

ADVANCING HIV JUSTICE 4

Understanding Commonalities,
Seizing Opportunities

July 2022



**HIV JUSTICE
WORLDWIDE**

ACKNOWLEDGEMENTS

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Unless otherwise cited, the information in this report was derived from the ongoing global monitoring, engagement and reporting conducted by HJN and stakeholder interviews.

We would especially like to acknowledge the courage and commitment of the growing number of people living with HIV and allies around the world who are challenging laws, policies and practices that inappropriately regulate and punish people living with HIV. Without them, this report – and the victories reported herein – would not have been possible.

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ABOUT THE HIV JUSTICE NETWORK

The HIV Justice Network (HJN) is the leading community-led non-governmental organisation working globally to end HIV criminalisation by building a co-ordinated, effective global response. HJN was formed in 2012 due to a growing concern over increasingly punitive approaches to HIV prevention — in particular, the inappropriate use of criminal law — even though HIV criminalisation is discredited as a public health response.

We collate authoritative data and information to build the evidence base against the unjust criminalisation of people living with HIV. We raise awareness of the harms of this approach in critical arenas, including among the scientific, medical, policy, advocacy and donor communities. Most importantly, we galvanise and nurture the global movement against HIV criminalisation. We provide an advocacy hub to bring individuals and national, regional and global networks and organisations together to catalyse change; and we also co-ordinate HIV JUSTICE WORLDWIDE.

Our vision is of a world where people living with HIV, in all our diversity, can enjoy our human rights and live in dignity, without fear of unjust criminalisation, regulation or control. Our mission is to support individuals, communities and organisations around the world to effectively advocate against discriminatory laws, policies and practices that unjustly regulate, control or criminalise people living with HIV.

To learn more, visit: www.hivjustice.net



ABOUT HIV JUSTICE WORLDWIDE

HIV JUSTICE WORLDWIDE is a global coalition that campaigns to abolish criminal and similar laws, policies and practices that regulate, control and punish people living with HIV based on their HIV-positive status. We believe that this HIV criminalisation is discriminatory, a violation of human rights, undermines public health and is detrimental to individual health and well-being.

HIV JUSTICE WORLDWIDE was founded in March 2016 by seven partners: AIDS and Rights Alliance for Southern Africa (ARASA), HIV Legal Network/Réseau juridique VIH, the Global Network of People Living with HIV (GNP+), HIV Justice Network, International Community of Women Living with HIV (ICW), Positive Women's Network – USA (PWN-USA) and The Sero Project (SERO).

Since then, a further seven partners have joined the Steering Committee: AIDS Action Europe (AAE), Eurasian Women's Network on AIDS (EWNA), Global Network of Young People Living with HIV (Y+ Global), Harm Reduction International, MENA Plus, MPact Global Action for Gay Men's Health and Rights, and Southern Africa Litigation Centre (SALC).

To learn more, and to join the movement, visit: www.hivjusticeworldwide.org

ABOUT THIS REPORT

The aim of *Advancing HIV Justice 4* is to provide a progress report of achievements and challenges in global advocacy against HIV criminalisation. We hope it will be useful for individuals and organisations working to end or mitigate the harm of HIV criminalisation around the world, as well as for others with an interest in HIV and human rights issues.

The report was created through a collaborative effort between the HIV Justice Network and our HIV JUSTICE WORLDWIDE partners that included:

- A desk review of materials relating to HIV criminalisation laws, cases, social science and advocacy (including, but not limited to, the [Global HIV Criminalisation Database](#) and other information contained on the HJN website, the [HIV Justice newsletter](#), and our English and French listservs).
- Conducting key informant interviews with individuals and organisations for further information on relevant laws, cases, advocacy initiatives and trends.

All of the case analyses and the vast majority of the legal and policy analysis in this report cover a 36-month period — 1 January 2019 to 31 December 2021, which begins where the third [Advancing HIV Justice](#) report (which covered 1 October 2015 to 31 December 2018) left off. However, significant law reform developments that took place in Q1 2022 are also included in our maps and analysis.

METHODOLOGY

In terms of tracking and analysing criminal prosecutions, HJN's [Global HIV Criminalisation Database](#) contains case reports of HIV-related criminal cases and criminal laws that target people living with HIV. All cases were analysed by cross-referencing those recorded on the HJN website with those documented by networks of people living with HIV and civil society organisations keeping records in their own countries, supplemented with information provided to HJN via email or during stakeholder interviews.

Obtaining accurate information on HIV-related cases can be challenging — even more so in countries where case reporting is not readily available. Given the lack, or inadequacy, of systems to track HIV-related criminal cases in most jurisdictions, it is not possible to determine a precise number for every country. Much of what is known about individual cases comes from media reports, and often the outcome of a reported arrest, or the legal disposition of a criminal case, remains unknown. As a result, our data should be seen as an illustration of what may be a more widespread, but generally undocumented, use of the criminal law against people living with HIV.

The following electronic databases were used to search for and retrieve court judgments: Lexis Library for UK and Commonwealth cases, Westlaw for United States cases, JustisOne for Caribbean cases, BAILII for British and Irish cases, CanLII for Canadian cases, AustLII for Australian cases, SAFLII for South African cases and CommonLII for additional cases from the Commonwealth and common law jurisdictions.

When writing about the growing movement of advocates, networks of people living with HIV and organisations working on HIV criminalisation, it is not possible to document every piece of advocacy — some of which takes place behind the scenes and is therefore not publicly communicated. The initiatives included in this report are not intended to be a comprehensive account of all the advocacy going on around the world, but instead a collection of examples chosen to *inform* and *inspire*. Moreover, each brief synopsis included here may represent countless hours and many processes that individuals, networks of people living with HIV, organisations and agencies have dedicated to advocacy for HIV justice.

Despite our growing global reach, we cannot be connected with everyone who is working to end HIV criminalisation. If we have missed you or your work, we apologise and hope that you will [join the HIV JUSTICE WORLDWIDE movement](#) so we can be in touch and you can share information about your successes and challenges.



INTRODUCTION: UNDERSTANDING COMMONALITIES AND SEIZING OPPORTUNITIES IN THE ERA OF COVID-19

During much of the period covered by this report (2019–2021), we have been living through *another* historic global pandemic — COVID-19. It is difficult to consider any of the advocacy initiatives ongoing throughout this period without recognising the influence of the stress and uncertainty, mobility and gathering restrictions, amplified inequalities and widespread illness that characterised this period. The effect of the pandemic on prosecutions and advocacy was not homogeneous, however.

As is discussed in more detail in the next chapter (*‘Global Overview’*), overall there seems to have been a decline in the number of HIV-related prosecutions that took place. The media, public health authorities and law enforcement may well have been distracted by COVID-19, as opposed to having changed their approach to people living with HIV, however. Whether this trend continues remains to be seen.

In some parts of the world, the energy for HIV criminalisation advocacy was diminished by COVID-19. HIV advocates became scattered in their response and the urgency of COVID-19-related issues supplanted other priorities. In addition, as discussed below in *‘In Pursuit of Rights-based Public Health Approaches’*, some countries began using punitive approaches — including criminal prosecutions — to enforce COVID-19-related public health measures. This more visible use of criminal law with respect to public health undoubtedly had the effect of making criminalisation seem more normal or acceptable in some countries. While rights restrictions such as those implemented to help control the pandemic are supposed to be justified only for emergencies (and time limited and proportional to the risk), as the pandemic persisted with numerous “waves”, rights arguments were increasingly manipulated by anti-democratic, neoliberal economic interests, and foundational principles of justice, human rights and public health became increasingly distorted. So while theoretically more might have been accomplished during this time period, building on the initiatives discussed in *Advancing HIV Justice 3*, COVID-19 pushed HIV out of the spotlight in some regions and progress may have been stalled or rolled back.

Nonetheless, as the various chapters that follow describe, a significant amount of strategic and impactful advocacy and movement building has taken place. Although legislative processes slowed down or stalled in some places, in the United States more HIV criminalisation laws were modernised or repealed in the period covered by this report than in any other period, the realisation of a maturing PLHIV-led HIV decriminalisation movement that began a decade or more ago. In Latin America and the Caribbean, networks have been growing, spreading awareness regarding HIV criminalisation and why change is needed. In the Eastern Europe and Central Asia region (EECA), networks of people living with HIV have increased their capacity to use international mechanisms and to draft proposals. Across Africa, challenges to HIV-specific laws have spread from country to country, using both legislative and court-based strategies.

In collecting case studies to prepare this report, a key lesson that stood out was that while the time may not always be right to change the law, there are *always* things that can be done to advance the rights of people

While the time may not always be right to change the law, there are always things that can be done to advance the rights of people living with HIV.

living with HIV. Whether providing practical support to individuals facing (or worrying about) coercion, blackmail, arrest or prosecution, or raising awareness to create a more amenable environment for eventual legislative change, supporting the advocacy of partners working on decriminalisation of other identities or behaviours, or seeking confirmation of rights violations from international organisations, there are always valuable initiatives to continue advancing our goals.

Another challenge that we are seeing in various regions is the shrinking of civic space. “Civic space” refers to the ability of citizens and civil society organisations to organise, participate and communicate without hindrance. Most major HIV victories have resulted from people taking action — in the streets, in courtrooms, at international conferences, in legislatures. With the pandemic, however, organisations in many regions have faced not only changes in their ways of working (e.g. no in-person meetings), they have also endured increased restrictions on the freedoms of expression, assembly and association.¹ Protestors have been detained, critics have been harassed and negotiations have been moved to “behind closed doors” — all limiting government and corporate accountability. Civil society is working in an increasingly hostile environment: 88.5% of the world’s population now lives in countries with closed, repressed or obstructed civic space, according to CIVICUS’ annual ranking.²

Many have observed that the COVID-19 pandemic has exposed long-present inequalities in societies around the world — those already living on the margins bore the heaviest health and economic tolls of the pandemic. In the HIV justice movement, we have long known that different forms of marginalisation and oppression intersect. The COVID-19 pandemic has drawn attention to the fact that using the criminal law for public health challenges is fundamentally wrong-headed and, in fact, exacerbates those challenges. Punitive responses to COVID-19 underline that the HIV community needs to work together with other communities. Those who are already marginalised or criminalised are the most impacted by further punitive measures.

When new challenges arise, authorities can quickly resort to criminalisation — which is bad for those affected and can roll back progress challenging criminalisation of people living with HIV and key populations.³ We cannot separate out issues.

So, as we share *Advancing HIV Justice 4: Understanding Commonalities, Seizing Opportunities*, we do so in solidarity, and in the spirit of building bridges between movements, sharing experiences and lessons around the world, and building collective power for justice, rights and equality.



Naina Khanna,
Positive Women’s
Network – USA,
Beyond Blame
2020

“I think that the work of HIV decriminalisation, and the work that each of you are doing every single day, is so powerful, radical and transformative. It fundamentally changes power relations. And that is why it is so important.”

“I know that we are in a very serious moment. And we’ve had a lot of conversations about how hard this moment is. But I also want to highlight that we are winning in a lot of places! And we are winning because of the long-term work that you all have been doing to build community power to challenge these laws, to make sure that the leadership pipeline is robust, to make sure that those communities that are most impacted are really centred.”

1 CIVICUS, *People Power Under Attack 2021*. <https://findings2021.monitor.civicus.org/>

2 CIVICUS, *People Power Under Attack 2021*. <https://findings2021.monitor.civicus.org/in-numbers.html>

3 “Key populations” refers to defined groups who are at increased risk of HIV irrespective of the epidemic type or local context. UNAIDS considers gay men and other men who have sex with men, sex workers, transgender people, people who inject drugs, and prisoners and other incarcerated people as the five main key population groups that are particularly vulnerable to HIV and frequently lack adequate access to services.



GLOBAL OVERVIEW

HIV criminalisation is a global phenomenon with a significant impact on both public health and human rights, therefore undermining the HIV response and exacerbating the epidemic. The impact of these cases extends far beyond the courtroom and is deeply damaging to the individuals involved. Media coverage of HIV criminalisation frequently demonises people living with HIV and perpetuates stigmatising misconceptions and ignorance about HIV and its modes of transmission. These cases also move sexual health decision-making and the management of a health condition from what should be the enabling and supportive arena of health, to a punitive sphere that involves investigation, prosecutions and (often severe) punishment.

Far from being a legitimate tool for public health, HIV criminalisation is often used as a proxy mechanism for increased state control, policing of marginalised groups, the enforcement of morality, and punishment of social vulnerability, thus exacerbating existing inequalities and power imbalances. HIV criminalisation is also often used with, and compounds the harms caused by, other criminal or punitive legal sanctions such as those used against sex workers, transgender people, irregular migrants, people who use drugs, and gay men and other men who have sex with men where same-sex sexual relationships are criminalised.

Despite UN recommendations aimed at limiting HIV criminalisation to extremely rare cases of intentional HIV transmission (i.e. where there is proven malicious intent to transmit HIV and the fact of transmission is proven beyond reasonable doubt), few countries have repealed or modernised their laws or legal frameworks, and only a handful limit the overly broad use of the criminal law as recommended.⁴ UNAIDS' latest Global AIDS Strategy explicitly recognises HIV criminalisation as a barrier to ending HIV as a public health threat by 2030, and has set bold new global targets — specifically that fewer than 10% of countries criminalise overly broad HIV non-disclosure, exposure or transmission by 2025, and fewer than 10% of people living with HIV experience stigma and discrimination in a wide range of settings, including the criminal legal system.⁵

WHAT DO WE MEAN BY “HIV CRIMINALISATION”?

HIV criminalisation describes the unjust application of criminal laws, regulations and punitive policies against people living with HIV primarily on the basis of their HIV-positive status. Both HIV-specific criminal laws and other kinds of criminal laws and punitive policies are applied to people living with HIV based on allegations of non-disclosure of their health condition, potential or perceived HIV exposure, or unintentional transmission. These laws and their application are a pervasive illustration of how state-sponsored stigma and discrimination work against marginalised groups of people with an immutable characteristic — in this case, HIV-positive status. As well as being a human rights issue of grave concern, HIV criminalisation is a barrier to universal access to HIV prevention, testing, treatment and care.

As the remainder of this chapter demonstrates, there is much more work yet to do in order to end HIV criminalisation and reach these bold targets. But progress is being made, as a result of some of the strategic advocacy detailed throughout this report and under the leadership of people living with HIV.

