use of the criminal law to exceptional circumstances where a person (i) acts with the specific intent to infect another and (ii) actually does so.⁸ However, in many countries, the law continues to be applied beyond this limited use as recommended by international experts and human rights bodies, and certainly the vast majority of these prosecutions to date around the globe, do not involve such circumstances. This gives rise to a variety of concerns that the current use of criminal sanctions in many jurisdictions undermines effective public health efforts and human rights by, for example: contributing to HIV-related stigma and misinformation; creating additional barriers to HIV testing and engagement in care; undermining relationships between patients and providers of health and other services; unnecessarily and unhelpfully infringing privacy; compounding gender inequality while offering little in the way of protection against HIV; and resulting discriminatory prosecutions and disproportionate sentencing. In light of such concerns, courts and legislatures in some countries have taken steps to narrow the scope of HIV criminalisation. However, **while lawmakers**

For ongoing updates regarding the state of HIV criminalisation globally, see the *Advancing HIV Justice* reports produced periodically by the HIV Justice Network (via www.hivjustice.net/publications) and the *Global HIV Criminalisation Database* (www.hivjustice.net/global-hiv-criminalisation-database).

and judges are ultimately responsible for how the law is drafted and interpreted, prosecutors have an important role to play in determining when and how the law gets applied and therefore guidance in this area may be useful.

Developing guidance for prosecutors

To guide the prosecutorial function, it has been recommended that states “define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.”⁹ In keeping with the fundamental principle of prosecutorial independence, it is generally recognized as improper for the executive branch of government, or a superior level of the hierarchy within the prosecution service, to issue instructions to a prosecutor regarding specific cases.¹⁰ However, the value of general instructions or guidelines is also recognized internationally: “In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.”¹¹

This observation applies across a diversity of legal systems: “In order to achieve consistency and fairness when taking discretionary decisions within the prosecution process and in court, clear published guidelines should be issued, particularly regarding decisions where or not to prosecute. Even when the system does not foresee that prosecutors can take discretionary decisions, general guidelines should lead the decisions taken by them.”¹²

These general considerations are certainly relevant to the specific context of HIV criminalisation, particularly in light of the important concerns for both human rights and public health it raises. Yet few jurisdictions have developed any clear guidance for prosecutors specific to the issue of criminal prosecutions related to non-disclosure, exposure or transmission of HIV (or other sexually transmitted infections).¹³ **Sound guidance in this area could help prosecutors ensure that cases are informed**

by accurate science and other important considerations, thereby avoiding prosecutions that over-extend the criminal law or stand little prospect of succeeding.¹⁴ Prosecutors often juggle heavy caseloads with limited resources; complex cases with multiple competing considerations, such as those involving HIV, require additional care, which means that clear guidance may be all the more helpful in avoiding inconsistency and unfairness and the misuse of scarce prosecutorial resources.

The development of such guidance has been recommended on numerous occasions. The Joint United Nations Programme on HIV/AIDS (UNAIDS) has produced a detailed guidance note on medical, ethical and legal considerations related to HIV criminalisation, in which it recommends governments develop and adopt evidence-informed guidelines for police and prosecutors.¹⁵ In 2018, the African Regional



“Police and prosecutorial guidelines can ensure the protection of individuals against overly broad, uninformed and/or unfair investigations and prosecutions. These guidelines can help to ensure that any police investigation or prosecution is based on the best available scientific evidence relating to HIV, upholds legal and human rights principles, treats like-harms alike, and aligns with public health strategies.”

— UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations* (2013)

Judges Forum on HIV, TB and Human Rights, echoed that recommendation. Following further consultations, the UN Development Programme (UNDP) developed this guidance document for prosecutors, with the goals of ensuring a human rights-based and evidence-based approach to the complex issue of HIV criminalisation.

This guidance is intended to be useful for prosecutors in various settings. However, there is considerable diversity in the substance of HIV-related laws across jurisdictions. Common law, civil law and hybrid legal systems also vary in their rules of criminal procedure and the role(s) of prosecutors. Formal guidance exists for prosecutors, on a range of policy and practice issues, in some jurisdictions, but not all. Similarly, who has the authority, in explicit law or in established practice, to adopt or issue such guidance also varies across legal systems. Guidance also takes different formats in different jurisdictions – from binding directives or instructions about very specific issues and circumstances (e.g., prosecuting certain kinds of offences or handling certain kinds of witnesses), to more general guidelines setting out factors to be considered as prosecutors exercise their discretion in their various roles.

Finally, sometimes such prosecutorial policies are internal documents accessible only to prosecutors, whereas in other jurisdictions they are made public – such as when published in an official government publication alongside other notices or regulations, or as part of an official manual for prosecutors, which may even be posted publicly online. Making such policies public provides greater transparency in the administration of justice. In some regions, it is expressly recommended that “where government gives instructions of a general nature [to public prosecutors], such instructions must be in writing and published in an adequate way.”¹⁶

This guidance document presents ten principles, accompanied by more detailed commentary. The guidance first sets out some general principles that are relevant throughout the handling of an HIV-related criminal prosecution (or potential prosecution), followed by some principles more specific to particular stages of a prosecution. Given the diversity of legislative contexts, legal systems and the roles that prosecutors play in those systems, certain elements of this guidance may not be applicable in a given context, but all of the key considerations and principles it presents should be relevant to some degree in every jurisdiction. This guidance will certainly require some adaptation to the local legal context. In doing so, it is essential to ensure consultations with relevant stakeholders – including not only prosecutors but also people living with HIV, health services providers, community organisations working in the HIV response (including with key populations particularly affected by HIV), scientific experts, and legal and human rights experts.¹⁷

Methodology

The development of this guidance document was informed by a review of relevant literature and consultations with people living with and affected by HIV, lawyers, prosecutors, judges, academics, human rights advocates, and representatives of international organisations. Those consultations included 28 in-depth interviews (with informants from different regions) and an online survey available in four languages (English, French, Russian and Spanish) widely distributed across the HIV community (with responses received from 29 countries from most of the world’s regions). A gender-balanced advisory committee, including people living with and affected by HIV, lawyers, judges and community advocates from different regions and legal systems, was convened to inform the content and format of the guidance.

Although this Guidance is intended primarily for prosecutors, it will also be useful for –

- Legislative committees and law reform commissions: looking to review HIV criminalisation laws and to make recommendations for reform to bring the law in conformity with latest evidence on HIV transmission.
- Public defenders and defence lawyers, as a resource for providing effective representation for clients charged with HIV non-disclosure, exposure and transmission, to prepare defence and conduct legal research.
- Magistrates setting bail conditions, hearing cases and imposing sentences in some cases where HIV status is material.
- Oversight bodies, including parliamentary committees, offices of the Ombudsman and national human rights institutions with relevant mandates to check the misuse of prosecutorial powers.
- Law enforcement officials who are often the first point of interface when there is a complaint of HIV non-disclosure, exposure and transmission, will find the Guidance useful for ensuring that material facts are contained in the statement of the complainant and that the rights of the suspect are not violated.
- Law schools and other institutions that provide continuing legal education such as law societies and bar associations.
- Civil society organisations monitoring, documenting and reporting on HIV criminalisation whose advocacy, reporting and evidence support law reform.
- People living with and vulnerable to HIV improving their knowledge of the procedural standards in respect of prosecution of HIV, especially when facing actual or possible prosecution.



GENERAL PRINCIPLES

1 Prosecutions should be informed at all stages by the most reliable evidence

Despite remarkable advances in HIV treatment and prevention, the use of the criminal law in relation to HIV often reflects persisting misconceptions and fears about HIV, contrary to improved scientific knowledge. Regrettably, laws and prosecutions have not always been guided by the best available scientific and medical evidence; some people have been prosecuted even where there was little or no possibility of transmitting HIV.

The UN's *Guidelines on the Role of Prosecutors* state that “prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”¹⁸ According

to professional standards adopted by the International Association of Prosecutors (IAP), “in the institution of criminal proceedings, [prosecutors] will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.”¹⁹ Furthermore, “throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.”²⁰

Prosecutions must always proceed based on credible evidence, including about HIV and its transmission – and this is the case whether a matter goes to trial or may be resolved by way of a guilty plea. Note that, before accepting a plea of guilty by a defendant, both prosecutors and defence lawyers should take care to ensure it is based on sound science regarding HIV.

AVOIDING UNSOUND ASSUMPTIONS

Prosecutions must never proceed on inaccurate assumptions, subjective biases, speculation or prejudice. The following are some important points to keep in mind.

- Simply because a person is HIV-positive does not automatically mean they are able to transmit HIV. For example, their viral load may be sufficiently low that there is no possibility of transmission.
- Simply having been given an HIV-positive test does not mean a person is necessarily aware of how HIV can, and cannot, be transmitted.
- Spitting poses no risk of HIV transmission.
- Biting poses no, or at most, negligible risk of HIV transmission.
- It is not the case any form of sexual activity necessarily poses a risk of HIV transmission.
- Exposure to HIV does not necessarily lead to actual infection.
- It cannot be assumed that a person living with HIV who engages in sex or other activity that may pose a risk of transmission intends to transmit HIV or has no regard for their partners' health.
- The first person in a couple to test positive for HIV is not necessarily the source of their partner's infection. The partner tested later may have been the one who passed on the infection, or there may have been another source.

In some areas, the science is clear; in other areas, it can be complex and is also evolving. **A correct working understanding of the relevant science is essential to ensuring that prosecutorial practice is consistent and that prosecutions (and any convictions that may result) are based on fair and objective facts.** A correct understanding of the science will also help with the wise use of prosecutorial resources, including by narrowing the issues in a proceeding and avoiding prosecution of cases where there is little or no scientific basis for proceeding. Such an understanding is also important on the part of law enforcement, defence lawyers and judges.

For example, prosecutors should be aware that:

- HIV cannot be transmitted through saliva.
- A reduction in a person's viral load (the amount of the virus circulating in the body, as measured in a blood sample) also means a reduction in the risk of HIV transmission.
- Effective treatment with anti-retroviral medication suppresses viral load. A small minority of people are naturally able to control their viral load without medication.
- HIV cannot be transmitted sexually from a person with an undetectable or suppressed viral load.
- HIV cannot pass through an intact condom, meaning correct condom use prevents HIV transmission.
- Oral sex poses no, or at most, negligible risk of HIV transmission.
- Access to antiretroviral therapies transforms HIV into a chronic, manageable health condition, meaning people with HIV who have access to care enjoy quality of life and have a life expectancy similar to that of people without HIV.