4 UNAIDS/UNDP. *Policy Brief: Criminalisation of HIV transmission*. August 2008. Available at: https://www.unaids.org/sites/default/files/media_asset/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*. May 2013. Available at: https://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf UNDP. *Guidance for Prosecutors on HIV-related Criminal Cases*. June 2021. Available at: <https://www.undp.org/sites/g/files/zskgke326/files/2021-06/UNDP-Guidance-for-Prosecutors-on-HIV-Related-Criminal-Cases.pdf>

5 UNAIDS. *Global AIDS Strategy 2021–2026 – End Inequalities*. End AIDS. March 2021. Available at: <https://www.unaids.org/en/Global-AIDS-Strategy-2021-2026>

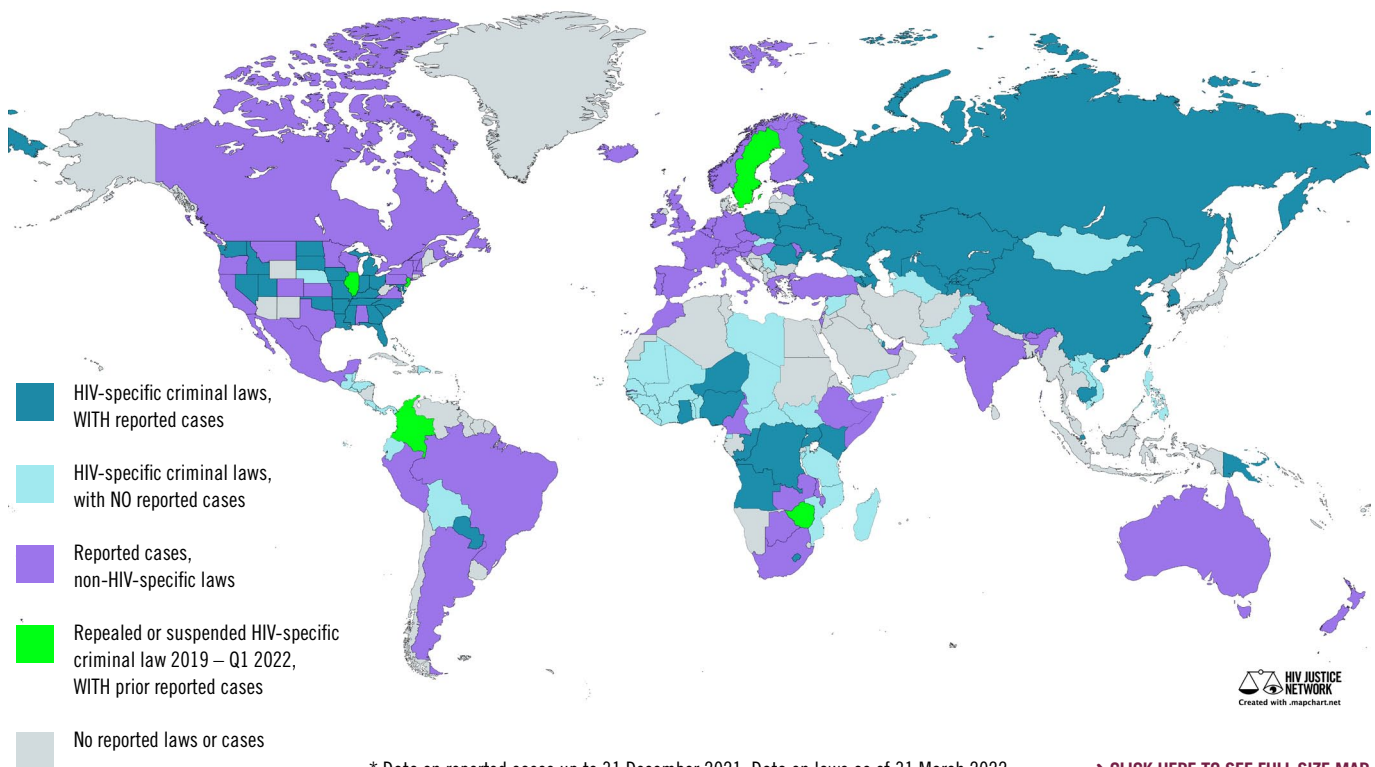
THE GLOBAL LEGAL LANDSCAPE

Every jurisdiction in the world has laws to address behaviours that harm others, including, for example, provisions on criminal negligence, assault and attempted murder. In some jurisdictions, prosecutors and judges have found that these provisions can be applied against people living with HIV for non-disclosure of their health status to sexual partners, potential or perceived exposure by any means, or alleged transmission. Some countries have also enacted HIV-specific criminal laws. These can either be provisions in the criminal code, provisions contained in HIV-specific laws (that may also provide for rights, protections and access to treatment and care), or provisions that single out people living with HIV for harsher treatment (e.g. longer sentencing) in public health laws that allow for criminal sanctions.

Criminal laws that single out people living with HIV for distinct treatment are always stigmatising. They are often vague and overly broad, and can also be written in a way that lowers the evidential bar compared with applying general laws which require proof of certain key elements (i.e. foreseeability, intent, causality and consent).⁶ On the other hand, some newer HIV laws are being carefully crafted with specific evidentiary requirements to limit the harms caused by earlier, imprecise provisions.

HIV-related criminal cases have taken place in **81 countries** since the first reported prosecution in 1986. **52 jurisdictions** in **35 countries**⁷ have applied HIV-specific criminal laws and **89 jurisdictions** in **48 countries** have applied non-HIV-specific, general criminal laws.

GLOBAL OVERVIEW OF LAWS AND CASES as of 31 March 2022*



6 OHCHR and UNAIDS. International Guidelines on HIV-AIDS and Human Rights (consolidated version). Geneva. 2006. Available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/HIVAIDSGuidelinesen.pdf>

7 Colombia, Denmark, the US states of Illinois and Texas, and the Australian state of Victoria have since repealed or suspended HIV-specific criminal laws that had previously been used for prosecutions.

HOW MANY COUNTRIES HAVE HIV-SPECIFIC CRIMINAL LAWS?

A total of **82 countries** (111 jurisdictions including states within Mexico, Nigeria and the US) currently have **HIV-specific criminal laws**.

Sub-Saharan Africa is the region with the most countries — 30 — that have jurisdictions with HIV-specific criminal laws. We are aware of their enforcement in ten countries: Angola, Congo, Democratic Republic of Congo, Ghana, Kenya, Lesotho, Niger, Nigeria (Lagos state), Uganda and Zimbabwe. Zimbabwe's Marriages Bill that included the repeal of their HIV-specific criminal law was passed in March 2022⁸ (see '[Reforming and Blocking Problematic Laws](#)'), and HIV-specific criminal laws in Kenya and Uganda are undergoing constitutional challenges.

Eastern Europe and Central Asia is the region with the second greatest number of HIV-specific criminal laws, enacted in jurisdictions in 16 countries. We are aware of their enforcement in 12 countries: Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Poland, Romania, Russian Federation, Tajikistan, Ukraine and Uzbekistan. During the period covered by this report, Armenia amended its HIV-specific criminal law to remove the criminalisation of potential or perceived HIV exposure, preserving actual HIV transmission as a crime. However, Tajikistan increased the penalties for its HIV-specific criminal law from two to five years in prison to eight to ten years,⁹ and Poland — under the guise of COVID-19 prevention — increased the maximum sentence for HIV exposure under its “exposure to infection” law from three years to eight years in prison.¹⁰

The **Latin America and Caribbean** region includes 15 countries with jurisdictions that have HIV-specific criminal laws. We are aware of their enforcement in just two countries: Bermuda and Paraguay. During the period covered by this report, Colombia's HIV-specific criminal law was suspended after being found unconstitutional. (See '[Challenging the Constitutionality of Laws in the Courts](#)').

The **Asia-Pacific** region includes 13 countries with jurisdictions that have HIV-specific criminal laws. We are aware of their enforcement in six countries: Cambodia, China, Papua New Guinea, Singapore, South Korea and Taiwan. During the period covered by this report, Taiwan's high court recognised that oral sex carried no risk of transmission and acquitted a gay man living with HIV previously found guilty of having “risky” sex.¹¹

The **North American** region has one country — the United States — with at least 24 jurisdictions that have HIV-specific criminal laws, although several additional jurisdictions have HIV-specific sentencing enhancements, and many others apply general laws (see below). We are aware of cases in 21 states with HIV-specific criminal laws: Arkansas, Florida, Georgia, Iowa, Idaho, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Mississippi, North Carolina, North Dakota, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee and Washington. During the period covered by this report, one US state (Illinois) repealed its HIV-specific criminal law, and a further five states (Michigan, Missouri, Nevada, Virginia and Washington) modernised their laws.¹² (See '[Reforming and Blocking Problematic Laws](#)').

Seven countries in the **Middle East and North Africa** region have jurisdictions with HIV-specific criminal laws, although only Qatar appears to have applied this law. Yemen passed a new HIV-specific

⁸ <https://www.hivjustice.net/country/zw/>

⁹ <https://www.hivjustice.net/country/tj/>

¹⁰ <https://www.hivjustice.net/country/pl/>

¹¹ <https://www.hivjustice.net/cases/taiwan-high-court-reverse-sentence-and-acquit-man-accused-of-hiv-exposure-thanks-to-expert-medical-evidence-on-hiv-risks/>

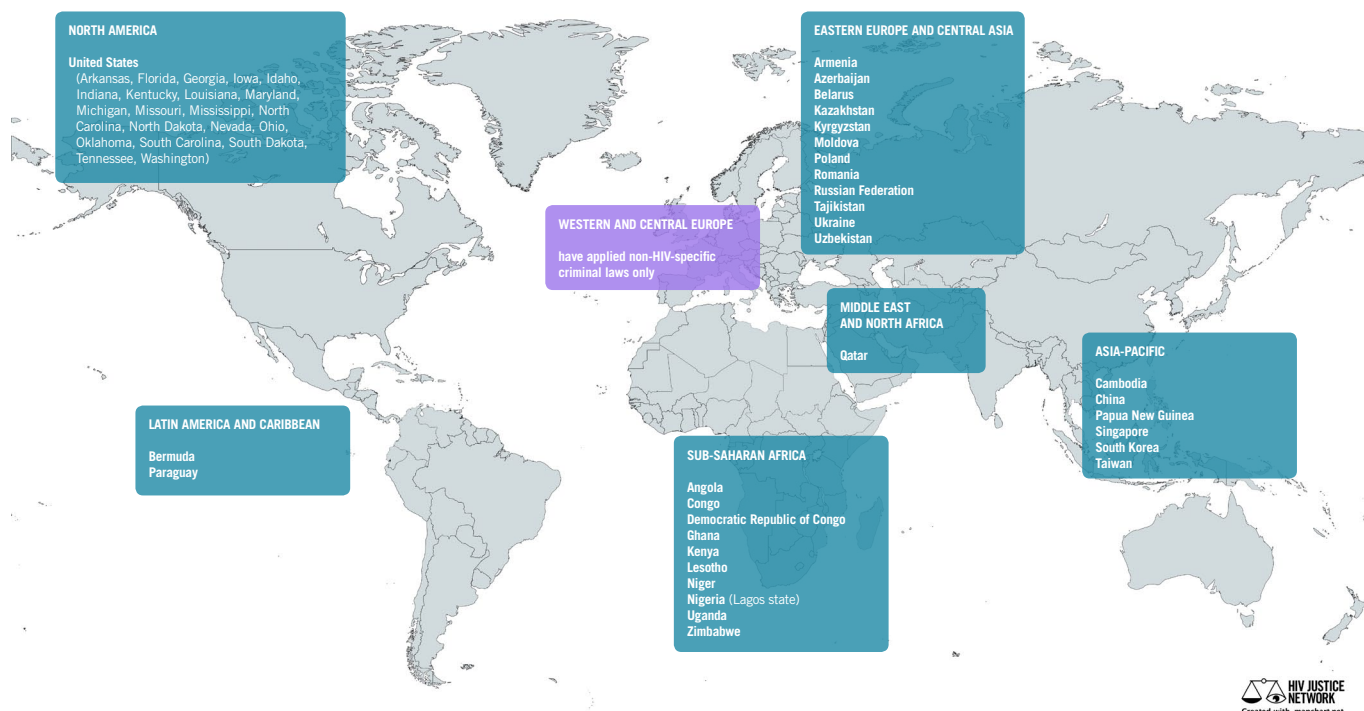
¹² A further two US states – New Jersey and Washington – repealed or modernised their laws in January 2022, following years of advocacy.

criminal law during the period covered by this report. The law, enacted in December 2021, not only criminalises alleged HIV transmission without requiring proof of intent, but also allows for mandatory HIV testing of refugees and migrants.¹³

Since Denmark suspended its HIV-specific criminal law in 2011 and Sweden repealed its HIV disclosure obligation in 2020, no jurisdictions in any country in **Western and Central Europe** have HIV-specific criminal laws.

COUNTRIES / JURISDICTIONS THAT HAVE APPLIED THEIR HIV-SPECIFIC CRIMINAL LAWS

as of 31 December 2021



WHERE ARE OTHER TYPES OF LAWS APPLIED IN HIV-RELATED CRIMINAL CASES?

A total of **89 jurisdictions** in **48 countries** have applied **non-HIV-specific criminal laws** to people living with HIV based on their HIV-positive status.

A total of 22 jurisdictions in 21 countries of **Western and Central Europe** have applied general laws to HIV criminalisation cases.¹⁴ Continuing a trend that began with Netherlands (2005) and Switzerland (2009), and which has continued across much of the continent in the intervening years, the highest courts in Finland¹⁵ and France¹⁶ recognised the prevention benefit of HIV treatment as defences to prosecutions for potential HIV exposure during this reporting period. In addition, Spain's Supreme Court set an important precedent for HIV criminalisation cases, making it clear that it is not solely up to the defendant to prove that they disclosed their HIV-positive status, as other factors can inform

¹³ Source: personal correspondence with UNDP. The text of the law is currently only available in Arabic, but is being translated into English and will then be uploaded to our Global HIV Criminalisation Database.

¹⁴ In order of first reported case: Germany, Iceland, Sweden, Switzerland, Netherlands, Austria, Belgium, Norway, Finland, Hungary, Spain, Cyprus, Czech Republic, France, Italy, Great Britain (Scotland, England & Wales), Portugal, Malta, Greece, Ireland and Slovenia.

¹⁵ <https://www.hivjustice.net/cases/finland-supreme-court-overturns-conviction-in-hiv-criminalisation-case-as-man-was-on-effective-treatment/>

¹⁶ <https://www.hivjustice.net/news-from-other-sources/france-highest-court-confirms-that-people-living-with-hiv-with-an-undetectable-viral-load-can-never-be-prosecuted-as-the-risk-of-transmission-is-null/>

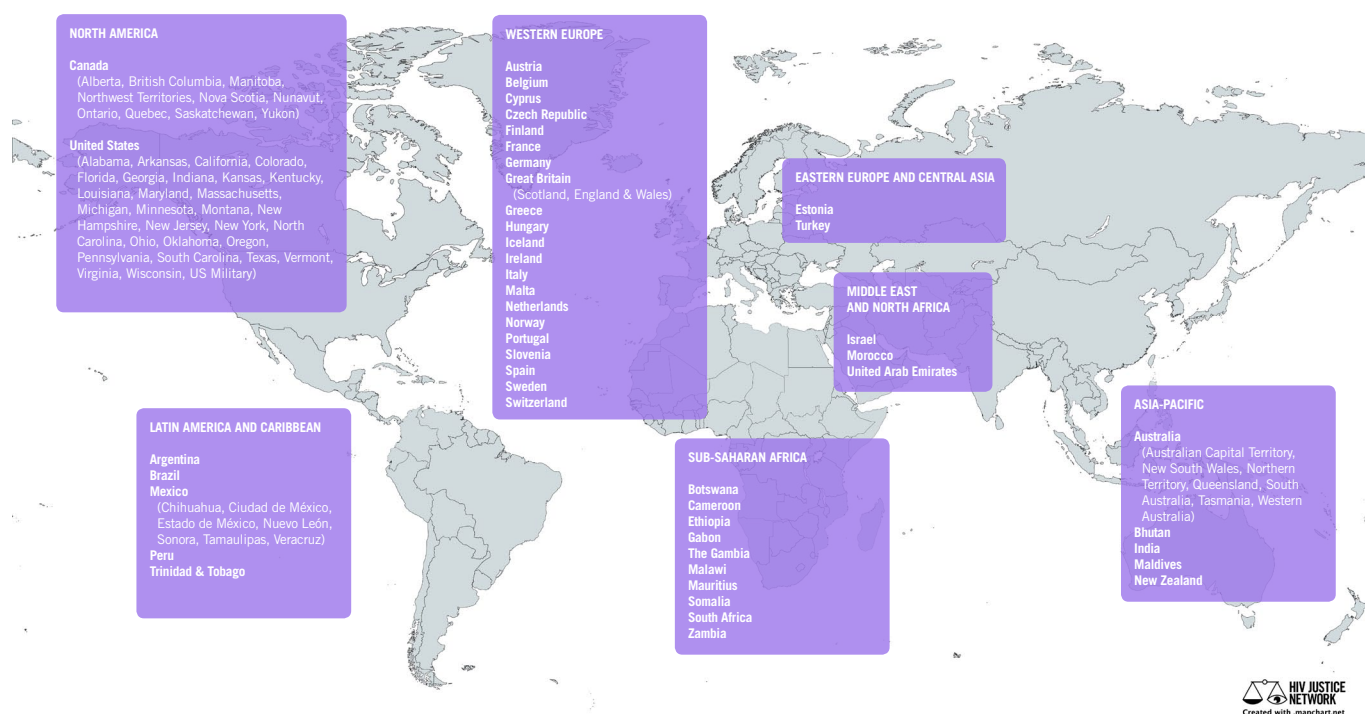
a court's determination of whether a complainant knew the accused was HIV-positive. The ruling should also make it more difficult for people to pursue vexatious or "revenge" cases.¹⁷ Other positive developments include Sweden abolishing the legal obligation to disclose HIV-positive status prior to sex¹⁸ and the Crown Prosecution Service for England and Wales affirming that their long-awaited update to guidance for prosecuting "Intentional or Reckless Sexual Transmission of Infection" will no longer suggest that someone who expressly deceives as to their HIV-positive status could be guilty of rape.¹⁹

Ten jurisdictions in ten countries in **Sub-Saharan Africa** have ever applied general laws.²⁰ Although Angola already has an HIV-specific criminal law, a new penal code which came into effect in February 2021 also criminalises anyone who, knowing that they are living with a "life-threatening sexually transmitted viral or bacterial disease", which includes HIV, has sexual intercourse without disclosing their HIV-positive status. This provision carries a penalty of up to two years' imprisonment or a fine, or two to four years' imprisonment where transmission takes place. Where the accused has the intention of transmitting the disease, the punishment would be four to six years where they are unsuccessful, and 10 to 15 years where transmission takes place.²¹

Eleven jurisdictions in five countries in the **Latin America and Caribbean** region have ever applied general laws.²² Eleven jurisdictions in five countries in the **Asia-Pacific** region,²³ three jurisdictions in three countries in the **Middle East and North Africa** region,²⁴ two jurisdictions in two countries in the **Eastern Europe and Central Asia** region,²⁵ as well as Canada²⁶ and 29 US jurisdictions (28 states and federal / US military) in the **North America** region, have ever applied general laws to HIV criminalisation cases.