- When contemplating the question of proving transmission from a defendant to a complainant, science such as phylogenetics (which analyses the degree to which HIV strains are genetically related) has important limitations.

Such information can be easily found in the *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* (also summarized in Annex C).²¹ In some instances, consulting such a source and other reliable resources, such as those listed in Annex D, can establish quickly and conclusively that there is no scientific basis for a criminal charge or prosecution in various circumstances.

In other, more complex circumstances, a prosecutor should seek an *expert scientific opinion* from a qualified expert at the earliest possible occasion and seek further expert opinion as necessary during a prosecution. Such expert opinion should address matters such as the possibility of HIV transmission associated with the act(s) that are alleged as the basis for a possible prosecution, and the bodily harm associated with HIV infection. If transmission from the defendant to the complainant is alleged, then a suitable expert should advise about whether the evidence could establish transmission with the legally required degree of certainty. As explained below, and noted in Annex C, an expert forensic virologist familiar with the complexity and limitations of phylogenetic analysis should be retained if such scientific evidence is being contemplated as part of proving actual transmission. Where the expert opinion does not support proof of the elements of the offence applicable in the law of the jurisdiction, a charge should not proceed or, if already laid, should be withdrawn.

② Prosecutors should ensure that the rights of the complainant, the defendant and witnesses are respected throughout every stage of the prosecution

Any application of the criminal law engages various human rights. Prosecutors, as representatives of the state, have a key role and obligation to ensure human rights are respected, protected and fulfilled in the course of their duties.²² Relevant human rights standards include the right to liberty, including freedom from unlawful or otherwise arbitrary deprivation of liberty,²³ as well as the right to be presumed innocent until proven guilty according to law,²⁴ and the right to a fair trial by a competent, independent and impartial tribunal.²⁵ International principles also require that complainants be treated with compassion and respect for their dignity and be informed about their rights, including access to justice and prompt redress.²⁶

Similarly, prosecutors must ensure respect for the right to equality before the law and to freedom from discrimination, including on the basis of race, colour, ethnicity, national or social origin, sex or other status including HIV-positive status, sexual orientation or gender identity.²⁷ This consideration operates at all times in exercising the prosecutorial function and applies to both the defendant and the complainant. Prosecutorial standards are explicit that prosecutors must “carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.”²⁸ Applying criminal law in the context of HIV, a stigmatised health condition, heightens the importance of scrupulous attention to these rights in order to avoid improper prosecutions and unjust convictions rooted in stigma or prejudice. Similarly, prosecutions involving sexual activity are often laden with biases and assumptions about sex, sexuality and gender, including discriminatory views about women and their sexuality, and prejudices against same-sex sexual activity, transgender identity or the sale of sex. Biases and prejudices based on ethnicity, colour or race, especially in settings

where communities have historically been disproportionately criminalised on these grounds or against migrants, have also been observed in some jurisdictions where HIV-related criminal prosecutions have been brought forward. In such contexts, heightened care is required to avoid unjust prosecutions.²⁹

HIV-related criminal prosecutions also engage the right to the highest attainable standard of physical and mental health,³⁰ the right to security of the person (against harms at the hands of the state) and even potentially the right to life,³¹ depending on the circumstances. Detention – during arrest proceedings, pre-trial and following conviction – can interrupt access to HIV treatment and other aspects of necessary medical care. Furthermore, in many settings, conditions of detention are harmful to the health of detainees in general. The potential harm of such conditions is even greater in the case of a detainee living with HIV. Stigma and abuse of various kinds, including in relation to HIV, are present in prison settings just as they are outside.

Finally, the right to privacy³² is also engaged by HIV-related criminal prosecutions, at multiple stages, and is of relevance to both the defendant and the complainant. The “open justice” principle that criminal proceedings should be open to public scrutiny is important; transparency is necessary to ensure fair proceedings consistent with human rights standards, as well as accountability in the operation of the justice system. At the same time, this must be balanced with the obligation to respect and protect the right to privacy, and consideration of the harms that may flow from HIV-related criminal prosecutions.

Criminal proceedings related to allegations of HIV non-disclosure, exposure or transmission will inevitably reveal the HIV-positive status of the defendant, and in cases where actual HIV transmission is alleged, that of the complainant. HIV remains highly stigmatised in many settings, and public disclosure of someone’s HIV-positive status can have serious adverse consequences. Most HIV-related prosecutions have arisen, and will likely continue to arise, in the context of sexual

encounters. As a result, they will necessarily involve evidence of sexual activities by the defendant and the complainant. This may also entail disclosure of the sexual orientation or gender identity of the defendant and/or complainant, and possibly of sexual activities outside a relationship that were not previously known to one of the partners.

Depending on the circumstances, a prosecution may involve evidence of other criminalised or stigmatised activity such as drug use or the sale and purchase of sexual services. It may also implicate the conduct of others, such as other sexual or drug-sharing partners of the complainant or defendant, whose privacy is therefore also engaged. It is important to consider that allegations brought forward are yet to be proven, and that exposing parties' and witnesses' identities, HIV status and/or other sensitive information can lead to serious consequences, including the loss of social and family relationships, as well as harassment and discrimination in various settings such as employment, housing and healthcare, and sometimes, violence.

Prosecutors, as well as defence lawyers and judges, should therefore strive to preserve the privacy of complainants, defendants and witnesses to the greatest extent possible. They should consider what measures can and should be taken to avoid or minimise violations of the right to privacy, of the complainant, defendant and other parties such as witnesses, in HIV-related criminal prosecutions. This should be observed at all stages of the prosecution. Access to medical and counselling records is particularly sensitive, hence health professionals' duty of confidentiality to patients. In keeping with applicable legal requirements and procedures, during an investigation, prosecutors should only seek access to elements of such records that are absolutely necessary, and at trial they should limit disclosure of information in such records. Both a complainant who is compelled by the process of the prosecution to share such intimate, private information, and a defendant who

by definition is facing an allegation (not a proven set of facts) have strong privacy interests. Aside from its inherent value, protecting privacy may enable witnesses to give a fuller and more candid account when testifying. It may also help protect witnesses against intimidation or retaliation in some cases.

Prosecutors, defence lawyers and judges should be alert to such concerns and should consider taking or requesting various measures to protect privacy, both at trial but also before trial and in any related preliminary or subsequent proceedings, such as court orders that:

- permit receiving evidence *in camera* in the case of specific witnesses;
- protect the identity of participants in the proceeding by redacting documents and/or requiring the use of initials only or pseudonyms in the proceeding and any court records accessible to the public;
- limit the introduction of information from confidential medical records to that which is strictly related to the facts at issue in the proceeding;
- restrict access to documents filed in the court proceeding to prevent broader public disclosure of such information;
- prevent the broader publication, via any document, media broadcast or other transmission, of the identities of the complainant and defendant or any information that could identify them; or
- exclude the general public from the courtroom, restricting access to close family, friends or supporters of the complainant and defendant, and perhaps access to news media subject to a publication ban such as that described above. The prosecution and the court should also consider the real risks to the complainant and defendant of publicising facts related to the case on social and news media platforms and take appropriate steps to prevent this.



DECIDING WHETHER AND HOW TO PROSECUTE

3 Prosecutors should pursue prosecutions in only limited circumstances, as HIV is most effectively addressed as a public health matter

The benefits of a public health approach

The available evidence shows that ensuring universal access to goods, services and information for the prevention, diagnosis and treatment of HIV and other STIs contributes substantially to halting the spread of new infections as well as improving the health of people living with HIV. It is also a human rights obligation to take positive steps to ensure such goods, services and information are available, accessible, acceptable to the intended populations, and of good quality.³³

For the most part, the majority of people who have been diagnosed with HIV, when empowered to do so, take steps to prevent the onward transmission of HIV, including to their sexual partners.³⁴ Access to effective treatment renders HIV a manageable, chronic infection. Life expectancy for someone who starts antiretroviral therapy soon after acquiring HIV now approaches that of the general population.³⁵ Beyond this individual benefit, an HIV-positive person who has an “undetectable” or “suppressed” viral load cannot transmit the virus to a sexual partner.³⁶ Viral suppression also significantly reduces the possibility of transmission via other means, such as vertical transmission from a mother to child during the pregnancy, during labour or through breastfeeding.³⁷ As noted above, effective antiretroviral treatment and condom use are each highly effective HIV prevention measures, resulting in no, or at most, negligible possibility of HIV transmission.³⁸ Public

health policies and programs that ensure people can safely find out their HIV status, and that they have access to HIV treatment and the tools for HIV prevention and are able to use them, constitute the primary, most effective responses to HIV.

The limits and adverse consequences of criminal prosecutions

HIV criminalisation has not been shown to be an effective HIV prevention policy. There is little or no evidence that the criminalisation of HIV helps to prevent new infections to any significant degree by deterring sexual risk behaviours or encouraging disclosure.³⁹ To the contrary, punitive laws, policies and practices, as well as stigma and discrimination against people living with HIV and other “key populations”⁴⁰ have been found to have a negative impact on public health in various ways,⁴¹ and to raise important human rights concerns. Assessing whether, when and how to prosecute should be informed by a consideration of these concerns, which favour restraint in resorting to criminal charges and prosecutions, as recommended by international guidance on HIV criminalisation.

Overly broad use of the criminal law can be another disincentive to testing. Scaling up HIV testing is critical to HIV prevention and access to treatment. It is a challenge to encourage people to come forward for HIV testing, so they can get treatment, information and other support to prevent onward transmission, if they fear the consequences of being identified as HIV-positive. Unfortunately, as criminalisation often applies to people through simply knowing about their HIV-positive status, the threat of possible charges and prosecution is, for some, another reason to avoid HIV testing altogether, in spite of the individual and public health benefits that result from simply

knowing one's status.⁴² Given estimates that a significant proportion of new HIV infections are attributable to persons who are undiagnosed, disincentives to testing contribute to further spread.⁴³ The more widely applied the criminal law – for example, criminalising people whose conduct poses negligible or no possibility of transmission – the greater the likelihood of such harm, because simply knowing of one's HIV-positive status, as opposed to engaging in particular conduct, can mean risking prosecution and punishment.⁴⁴

HIV criminalisation also undermines public health by threatening the relation of trust between patients and health care providers, especially when medical records are used in criminal investigations and against a patient in a prosecution, or doctors and nurses are compelled to testify in courts against their patients.⁴⁵ This occurs routinely in HIV-related prosecutions to establish a defendant's HIV-positive status, date of diagnosis, viral load, or possible exposure to other STIs; introduce details of information provided to the defendant by a provider of HIV testing or other health services; or, sometimes in an attempt to corroborate claims that certain conduct did or did not occur (e.g., with a sexual partner) and to identify previous contacts. Where an individual has been compelled by law to provide such information to their doctor or public health, the use of such information as evidence against that person in a criminal proceeding infringe on the right against self-incrimination.

Disclosing HIV-positive status is often a difficult personal undertaking, given the prevalence of HIV-related stigma, discrimination and other abuses. People often have good reason to fear rejection and ostracism, as well as discrimination in areas such as access to health and basic services, employment or housing, or other harms, if identified as HIV-positive.⁴⁶ Some people with HIV face violence, abandonment and other abuses if they tell a partner about their status. This is a stark reality faced by a significant number of women living with HIV and key populations.⁴⁷ Some people may not be in a position to disclose their status because of denial or a lack of understanding of their health condition.

Aside from the challenges of disclosure, there are systemic or personal barriers to HIV prevention. Some people living with HIV, and some communities particularly affected by HIV, have limited or no access to the effective antiretroviral treatment that prevents transmission, or are less able to negotiate or ensure precautions such as consistent and correct condom use in their sexual encounters. Such barriers can include: the cost of health goods and services where there is limited or no access that is free or covered by insurance or user fees are charged;⁴⁸ the unavailability of treatment or viral load testing in some countries or to some populations (e.g., undocumented migrants);⁴⁹ stigma and discrimination in health care settings against people living with HIV and other key populations, which affects both access to care and is also shown to undermine the effectiveness of HIV treatment;⁵⁰ inaccessible health services for people with disabilities;⁵¹ policies precluding access to sexual and reproductive health services for young people;⁵² and gender-based violence and inequalities.⁵³ When access to the means of HIV prevention and the ability to use them effectively is limited in such ways, the burden of criminal prosecutions for HIV transmission, or conduct seen as risking transmission, will often end up falling disproportionately on those already disadvantaged. This raises questions of fairness, as well as whether such an approach is sound public health policy – particularly if the over-extension of the criminal law itself creates barriers to accessing health services and other measures that are shown to be effective for HIV prevention.

Overly broad application of the criminal law contributes to the stigma associated with HIV, by contributing to misconceptions about the virus, including exaggerated perceptions of the risk of transmission. This is especially the case when criminal prosecutions – and attendant publicity, including often inaccurate or sensational media coverage – are based on activities that pose little or no risk of HIV transmission.⁵⁴ By associating HIV with criminality, and contributing to popular representations of people living with HIV as criminals, HIV criminalisation further reinforces the stigma surrounding HIV, and hence discrimination against people living with HIV. This in turn

contributes to making HIV disclosure more difficult, and also creates barriers to the success of accurate and effective HIV prevention education, and the provision of care and treatment. Additionally, in the large majority of known cases, people have been prosecuted despite the absence of any intent to harm others or in cases where transmission was neither alleged nor proved. In some cases, people have been charged – and in some cases convicted and received severe sentences – even if they took precautions to protect their partners and prevent HIV transmission, raising concerns about the appropriateness of harsh, stigmatizing criminal sanctions in such circumstances.⁵⁵

Concerns have been raised about the ways in which HIV criminalisation harms women. The use of criminal sanctions has often been pursued out of a laudable desire to protect women.⁵⁶ However, women’s rights advocates concerned about HIV criminalisation have highlighted that it does not address the global epidemic of gender-based violence and gender inequalities, which factors are intertwined with their HIV risk,⁵⁷ and instead exacerbates these risks for women living with HIV.⁵⁸ In many settings, women are more likely to discover their HIV-positive status, including in the context of prenatal care, before a male partner. Some are then at risk of unfounded accusations of ‘bringing HIV into the relationship’ as well as abuse and violence. HIV criminalisation also means that people living with HIV who are in abusive relationships – who are disproportionately women – face the possibility of being threatened with criminal accusations of HIV non-disclosure, exposure or transmission as a means of control and coercion.⁵⁹ HIV criminalisation has also been found to undermine access to health care for women living with HIV.⁶⁰ Women living with HIV have also been subject to prosecution in some instances for the risk, or even simply the perceived risk, of vertical transmission (i.e., from a mother to child), including for breastfeeding. Such prosecutions have arisen despite significant advances in scientific knowledge that antiretroviral treatment dramatically reduces such risks, and the simultaneous recognition that women living with HIV face difficult, complex choices regarding breastfeeding and how best to protect the health

of their children.⁶¹ For example, replacement feeding may not be a safe or viable option in many contexts, for various reasons. The lack of potable water may mean replacement feeding is not only expensive and deprives children of the nutritional and immunological benefits of breastfeeding, but also increases the risk of illness and potentially fatal waterborne diseases. Cultural norms demanding breastfeeding may make it unsafe or difficult for a mother to refuse to breastfeed, as doing so may entail disclosure of, or at least speculation about, her HIV status and the stigma, discrimination or even violence that may follow. Women’s choices in such circumstances are complex; adding the threat of criminal prosecution is of no benefit whatsoever to either women or the children in their care.⁶²

Discriminatory application of the law is another concern. Available data shows that in numerous jurisdictions, prosecutions for alleged HIV non-disclosure, exposure or transmission have disproportionately affected particularly marginalised groups, such as ethno-racial minorities, sex workers, or gay men and other men who have sex with men.⁶³ Research in some jurisdictions has also found media coverage of HIV-related criminal prosecutions focussed disproportionately on Black and/or migrant defendants, and reflecting or contributing to troubling racist stereotypes.⁶⁴ Furthermore, the risk of unfairness, and potential discrimination, in the application of the law is heightened in jurisdictions where the law is not clear as to what conduct is criminally prohibited, because statutory provisions are ambiguously drafted, prosecutorial policy is non-existent or unclear and/or prosecutorial practice is inconsistent.

Principles restraining use of the criminal law

In most legal systems and traditions, criminal sanctions are understood as the strongest formal means of condemnation that society can impose. Therefore, their use should be a measure of last resort, reserved for behaviour that is sufficiently blameworthy as to warrant such sanction. Beyond this foundational principle of criminal

law, international legal standards also require that limitations on human rights, such as the right to liberty or other rights implicated by a criminal prosecution, must satisfy certain criteria in order to be justified. These include the requirements that: any such limitation must be provided for by law that is clear and accessible (the principle of legality or legal certainty); it must not be applied in a manner that is arbitrary, unreasonable or discriminatory; and it must be “necessary” – meaning that the infringement of liberty responds to a pressing public or social need, it pursues a legitimate aim, and it is proportionate to that aim.⁶⁵ This principle of restraint in the use of criminal sanctions applies not only to the legislature’s function of *making* the law and the judiciary’s function of *interpreting* the law, but also to the *application* of the law, including at the level of prosecutors making decisions about individual prosecutions. This includes the decision about *whether* a charge should be laid and *which* charge to pursue. There should be no automatic assumption that it must be the most serious charge that could be made on the evidence. Nor should it automatically be made the practice to lay multiple charges, using different offences, to address the same conduct.

4 Prosecutors should establish a sufficient evidentiary basis for a prosecution

In any given case, prosecutorial discretion should be exercised based on whether there is a realistic or reasonable prospect of conviction based on the whole of the evidence that is considered reliable, credible and admissible at trial. While the exact formulation of this test varies across legal systems, all systems recognize that no prosecution is warranted in the absence of sufficient evidence, acceptable to an impartial and independent adjudicator, to make out the required elements of the offence.⁶⁶ To avoid improper prosecution, and to use the resources of the justice system wisely, the prosecutor must re-assess the reasonable prospect of conviction at each stage of the prosecution and as the evidentiary foundation of the case evolves. In the specific context of HIV-

related prosecutions, a number of factors should be considered by prosecutors in assessing the reasonable prospect of conviction.

Evidence regarding the HIV-positive status of the defendant at the time of the alleged offence: There can be no prosecution alleging HIV transmission, exposure or non-disclosure unless it is established that the defendant was HIV-positive at the time of the alleged offence. An HIV test performed after the alleged offence, including in the context of an investigation, would not provide sufficient evidentiary basis for a prosecution.

Evidence regarding the conduct that is the basis of the charge: The prosecutor should explore what evidence there is regarding the specific details of the sexual relations (or other acts) between the complainant and the defendant. Which acts occurred? How many times? Under what circumstances? These details will be essential to an informed assessment of the possibility of HIV transmission. Details of communications between the complainant and the defendant also need to be established. For example, did the defendant disclose in some way their HIV-positive status? Did either complainant or defendant suggest condom use or not engaging in certain sexual acts? The prosecutor should investigate whether there are any objective sources of evidence, other than the complainant and defendant, corroborating or contradicting the accounts of their encounters. For example, there may be independent evidence confirming that disclosure took place or that the complainant otherwise knew of the defendant’s status, including information acquired from others aware of the defendant’s status. In the case of an ongoing relationship, the prosecution should consider the context. Is there evidence of a dynamic in the relationship, such as a pattern or threat of violence, that could reasonably prevent the accused from disclosing their status or proposing measures to reduce the possibility of HIV transmission? Conversely, is there any evidence that a complainant’s accusations against a defendant are motivated by some attempt to control the partner or may be part of a pattern of threats, intimidation, violence or revenge. It should also be recalled that determining whether

the complainant or the defendant was infected first cannot be assumed based on who was first diagnosed with HIV or who initiated a complaint to authorities.

Evidence of risk and harm: As noted above, the prosecutor must ensure that assessment of the risk of transmission, and proof of actual transmission if alleged, is well-founded in current science, drawing on the opinion of properly qualified experts when necessary. In the absence of such a sound scientific foundation there is no basis for a prosecution. While international recommendations are against the application of criminal law where there is no actual transmission, in some jurisdictions, exposure to a potential risk of infection suffices for a conviction under the law; in such cases, the lower the possibility of transmission, the less likely a prosecution is to be warranted. Conduct posing no or negligible possibility of transmission never warrants prosecution. Some key points for consideration, based on the available scientific consensus (see Annex C):

- There is no possibility of HIV transmission through saliva, even when it contains small quantities of blood.
- The possibility of HIV transmission from biting ranges from none, to at most, negligible.
- The possibility of HIV transmission during a single act of vaginal or anal sex ranges from low to none, depending on the circumstances
- The possibility of HIV transmission during a single act of oral sex ranges from none, to at most, negligible.
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex when the HIV-positive partner has an undetectable (or “suppressed”) viral load.
- The possibility of HIV transmission during a single act of vaginal or anal sex when the HIV-positive partner has a low viral load ranges from none, to at most, negligible.
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex where a latex or polyurethane condom is used correctly, meaning its integrity is not compromised and it was worn throughout the sex act in question.