COUNTRIES / JURISDICTIONS THAT HAVE APPLIED NON-HIV-SPECIFIC CRIMINAL LAWS

as of 31 December 2021



17 <https://www.hivjustice.net/news/spanish-supreme-court-sets-important-hiv-criminalisation-precedent/>

18 <https://www.hivjustice.net/news-from-other-sources/sweden-parliamentary-social-committee-recommends-reviewing-obligation-to-disclose-hiv-status/>

19 Personal correspondence from NAT to HJN and others, 2021.

20 In order of first reported case: Botswana, South Africa, Ethiopia, Cameroon, Zambia, Malawi, The Gambia, Mauritius, Somalia and Gabon.

21 Article 205 Angola Penal Code (Law No. 39/20) See: <https://www.hivjustice.net/country/ao/>

22 In order of first reported case: Mexico (Chihuahua, Ciudad de México, Estado de México, Nuevo León, Sonora, Tamaulipas and Veracruz) Argentina, Brazil, Trinidad & Tobago and Peru.

23 In order of first reported case: Australia (Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania and Western Australia), New Zealand, India, Maldives and Bhutan.

24 In order of first reported case: Morocco, United Arab Emirates and Israel.

25 In order of first reported case: Turkey and Estonia.

26 Cases have been reported in all provinces and territories in Canada except for New Brunswick, Newfoundland and Labrador, and Prince Edward Island. Ontario and Quebec account for the majority of cases to date. See: HIV Legal Network. HIV Criminalization in Canada: Key Trends and Patterns (1989-2020). Available at: <https://www.hivlegalnetwork.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns-1989-2020/?lang=en>

WHERE HAVE HIV-RELATED CRIMINAL CASES RECENTLY BEEN REPORTED?

Our [Global HIV Criminalisation Database](#) includes individual case reports of **275 arrests, prosecutions, convictions, appeals and/or acquittals** in **39 countries** between January 2019 and December 2021. However, the actual number of cases is likely to be much higher. For example, when we include numbers from countries that provide official data – Belarus,²⁷ Russian Federation²⁸ and Uzbekistan²⁹ – we estimate **almost 700 cases**.

These numbers are somewhat fewer than the 900 or so cases and [392 individual case reports from 49 countries](#) in our previous *Advancing HIV Justice 3* report, which covered an additional three months' case analysis compared to this report. The apparent decline may be due to fewer media reports (because the media has been focused on COVID-19) as opposed to fewer actual prosecutions, since much of our information on cases comes from media monitoring.

For example, in 2021 we only found one media report of an unjust case in Belarus, but on World AIDS Day 2021 the official Telegram account of the Investigative Committee of Belarus³⁰ noted that there had actually been 34 HIV-related criminal cases investigated thus far in 2021.³¹

During the report period, the criminal law was **applied for the first time** to people living with HIV for non-disclosure, potential or perceived exposure, or alleged transmission in **five countries**: Bhutan, Gabon, Lesotho, Paraguay and Slovenia.

BELARUS CASE REPORT ANALYSIS, 2019 – 2021

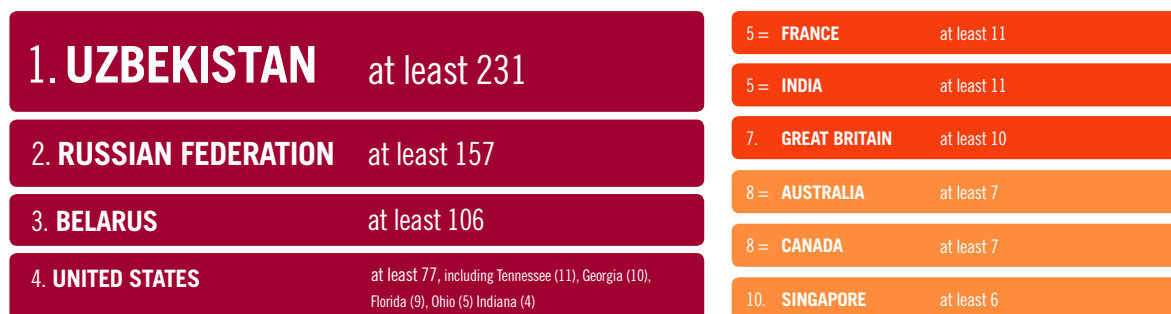
In 2019, Article 157 of the Criminal Code of the Republic of Belarus was amended to allow disclosure of HIV-positive status as a defence to the country's draconian HIV-specific law for the first time. Prior to this, even people living with HIV who had obtained consent to the risk of acquiring HIV from their partner (for the purposes of procreation, for example) could be, and were, prosecuted, with many cases initiated by doctors. In 2017 and 2018, 130 and 133 criminal cases respectively were initiated under Article 157. After the amendment entered into force (on 19 July 2019), the number of criminal cases fell, but was still numerous. In 2019, 59 people were prosecuted. In 2020, 15 people were prosecuted. In 2021, 32 people were prosecuted. Women remain especially vulnerable to prosecution, comprising 61% (65 out of 106) of all cases between 2019–2021.³²

- 27 Eurasian Women's Network on AIDS. List of Issues on the implementation of the CEDAW by the Republic of Belarus as it relates to women living with HIV submitted for the consideration at the 83rd Pre-Sessional Working Group of the UN Committee on the Elimination of Discrimination against Women. Geneva, Switzerland, 28 February – 4 March 2022. https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BLR/INT_CEDAW_NGO_BLR_47764_E.docx
- 28 According to statistics by the Judicial Department at the Supreme Court of the Russian Federation, in 2019 Russian courts convicted 59 people; in 2020, 66 people; and in the first six months of 2021, 32 people. <https://web.archive.org/web/20220106073402/http://www.cdep.ru/index.php?id=79>
- 29 There were 131 criminal offences registered in the country under Article 113 of the Criminal Code in 2020 and 100 criminal offenses registered in the first nine months of 2021 according to the official response of the Legal Statistics Center of the Ministry of Internal Affairs of the Republic of Uzbekistan No. 7/9-3192 dated October 18, 2021 as quoted in *Alternative report on the implementation of the CEDAW concerning women living with HIV by the Republic of Uzbekistan for the 81st session of the UN Committee on the Elimination of Discrimination against Women Geneva, Switzerland 07 – 25 February 2022*, Submitted by the Eurasian Women's Network on AIDS and Alliance for Public Health. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fUZB%2f47454&Lang=en
- 30 <https://www.hivjustice.net/cases/belarus-woman-sentenced-to-8-years-imprisonment-for-alleged-hiv-transmission-and-exposure/>
- 31 <https://www.hivjustice.net/news-from-other-sources/belarus-34-prosecutions-for-hiv-infection-in-2021/>
- 32 *Op cit*. Eurasian Women's Network on AIDS. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fBLR%2f47764&Lang=en

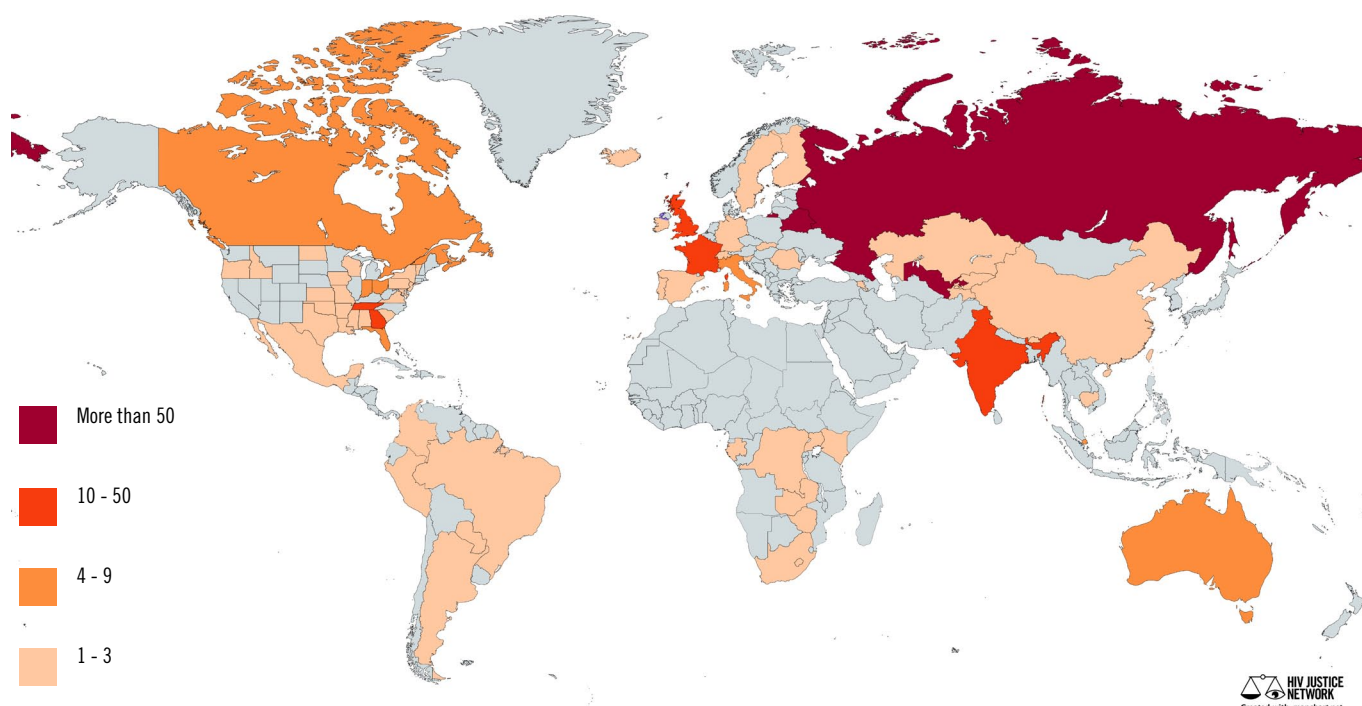
CRIMINALISATION HOTSPOTS

Although the number of cases in some countries that were previously HIV criminalisation hotspots – notably Canada, Czech Republic, some US states, Norway, Sweden and Zimbabwe – have diminished in recent years, in parts of the world where advocacy has not been as successful, high numbers of cases continue to be reported – notably in Eastern Europe and Central Asia.

Notwithstanding the limitations of tabulating cases globally, the highest number of reported cases during the period covered by this report were in:



WHERE HIV-RELATED CRIMINAL CASES HAVE BEEN REPORTED 2019-21 as of 31 December 2021



→ [CLICK HERE TO SEE FULL SIZE MAP](#)

HIV CRIMINALISATION IMPEDES 90-90-90 TARGETS

In its 2021 *Global AIDS Update*, UNAIDS reported that at least eight countries had fully achieved the 90–90–90 targets by the end of 2020.³³ Another 11 had reached an equivalent 73% viral load suppression among all people living with HIV.³⁴ UNAIDS concluded that the diversity of these 19 countries demonstrates that these ambitious targets can be achieved across income levels, epidemic settings and sociocultural norms.³⁵

Notably, *none* of the leading prosecuting countries, or those where the criminal law appears to be disproportionately applied, are included in these lists.

WHO IS GETTING PROSECUTED?

Our analysis of recent cases confirms that HIV arrests, prosecutions and convictions continue to disproportionately impact certain populations who are marginalised and in a position of vulnerability.

Women, racial and ethnic minorities, migrants, gay men and other men who have sex with men, transgender people, and sex workers represent approximately 50% of defendants.³⁶ Disparity along racial and ethnic minority lines was most stark in the United States with at least 55% of arrests, prosecutions and convictions directed towards Black people and other people experiencing racism.³⁷

Persons prosecuted for **biting** and **spitting** were often institutionalised or were accused of committing the offences during arrest or while being restrained. All complainants in these cases were persons in positions of authority to the accused. The United States had the majority of such cases (19 out of 34, or 56%), followed by England (4) and Russia (4).

Breastfeeding and comfort nursing cases mostly arose in Africa — Kenya, Uganda, Zambia and Zimbabwe — with one case in Russia. The women prosecuted were mainly employed as caregivers and, in many instances, their HIV-positive status was not confirmed prior to arrest.

Medical negligence cases (which are not included in our quantitative analysis) were mostly reported in Asia (Cambodia, Pakistan and India), with isolated cases in Algeria, Slovakia and Russia. We note that these cases most often arise in circumstances where there are limited resources for the provision of health care services.

HOW FAIR ARE HIV-RELATED PROSECUTIONS?

The 2021 UNDP *Guidance for Prosecutors on HIV-related Criminal Cases* sets out ten key principles for the prosecution of HIV-related criminal cases.³⁸ (See ‘[Ensuring “HIV Justice” in the Criminal Legal System](#)’.)

In our review of available decisions, we found that arrests and prosecutions for HIV-related offences often proceed based on inaccurate assumptions regarding HIV, and prosecution is not limited to cases of intentional HIV transmission (i.e. where there is proven malicious intent to transmit HIV and the fact

33 Eswatini, Switzerland, Rwanda, Qatar, Botswana, Slovenia, Uganda and Malawi.

34 Zimbabwe, Kenya, Namibia, Cambodia, Lesotho, Burundi, Uruguay, Norway, Thailand, Zambia and Croatia.

35 UNAIDS, *Global Aids Update, Confronting Inequalities: Lessons for pandemic responses*. 2021, p. 86. <https://www.unaids.org/en/resources/documents/2021/2021-global-aids-update>.