Where the prosecution seeks to prove transmission of HIV, extra caution is required in dealing with scientific evidence such as phylogenetic analysis comparing two strains of HIV or tests aimed at estimating the likelihood of a complainant’s recent infection. The limitations of this evidence must be carefully understood. Such analyses cannot on their own prove that a defendant has infected a complainant with HIV. Importantly, phylogenetic analysis can exonerate a defendant when the results rule out the defendant as the source of a complainant’s HIV infection.

The presence or absence of the requisite mental culpability

- A prosecutor should first be satisfied that the defendant was aware of and understood their HIV-positive diagnosis, and furthermore, that the defendant understood the risk of transmission associated with the sexual (or other) act that is alleged. Without these basic facts, there would be no basis for establishing the requisite degree of mental culpability (often referred to as *mens rea* or the mental element, depending on the legal system).⁶⁷ The circumstances of the individual defendant must be considered. In some cases, being informed of a positive test result or even having a discussion with a health care practitioner may not be sufficient to establish that the person understood the risks of HIV transmission, especially if the person was in shock when receiving their diagnosis or in denial.
- While knowledge of HIV-positive status and of the risk of transmission should always be understood as necessary elements, they may not be sufficient for a conviction. The prosecutor needs to be satisfied that the reliable, credible and admissible evidence as a whole can establish the level of mental culpability as defined in the law of the jurisdiction.
- Mental culpability – and certainly not an intent to transmit HIV – cannot be presumed merely because a person living with HIV did not disclose their HIV-positive status or engaged in certain activity (e.g., sex without a condom, having a baby). As noted above, there are many reasons why someone might not disclose

their status, including fear of serious negative consequences or an understanding or belief that there is no significant risk of transmission in the circumstances, such as having an undetectable viral load, using a condom, or their sexual partner's use of pre-exposure prophylaxis (PrEP). In some instances, a person may not be in a position to insist that their sexual partner use a condom. These factors must be taken into account when considering whether the evidence establishes the mental culpability of the defendant required by the applicable law.

- Conversely, taking precautions to prevent or reduce the possibility of transmission of HIV would be a factor negating the existence of any intent to cause harm. Proof of direct intent to transmit HIV should require not only knowledge of one's HIV-positive status and of how HIV can be transmitted, but also evidence of some deliberate action done for the purpose of transmitting. In the case where a lower standard of mental culpability may suffice for a conviction (e.g., "recklessness" in some legal systems or "indirect intent" in other systems), what is required is clear evidence of a conscious and willing disregard in relation to acts that, based on the best available scientific evidence, pose a significant possibility of HIV transmission. Taking precautions to prevent or reduce the possibility of transmission would be a factor negating the existence of recklessness or negligence. So, too, would be an honest belief that a partner was taking precautions effective at preventing HIV transmission (e.g., using a condom, taking pre-exposure prophylaxis).

5 Prosecutors should consider whether a prosecution in a given case is in the public interest

While essential, a mere sufficiency of evidence to support a charge and a conviction is not the only consideration. Some jurisdictions explicitly state, whether in legislation or in a code or other policy governing prosecutors, that a prosecutor must also consider whether, in all the circumstances,

a prosecution would be in the public interest, as a second part of the test to be applied in each case. In some jurisdictions, in keeping with the principle that the criminal law is a last resort (the principle of *ultima ratio*), guidance to prosecutors indicates that prosecution should proceed only if there is no other alternative. In contrast, in the law, policy or practice of other legal systems, as long as the evidentiary requirements of the offence are satisfied, there is a presumption (even sometimes stated explicitly) that prosecution is in the public interest and should proceed unless there are compelling reasons not to prosecute.

Despite this considerable variation, in no legal system would it be sound prosecutorial practice to disregard these other considerations entirely. It is internationally recognized by states that "in the performance of their duties, prosecutors shall ... protect the public interest, act with objectivity, take proper account of the position of the suspect and the complainant, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect...".⁶⁸ The International Association of Prosecutors declares, as basic standards of professional responsibility, that prosecutors: "shall... always serve and protect the public interest";⁶⁹ "shall remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest";⁷⁰ and "shall always... assist the court to do justice between the community, the victim and the accused according to the law and the dictates of fairness."⁷¹ The UN *Guidelines on the Role of Prosecutors* declare that "in accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting cases from the formal justice system, with full respects for the rights of suspect(s) and the complainant(s)."⁷² In accordance with such international standards, prosecutors must *always* have some regard, within the parameters of discretion applicable in their legal system, for the public interest in exercising their prosecutorial function – including what outcome best addresses the needs of the complainant, the defendant and the community. This applies from the outset and at each stage of the prosecution.

There is a public interest in the fair, impartial and consistent enforcement of the criminal law, within the bounds of the state’s human rights obligations. However, the public interest encompasses more than this. While the specifics will vary from case to case, and hence the weight to be accorded to these, some general considerations would usually include:

- the nature of the alleged offence;
- the extent or absence of harm caused by the alleged offence;
- the circumstances of the complainant;
- the level of culpability and the circumstances of the defendant, including any significant mitigating or aggravating circumstances;
- whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offence or the particular defendant;
- the impact on the community and broader public of prosecuting or not prosecuting;
- whether the public interest can be adequately served by some alternative to prosecution; and
- the implications for efficient allocation of public resources.



“In the performance of their duties, prosecutors shall ... protect the public interest, act with objectivity, take proper account of the position of the suspect and the complainant, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.”

— UN Guidelines on the Role of Prosecutors (1990)

In the specific context of HIV-related prosecutions, a number of factors should be considered by prosecutors in assessing the *public interest* in pursuing a prosecution.

Seriousness of the offence: As a general rule, the more serious the offence, the more likely it will be in the public interest to pursue a prosecution. In the context of HIV-related prosecutions, the issue of public interest must be assessed carefully. In some jurisdictions, HIV-specific laws are ambiguously or poorly drafted, often without regard for the best available scientific evidence, and often imposing penalties that are not commensurate with the actual seriousness of the alleged offence. These laws may capture conduct across a broad spectrum, not all of which may be deemed serious as HIV transmission may be unlikely or not possible. In some jurisdictions, general (i.e., non-HIV-specific) criminal offences have been applied, in ways not originally contemplated by legislators, to circumstances of alleged HIV non-disclosure, potential or perceived exposure, or transmission.

Avoiding bias and discrimination: Prosecutors must act impartially and avoid discrimination. This is of particular importance in the context of HIV-related prosecutions, given ongoing stigma and prejudice related to HIV, sex, sexual orientation and gender identity, sex work and drug use. As the HIV epidemic has disproportionately affected people and communities who are socially and economically marginalized, as well as communities disproportionately subjected to the criminal justice system, it is important for prosecutors to be alert to such considerations in deciding whether and when to prosecute.

Additional factors to consider: Prosecutors should consider a range of other specific factors when assessing whether a prosecution is warranted in a given case, noting that the relevance of any given factor will depend on the definition of the applicable offence in a given jurisdiction. Factors to be considered include the following:

- the complainant was not infected with HIV
- non-disclosure of HIV-positive status was an isolated incident and there is no evidence

of a history of non-disclosure placing sexual partners at a significant risk

- the possible power imbalance in intimate or other relationships – whether the defendant took advantage of the vulnerability of the complainant, but also whether the defendant was in a vulnerable or subordinate position to the complainant
- the staleness of the alleged offence in situations where historical sexual partners come forward alleging non-disclosure
- the compromised physical and mental health of a defendant living with HIV
- whether the HIV-positive defendant is a marginalized or vulnerable person who lacked a support network or other means to access appropriate medical information and treatment
- whether other measures, such as public health interventions, have previously been employed with the defendant to address conduct that, based on sound science, poses a significant risk of transmission
- whether public health interventions may be usefully employed, in a manner consistent with human rights standards, as an alternative to prosecution and possible incarceration
- the potentially unduly harsh or oppressive consequences of prosecutions and a conviction for the defendant, including the health and safety risks that incarceration poses for a defendant living with HIV, and any ancillary (and sometimes mandatory) sentencing provisions that may come into play in cases of conviction for a sexual offence (e.g., years-long designation as a sex offender) even though HIV-related matters are not sexual offences *per se*
- the impact of prosecution and, in the event of a conviction, of a likely or possible sentence (e.g., of incarceration) on others, such as children or other dependants of the defendant
- whether a criminal proceeding offers a realistic prospect of achieving some meaningful remedy or acknowledgment of a complainant's legitimate grievance (e.g., recognition of harm experienced)
- whether alternatives to prosecution, including diversionary measures and possible restorative justice programs, may offer a satisfactory resolution.⁷³



UNAIDS and UNDP have urged governments to limit criminalisation to cases of intentional, actual 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. They have also recommended that there should be no use of the criminal law where there is no significant risk of transmission, or where the defendant:

- did not know that they were HIV-positive;
- did not understand how HIV is transmitted;
- disclosed their HIV-positive status to the complainant (or honestly believed the other person was aware of their status through some other means);
- did not disclose their HIV-positive status because of fear of violence or other serious negative consequences;
- took reasonable measures to reduce the risk of transmission (e.g., using a condom); or
- previously agreed on a level of mutually acceptable risk with the complainant.

— UNAIDS & UNDP, Policy Brief: Criminalisation of HIV Transmission (2008)



PRE-TRIAL AND TRIAL CONSIDERATIONS

6 Prosecutors should generally consent to pre-trial release, absent exceptional circumstances

Every person has the right to liberty and the right to be presumed innocent until proven guilty before an independent and impartial tribunal,⁷⁴ as well as the right to be brought promptly before an independent and impartial judicial authority, if detained.⁷⁵ Consequently, detaining someone who has yet to be proven guilty requires adequate justification by the state. Detention pending trial must be an exceptional means of last resort, and of short duration; it must also be necessary and reasonable in the circumstances of the individual defendant.⁷⁶ Pre-trial detention may not be used for punitive purposes. Pre-trial release may be accompanied by measures intended to guarantee the defendant's appearance at trial or sentencing.⁷⁷ Note that such alternative, non-custodial measures pending trial are optional, not compulsory. There is also a right to trial within a reasonable time.⁷⁸ Where this cannot be guaranteed, pre-trial detention is of even greater concern.