36 126/259 (49%) explicitly identified for all cases with demographic data in our Global HIV Criminalisation Database. 91/195 (47%) of cases with demographic data explicitly identified for alleged non-disclosure of HIV status, potential or perceived HIV exposure, or unintentional transmission prior to consensual sexual activity.

37 See a detailed analysis of the impact of race on vulnerability to HIV criminalisation by the Williams Institute here: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Crim-and-Race-Infographic.pdf>

38 UNDP. *Guidance for Prosecutors on HIV-related Criminal Cases*. 2021. https://hivlawcommission.org/wp-content/uploads/2021/05/UNDP_Guidance-for-Prosecutors-on-HIV-related-Criminal-Cases_Final.pdf

of transmission is proven beyond reasonable doubt). There appears to be little consideration of whether prosecution is in the public interest and a reluctance to acknowledge that issues of HIV prevention are most effectively addressed as a public health matter.

While a full case audit against the principles is not possible due to lack of information on many cases reported in the media, many deficiencies were evident in the available decisions. Of particular concern are the number of cases that fail to reflect scientific advances regarding HIV, in particular with respect to the prevention effects of antiretroviral treatment and the inability to transmit HIV with an undetectable viral load. Perversely, some courts are still using the fact that the accused is on antiretroviral therapy as evidence of criminality, rather than evidence that the accused could not be guilty. In cases where HIV transmission is alleged, the first diagnosed is often assumed to be the first infected and the guilty party, without any further scientific or medical evidence.

Of particular concern are the number of cases that fail to reflect scientific advances regarding HIV, in particular with respect to the prevention effects of antiretroviral treatment and the inability to transmit HIV with an undetectable viral load.

In some jurisdictions, scientific evidence regarding low or no transmission risk has been accepted by courts to acquit people living with HIV. For example, in Germany, the court considered the undetectable status of the accused in acquitting them of attempted dangerous bodily harm.³⁹ In a case related to breastfeeding in Uganda, the court noted that “knowing that a person is HIV-positive is no reason to believe that they should or are capable of transmitting the virus except if an additional action is committed which exposes another person to an infection.”⁴⁰

In Canada, the courts are timidly acknowledging some scientific advances, but remain hesitant to depart from previous judicial decisions. For example, despite acknowledging the *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law*,⁴¹ the appellate court in *R v N.G.* found that, even with the use of condoms, a realistic possibility of HIV transmission remained for vaginal intercourse (and therefore the guilty verdict was confirmed).⁴² In earlier cases, however, Canadian courts had accepted that an undetectable viral load precludes criminal conviction.

Sentencing is another area where the cases demonstrate significant divergence from the principles. Generally speaking, sentencing for HIV-related offences is disproportionate, as compared to other offences and the degree of harm. Non-custodial sentencing is rarely used.

ADVOCACY AGAINST HIV CRIMINALISATION IS SHOWING RESULTS

Important and promising developments in case law, law reform and policy have taken place in many countries and jurisdictions over the three years covered by this report. Most of these came about as a direct result of advocacy by individuals and organisations — and, in particular, people living with HIV and their networks — working to end the inappropriate use of the criminal law to regulate and punish

39 Court judgment unavailable. Decision reported at: <https://www.hivjustice.net/cases/germany-bonn-court-takes-hiv-treatment-into-account-and-acquits-teacher-accused-of-having-unprotected-sex-with-minor/>




40 Court judgment unavailable. Decision reported at: <https://www.hivjustice.net/cases/uganda-32-year-old-woman-sentenced-to-two-years-in-jail-for-allegedly-injecting-a-baby-with-hiv/>

41 Barré-Sinoussi F, et al. *Expert consensus statement on the science of HIV in the context of criminal law*. J Int AIDS Soc. 21(7). 2018. e25161. doi:10.1002/jia2.25161. <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>

42 *R. v. N.G.*, 2020 ONCA 494 [Ontario Court of Appeal].

people living with HIV. This work is not only varied in terms of the complex intersection of laws, policies and practices, but also in terms of unique social, epidemiological and cultural contexts.

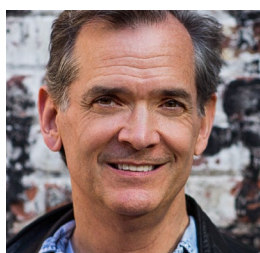
During the period covered by this report, four HIV criminalisation laws were repealed; another HIV criminalisation law was found to be unconstitutional; and six laws were modernised (i.e. applied up-to-date science on HIV-related risk or harm and/or legal and human rights principles to limit the application of the law) five of which were in the United States.

 <p>LAWS REPEALED</p> <ul style="list-style-type: none"> Sweden (disclosure obligation, 2020) Illinois (US, 2021) New Jersey (US, 2022) Zimbabwe (2022) 	 <p>HIV CRIMINALISATION LAWS RULED UNCONSTITUTIONAL</p> <ul style="list-style-type: none"> Colombia (2019) 	 <p>LAWS MODERNISED</p> <ul style="list-style-type: none"> Armenia (2021) Michigan (US, 2019) Missouri (US, 2021) Nevada (US, 2021) Virginia (US, 2021) Washington State (US, 2020/2022)
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In addition, we saw precedent-setting cases in four countries and policy recommendations or improvements in four further countries — all of which have the potential to limit the overly broad application of the law to people living with HIV based on HIV-positive status.

 <p>LEGAL PRECEDENTS IN CASE LAW</p> <ul style="list-style-type: none"> Finland (recognising U=U, 2021) France (recognising U=U, 2019) Spain (responsibility for proving disclosure, 2020) Taiwan (recognising oral sex is not “risky”, 2020) 	 <p>OTHER</p> <ul style="list-style-type: none"> Canada (Justice Committee report recommends wide-ranging legal reforms, 2019) England & Wales (UK, prosecutorial guidance further updated, 2021) Kyrgyzstan (CEDAW recommends repeal of HIV-specific criminal law, 2021)⁴³ New Jersey (US, prosecutorial guidance issued, 2021)
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All of these outcomes were primarily due to sustained and effective advocacy — including impressive efforts by coalitions of people living with HIV, together with human rights organisations, healthcare providers, lawyers and other allies. Much of the rest of this report explores the various ways in which advocates organised to challenge these and other HIV criminalisation laws.



Sean Strub,
The Sero Project

“Since the beginning of the epidemic, people living with HIV have been responsible for advocacy, resulting in many of the most important epidemic milestones and breakthroughs. Whether it concerns research, prevention, treatment or public policy, people living with HIV speak with an unparalleled authority, authenticity and urgency.”

“Tokenising people living with HIV more often results in token progress. When people living with HIV are involved from the first step of advocacy efforts, the work is stronger and the result better. Nowhere is this more evident than in the movement to end HIV criminalization, which has been driven for a decade primarily by people living with HIV and their networks.”

⁴³ CEDAW also recommended that Uzbekistan repeal its HIV-specific criminal law in March 2022. See: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fUZB%2fCO%2f6&Lang=en

GROWING MOVEMENTS FOR HIV JUSTICE

When (now retired) South Africa Constitutional Court Justice Edwin Cameron called for a global campaign against HIV criminalisation, declaring “*HIV is a virus, not a crime!*” at the 17th International AIDS Conference in 2008, it was the start of a movement that has seen many successes, even as multiple challenges remain. Today, thanks to greater awareness of the importance of the issue, an awareness of the intersections between HIV and other kinds of criminalisation and marginalisation, and an appreciation of the urgency to fund the work, there are numerous national and regional networks working to end HIV criminalisation, alongside international organisations and institutions. HJN and the global HIV JUSTICE WORLDWIDE coalition which HJN co-ordinates, have played an important role in the development of this movement, nurturing the growth of several regional networks, as well as highlighting the intersectional nature of HIV criminalisation.

MOVEMENT BUILDING

During the period covered by this report, the nascent **Action Network for Justice for People Affected by HIV in Latin America and the Caribbean** formalised itself as a regional network against HIV criminalisation. Amongst its first activities were webinars to raise awareness about HIV criminalisation in Brazil, Chile and Jamaica, and opportunities to share experiences and strategies throughout the region.

Undetectable =
Untransmissible
messaging in the
Arab region.



In the **Middle East and North Africa** region (MENA), HIV has been used extensively as additional evidence to increase penalties and criminalise men who have sex with men, sex workers, people who use drugs, and transgender people. Building the movement in MENA, therefore, has involved a focus on increasing visibility of these communities throughout society, to increase recognition and acceptance. In addition, civil society has created an Arabic U=U campaign to increase awareness of the changing reality of HIV prevention and infection as a result of treatment.

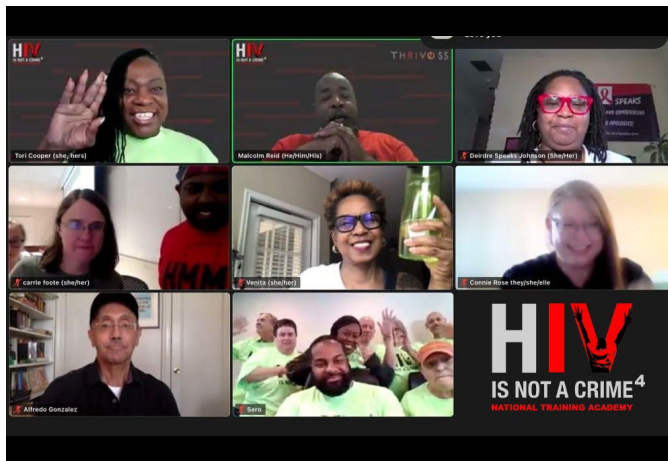
The regional network in **Francophone Africa** has continued to exchange information and strategies. (The network was profiled in *Advancing HIV Justice 3*, pp. 64-5.) HJN has supported members of the network to continue awareness-raising and movement-building efforts. Numerous laws based on the flawed 2004 “N’Djamena Model” remain in force throughout the region.⁴⁴ Civil society in Burkina Faso, for example, has engaged in the law reform process to address obstacles identified through a legal environment analysis. A new bill that removes the criminalisation provision from the national HIV legislation has been proposed. Similarly, a grassroots sex workers group in the Democratic Republic of Congo has been spreading the news that HIV is no longer criminalised in the HIV law by connecting with lawyers, paralegals and other key populations, and by speaking on the radio about the law, human rights and issues facing key populations in the country.

⁴⁴ See Canadian HIV/AIDS Legal Network. *A Human Rights Analysis of the N’Djamena Model Legislation on AIDS and HIV-Specific Legislation in Benin, Guinea, Guinea-Bissau, Mali, Niger, Sierra Leone and Togo*. 2007. <https://www.hivlegalnetwork.ca/site/download/11249/>

TRAINING AND EDUCATION

In the **Southern Africa** region, ARASA runs an [annual e-learning course](#) on the criminalisation of HIV transmission, exposure and non-disclosure for advocates and lawyers based in southern and east Africa. The course provides a foundation of information and strategies to engage in ongoing advocacy. (See the case study in [Advancing HIV Justice 3](#), pp. 67-8.)

The closing session of the fourth HIV is Not a Crime Training Academy, June 7-10, 2021. Upper L-R: Tori Cooper, Malcolm Reid, and Deirdre Johnson. Middle L-R: Carrie Foote, Jacob D, Venita Ray, and Connie Shearer. Bottom L-R: Alfredo Gonzalez and Sero Project staff. Credit: Sero Project.



In the **United States**, the biennial [HIV is Not a Crime National Training Academy](#) aims to unite and train advocates living with HIV and allies from across the country on laws criminalising people living with HIV and on strategies and best practices for repealing such laws. Skills-building training provides participants with concrete tools and resources to work on state-level strategies. The fourth training academy took place online in July 2021. Watch all of the sessions [here](#).

HJN's flagship event — **Beyond Blame** — is designed to inform, inspire and connect our movements around the world. Due to COVID-19 travel restrictions, Beyond Blame 2020, expected to take place at the HIV2020 community global meeting in Mexico City, was reimagined as a two-hour live web show and featured interviews on women challenging HIV criminalisation in Africa, the impact of HIV criminalisation on women and people who use drugs in EECA, networks in Mexico and across Francophone Africa, trends in prosecutions, and HIV-related science. Watch [here](#).

Beyond Blame 2021 followed the same web show format. Speakers addressed the criminalisation of breastfeeding while HIV-positive, science and HIV justice, developments in EECA, Africa and the USA, and local/global connections. The English segments are available online [here](#). The online format (with simultaneous translation to [French](#), [Russian](#) and [Spanish](#)) permitted the synchronous participation of more than 150 people from all continents.



Social media meme and screenshot from the BEYOND BLAME 2021 online conference.

CLOSING REMARKS AT BEYOND BLAME 2021

by
Dr Tlaleng Mofokeng
("Dr T"),
Special Rapporteur
on the Right
to Health



Warm greetings to you all from South Africa! I am very happy to be with you today to add my voice in challenging HIV criminalisation in the strongest terms.

In the past two hours, we've been informed,... saddened,... enraged,... but also energised and inspired.

We share a vision of a world where all of us are free to live our lives fully, to celebrate our sexuality in all our glorious diversity, to find pleasure and fulfilment throughout our lives.

None of this can happen when we are living under constant threat of punitive laws – laws that restrict our freedom, strip away our dignity, and punish us for the very things that make us human, whether that's loving who we love, or breastfeeding our children.

The evidence is clear. We know that criminalisation is bad for health on every level – bad for our health and well-being as individuals, and bad for public health globally.

But now we have a real opportunity to turn the tide.

The new Global AIDS Strategy and Political Declaration are unequivocal: the HIV pandemic is driven by inequalities; HIV stigma is real; and criminalisation is the distillation of inequality and stigma in their worst form.

Let us harness this momentum and focus, to drive forward the changes we want to see. While there is much to celebrate, there is certainly no shortage of work for us to do! As we have heard, one hundred and ten countries still have laws that criminalise HIV on their books.

Yet we know that we can't improve laws with science alone – yes, the science moves us forward, but it is only when science is applied in ways that respect, protect and defend human rights that we can achieve our goals.

On the eve of World AIDS Day, with its focus this year on ending inequalities and reaching people left behind, the work to end HIV criminalisation is more important than ever.

The time has come. The time is now. We know that we are on the right side of history, so let us say it loud and proud: *We can't end HIV without HIV JUSTICE WORLDWIDE!*

Thank you.

IN PURSUIT OF RIGHTS-BASED PUBLIC HEALTH APPROACHES

Global experience and evidence clearly demonstrate that rights-based approaches to public health are more effective than punitive approaches, yet we continue to see authorities resorting to fines, arrests and other punishments to incentivise compliance with prevention initiatives and admonish behaviours (and identities) perceived as risky. Responses to the rapid spread of COVID-19 throughout the world in 2020 were no different.

COVID-19

Recognising the knee-jerk turn to punitive measures that was starting to emerge, in March 2020, the Steering Committee of HIV JUSTICE WORLDWIDE released a [statement on COVID-19 criminalisation](#).

Excerpt from the statement:

COMMUNICABLE DISEASES ARE PUBLIC HEALTH ISSUES, NOT CRIMINAL ISSUES: WHAT WE HAVE LEARNT FROM THE HIV RESPONSE

Measures that are respectful of human rights and the empowering of communities are more effective than punishment and imprisonment.

The COVID-19 IS NOT A CRIME meme, an adaptation of the Sero Project's HIV IS NOT A CRIME logo, was produced by Australian activist Nic Holas.

Our experience has taught us that hastily drafted laws, as well as law enforcement, driven by fear and panic, are unlikely to be guided by the best available scientific and medical evidence – especially where such science is unclear, complex and evolving. Given the context of a virus that can easily be transmitted by casual contact and where proof of actual exposure or transmission is not possible, we believe that the

criminal justice system is unlikely to uphold principles of legal and judicial fairness, including the key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof.