Despite the international standards noted above, in many settings defendants are incarcerated in pre-trial detention for months or even years. Despite internationally-agreed minimum standards,⁷⁹ this is often in conditions that are detrimental to health,⁸⁰ raising further concerns about violation of the right to humane conditions of detention and the prohibition on torture or other cruel, inhuman or degrading treatment.⁸¹ For a defendant living with HIV, the consequences can be particularly harsh, including interruptions of HIV anti-retroviral medication and lack of access to other aspects of necessary medical care, despite minimum standards requiring that prisoners have access

to health care equivalent to that available in the community.⁸² Detention can also give rise to heightened risks to personal safety for people living with HIV. HIV is often heavily stigmatised in prison settings, as are sexual offences, which are used in some jurisdictions to prosecute allegations of HIV non-disclosure, exposure or transmission. These can increase the risk of harassment, threats and violence. Some defendants may also be particularly vulnerable to violence, including sexual violence in detention, if they are perceived as lesbian, gay, bisexual or transgender. Detention can have further harsh consequences for a parent who is breastfeeding or has young children or other dependants.

Prosecutors should ordinarily not seek pre-trial detention of someone in connection with HIV-related criminal charges unless there are serious, demonstrable grounds militating against release pending trial. In such circumstances, it is also incumbent on prosecutors to show that measures short of pre-trial detention, such as release subject to conditions, are inadequate. A defendant's HIV-positive status is never *per se* a sufficient basis on which to seek or impose pre-trial detention. Nor is it justified to assume or assert, without particular evidence applicable to the specific circumstances, that the HIV-positive defendant poses a risk to public health or safety that warrants detention pending trial. Other restrictions on liberty, short of pre-trial detention – such as restrictions on social interactions or intrusive monitoring of movements or activities – similarly require justification as being necessary and proportionate, and cannot be based on stigma or prejudicial assumptions, including those about HIV, people living with HIV, or other personal characteristics of a defendant such as sexual orientation, gender identity, drug use, involvement in sex work, etc.

7 Prosecutors should avoid statements and arguments that could be inflammatory, prejudicial or contribute to public misinformation about HIV

Given the stigma surrounding HIV and common societal prejudices attached to the discussion of HIV (including issues of gender, sex, sexuality and drug use), it is essential that prosecutors do not play to, or encourage, such prejudices on the part of judges and/or juries. All persons are entitled to equal enjoyment of the right to liberty and to equality before the courts.⁸³ In accordance with international standards, prosecutors should always “respect, protect and uphold the universal concept of human dignity and human rights,”⁸⁴ and are required to “carry out their functions impartially and avoid all ... social, religious, racial, cultural, sexual or any other kind of discrimination.”⁸⁵

As part of this obligation, prosecutors should avoid arguments or comments – to the jury and/or judge at trial, and to media before, during or after trial – that are inaccurate, misleading, inflammatory or prejudicial, and could therefore lead to an unfair trial or appeal. Prosecutors should avoid:

- assertions or comments not supported by the evidence;
- expressing the prosecutor’s personal opinions about HIV or about the witnesses (including the complainant and the defendant);
- negative comments about the defendant’s or a witness’ credibility or character, via references to personal characteristics such as HIV-positive status, race, ethnicity, country of origin, religion, citizenship, migrant status, age, disability, sexual orientation, gender identity or expression, sex characteristics, involvement in sex work, marital status, drug use, etc. in an attempt to discredit the person;
- appealing to fear, emotion or prejudice, including through the use of inflammatory or stigmatizing language (e.g., referring to HIV as “a death sentence” or referring to people with HIV, such as a defendant, with terms such as “AIDS carrier”);

- bringing forward at trial matters which have no relevance to the issues before the court; or
- publishing prejudicial or misleading facts on social media or other digital platforms, which can easily and dramatically magnify the harms to those involved in the proceeding.

As described above, an infectious disease such as HIV is most effectively addressed primarily through public health efforts, and misinformation about HIV and its transmission contribute to stigma and prejudice against people living with HIV, impeding an effective public health response. Prosecutors, who are at all times obliged to act in the public interest,⁸⁶ should therefore be careful to avoid contributing in any way to that misinformation. This suggests avoiding prosecution – particularly via the use of serious offences – in cases where there is little or no risk of transmission. In the case of a prosecution that proceeds to trial, the prosecution should not present or elicit evidence or argument that reinforces societal prejudices, preconceptions, and irrational fears regarding HIV, or that in other ways undermines public health efforts to prevent the spread of HIV and other STIs.

8 Prosecutors should ensure the correct interpretation of science and its limitations, if seeking to prove actual transmission of HIV

In some jurisdictions, the law limits criminal liability to cases of actual transmission of HIV, in keeping with international recommendations. In such cases, the prosecution will necessarily consider whether there is sufficient evidence, including sound expert scientific opinion, to prove the defendant transmitted HIV to the complainant. In other jurisdictions, the law may be broader and not require actual transmission, but the prosecution may nonetheless consider whether it will seek to prove that the defendant actually transmitted HIV to the complainant (e.g., for sentencing purposes). In such circumstances, evidence will derive from a number of relevant sources, including medical records, sexual or other relevant history regarding

potential other sources of infection, and scientific evidence. A correct understanding of the scientific evidence – and its forensic limitations – is essential, as is the ethical use of such science before the court and in the prosecution’s interaction with the defendant.

It is important to understand that lawfully obtained medical records can provide context, such as establishing a period during which the defendant and a complainant each acquired HIV, and their CD4 counts and viral load on particular dates. But such evidence cannot, without additional facts from other sources, prove transmission between a complainant and a defendant.⁸⁷ Other possible sources of a complainant’s infection also need to be considered, such as other sexual partners, the sharing of drug injection equipment, or the receipt of blood, tissue or organs. It should also be evident that determining whether the complainant or the defendant was infected first cannot be assumed based on who was first diagnosed with HIV or who has initiated a complaint resulting in criminal charges.

Phylogenetic analysis has been used in some criminal prosecutions as ostensible evidence of actual transmission of HIV by analysing HIV gene sequences in samples from both a defendant and a complainant. Phylogenetics is the study of the degree to which HIV strains are genetically related. This area of science is complex. To ensure the science is correctly understood and applied, it is important that the prosecution, the defence and the court all have the benefit of the expert opinion of virologists with specialised knowledge of this discipline.

The results of phylogenetic analysis of HIV gene sequences are *not* akin to forensic analysis matching two samples of human DNA. Phylogenetic analysis may establish that the HIV strains in two people are closely related, but these strains are not necessarily unique to these two people. Other people may also share the same strain if they are within the same network of HIV transmission (e.g., current or former sexual partners that the defendant and complainant have in common, whether they know it or not, and the sexual partners of those partners).

This means that evidence of a complainant’s past sexual contacts, or drug equipment-sharing contacts, will also be relevant in determining whether another person, other than the defendant, may be the source of the complainant’s infection. Phylogenetic analysis is not able to establish direct transmission – i.e., who transmitted HIV to whom and when. This means that phylogenetic analysis alone cannot prove that a defendant transmitted HIV to a complainant. It simply establishes how closely related their respective HIV strains are. Note that such analysis could *exclude* a defendant as the source of a complainant’s infection if the analysis shows the two strains are unrelated. It is important that any expert conducting phylogenetic analysis, particularly if it is to be used in a criminal proceeding, applies rigorous methods, including the appropriate controls for comparison of genetic relatedness, so as to not exaggerate the perceived degree of relation between the HIV strain of the defendant and the complainant.⁸⁸

In some settings, a “recent infection testing algorithm” (RITA) may be used to estimate the likelihood that a person recently acquired HIV. Such testing protocols, used in a limited number of countries given the laboratory expertise required, are designed for purposes of research and epidemiological surveillance, including to estimate HIV incidence (i.e., the rate of which people are being newly infected) in a given setting. As with phylogenetic analysis, it is important to understand the limitations of RITA testing, particularly when applied to individual cases in the context of a criminal prosecution. Various RITA tests measure different facets of a person’s immune response when challenged by HIV. Those results have been combined with other information about a particular individual (e.g., other clinical information such as the person’s CD4 count and viral load, the person’s recall of recent HIV risk behaviour) to assess whether their HIV infection was “recent” or not.

RITA tests are designed to estimate the recency of infection at the population level, not at an individual level. They are based on comparisons with an ‘average’ or typical immune response to new HIV infection, not on the immune response

of an individual defendant, which may not be 'average'. RITA tests may suggest a person was recently infected but cannot conclusively establish whether that is so. Therefore, they cannot be used with confidence to support a claim that a particular recent sexual partner (e.g. the defendant) was the source of infection of a person (e.g., the complainant). Conversely, RITA tests may suggest that a person was *not* recently infected, but this would not conclusively rule out a recent sexual partner as the source of their infection. In sum, RITA tests cannot prove the timing of infection; they can only approximate the likelihood of recent HIV infection and cannot establish it with the scientific certainty required for proving transmission at a particular time by a particular person. Any use of RITA tests must be interpreted in light of all the other evidence in a case.⁸⁹

Finally, prosecutors also need to take care to ensure that experts not only understand their independent role in assisting the court, but clearly acknowledge the limitations of the scientific evidence they are providing or interpreting and hence what conclusions it does – or does not – support. This should be reflected carefully in the language they use in both written and oral expert evidence they provide to the court. For example, scientific experts should be clear in their evidence about the points above, such that neither phylogenetic analysis nor RITA test results can, on their own, conclusively prove timing and direction of infection. Ensuring this correct understanding of the limits of the science is in keeping with the obligation of the prosecutor is to ensure that “throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.”⁹⁰



SENTENCING CONSIDERATIONS

9 Prosecutors should ensure there is no discrimination in sentencing

Depending on the legal system, the prosecutor may have some input regarding what sentence should be imposed following a conviction or guilty plea. Prosecutors must carry out their functions impartially and avoid all social, racial, sexual or any other kind of discrimination.⁹¹ Norms adopted in some regions expressly caution that: “No discrimination in sentencing should be made by reason of race, colour, gender, nationality, religion, social status or political belief of the offender or the victim. Factors such as unemployment, cultural or social conditions of the offender should not influence the sentence so as to discriminate against the offender.”⁹²

A person’s HIV-positive status is never itself justification for the imposition of a custodial sentence, nor is a person’s sexual orientation, gender identity, migrant status, substance use or their sale or purchase of sex. Nor are these grounds for harsher or more stringent sentences, or of conditions of parole or probation following release from custody.

Ensuring non-discrimination in sentencing also means prosecutors have a role to play in assisting the courts so their decisions on sentencing are gender-sensitive and cognizant of other factors. Among other things, this means taking into account the effects of gender-based or other violence that a defendant may have experienced, or a person’s pregnancy or care responsibilities.⁹³ Similarly, other circumstances of a defendant that may play into the burden of incarceration or other non-custodial sentence (e.g., factors as such as health status, sexual orientation or gender identity, or being a migrant) must be considered: “In proposing or imposing sentences, account should be taken of the probable impact of the

sentence on the individual offender, so as to avoid unusual hardship and to avoid impairing the possible rehabilitation of the offender.”⁹⁴

More generally, in some jurisdictions there has been historic over-representation of certain communities, such as particular ethno-racial minorities, in the criminal justice system and in prisons in particular. In their handling of individual cases, prosecutors (and other actors in the criminal justice system, such as judges), have a general responsibility to consider means for avoiding perpetuating such systemic discrimination; in some settings, this may be an explicit legal obligation.

10 Prosecutors should ensure sentencing is not disproportionate

In keeping with the protection of the public interest, basic criminal law principles, and ensuring respect for human rights, prosecutors have a responsibility to assist the court in ensuring that sentences are not disproportionate. In the context of HIV-related criminal prosecutions, experience suggests that this is a serious concern, with the potential for HIV-related stigma and prejudices of various kinds to taint the sentencing process, as with other stages of a prosecution.

Ensuring proportionality requires regard to the individual circumstances of the case and must include consideration of alternatives to penalties such as incarceration. Any deprivation of liberty must be shown to be necessary and proportionate to the pursuit of legitimate aims, meaning it must be the least intrusive means of achieving the desired result.⁹⁵ This means that a range of available sentencing options must be available and considered. The criminal justice system should provide a wide range of non-custodial measures at relevant stages, including at sentencing.⁹⁶ A prison

sentence should be sought and imposed only when no other penalty would be proportionate to the seriousness of the offence and how it was committed, taking into account any aggravating and mitigating factors.⁹⁷ “All measures of detention should be justified, adequate, necessary and proportional to the aim sought.”⁹⁸

In determining its position on the appropriate sentence, the prosecution should consider a number of aggravating and mitigating factors specific to the context of prosecutions related to HIV, many of which are likely to have also been relevant at earlier stages, including the decision to prosecute and the matter of pre-trial release. These include the following:

- If a defendant living with HIV is a marginalized or vulnerable person who lacked a support network or other means to access appropriate medical information and treatment, their circumstances should be a mitigating factor at the sentencing stage.
- Established disclosure of known HIV-positive status to a consenting sexual partner should always preclude any criminal prosecution. However, some jurisdictions have very broadly-worded and discriminatory laws that impose criminal liability notwithstanding disclosure. In such instances, the fact of disclosure should nonetheless be a very significant mitigating factor at the stage of sentencing.
- A defendant’s reasonable fear that disclosing their HIV status to a sexual partner, or taking or proposing steps to reduce the possibility of transmission (e.g. condom use, refraining from certain sexual acts), could result in violence or other serious negative consequence would be an important mitigating factor to consider at sentencing (if the prosecution has nonetheless proceeded despite such circumstances).⁹⁹
- Actual transmission of HIV could be an aggravating factor at sentencing, if it is not a requisite element of the offence that is prosecuted. The harm caused by transmission of HIV should be assessed in light of the best available scientific evidence and the

availability of effective treatment for the infection caused. Only actual harm of infection and its consequences should be considered, rather than concern about possible infection (particularly where, as noted above, that possibility is likely exceedingly small). Conversely, the absence of transmission is a mitigating factor. In cases where there is no evidence of transmission of HIV, the prosecution should consider seeking a sentence at the low end of the range of sentences applicable for the offence.

- If the offence is one that does not require actual transmission of HIV, then the possibility of transmission associated with the convicted person’s conduct needs to be considered. International recommendations suggest that activities that pose no or negligible risk of transmission should not attract criminal liability at all, but sometimes they may, depending on the breadth of the law in a given jurisdiction – in which case the absence of any significant risk (e.g. in the case of oral sex, sex with a condom or a low or undetectable viral load, or a sexual partner’s use of PrEP) should be considered a mitigating factor at the sentencing stage.
- The potential negative health and safety consequences of incarceration for the convicted person living with HIV must also be factored into the sentencing decision. As noted above, in relation to pre-trial release or detention, factors that must be considered include potential interruptions in HIV treatment, denial of adequate access to other aspects of health care, and exposure to threats, intimidation or violence (including sexual violence) in the prison setting. The impact on any dependants should also be considered.
- Even where the HIV transmission or exposure that is the basis of the prosecution arises in the context of a sexual encounter, HIV-related matters are not sexual offences *per se*. Therefore, prosecutors ought to avoid, where possible, invoking the various ancillary sentencing provisions that may come into play in cases of a conviction for a sexual offence.¹⁰⁰

ANNEX A: GLOBAL COMMISSION RECOMMENDATIONS

The Global Commission on HIV and the Law has produced two reports in which it has, based on research and consultation with participants from around the world, produced a number of recommendations on various areas of law and policy as they relate to an effective response to HIV and certain other public health challenges such

as viral hepatitis and tuberculosis. Reproduced below are the most salient recommendations of relevance to prosecutors related to the criminalisation of HIV or other sexually transmitted infections, with the most directly relevant aspects highlighted.

Risks, Rights and Health (2012 report)

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

- 2.1.** Countries must not enact laws that explicitly criminalise HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed. The provisions of model codes that have been advanced to support the enactment of such laws should be withdrawn and amended to conform to these recommendations.
- 2.2.** **Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to have taken place.** Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.
- 2.3.** Countries must amend or repeal any law that explicitly or effectively criminalises vertical transmission of HIV. While the process of review and repeal is under way, governments must place moratoria on enforcement of any such laws.
- 2.4.** Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.
- 2.5.** The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the defendant immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender records.

Supplement (2018)

1. In countries where HIV criminalisation laws still exist, courts must require proof, to the applicable criminal law standard, of intent to transmit HIV. **The intent to transmit HIV cannot be presumed or derived solely from knowledge on the part of the defendant of positive HIV status and/or non-disclosure of that status; from engaging in unprotected sex; by having a baby without taking steps to prevent mother-to-child transmission of HIV; or by sharing drug injection equipment.**
2. Governments must ensure that, where an HIV-specific law has been repealed, there is a restriction on the application of any general laws to the same effect either for HIV or TB.
3. Governments must prohibit the prosecution under HIV-specific statutes, drug laws, or child abuse and neglect laws, of women living with HIV for choices they make during and after pregnancy, including about breastfeeding children.
4. Whenever HIV arises in the context of a criminal case, police, lawyers, judges and where applicable, juries, must be informed by the best available scientific evidence concerning the benefits and consequences of appropriate therapy, and the individual and community advantages of maintaining such therapy.
5. Governments must ensure that HIV status is not used to justify pre-trial detention, segregation in detention or prison, or harsher or more stringent sentences or conditions of parole or probation following release from custody.

ANNEX B: UNAIDS AND UNDP RECOMMENDATIONS

In their *Policy Brief: Criminalisation of HIV Transmission* (2008), UNAIDS and UNDP recommend that governments limit criminalisation to cases of intentional, actual 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. Where a jurisdiction's law is not limited to cases of actual transmission, they also recommend the following:

In particular, criminal law should not be applied to cases where there is no significant risk of transmission or where the person:

- did not know that s/he was HIV positive
- did not understand how HIV is transmitted
- disclosed his or her HIV-positive status to the person at risk (or honestly believed the other person was aware of his/her status through some other means)
- did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences
- took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts, or-
- previously agreed on a level of mutually acceptable risk with the other person.

ANNEX C: SCIENCE OF HIV IN THE CONTEXT OF THE CRIMINAL LAW

In 2018, concerned by reports of criminal laws and prosecutions in relation to HIV non-disclosure, exposure or transmission that had not been guided by the best available science, leading HIV scientists from around the world authored a peer-reviewed *Expert consensus statement on the science of HIV in the context of criminal law*.

F. Barré-Sinoussi et al., **Expert consensus statement on the science of HIV in the context of criminal law**, *Journal of the International AIDS Society* 2018, 21:e25161
<https://doi.org/10.1002/jia2.25161>
<https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>

The *Expert consensus statement* is also available in French, Russian and Spanish:

Déclaration de consensus d'experts sur la connaissance scientifique relative au VIH dans le contexte du droit pénal
https://onlinelibrary.wiley.com/action/downloadSupplement?doi=10.1002%2Fjia2.25161&file=jia225161-sup-0003-Sup_MaterialS3.pdf

Заявление об экспертном консенсусе в отношении научных данных о ВИЧ-инфекции в контексте уголовного права
https://onlinelibrary.wiley.com/action/downloadSupplement?doi=10.1002%2Fjia2.25161&file=jia225161-sup-0004-Sup_MaterialS4.pdf

Declaración de Consenso de expertos sobre la ciencia relativa al VIH en el contexto del derecho penal
https://onlinelibrary.wiley.com/action/downloadSupplement?doi=10.1002%2Fjia2.25161&file=jia225161-sup-0005-Sup_MaterialS5.pdf

The statement is based on a detailed analysis of the best available scientific and medical evidence on HIV transmission, the effectiveness of HIV treatment and forensic phylogenetic evidence. The consensus statement provides a succinct summary of the science so that it may be better understood in criminal law contexts. Published in the *Journal of the International AIDS Society*, the consensus statement was endorsed by dozens of additional scientists globally and by UNAIDS, the International AIDS Society (IAS) and the International Association of Providers of AIDS Care (IAPAC), three leading organisations in the field of HIV science and clinical care.

The entirety of the *Expert consensus statement* should be consulted by prosecutors handling a case of alleged HIV non-disclosure, exposure or transmission, as it provides important guidance regarding the state of the science (as of 2018). Below are the key elements and conclusion from the consensus statement for easy reference.