We therefore urge law- and policymakers, the media, and communities at large, to keep human rights front and centre as we collectively respond to a new public health crisis in a climate of fear and uncertainty. It is more critical than ever to commit to, and respect, human rights principles; ground public health measures in scientific evidence; and establish partnerships, trust, and co-operation between law- and policymakers and communities.



In response to the novel virus and its impacts, governments began passing laws and putting various mechanisms in place — state of emergency declarations, quarantine measures, data collection, measures related to mask-wearing and social distancing, financial support and medication and vaccines protocols. While measures grounded in science, evidence and human rights have been indispensable to approve

vaccines, create safer workplaces and provide access to health services, other measures have harmed marginalised populations, entrenched stigma and discrimination and hindered efforts to control the pandemic (e.g. fining homeless people for breaking curfews, suspending trials under emergency measures).

This response to COVID-19 demonstrates that many lessons of HIV criminalisation have not yet been learnt. Our education and advocacy work clearly continues to be needed, both to improve the lives of people living with HIV and key populations, and also to influence and inform public health practice in the face of other epidemics and infectious diseases.

The United Nations Development Programme (UNDP), the World Health Organization (WHO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the O'Neill Institute for National and Global Health Law at Georgetown University, the Inter-Parliamentary Union (IPU) and the Universal Health Coverage Legal Solutions Network created a COVID-19 Law Lab to collect, share and analyse legal documents from around the world. This includes a full range of provisions, including both protective and helpful laws, as well as harsh criminal and other punitive provisions.⁴⁵

In light of the proliferation of problematic COVID-19 laws and policies, HJN adapted its newsletter, then called *HIV Justice Weekly*, to include coverage of punitive responses to COVID-19. The newsletter, now renamed *HIV Justice News*, links to [a list of global and national resources](#) that track laws and policies implemented in response to the pandemic, as well as data analyses, statements and recommendations.



INTERNATIONAL-LEVEL NEGOTIATIONS

While much of the global health sector was focused on the COVID-19 pandemic, HIV-focused negotiations and policymaking continued in various venues. At the international level, the **2021 – 2026 Global AIDS Strategy entitled *End Inequalities. End AIDS.*** represented a significant shift in approach.⁴⁶ Adopted by consensus by the UNAIDS Programme Coordinating Board (PCB) in March 2021, the strategy sets out targets and policies aimed at closing gaps that prevent progress towards the goal of ending AIDS as a public health threat by 2030. Ten thousand stakeholders from 160 countries provided input into the strategy development progress.



The focus on reducing inequalities is distinct from the previous “Fast Track” approach (2016-2021) that privileged biomedical interventions. Recognising the strong role that law and policy play with respect to fomenting or redressing inequalities, the following important and ambitious target is included in the strategy:

Less than 10% of countries have punitive legal and policy environments that deny or limit access to services.

⁴⁵ <https://covidlawlab.org/>

⁴⁶ www.unaids.org/en/resources/documents/2021/2021-2026-global-AIDS-strategy

Within this overarching target are more specific targets:

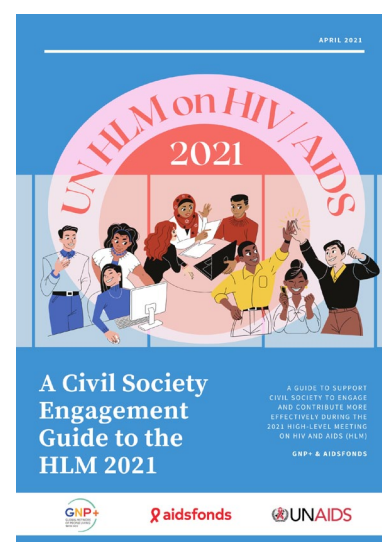
- Less than 10% of countries criminalise sex work, possession of small amounts of drugs, same-sex sexual behaviour and HIV transmission, exposure or non-disclosure by 2025.
- Less than 10% of countries lack mechanisms for people living with HIV and key populations to report abuse and discrimination and seek redress by 2025.
- Less than 10% of people living with HIV and key populations lack access to legal services by 2025.
- More than 90% of people living with HIV who experienced rights abuses have sought redress by 2025.

In addition to this target on legal and policy environments, two other targets are relevant to HIV criminalisation. The first is that **less than 10% of people living with HIV and key populations experience stigma and discrimination**. Stigma fuels pro-criminalisation sentiment and criminalisation increases stigma, so the aggressive focus on reducing stigma and discrimination against both people living with HIV and key populations is an important aim. The other is that **less than 10% of women, girls, people living with HIV and key populations experience gender inequality and violence**. Gender-based violence and discrimination are endemic globally, so this is indeed an ambitious target. Yet gender-based discrimination and violence are intimately interrelated with the criminalisation of HIV non-disclosure, exposure, and transmission, so pursuing these objectives simultaneously is both strategic and principled.

Another important target is that 60% of programming to support the achievement of these targets should be delivered by community-led networks and civil society organisations. This target is extremely important, enabling advocacy for funding. The target provides leverage and accountability not generally available in the HIV sector. Altogether, this Global Strategy opens up tremendous opportunities for HIV justice advocacy work.

Following on from the new UNAIDS Strategy was the **UN General Assembly High-Level Meeting on AIDS** process.⁴⁷ GNP+ and Aidsfonds, under the Love Alliance programme, were chosen to co-convene the **civil society process** with UNAIDS. A 16-member multi-stakeholder task force with regional representation, civil society, private sector and community representatives was the centrepiece of community participation and engagement.⁴⁸

Due to COVID-19 restrictions, civil society participation in the High-Level Meeting had to be virtual. The co-conveners created mechanisms for interaction, such as live chats and Q&A sessions. All documents were available in seven languages, which increased participation, especially from North Africa and the Middle East. So while informal conversations in corridors, side meetings and direct engagement with country delegations were not possible — important lobbying opportunities at previous meetings — the online format allowed for much broader participation and more ownership of the outcomes, especially on the part of youth.



⁴⁷ <https://hlm2021aids.unaids.org/>

⁴⁸ https://www.unaids.org/en/resources/presscentre/featurestories/2021/march/20210329_multistakeholder-task-force-high-level-meeting-hiv

CIVIL SOCIETY DECLARATION FOR THE UNITED NATIONS GENERAL ASSEMBLY 2021 HIGH-LEVEL MEETING ON HIV/AIDS ISSUED ON 29 APRIL 2021

END INEQUALITIES. END AIDS. ACT NOW!

There is a crisis in the HIV response. Over the last five years, the world has failed to meet any of the targets for prevention, diagnosis and treatment set out in the 2016 Political Declaration on HIV/AIDS, with progress on HIV prevention lagging particularly far behind. The 2021 high-level meeting on HIV/AIDS – and the Political Declaration that results from it – is the last chance to create sustained momentum for the policies, programmes and funding that are needed to end HIV as a global health threat by 2030.

Now more than ever, evidence-based responses and renewed political will are called for – especially in face of the additional burdens imposed by the Covid-19 pandemic. In order to focus efforts and resources where they are most needed, we call for a Political Declaration that:

- RECOGNIZES explicitly who is most at risk of HIV
- ACKNOWLEDGES why this is so
- COMMITS to fully fund and support effective responses
- HOLDS ACCOUNTABLE Member States for their actions⁴⁹

Read the full declaration [here](#).



The *Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030* was adopted by United Nations Member States in June 2021.⁵⁰ Disappointingly, the *Political Declaration* lacked global consensus, and was adopted with watered down language on human rights and some key issues completely missing. Russia, Belarus, Nicaragua and the Syrian Arab Republic opposed the final draft’s progressive language, including naming “key populations”. With the Declaration, States specifically commit to:

- eliminating HIV-related stigma and discrimination and to respecting, protecting and fulfilling the human rights of people living with, at risk of and affected by HIV;
- creating an enabling legal environment by reviewing and reforming, as needed, restrictive legal and policy frameworks;
- adopting and enforcing legislation, policies and practices that prevent violence and other rights violations against people living with, at risk of and affected by HIV and protect their human rights;
- ending impunity for human rights violations against people living with, at risk of and affected by HIV; and
- ensuring that all services are designed and delivered without stigma and discrimination, and with full respect for the rights to privacy, confidentiality and informed consent, amongst other commitments.

The Declaration also included language on HIV criminalisation as part of the 10-10-10 targets on societal enablers. Having secured these important commitments, the onus now lies with civil society to hold governments and institutions accountable to them.

⁴⁹ https://www.unaids.org/sites/default/files/media_asset/2021-hlm-cs-declaration_en.pdf

⁵⁰ https://www.unaids.org/sites/default/files/media_asset/2021_political-declaration-on-hiv-and-aids_en.pdf

UNDERSTANDING AND USING SCIENCE FOR JUSTICE

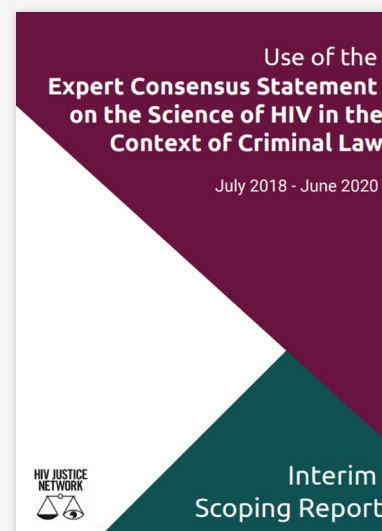
Science has always played an important role in defending people living with HIV who are prosecuted for HIV non-disclosure, exposure or transmission, and also in advocacy to reform or repeal laws that unfairly criminalise people living with HIV. An exaggerated sense of HIV-related risk and harm are important factors that drive HIV criminalisation laws and prosecutions. “Using science for justice” has therefore been a prevalent theme and strategy since the establishment of HJN. (See [Advancing HIV Justice 3](#), pp. 42-47.)

INTERIM SCOPING REPORT:

USE OF THE EXPERT CONSENSUS STATEMENT ON THE SCIENCE OF HIV IN THE CONTEXT OF CRIMINAL LAW

In July 2018, 20 of the world’s leading HIV scientists published the peer-reviewed [Expert Consensus Statement on the Science of HIV in the Context of Criminal Law](#), which interprets the evidence on HIV transmission risks, the impact of treatment effectiveness on perceptions of HIV-related harm, and the use of complex scientific tests as forensic evidence so that HIV-related science would be better understood in criminal law contexts. (See [Advancing HIV Justice 3](#), pp. 43-4.)

The *Expert Consensus Statement* continues to be used extensively in a wide range of circumstances. For example, civil society organisations advocating for law reform in Burkina Faso, Moldova, Ukraine and Zimbabwe relied on the *Expert Consensus Statement* to support their arguments. It was also entered as evidence in court cases in Canada, Colombia, Kenya, Lesotho and Uganda. To improve the legal and policy environment for people living with HIV, it was translated into Czech and distributed to Czech regional HIV centres; used to inform prosecutorial approaches to HIV-related cases in Morocco; and helped sensitise customary religious leaders in Burkina Faso.



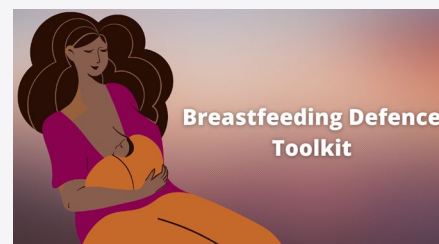
Providing accurate, accessible and relevant resources about the best available science on HIV-related health, prevention and transmission has been critical to assisting judges to handle the HIV-related cases that come before them. In particular, contextualising the science in terms of the real lives of stigmatised and marginalised communities is important. The *Expert Consensus Statement* was a foundational document at the online Judges’ Forum on HIV, Human Rights and the Law, hosted by UNDP and the Supreme Court of Tajikistan in October 2020, which focused on the criminalisation of HIV exposure, transmission and non-disclosure. In the Eastern European and Central Asia (EECA) region, the legal and policy environment is problematic with respect to the criminalisation of HIV, sex work, drug use and/or possession, and forced or coerced HIV testing. Judges, therefore, can play a significant role in protecting the rights of people living with HIV and key populations in the face of stigma and repression. Providing judges with an accurate and comprehensive understanding of the science of HIV transmission has proven effective in reducing unjust convictions in parts of the region.

BREASTFEEDING AND HIV

Since the publication of the *Expert Consensus Statement*, medical and scientific research has continued. One area where recent developments are particularly important for anti-criminalisation advocacy is with respect to HIV transmission through breastfeeding, chestfeeding or comfort nursing. HJN is aware of 13 women living with HIV who have been criminally prosecuted for breastfeeding or comfort nursing (in addition to the countless women who have experienced surveillance and child protection interventions).⁵¹ When the *Expert Consensus Statement* was published in 2018, the scientific understanding of HIV transmission through breastfeeding was not as robust as it was for sexual transmission. Effective HIV treatment in pregnancy and post-partum had resulted in a marked reduction in rates of vertical (i.e. parent-to-child) transmission of HIV, but there was insufficient evidence to declare that undetectable viral load as measured in the blood meant that HIV was “untransmittable” (the credo behind the U=U movement) for breastfeeding.⁵²

Coalitions of women living with HIV, clinicians and researchers have been sharing case information and compiling research to better understand mechanisms of transmission and prevention, generally trending towards increasing acceptance of the idea that breastfeeding while on effective antiretroviral treatment poses a low, likely negligible, risk of HIV transmission.

Several papers have recently been published that document cases of women on HIV treatment breastfeeding without transmitting the virus.⁵³ Further, at the Conference on Retroviruses and Opportunistic Infections (CROI) 2021, during a presentation on HIV treatment during pregnancy, a specialist stated that “U likely equals U” with respect to vertical transmission with antiretroviral therapy from conception, viral suppression and no breastfeeding. Further, “although less certain, U is close to U” during breastfeeding among women with postnatal viral suppression.⁵⁴ This emerging science will support defence arguments in ongoing prosecutions against women living with HIV, as well as law reform initiatives aimed at clarifying that breastfeeding is not a criminal offence.



As new scientific information emerges that supports curtailing surveillance, child protection interventions, and especially criminalisation of people living with HIV for breastfeeding or comfort nursing, HJN will add it to the [Breastfeeding Defence Toolkit](#).

If you are involved in a case related to HIV and breastfeeding, please let us know at breastfeeding@hivjustice.net.

⁵¹ <https://www.hivjustice.net/page/2/?s=breastfeeding>

⁵² Waitt, C et al. Does U=U for breastfeeding mothers and infants? Breastfeeding by mothers on effective treatment for HIV infection in high-income settings. *Lancet HIV* 5: e531–36. 2018.

⁵³ See for example: Loutfy, M and Bitnum, S. 'A Step by Step Process on How we can Support Mothers Living with HIV'. *CATIE Blog*. 11 March 2019. <http://blog.catie.ca/2019/03/11/a-step-by-step-process-on-how-we-can-support-mothers-living-with-hiv/> Bansaccal, N et al. HIV-Infected mothers who decide to breastfeed their Infants under close supervision in Belgium: about two cases. *Front. Pediatr.* 8:248. 2020. doi: 10.3389/fped.2020.00248. Luoga, E et al. No HIV transmission from virally suppressed mothers during breastfeeding in rural Tanzania. *J Acquir Immune Defic Syndr*: Volume 79, Number 1, 1 September 2018. <https://pubmed.ncbi.nlm.nih.gov/29781882/>

⁵⁴ Dr Shahin Lockman, Brigham and Women's College Hospital and Harvard TH, Chan School of Public Health. <http://www.croiwebcasts.org/console/player/48315?mediaType=slideVideo> at 0:07:30 and 0:07:37.

MOLECULAR HIV SURVEILLANCE

Video: A Perfect Storm? Molecular HIV Surveillance in the Context of Criminalisation, 2021. Watch it [here](#).