Possibility of HIV transmission

Based on the extensive review of the available scientific data, the *Expert consensus statement* (i) outlines the conditions that must exist for HIV transmission to occur, and (ii) describes the possibility of HIV transmission during a single, specific act along a continuum of risk, noting that the possibility of HIV transmission varies according to range of intersecting factors, including the HIV-positive person's viral load, condom use and other risk reduction practices. The consensus statement defines categories of risk of transmission as follows:¹⁰¹

Terminology for this statement	Possibility of transmission per act
Low possibility	Transmission during a single act is possible but the likelihood is low
Negligible possibility	Transmission during a single act is extremely unlikely, rare or remote
No possibility	The possibility of transmission during a single act is either biologically implausible or effectively zero

Based on a comprehensive review of the scientific data, the *Expert consensus statement* outlines the following key conclusions about the possibility of HIV transmission in various circumstances:

- *The possibility of HIV transmission during a single act of vaginal or anal sex ranges from low to none. (See the detailed discussion for important factors affecting the possibility of transmission.)*
- *The possibility of HIV transmission during a single act of oral sex ranges from negligible (in very unusual and extreme circumstances) to none. (See the detailed discussion for important factors affecting the possibility of transmission.)*
- *There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex where a condom is used correctly (meaning its integrity is not compromised and it was worn throughout the sex act in question).*
- *There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex when the HIV-positive partner has an undetectable viral load.*
- *The possibility of HIV transmission during a single act of vaginal or anal sex when the HIV-positive partner has a low viral load ranges from negligible to none.*
- *There is no possibility of HIV transmission through saliva, even when it contains small quantities of blood.*
- *The possibility of HIV transmission from biting ranges from negligible (in very unusual and extreme circumstances) to none.*

Effectiveness of HIV treatment and the harm of HIV infection

The *Expert consensus statement* also reviews and summarizes the available science regarding the natural progression of HIV infection in most people if left untreated as well as the impact of antiretroviral therapies that “dramatically reduce HIV-associated disease progression” when available.¹⁰² The key conclusion is the following:

- *The life expectancy of most people living with HIV, who have access to modern antiretroviral therapies, has increased to the point where it is similar to that of HIV-negative people, thereby transforming HIV infection into a chronic manageable health condition.*

Forensic phylogenetic analysis and proving HIV transmission

Finally, the *Expert consensus statement* addresses the importance of the correct use of scientific and medical evidence in HIV-related prosecutions where proof of actual transmission from one person to another is at issue. The key conclusion is the following:

- *Phylogenetic analysis on its own cannot prove that a defendant has infected a complainant with HIV. Importantly, phylogenetic analysis can exonerate a defendant when the results rule out the defendant as the source of a complainant’s HIV infection.*

ANNEX D: USEFUL RESOURCES

Science of HIV

F. Barré-Sinoussi et al., “Expert consensus statement on the science of HIV in the context of criminal law,” *Journal of the International AIDS Society* July 2018, 21:e25161, <https://doi.org/10.1002/jia2.25161>.

E.J. Bernard et al., “HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission,” *HIV Medicine* 2007; 8(6): 382–387, <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-1293.2007.00486.x>.

E.J. Bernard et al., *HIV Forensics II: Estimating the likelihood of recent HIV infection – Implications for criminal prosecution* (London: National AIDS Trust, July 2011), www.nat.org.uk/publication/hiv-forensics-ii-estimating-likelihood-recent-hiv-infection-implications-criminal.

Other guidance and recommendations

UNAIDS & UNDP. *Policy Brief: Criminalization of HIV Transmission* (2008), www.unaids.org/en/resources/documents/2008/20081110_jc1601_policy_brief_criminalization_long_en.pdf.

UNAIDS. *Ending overly broad criminalisation of HIV non-disclosure, exposure and*

transmission: Critical scientific, medical and legal considerations (2013), www.unaids.org/en/resources/documents/2013/20130530_Guidance_Ending_Criminalisation.

UNAIDS. *Judging the epidemic: A judicial handbook on HIV, human rights and the law* (2013), www.unaids.org/en/resources/documents/2013/201305_Judging-epidemic.

African Commission on Human & People’s Rights. *HIV, the Law and Human Rights System: Key Challenges and Opportunities for Rights-Based Responses* (2018), www.unaids.org/en/resources/documents/2018/HIV_Law_AfricanHumanRightsSystem.

Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012) and *Supplement* (2018), online via www.hivlawcommission.org. (See key recommendations on HIV and criminal law in Annex A.)

Office of the UN High Commissioner for Human Rights & UNAIDS. *International Guidelines on HIV/AIDS and Human Rights* (2006 Consolidated Version), www.unaids.org/en/resources/documents/2006/20061023_jc1252-internguidelines_en.pdf.

ENDNOTES

1. In some instances, the law in question extends further to include other sexually transmitted infections (STIs) or, in some cases, even communicable diseases more broadly, but *de facto* it has been primarily people living with HIV to whom such laws have been applied. Most documented prosecutions have related to sexual activity, but there have been some troubling prosecutions in relation to non-sexual exposure (or perceived exposure), such as breastfeeding, biting or spitting.
2. UNAIDS, End Inequalities. *End AIDS. Global AIDS Strategy 2021-2026* (2021), page 43: https://www.unaids.org/sites/default/files/media_asset/global-AIDS-strategy-2021-2026_en.pdf
3. *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990), www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx; International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999), [www.iap-association.org/Resources-Documents/IAP-Standards-\(1\)](http://www.iap-association.org/Resources-Documents/IAP-Standards-(1)) ["IAP Standards"]; UNODC and International Association of Prosecutors, *The Status and Role of Prosecutors* (2014), www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf; Consultative Council of European Prosecutors, *Opinion No. 9 to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors* (2014) (consisting of the "Rome Charter" and accompanying Explanatory Note) ["Opinion No. 9"], <https://rm.coe.int/168074738b>; African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) (Section F: Role of Prosecutors), www.achpr.org/legalinstruments/detail?id=38.
4. *Guidelines on the Role of Prosecutors*, para 13; CCPE, *Opinion No.9*, paras. 10, 14.
5. *Guidelines on the Role of Prosecutors*, para 18; CCPE, *Opinion No. 9, supra*, para 28. Alternatives to prosecution are particularly to be considered in the case of juveniles: *Guidelines on the Role of Prosecutors*, para. 19; CCPE, *Opinion No. 9*, paras. 31-32.
6. UNODC & IAP, *The Status and Role of Prosecutors, A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide* (2014), www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf; see also: *Guidelines on the Role of Prosecutors*, para 11; *IAP Standards*, Article 4.2 (participating in investigation, exercising authority over police or other investigators, supervising the investigation of crime); CCPE, *Opinion No. 9*, paras 10-11 (functions of prosecutors in criminal proceedings, including in some criminal justice systems conducting, directing or supervising investigations).
7. Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (July 2012), www.hivlawcommission.org/report; *On the fast track to ending the AIDS epidemic: Report of the Secretary-General*, UN General Assembly, 2016 High-Level Meeting on HIV, UN Doc. A/70/811, www.unaids.org/sites/default/files/media_asset/20160423_SGreport_HLM_en.pdf; UNAIDS et al., *Joint United Nations statement on ending discrimination in health care settings*, 27 June 2017, www.who.int/news-room/detail/27-06-2017-joint-united-nations-statement-on-ending-discrimination-in-health-care-settings.
8. E.g., UNAIDS & UNDP, *Policy Brief: Criminalization of HIV Transmission* (2008), https://www.unaids.org/en/resources/documents/2008/20081110_jc1601_policy_brief_criminalization_long_en.pdf; UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/HRC/14/20 (2010), <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>; Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (July 2012), www.hivlawcommission.org/report; UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations* (2013), www.unaids.org/en/resources/documents/2013/20130530_Guidance_Ending_Criminalisation; UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/CAN/CO/8-9, November 18, 2016, <https://digitallibrary.un.org/record/3802136?ln=en>; UN Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22 (2016), via <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>.
9. Council of Europe, *The Role of Public Prosecution in the Criminal Justice System: Recommendation no. R (2000) 19 of the Committee of Ministers to Member states*, <https://rm.coe.int/16804be55a>. The Council further recommends: "The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request." *Ibid.*, para. 36(c).
10. E.g., CCPE, *Opinion No. 9*, para. 47; *IAP Standards*, Article 2.1
11. *Guidelines on the Role of Prosecutors*, para. 17.
12. CCPE, *Opinion No. 9*, para. 13.