Another area of science of increasing concern for people living with HIV and human rights activists is molecular HIV surveillance (MHS). MHS uses blood samples taken from people living with HIV during routine drug resistance testing, and then stores the samples in surveillance databases so that they can be used for public health purposes. Some people consider this to be a promising new public health tool that can not only detect patterns of transmitted drug resistance but also rates of HIV transmission in a given area, facilitating identification of transmission “hotspots” and allowing for targeted prevention efforts.

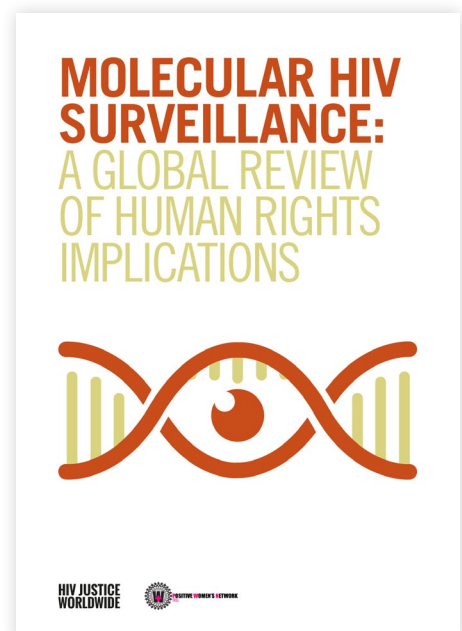


A growing number of people living with HIV, public health professionals and human rights activists, however, have deep concerns about the ethics of MHS and believe it may do more harm than good for public health and human rights. Data is being collected on people living with HIV, without their knowledge or consent, as part of public health surveillance. Yet many people living with HIV would not agree to having their personal data used without their permission or in any way other than to tailor their own care.

MHS data sharing is taking place in countries that actively criminalise sex work, drug use, migration and HIV, and where data about HIV transmission networks is being shared in unprecedented ways to identify people. Sometimes public health institutions will then share their data with researchers who conduct even more analysis on people without their knowledge or consent.

MHS is frequently applied to already marginalised and criminalised communities, including men who have sex with men, trans women, sex workers, people who use drugs, and migrants. The science behind direct transmission is still contested and there is concern that such analysis would be harmful if misused and misunderstood in HIV criminalisation cases.

This [report](#), produced by Positive Women’s Network – USA on behalf of HIV JUSTICE WORLDWIDE, provides a more detailed discussion of MHS and our concerns, including recommendations for researchers and scientists, public health practitioners, legal system experts and actors, and people living with HIV.



NEW RESEARCH SUPPORTING DECRIMINALISATION EFFORTS

Research and evidence have always been important for advocacy against HIV criminalisation. Social science and community-led research most often considers the effects of HIV criminalisation on HIV prevention, public health and the lives of people living with HIV. It also documents civil society initiatives and facilitates the sharing of on-the-ground experiences and lessons. Legal and policy research presents relevant laws, policies and court cases, often comparing and contrasting approaches and results. Scientific/medical research explores topics ranging from epidemiologic trends and virology to treatment effectiveness, therapeutic interventions and social determinants of health (not included in our analysis). All types of research have proven to be important for defending individuals accused of HIV-related offences, raising awareness regarding the harms of criminalisation, and countering arguments used to support HIV criminalisation. And, importantly, people living with HIV have led and contributed to all types of research.

During the period covered by this report, a wealth of new research was published. We have briefly summarised some of the most relevant pieces of this research – covering social science, community-led research, and law and policy analysis – in this chapter, organised by region.

GLOBAL

In 2021, a multivariate analysis was conducted using the data from the HIV Policy Lab to explore whether countries that criminalised key populations achieved better or worse outcomes under the 90-90-90 targets (Global AIDS Strategy 2015-2020) compared to those countries that had a less criminalised environment.⁵⁵ The study considered the criminalisation of same-sex relationships, sex work and drug use and/or possession, as well as rights-protective and gender-protective laws (although HIV criminalisation was not included in the analysis). The analysis showed that “countries that have adopted a criminalising approach to key populations saw less success than those that chose not to criminalise. Where same-sex sex, sex work and drug use were criminalised, a smaller portion of people living with HIV knew their status and fewer had suppressed virus. Meanwhile, where protective laws have been adopted that advance non-

THE HIV JUSTICE TOOLKIT

The HIV Justice Toolkit aims to support advocates at all levels with information and resources. It includes materials from all over the world and is available in English, French, Russian and Spanish. HJN continues to add to, and develop, the Toolkit as new research and resources become available.



To coincide with the High-Level Meeting process in 2021, UNAIDS published a useful summary of HIV criminalisation as a human right fact sheet, available [here](#).

⁵⁵ Kavanagh, MM et al. *Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response?* BMJ Global Health. Volume 6, issue 8. 2021. doi:10.1136/bmjgh-2021-006315. The HIV Policy Lab can be found at: <https://hivpolicylab.org/>

discrimination, human rights institutions and responses to gender-based violence, countries have done better on the 90-90-90 goals.”⁵⁶

ASIA PACIFIC

Australian-based researchers conducted a study with 895 people living with HIV to determine whether and how HIV criminalisation impacts the well-being of people living with HIV.⁵⁷ The findings suggest that HIV criminalisation – likely reinforced by ongoing media reporting around the issue – has contributed to considerable anxiety among people living with HIV in Australia. The highest levels of anxiety were reported by people who are also marginalised on the basis of sexuality, ethnicity or financial distress. The research also found that a quarter of people surveyed were worried about disclosing their HIV status to their healthcare provider due to concerns about HIV criminalisation.

EASTERN EUROPE AND CENTRAL ASIA

Positive Women (Ukraine) Board Chair, Olena Stryzhak, presents “Women: The Face of HIV Criminalization” at the Women’s Forum on HIV and AIDS, October 2020, in Svyatogirsk, Ukraine. Credit: Ukrainian Women’s Forum on HIV and AIDS.

The Eurasian Women’s Network on AIDS (EWNA) prepared a compendium entitled *Women’s Leadership in HIV Decriminalization: Experience of the EECA Region*. The first report of its kind from the EECA region, it describes the advocacy, research and activism undertaken by women leaders, experts and civil society activists on HIV decriminalisation. As noted in the introduction, “the collected materials show what the global problem of HIV criminalisation looks like today and how it is connected to gender inequality. The results of the research conducted by the women’s community ... clearly demonstrate that HIV criminalisation not only fails to protect women from being infected with HIV, but, on the contrary, worsens their status in the society.”⁵⁸



The topics addressed in the report include: the harms of HIV criminalisation; women-led community-based research; a gender comparison of court sentences; the Committee on the Elimination of Discrimination against Women (CEDAW) and HIV criminalisation; breastfeeding; blackmail of women living with HIV; the role of the media in demonising HIV-positive women; HIV and labour law; and the elimination of vertical transmission and HIV decriminalisation.

LATIN AMERICA AND THE CARIBBEAN

The Mexican Network against the Criminalisation of HIV released an extensive report in December 2021 on Mexican legislation on HIV and its impact on people living with HIV.⁵⁹ Each state within

⁵⁶ Ibid., p. 7.

⁵⁷ Bourne, A et al. *Anxiety about HIV criminalisation among people living with HIV in Australia*. AIDS CARE. 2021. <https://doi.org/10.1080/09540121.2021.1936443>

⁵⁸ Sidorenko, N & Moroz, S. *Women’s Leadership in HIV Decriminalization: Experiences of the EECA region*. Prepared by the Eurasian Women’s AIDS Network and the Global Network of People Living with HIV on behalf of HIV JUSTICE WORLDWIDE. 2021.

⁵⁹ Red Mexicana de Organizaciones en Contra de la Criminalización del VIH, *La legislación mexicana en materia de VIH y sida. Su impacto en las personas viviendo con VIH*. 2021. Produced with the support of The Sero Project for HIV JUSTICE WORLDWIDE with financial support from the Robert Carr Fund for Civil Society Networks. See also the case study on the Mexican Network in *Advancing HIV Justice* 3, pp. 23-25.

Mexico has its own criminal provisions, with multiple state-level law reform initiatives ongoing simultaneously. This comprehensive report outlines the relevant laws, provides information on cases, describes reform initiatives, and makes recommendations. Drafting this massive report was a large undertaking; gathering information regarding prosecutions proved difficult without official government sources. It now provides a foundation for awareness-raising and advocacy work throughout the country.



NORTH AMERICA

The *Criminalization of HIV Non-disclosure in Canada: Experiences of People Living with HIV* presents the stories of nine people living with HIV who were prosecuted in Canada.⁶⁰ This is the first known qualitative research study examining the phenomenon of criminal charges for HIV non-disclosure from the perspectives of those who have lived it. Based on a doctoral research project, the booklet also includes an overview of the main findings of the research. Understanding the lived experiences of HIV criminalisation survivors helps to shift how HIV criminalisation is talked about. Instead of a focus on the negative impacts it has on public health, this places in sharp focus the negative impacts HIV criminalisation has on the lives of people living with HIV.

The Williams Institute at UCLA School of Law examined HIV criminalisation in several US states using data from legal system information sources combined with literature reviews.⁶¹ The Institute has produced reports on prosecutions in Kentucky, Virginia, Florida, Georgia, Nevada and California, as well as on policing LGBT people and COVID-19. These reports have been indispensable to law reform efforts in the United States. (See ‘[Reforming and Blocking Problematic Laws](#)’.)

SUB-SAHARAN AFRICA

To assist with their law reform advocacy, the National Coalition for the Decriminalisation of HIV in Niger completed an evaluation of the impact of applying the legislation that criminalises HIV transmission, exposure and non-disclosure on the national HIV response in May 2021.⁶² Niger’s HIV-specific law, first enacted in 2007, had been updated in 2015. This evaluation sought to understand how the updated law was being applied and what further revisions were required. The methodology included desk research, interviews and focus groups, and an advisory committee to analyse the results.

The recommendations included in the final report include the following: repeal Articles 33-34 of Law No. 2015-30 of May 26, 2015 [provision criminalising negligent transmission, and provisions elevating rape to an aggravated offence if the accused is living with HIV]; and amend the provisions of Article 32 of Law No. 2015-30 of May 26, 2015 [criminalising HIV exposure] to include several defences. This comprehensive report, together with the capacity-building and coalition-building that resulted from the process, is intended to support further advocacy to open a fresh legislative reform process.

60 McClelland, A. *The Criminalization of HIV Non-disclosure in Canada: Experiences of people living with HIV*. 2019. <https://toolkit.hivjusticeworldwide.org/wp-content/uploads/2019/12/McClelland-Criminalization-2.pdf>

61 <https://williamsinstitute.law.ucla.edu/publications/?issues=criminalization&pn=1>

62 Réseau Nigérien des Personnes Vivant avec le VIH/SIDA (RENIP+), *Évaluation d’impact de l’application de la législation pénalisant la transmission, l’exposition et la non divulgation du VIH sur la Riposte nationale au VIH, Rapport final*. May 2021. Produced with the support of the HIV Legal Network for HIV JUSTICE WORLDWIDE with financial support from the Robert Carr Fund for Civil Society Networks. <https://toolkit.hivjusticeworldwide.org/fr/resource/evaluation-dimpact-de-lapplication-de-la-legislation-penalissant-la-transmission-lexposition-et-la-non-divulgation-du-vih-sur-la-riposte-nationale-au-vih/>

WESTERN AND CENTRAL EUROPE

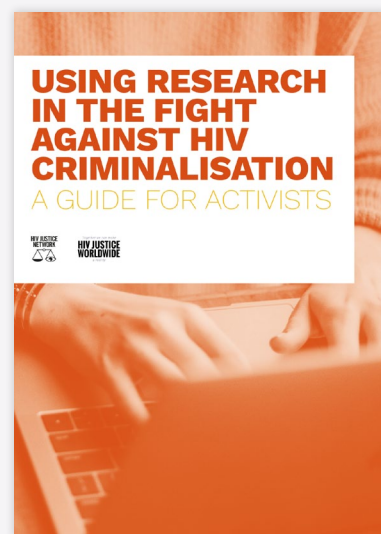
The HIV Legal Forum of AIDS Action Europe (AAE) published a [comparative legal report](#) on HIV criminalisation in ten (current and former) European Union member states: Austria, Czechia, Finland, Germany, Greece, Ireland, Italy, Portugal, Romania, and the United Kingdom.⁶³ The report confirms that there is a gap between the knowledge of judges, prosecutors and police and the current science on HIV exposure and transmission. It also underlines that HIV criminalisation disproportionately affects key populations, women, people with migration backgrounds, and people living in poverty and/or homelessness. Policy briefs and recommendations were subsequently developed in English and Russian based on the report findings.⁶⁴

USING RESEARCH IN THE FIGHT AGAINST HIV CRIMINALISATION: A GUIDE FOR ACTIVISTS

This guide from HIV JUSTICE WORLDWIDE discusses the various ways that research can be a useful part of an activist's toolkit.

Research findings help us to understand how the law works, how it impacts HIV prevention, how it affects people living with HIV, and how it is linked to other forms of structural inequality and oppression. Research findings also help us to influence key decision makers and authorities, many of whom expect our advocacy arguments to be backed by research and feel more comfortable to take a stand when the case against HIV criminalisation is supported by evidence.

The guide includes a description of the different kinds of research that have been conducted with respect to HIV criminalisation, information on how to find, read and interpret such research, and some examples of how advocates have successfully used research to challenge HIV criminalisation.



⁶³ European HIV Legal Forum, HIV Criminalization in the EU/EEA: A Comparative 10 Country Report (2019).

⁶⁴ <https://www.aidsactioneurope.org/en/publication/policy-brief-hiv-criminalization> and <https://www.aidsactioneurope.org/en/publication/policy-recommendations-hiv-criminalization>

USING INTERNATIONAL MECHANISMS FOR HIV JUSTICE

Over the years, HIV justice advocates have used a variety of international health and human rights mechanisms to increase pressure on their governments to repeal or reform HIV criminalisation laws. During the period covered by this report, regional and international networks of people living with HIV – notably women’s networks – have brought international pressure to their local anti-criminalisation work by engaging with two distinct UN mechanisms.

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention on the Elimination of all Forms of Discrimination against Women is an international human rights treaty which has been ratified by 189 State Parties.⁶⁵ The Convention defines sex discrimination and requires States to take all appropriate measures, including legislation, to ensure the full development and advancement of women (Articles 1 & 3). The Convention includes a range of women’s human rights, including, for example, voting, nationality, education, employment and health care, in addition to reproductive rights. The Committee on the Elimination of Discrimination against Women (CEDAW) is a body of independent experts from around the world who monitor the implementation of the Convention.⁶⁶

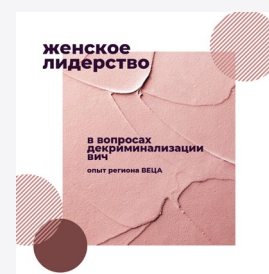
As with other international human rights treaties, States that sign the CEDAW Convention are obliged to report to CEDAW on legislative, judicial, administrative or other measures they have taken. (This reporting is usually due every four years and is referred to as a “periodic report”.) Non-governmental organisations also have the right to submit reports to the Committee and highlight women’s rights concerns (often referred to as “shadow reports”). At the end of the review process, the Committee issues Concluding Observations with recommendations for each State.

Organisations in the EECA region have become quite adept at engaging in CEDAW processes.

EWNA has provided technical and mentoring support to representatives of the community of women living with HIV, women who use drugs and sex workers in order to provide CEDAW with information regarding the implementation of the Convention in several countries.⁶⁷

The Eurasian Women’s Network on AIDS (EWNA) has produced *Women’s Leadership in HIV Decriminalization: The Experience of the EECA Region* to share their strategies with others

around the world. It describes the gendered nature of HIV criminalisation and the decriminalisation strategies that have been advanced in the region. The compendium is available in Russian and *English*.