13. E.g., Crown Prosecution Service [England and Wales], Prosecution Guidance: “Intentional or Reckless Sexual Transmission of Infection,” www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection; Crown Office and Procurator Fiscal Service [Scotland], “Intentional or Reckless Sexual Transmission of, or Exposure to, Infection,” https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Sexual%20Transmission%20or%20Exposure%20to%20Infection%20-%20Prosecution%20Policy.PDF; “Directive of the Attorney General of Canada,” *Canada Gazette*, Part I, Vol. 152(49), 8 December 2018, pp. 4432-4434, www.gazette.gc.ca/rp-pr/p1/2018/2018-12-08/pdf/g1-15249.pdf, reproduced also in the *Deskbook of the Public Prosecution Service of Canada* (Section 5.12: “Prosecutions involving non-disclosure of HIV status”), www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html; Ministry of the Attorney General [Ontario], “Sexual Offences Against Adults – Sexually transmitted infections and HIV exposure cases,” *Crown Prosecution Manual* (updated 1 December 2017), <https://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults>; British Columbia Prosecution Service, “Sexual Transmission, or Realistic Possibility of Transmission, of HIV,” *Crown Counsel Policy Manual* (16 April 2019), <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf>.
14. Power L, *Understanding Criminal Prosecutions for Sexual Transmission of Infection: A report on charges of grievous bodily harm via sexual transmission of infection handled by the Crown Prosecution Service in England and Wales between 2008-2012, their management and outcomes* (London: Terrence Higgins Trust, undated), available at www.tht.org.uk/hiv-and-sexual-health/living-well-hiv/legal-issues/views-prosecutions. This appears to be the only published report to date attempting to systematically assess the impact of official prosecutorial guidance on the handling of HIV-related criminal prosecutions. Other, anecdotal evidence from this and a few other jurisdictions confirms that clear policy can reduce the number of prosecutions that are not well-grounded in science or that, for other reasons, may not warrant proceeding.
15. UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations* (2013), www.unaids.org/en/resources/documents/2013/20130530_Guidance_Ending_Criminalisation.
16. Council of Europe, *Recommendation (2000) 19*, para. 13(c).
17. Azad Y, “Developing guidance for HIV prosecutions: an example of harm reduction?” *HIV/AIDS Policy & Law Review* 2008; 13(1): 13-19, www.aidslaw.ca/site/hivaids-policy-law-review-131-july-2008. It is also recommended that, particularly in jurisdictions with a significant number of HIV-related criminal prosecutions, individual prosecutors and the prosecution authority should reflect on how such cases are being handled, including what measures can and should be taken, with the benefit of guidance such as this document, to avoid unnecessary use of prosecutorial resources.
18. *Guidelines on the Role of Prosecutors*, para. 14.
19. *IAP Standards*, para 4.2(d). See also: CCPE, *Opinion No.9* (Rome Charter), para. XV (“Prosecutors should decide to prosecute only upon well-founded evidence, reasonably believed to be reliable and admissible.”).
20. *Ibid.*, para 4.2(e). See also: CCPE, *Opinion No.9* (Explanatory Note), para. 14 (“Prosecutions should be firmly but fairly conducted but not beyond what is indicated by the evidence.”)
21. Barré-Sinoussi F et al., “Expert consensus statement on the science of HIV in the context of criminal law,” *Journal of the International AIDS Society* 2018, 21:e25161, <https://doi.org/10.1002/jia2.25161> [“Expert Consensus Statement”].
22. E.g., *Guidelines on the Role of Prosecutors*, paras 12-13; *IAP Standards*, Standards 1.6, 4.3.
23. *Universal Declaration of Human Rights*, Articles 3 and 9 (“UDHR”); *International Covenant on Civil and Political*, 999 UNTS 171, Article 9(1) (“ICCPR”).
24. UDHR, Article 11; ICCPR, Article 14(2).
25. UDHR, Article 10; ICCPR, Article 14(1).
26. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly Resolution 40/34 (29 November 1985); *Guidelines on the Role of Prosecutors*, para 13(d).
27. UDHR, Articles 2, 7, 10; ICCPR, Articles 2(1), 3, 14(1), 14(3).
28. *Guidelines on the Role of Prosecutors*; Council of Europe, *Recommendation (2000) 19*; African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.
29. E.g., American Bar Association, *Standards for the Prosecution Function*, 4th ed. (2017).
30. UDHR, Article 25; ICESCR, Article 12.
31. UDHR, Article 3; ICCPR, Article 6.
32. UDHR, Article 12; ICCPR, Article 17.
33. *Universal Declaration of Human Rights*, Article 25; *International Covenant on Economic, Social and Cultural Rights*, 999 UNTS 3, Articles 2 and 12; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), paras. 12, 16, 30-37, 43-44, <https://digitallibrary.un.org/record/425041?ln=en>; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health*, UN Doc. E/C.12/GC/22 (2016), paras. 11-21, <https://digitallibrary.un.org/record/832961?ln=en>.

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35. *Expert Consensus Statement*, p. 4
36. Ibid. See also: UNAIDS, *Undetectable = Untransmittable. Public Health and HIV viral load suppression – UNAIDS Explainer* (2018), <https://www.unaids.org/en/resources/documents/2018/undetectable-untransmittable>.
37. World Health Organization, *Consolidated guidelines on the use of antiretroviral drugs for treating and preventing HIV infection recommendations for a public health approach (2nd ed., 2016)*, <https://www.who.int/hiv/pub/arv/arv-2016/en/>.
38. *Expert Consensus Statement*.
39. Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012), www.hivlawcommission.org/index.php/report, and *Supplement* (2018), www.hivlawcommission.org/supplement; UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations* (2013), https://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf; O'Byrne P et al., "HIV criminal prosecutions and public health: an examination of the empirical research," *Medical Humanities* 2013; 39: 85-90, doi: <https://mh.bmj.com/content/39/2/85.info>.
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41. Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012), www.hivlawcommission.org/index.php/report, and *Supplement* (2018), www.hivlawcommission.org/supplement.
42. E.g., Kesler MA et al., "Prosecution of non-disclosure of HIV status: Potential impact on HIV testing and transmission among HIV-negative men who have sex with men," *PLOS ONE* 2018; 13(2): e0193269, DOI: [10.1371/journal.pone.0193269](https://doi.org/10.1371/journal.pone.0193269); O'Byrne P et al., "Nondisclosure prosecutions and HIV prevention: results from an Ottawa-based gay men's sex survey," *JANAC* 2013; 24(1): 81–7, DOI: [10.1186/1471-2458-13-94](https://doi.org/10.1186/1471-2458-13-94); O'Byrne P et al., "Nondisclosure prosecutions and population health outcomes: examining HIV testing, HIV diagnoses, and the attitudes of men who have sex with men following nondisclosure prosecution media releases in Ottawa, Canada," *BMC Public Health* 2013; 13: 94, DOI: [10.1186/1471-2458-13-94](https://doi.org/10.1186/1471-2458-13-94).
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66. *IAP Standards* (1999), para. 4.2(d); see also *Guidelines on the Role of Prosecutors* (1990), para. 14 (“Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”)
67. In some legal systems, criminal liability may be imposed on the basis of what is characterized as “willful blindness” or ignorance – i.e., knowledge is attributed in circumstances where a person who had suspicions has deliberately refrained from making inquiries so as to avoid having suspicions confirmed.
68. *Guidelines on the Role of Prosecutors* (1990), para 13(b).
69. *IAP Standards* (1999), para. 1.7.
70. *IAP Standards*, para. 3.2.
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73. See the UN *Basic Principles on the use of restorative justice programmes in criminal matters*, UN Doc. E/2000/INF/2/Add.2 at 35 (2000), www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf.
74. ICCPR, Articles 9(1), 14(1) and 14(2).
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76. *International Covenant on Civil and Political Rights*, Article 9(3); UN Standard Minimum Rules for Non-custodial Measures (“Tokyo Rules”), U.N. Doc. A/45/49 (1990), Rule 6 (“Avoidance of pre-trial detention”), <https://digitallibrary.un.org/record/105347?ln=en>; UN Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, UN Human Rights Council, 19th Session, UN Doc. A/HRC/19/57 (2011), https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-57_en.pdf; UN Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, UN Doc. (2014), paras. 12, 38; *Siracusa Principles*, <https://undocs.org/pdf?symbol=en/E/CN.4/1985/4>. For regional instruments, see: African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), para. M(1)(e), <https://www.achpr.org/legalinstruments/detail?id=38>; Inter-American Commission on Human Rights, *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (2008), Principle III(1,2), <https://www.oas.org/en/iachr/mandate/Basics/principles-best-practices-protection-persons-deprived-liberty-americas.pdf>; Council of Europe, *Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse – Appendix: Rules on Remand in Custody*, Rule 3, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d743f; League of Arab States, *Arab Charter on Human Rights*, Article 14(5), <http://hrlibrary.umn.edu/instree/loas2005.html>. For a national example, see: Standard 3-5.2 (“The Decision to Recommend Release or Seek Detention”) in American Bar Association, *Criminal Justice Standards for the Prosecution Function*, 4th ed. (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.
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83. ICCPR, Articles 2, 9 and 14.
84. *IAP Standards*, para. 1.8.
85. *UN Guidelines on the Role of Prosecutors*, para. 13(a).
86. *UN Guidelines on the Role of Prosecutors*, para. 13(b); *IAP Standards*, para. 1.7.
87. See *Expert Consensus Statement*, p. 7.
88. *Expert Consensus Statement*, pp. 7-8; Bernard EJ et al., “HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission,” *HIV Medicine* 2007; <https://doi.org/10.1111/j.1468-1293.2007.00486.x>. Learn G.H. and Mullins J., “The Microbial Forensic Use of HIV Sequences” in: Leitner T. et al. eds., *HIV Sequence Compendium 2003* (Los Alamos, New Mexico: Los Alamos National Laboratory, 2004), pp. 22-37, <https://www.hiv.lanl.gov/content/sequence/HIV/COMPENDIUM/2003/partI/Learn.pdf>.
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90. *IAP Standards*, para. 4.2(e).
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93. *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, UN Doc. A/C.3/65/L.5 (2010), Rules 57, 58, 61 and 64, <https://www.ohchr.org/Documents/ProfessionalInterest/BangkokRules.pdf>.
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95. UDHR, Article 29(2); *Siracusa Principles*; UN Human Rights Committee, *General comment No 31 on the nature of the general legal obligations imposed on state parties to the Covenant*, UN Doc. CCPR/C/21/Rev/1/Add.13 (2004), <https://digitallibrary.un.org/record/533996?ln=en>.
96. Tokyo Rules, Rules 2.3, 3.2, 8.1 and also 8.2 (examples of non-custodial sentencing alternatives). The Bangkok Rules also specifically provide that women “shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible.”: Bangkok Rules, Rule 58.
97. Council of Europe, *Recommendation No. R (92) 17*, para. 5.
98. Report of the UN Working Group on Arbitrary Detention, UN Doc. A/HRC/27/48 (2014), para 88, <https://digitallibrary.un.org/record/777917?ln=en>.
99. These circumstances might also amount to *duress*, which in some legal settings could serve as an affirmative defence to a charge, and not merely a mitigating factor at sentencing.
100. It is recognized that there are some jurisdictions in which sexual offences have been used to prosecute allegations of HIV non-disclosure, exposure or transmission. However, this has attracted considerable criticism, including from advocates concerned about gender-based violence, as a misapplication of such laws. Prosecutorial (and judicial) discretion may be limited by the law in such cases if, for example, certain sentencing consequences (e.g., sex offender designation and registration) flow automatically from conviction as a matter of law. However, this underscores the importance of considering at earlier stages whether the use of such charges is appropriate. In light of these concerns, in one of the few jurisdictions to use sexual assault laws to prosecute HIV non-disclosure, the federal Attorney General has issued an official directive stating that the federal public prosecution service “shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness”: Attorney General of Canada, “Directive to Director of the Public Prosecution Service,” *Canada Gazette*, Part I, Vol. 152, December 8, 2018, <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>.
101. See *Expert Consensus Statement*, p. 3 (Table 2).
102. See *Expert Consensus Statement*, p. 7.



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