⁶⁵ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

⁶⁶ <https://www.ohchr.org/en/treaty-bodies/cedaw>

⁶⁷ See also descriptions of CEDAW’s recommendations to Canada and Tajikistan in *Advancing HIV Justice 3*, pp. 51–53.

- A civil society shadow report was submitted for Kazakhstan's review in 2019.⁶⁸ One of the recommendations was a proposal to abolish criminal liability for putting another person at risk of contracting HIV and to revise Article 118 of the Criminal Code, Infection with the Human Immunodeficiency Virus (HIV/AIDS) (2014).
- In March 2020, EWNA, in coalition with Positive Women and Club Svitanok, submitted a list of issues to the Committee regarding Ukraine's implementation of CEDAW with respect to women living with HIV and women who use drugs.⁶⁹
- Information regarding Armenia was submitted to the Committee by the Coalition to Stop Violence against Women Armenia. The Committee questioned Armenia about the Law on the Prevention of Disease caused by HIV (1997) and whether the government would repeal sections.⁷⁰

In 2020, a coalition of civil society organisations in Kyrgyzstan prepared a shadow report about Kyrgyzstan.⁷¹ Then in 2021, EWNA and the Women's Network of Key Communities (Kyrgyzstan) presented a shadow report on the implementation of CEDAW with respect to women living with HIV.⁷² The report focused on the harms of prosecutions of women living with HIV, access to health services, issues of violence and the impact of COVID-19-related restrictive measures. The Committee's Concluding Observations were its strongest yet with respect to HIV criminalisation.

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN CONCLUDING OBSERVATIONS ON THE FIFTH PERIODIC REPORT OF KYRGYZSTAN CEDAW/C/KGZ/CO/5 29 NOVEMBER 2021

44. The Committee recommends that the State party:

- (a) Decriminalize HIV/AIDS transmission (article 149 of the Criminal Code) through consensual sexual relations between adults;
- (b) Ensure access to health care, including confidential testing, antiretroviral treatment and psychological support, and the confidentiality of information regarding women's HIV status, and impose deterrent penalties for the disclosure of such status;
- (c) Eliminate repressive elements of epidemiological investigation and review the wording of HIV infection codes;
- (d) Ensure that women living with HIV/AIDS are not isolated from their children based on their HIV status and that they have adequate access to childcare facilities, free from stigmatization;
- (e) Prohibit the practice of employers requiring HIV certificates for access to and retention of employment.⁷³

68 Civil society shadow report on discrimination and violence against women living with HIV, women who use drugs, sex workers and women in prisons. 2018. http://www.ewna.org/wp-content/uploads/2018/10/Final_KZ_CEDAW_ru.pdf

69 EWNA. List of Issues on the implementation of the CEDAW by Ukraine related to violence and discrimination against women living with HIV and women who use drugs. 2020. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCS%2fUKR%2f41392&Lang=en

70 Written Information for the Adoption of the List of Issues by the CEDAW submitted by the Coalition to Stop Violence against Women Armenia, June 2021. 81 (Virtual PSWG) Pre-Sessional Working Group (05 Jul 2021 – 09 Jul 2021). https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCO%2fARM%2f45058&Lang=en

71 Joint Submission to the 76th Pre-sessional Working Group of the CEDAW Committee to Generate a List of Issues for the 5th Periodic Report of the Kyrgyz Republic. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCO%2fKGZ%2f37336&Lang=en

72 Alternative report on the implementation of the CEDAW concerning women living with HIV by the Kyrgyz Republic. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fGO%2fKGZ%2f46744&Lang=en

73 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKGZ%2fCO%2f5&Lang=en

EWNA and their partners intend to continue using the CEDAW processes as other countries in the region come up for review. They have found it to be a useful tool to hold governments to account, raise awareness about marginalised women who are often otherwise invisible to women's human rights advocates, and mobilise community members. The experience in each country is different, but local women's groups are always consulted, and the safety of activists is prioritised (e.g. in some submissions, EWNA did not reveal the names of local partner organisations for their protection). When the Committee issues strong recommendations, civil society has another tool for further education and advocacy, thereby bringing international human rights back to the local level.

WORLD HEALTH ORGANIZATION

Another international mechanism being used innovatively to press governments to decriminalise HIV is the WHO's Elimination of Mother-to-Child Transmission (EMTCT) of HIV, Syphilis and Hepatitis B Validation Process.⁷⁴ Since 2015, States have been able to apply for certification of achieving the EMTCT of HIV and/or syphilis (and now hepatitis B), to a level where it is no longer a public health threat. To receive the sought-after certification, countries must demonstrate that they meet the WHO's standardised criteria for delivering quality services for women, girls and their children.

The International Community of Women Living with HIV (ICW) and GNP+ were involved in developing the validation process. Through a consultative process with networks of women living with HIV, they developed the Human Rights, Gender Equality and Community Engagement Tool — representing the first time that human rights issues are being assessed in a disease elimination validation process.⁷⁵ The tool measures progress towards achieving a human-rights-based approach to vertical transmission, as well as implementing good practices regarding gender equality and community engagement.



A key consideration is whether the interventions to reach the EMTCT targets have been implemented in a manner consistent with international, regional and national human rights standards. The ten areas for evaluation are: criminalisation of HIV, syphilis and hepatitis B virus; voluntary testing and treatment; prior, voluntary and informed consent; eliminating coercive practices including involuntary sterilisation, contraception or abortion; confidentiality of health information; equality and non-discrimination; accessibility and quality of services; addressing gender-based violence; engaging and being accountable to communities; and ensuring access to justice.⁷⁶

ICW and GNP+ also provided the primary guidance on the requirements for community engagement to ensure that local and national networks of women living with HIV would have avenues to provide critical input into the process of validation. ICW and GNP+ continue to serve as observers to the Global Validation Advisory Committee (GVAC) and provide technical assistance and support to strengthen community engagement in the validation process.

⁷⁴ <https://www.who.int/initiatives/triple-elimination-initiative-of-mother-to-child-transmission-of-hiv-syphilis-and-hepatitis-b/validation>

⁷⁵ World Health Organization, Validation of EMTCT of HIV and/or syphilis: Tools and checklists for in-country evaluation of four required components. 4. *Human rights, gender equality, and engagement of civil society in the EMTCT process*. 1 July 2017. Available for download via https://cdn.who.int/media/docs/default-source/hq-hiv-hepatitis-and-stis-library/stis/hr-ge-ce-assessment_tool.docx?sfvrsn=76719407_5

⁷⁶ World Health Organization. *Global guidance on criteria and processes for validation: elimination of mother-to-child transmission of HIV, syphilis and hepatitis B virus*. 26 November 2021. <https://www.who.int/publications/i/item/9789240039360>

When it is found that a country has criminal laws that could apply to cases of vertical transmission, the GVAC recommends that the government reviews the laws. The UNAIDS country office then encourages the country to reform the laws, and ICW and civil society have further leverage to advocate for change. As such, the validation process serves as a human rights accountability mechanism and has the potential to spur dialogue between women living with HIV and policy makers on critical issues of human rights, gender equality and community engagement, including persistent stigma and discrimination in healthcare settings and decriminalisation.⁷⁷

EWNA has spearheaded using the EMTCT process in decriminalisation advocacy. In the case of Belarus, for example, the strategy was successful: WHO issued a validation certificate, but with the requirement that the criminal law change.⁷⁸ If the government does not change the law, the validation can be revoked. Advocates now have this extra leverage for their ongoing work.

EWNA also engaged in the validation review process for Kazakhstan, which is under review at the time of writing.

77 Kismodi, E et al. *Where public health meets human rights: integrating human rights into the validation of the elimination of mother-to-child transmission of HIV and syphilis*. Health and Human Rights Journal: 19(2): pp. 237-247. 2017. <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2017/12/Kismodi.pdf>

78 World Health Organization, Thailand, Belarus and Armenia eliminate mother-to-child transmission of HIV (Geneva: WHO, 2016). Available at <https://www.who.int/news/item/08-06-2016-who-validates-countries-elimination-of-mother-to-child-transmission-of-hiv-and-syphilis>

ENSURING HIV JUSTICE IN THE CRIMINAL LEGAL SYSTEM

When allegations of HIV non-disclosure, exposure or transmission arise in a jurisdiction that allows for HIV-related prosecutions, actors within the legal system — usually with little to no knowledge or training about HIV — are called upon to make decisions with huge implications for the lives of people living with HIV, and ultimately for the HIV response in that jurisdiction.

The actions of police officers, prosecutors, paralegals, lawyers, magistrates and judges can perpetuate long-standing ignorance, discriminatory attitudes and misinformation about HIV. On the other hand, a prosecutor can end a prosecution, a defence lawyer can prove their client is “not guilty”, and a judge can find a law unconstitutional.

The actions of police officers, prosecutors, paralegals, lawyers, magistrates and judges can perpetuate long-standing ignorance, discriminatory attitudes and misinformation about HIV.

HIV organisations all over the world produce reference materials, conduct training and offer discussion forums for criminal legal system actors — because of the immense power they hold. When these actors better understand the numerous individual and public policy implications of HIV criminalisation, and the latest scientific and medical evidence, HIV justice is more likely to prevail.

JUDGES AND MAGISTRATES

Alexandra Volgina of GNP+, Nurali Amandzholov of the Central Asian Union of People Living with HIV and Justice Sharof Alanazarzoda of the Supreme Court of Tajikistan discussed the role of the judiciary in ending unjust HIV criminalisation, 2021. Credit: GNP+.

With respect to judges, UNDP has been leading the efforts. In the period covered by this report, a judicial dialogue was convened by UNDP and the Supreme Court of Tajikistan, providing a non-political space for judges from the EECA region to learn about HIV and key populations, and to build relationships with peers ruling in similar cases throughout the region. Participants discussed hypothetical cases with the support of facilitators and spoke with key populations’ representatives about their communities.

The EECA regional forum was inspired by the African Regional Judges Forum which held an in-person dialogue in Johannesburg in 2017 (profiled in *Advancing HIV Justice 3*, pp. 37-8) and a Caribbean Regional Judges Forum, which was established in 2019. The establishment of the planned Southeast Asia Forum has been delayed due to COVID.



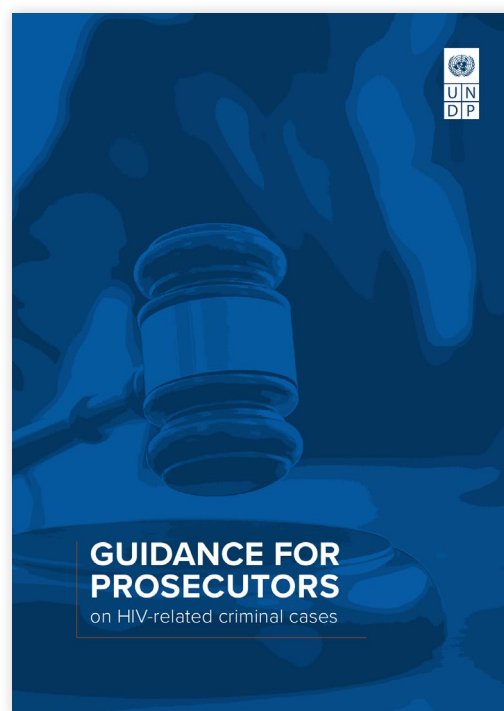
Forum meetings are planned by the judges, based on identified areas of interest and new developments in jurisprudence relating to HIV, TB and key populations. UNDP and civil society organisations help identify technical experts and ensure the participation of key populations' representatives so that the judiciary can hear directly from the people affected by their rulings. While it is difficult to quantify the impact of these forums, most judges remain in their positions for life and move up the ranks to superior courts, where strategic litigation cases are decided. Those who participate in the forums apply their learnings in court and share with their peers.

At the domestic level, the Uganda Network on Law Ethics and HIV/AIDS (UGANET), released a comprehensive *Judicial Handbook on HIV, Human Rights, and the Law in Uganda* in December 2021. With a foreword by Chief Justice The Honourable Alfonse Chigamoy Owiny-Dollo, the handbook addresses international human rights law, relevant national law, stigma, HIV criminalisation, HIV testing, domestic violence, employment and access to healthcare and treatment, and includes considerations for judges adjudicating HIV-related cases and numerous case summaries. Notable in this resource is the breadth of cases and materials included, contextualised for application in the context of Uganda.

PROSECUTORS

While resources on HIV criminalisation had been produced for defence lawyers, police and judges (find examples in the [HIV Justice Toolkit](#)), until recently there was no guidance for prosecutors involved in HIV-related criminal cases. Putting together an international resource is challenging due to the diverse legal systems and precedents in place around the world, but also necessary to ensure that prosecutors understand the many complex issues relevant to HIV-related criminal cases.

Prosecutorial guidance is a good example of a “harm reduction” approach. Where it is not possible to change or repeal HIV-specific laws, or if other kinds of laws are applied to HIV-related cases, adopting such guidance can result in fewer miscarriages of justice. It can also improve the criminal legal system’s understanding of, and approach to, people living with HIV. Once implemented, it is also a tool for holding prosecutors to account.



Guidance for Prosecutors on HIV-related Criminal Cases, published by UNDP in June 2021, is addressed specifically to prosecutors — recognising the critical role they can play in stopping the misuse of criminal law by discharging their professional obligations with full regard to science, human rights and the public interest.⁷⁹ It presents ten key principles that should assist prosecutors in handling a (potential) prosecution involving an allegation of HIV non-disclosure, exposure or transmission.

79 https://hivlawcommission.org/wp-content/uploads/2021/05/UNDP_Guidance-for-Prosecutors-on-HIV-related-Criminal-Cases_Final.pdf

In summary, prosecutors should:

- 1 be informed at all stages by the most reliable evidence;
- 2 ensure that the rights of the complainant, the defendant and witnesses are respected throughout every stage of the prosecution;
- 3 pursue prosecutions in only limited circumstances, as HIV is most effectively addressed as a public health matter;
- 4 establish a sufficient evidentiary basis for a prosecution;
- 5 consider whether prosecution in a given case is in the public interest;
- 6 generally consent to pre-trial release, absent exceptional circumstances;
- 7 avoid statements and arguments that could be inflammatory, prejudicial or contribute to public misinformation about HIV;
- 8 ensure the correct interpretation of science and its limitations if seeking to prove actual transmission of HIV;
- 9 ensure there is no discrimination in sentencing; and
- 10 ensure sentencing is not disproportionate.

Each principle is accompanied by commentary examining its specific application in a potential or ongoing prosecution.

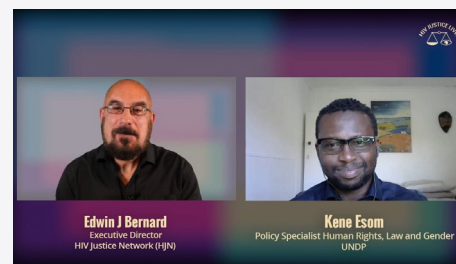
UNDP led the development of the *Guidance for Prosecutors*, with input from a committee of activists, community members and legal experts. At the time of writing, it is available in English, French and Russian.

Canadian-based HIV Legal Network used the UNDP's international *Guidance for Prosecutors* to support their domestic advocacy by sending copies to all Attorneys General across Canada, reminding them of the importance of sound prosecutorial policy. Several Attorneys General responded to the correspondence and further engaged with the HIV Legal Network about their provincial/territorial prosecutorial policies.

The HIV Legal Network is now developing model prosecutorial guidelines, adapting the international guidance to the Canadian context.

PARALEGALS

In many regions, paralegals enable access to justice for community members by informing people of their rights and helping them find solutions aligned with the rule of law and human rights. Paralegals have become important service-providers with respect to HIV criminalisation cases in the EECA region. The Ukraine-based NGO, 100 Percent Life (formerly the All-Ukrainian Network of People Living with



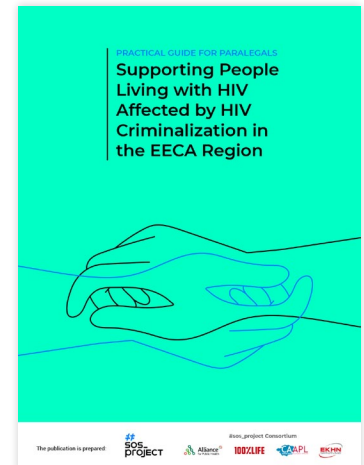
The [fourth episode](#) of HIV Justice Network's web show *HIV Justice Live!* streamed live in July 2021. It discussed the *Guidance for Prosecutors* and provided insights into how to work with prosecutorial authorities so that they have a clear understanding of how to — and more importantly, how not to — use HIV criminalisation laws.

80 Sasha Volgina, Andrey Lungu, Svetlana Moroz and Natalia Sidorenko, *Practical Guide for Paralegals: Supporting People Living with HIV Affected by HIV Criminalisation in the EECA Region*. 2021. <https://toolkit.hivjusticeworldwide.org/wp-content/uploads/2022/02/Practical-Guide-for-Paralegals.pdf>

HIV), prepared a resource specifically for paralegals: *Practical Guide for Paralegals: Supporting People Living with HIV Affected by HIV Criminalisation in the EECA Region*.⁸⁰ As described in the introduction:

This handbook contains comprehensive information on the concepts associated with the criminalization of HIV and its consequences for the lives of people living with HIV, as well as society as a whole. Moreover, it is a collection of systematized practical information on how to start working on the decriminalization of HIV, what materials can be used in this work, as well as recommendations by human rights defenders and experts from international organizations.

The author team highlights the concept and content of paralegal assistance and its role in improving access to justice, describing the practical experience of their participation in civil and criminal proceedings to defend the rights of HIV-positive people.



Training has been developed to accompany the handbook.



CHALLENGING THE CONSTITUTIONALITY OF LAWS IN THE COURTS

A total of 82 countries continue to have laws on the books that specifically criminalise HIV non-disclosure, (perceived) exposure and/or transmission. People living with HIV and human rights advocates are increasingly understanding these laws to be in violation of constitutionally protected rights. Some advocates, therefore, have decided to engage in strategic litigation to challenge the laws themselves. Whether and when to pursue this strategy is a complex decision because constitutional litigation can be extremely resource intensive over a long period of time. If the case is being taken forward in the name of an individual(s), it can be burdensome and risky for that person(s), and there is always the danger of being unsuccessful or even setting a detrimental precedent.

While a litigation strategy revolves around legal arguments and evidence, the activities are seldom confined to the courtroom. Activists usually organise around the case, media reports on the issue and policymakers, human rights organisations and other stakeholders may become involved as intervenors (a person or organisation who is not a party to the case, but is permitted to provide relevant expertise to the court). Whether the case is won or lost, it can sway public opinion and bring about law reform and/or changes in prosecutorial practice.

During the period covered by this report, several constitutional challenges have gone forward.

Since 1991, criminal legislation in **Colombia** had contained HIV-specific provisions (Decree 559 of 1991). A new criminal code enacted in 2000 contained a provision that any person who was aware of having HIV or hepatitis B and acted in a way that could spread the disease would be sentenced to three to eight years in prison (Law 599 of 2000). Subsequent amendments increased the maximum penalty to 12 years (Law 1220 of 2008). According to data from the Attorney General's Office of Colombia, 218 criminal investigations were opened between 2010 and 2019, and eight people were convicted (although the data was not separated to show how many cases related to HIV versus hepatitis B).⁸¹

The constitutionality of the law was challenged by a defendant who argued it restricted the right to the free development of personality (which is protected by the Constitution of Colombia) because it limited the enjoyment of sexuality, and also that it was discriminatory because it differentiated between people living with HIV and hepatitis B, as compared to those with other sexually transmitted diseases. The Court received interventions from universities, public institutions (including UNAIDS), civil society organisations and individuals.

The Court ruled that Article 370 of Law 599 of 2000 was unconstitutional. The Court considered various factors, including: the fact that people living with HIV and hepatitis B had been historically subjected to stigma and discrimination; the advent of antiretroviral medications; the lack of logic in differentiating HIV and hepatitis from other sexually transmitted infections; and that the provision could deter testing and treatment uptake.⁸² As the law has been ruled unconstitutional, it is no longer in effect.

81 Garcia Ruiz, J et al. *Decriminalizing HIV in Colombia*. HPHR 14. 2021. <https://hphr.org/38-article-garcia-ruiz/>

82 Sentencia C-248/19. <https://www.corteconstitucional.gov.co/relatoria/2019/C-248-19.htm>

Activists in Uganda campaign against HIV-related stigma and discrimination. Credit: UGANET.

In 2016, a coalition of HIV, human rights and LGBTQ+ organisations led by the Uganda Network on Law, Ethics and HIV/AIDS (UGANET) launched a case at the Constitutional Court of **Uganda** (Petition No. 4 of 2016) challenging three clauses of the HIV Prevention and Control Act (2014). The Act allows for stringent punishments for the vague crimes of attempted and intentional HIV transmission, mandatory HIV testing for pregnant women and their partners, and it allows medical providers to disclose a patient's HIV status to others without consent.⁸³ The *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* was central to the petitioners' arguments.



After five years of waiting, in August 2021 the Constitutional Court began to hear the case.⁸⁴ At the time of writing this report, the Attorney General has submitted their reply and no further proceedings have taken place.

Organisations in Kenya are also challenging the constitutionality of HIV criminalisation provisions. In March 2018, the Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN), alongside six others, filed a petition at the High Court of Kenya at Nairobi challenging the constitutionality of Section 26 of the Sexual Offences Act (Petition 447 of 2018). This law criminalises “deliberate” transmission and/or exposure of life-threatening sexually transmitted disease, including HIV. The petitioners allege that the law violates the right to: freedom from discrimination; freedom from cruel, inhuman and degrading treatment; dignity; and health in the Constitution of Kenya. Moreover, they highlight the possible negative impact that the section has on public health efforts to promote regular testing of HIV, and argue it is unconstitutional because it is vague and incapable of enforcement.⁸⁵ UNAIDS submitted an *amicus curiae* brief (“friend of the court”) in this case.

At the time of writing, the Attorney General has filed their submissions arguing that the Petition should be dismissed. The Attorney General argues that Section 26 is constitutional as it is necessary to curb deliberate transmission due to the continued presence of HIV in Africa. They further argue that the rights of persons living or affected by HIV are not absolute, and that these must be weighed and interpreted with limitations provided under the Constitution. The next court date was scheduled for February 2022.

Finally, the Southern African Litigation Centre (SALC) and HJWW are supporting a challenge to the constitutionality of sections 30 and 32(a)(vii) of the Sexual Offences Act No.29 of 2003 of **Lesotho**, which provides for mandatory HIV testing of an accused person upon being charged with rape and imposes a mandatory death sentence upon conviction pursuant to a positive HIV test. The *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* is being used to support the challenge.

⁸³ <https://www.hivjustice.net/news-from-other-sources/uganda-uganda-network-on-law-ethics-and-hiv-uganet-leads-call-to-repel-some-provisions-of-the-hiv-prevention-and-control-law-as-discriminatory-and-unconstitutional/>

⁸⁴ <https://uganet.org/euphoria-as-hiv-constitutional-petition-of-2016-comes-up-for-mention-in-court/>

⁸⁵ <https://www.kelinkenya.org/case-tracker/>

REFORMING AND BLOCKING PROBLEMATIC LAWS

Throughout the world, allegations of HIV non-disclosure, potential or perceived exposure or transmission are prosecuted through different mechanisms, including HIV-specific legislation as well as a variety of criminal laws of general application (see '[Global Overview](#)'). Advocates around the world are working to improve the legal environment for people living with HIV, obstruct the adoption of new problematic laws and policies, and to repeal or reform existing laws and policies that criminalise HIV and/or key populations.

World AIDS Day 2019 Candlelight Memorial in Beirut on the theme of 'Intensifying the Fight for Rights and Health', organised by Soins Infirmiers et Développement Communautaire (SIDC) in collaboration with Vivre Positif and SALAMA. Credit: SIDC.



A UNITED APPROACH

The likelihood of prosecution under laws and policies that criminalise HIV non-disclosure, exposure and transmission is increased for those who experience intersecting discrimination, including on the basis of race, ethnicity, migrant status, sex, gender identity or sexual orientation, as well as people in prison and other closed settings, unsheltered individuals, and people with disabilities, notably with mental health issues.

In addition to HIV criminalisation, many other laws and policies also undermine the HIV response and fuel stigma, discrimination, misinformation and violence. These include punitive laws and policies that are targeted at gay men and other men who have sex with men; transgender people; sex workers, their clients and third parties; and people who use drugs. Other problematic laws are directed at people who are living in poverty; cis and trans women and girls; gender-diverse people; and people who experience racism.

For the purposes of this chapter, we are focusing on laws that target people living with HIV based on their HIV-positive status. However, the drive to criminalise, punish and marginalise people who are different to those holding power in a society is common to all of these forms of criminalisation. Oppressions intersect. Fighting criminalisation and incarceration is a common goal of various movements. For maximum impact, we must support one another and speak out against punitive approaches with a common voice.

Efforts to shape public policy — and, in particular, to block bills, and reform or repeal laws — are never straightforward. Strategies may include: documenting experiences of those who have been prosecuted; identifying harms caused by the law; reviewing related laws and procedures; challenging underlying values and assumptions; proposing alternatives; raising public awareness; mobilising allies and building coalitions; identifying relevant international experience and authoritative research, statements and obligations; preparing evidence — and rights-based briefs; and lobbying politicians and public servants. Advocates must pivot and adapt to changing circumstances, seizing opportunities when they arise. People living with HIV have proved very adept at leading these initiatives.

Law reform initiatives are underway around the globe. What follows is a non-exhaustive overview of significant efforts of which we are aware during the period covered by this report, organised by geographic region.

NORTH AMERICA

In **Canada**, HIV non-disclosure has been criminalised through criminal provisions on sexual assault for over 20 years. The Canadian Coalition to Reform HIV Criminalization (CCRHC), a national coalition of people living with HIV, community organisations, lawyers, researchers and other advocates, has led recent law reform advocacy initiatives. (CCRHC is discussed in *Advancing HIV Justice 3*, pp. 62-3.) Building on an earlier “think tank” that explored possible strategies to reform the law, CCRHC launched a community consultation process in August 2021 to inform decisions regarding how to proceed with respect to law reform advocacy. A series of focus groups enabled the engagement of more than 100 community members, and 200 people completed an online survey. The results of this community consultation will inform the next steps of the Coalition’s ongoing law reform advocacy.

**Canadian
Coalition
to Reform
HIV
Criminalization
(CCRHC)**

Senate Bill 275 (2021), Nevada’s HIV modernisation bill, was signed at the Henderson Equality Center in Henderson, Nevada. Credit: Nevada HIV Modernisation Coalition.



In the **United States**, states have their own penal codes and possess police power so reform initiatives must proceed state-by-state. In the period covered by this report, there was significant growth in state-level organising and notable successes. The Sero Project, Positive Women’s Network — USA, and the Health Not Prisons Collective have been at the forefront of building community capacity in the US, supporting strategic planning and training advocates at the [HIV is Not a Crime National Training Academies](#). The Elizabeth Taylor AIDS Foundation has also been an important supporter of HIV decriminalisation advocacy in the US.

US advocacy has resulted in the following legal changes:

- **Illinois:** the HIV law was fully repealed in July 2021.
- **Michigan:** the HIV disclosure law was updated in January 2019 to reflect advances in HIV science.
- **Missouri:** the HIV laws were updated in July 2021 to reflect advances in HIV science.
- **Nevada:** the HIV criminalisation laws were updated in July 2021 to reflect advances in HIV science.

- **New Jersey:** the Attorney General provided guidance to prosecutors in 2021 recommending they do not prosecute cases that do not involve coercion, or intent to transmit, or when a person's viral load is undetectable. In January 2022, the state's legislature repealed New Jersey's HIV- and STI-specific law while retaining the possibility for felony prosecutions.
- **Virginia:** the HIV law was updated in March 2021 to reflect advances in HIV science.
- **Washington:** in 2020, Washington reduced the penalties for HIV exposure (from a felony to a misdemeanour).

Notably, President Biden named HIV criminalisation as a problem in World AIDS Day 2021 — the first US president to do so.⁸⁶ The Centers for Disease Control and Prevention (CDC) also called out states for criminalising people living with HIV.⁸⁷ These statements provide important additional leverage to US activists.

We asked the leaders of several of the successful US campaigns what advice they would give to others attempting to change unjust HIV criminal laws. Here's what they told us:

- Law reform campaigns must be led by and centred on people living with HIV.
- Do no harm. Consider your proposals from different perspectives and do not propose anything that could criminalise or harm others, including people living with HIV (undetectable vs detectable viral load), people who use drugs, sex workers and sexual assault survivors.
- Each jurisdiction is different. You cannot replicate the process in another space and expect the same results.
- Be very inclusive. Ensure broad diversity in your coalition and consultations, including sex workers, people who use drugs, trans people, people of colour, etc.
- Be strategic about your goal: full decriminalisation or amendments? Beware of unintended consequences and be sure everyone in the coalition is on the same page.
- Public health messaging is often more persuasive with legislators than human rights messaging.
- Ensure wellness checks and psychosocial supports throughout the process. This is very hard work.
- Include lots of storytelling. Explain how the law impacts you. Include the voices of survivors.
- The need for education never ends.

SUB-SAHARAN AFRICA

In **Benin**, Law 2005-31 of 10 April 2006 on HIV/AIDS requires people living with HIV to disclose their status to sexual partners and contains aggravated sentencing provisions for sexual assault cases. After years of calls for reform and awareness-raising regarding HIV science, a bill was to be presented to the Ministry of Health by the National AIDS Council in late 2021 — expanding, rather than contracting, obligations on people living with HIV.⁸⁸

With small grant support from HJN and strategic support from other members of the HIV JUSTICE

⁸⁶ Remarks by President Biden to Commemorate World AIDS Day, Launch the National HIV/AIDS Strategy, and Kick Off the Global Fund Replenishment Process. 1 December 2021. <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/01/remarks-by-president-biden-to-commemorate-world-aids-day-launch-the-national-hiv-aids-strategy-and-kick-off-the-global-fund-replenishment-process/>

⁸⁷ Centers for Disease Control and Prevention. *HIV Criminalization and Ending the HIV Epidemic in the US*. <https://www.cdc.gov/hiv/policies/law/criminalization-ehe.html>

⁸⁸ <https://www.hivjustice.net/news-from-other-sources/benin-experts-meet-in-cotonou-to-discuss-hiv-criminalisation-reforms-in-light-of-the-experts-consensus-statement-on-the-science-of-hiv/>

WORLDWIDE Francophone Network (profiled in *Advancing HIV Justice 3*, pp. 64–5), representatives of key populations have come together under the leadership of REBAP+ to understand the bill, highlight the most problematic provisions and devise an advocacy strategy. With the support of UNAIDS, amendments to the proposed bill have been prepared. Efforts towards a rights-based, evidence-informed new law continue.

Strategising in Bénin, coordinated by Néhémie Kakpo with RÉBAP+ and key population networks. Credit: RÉBAP+.

In **Burkina Faso**, the process to reform Act No. 030-2008/AN on Combating HIV/AIDS and Protecting the Rights of people Living with HIV/AIDS is also quite advanced with a new bill under consideration. Significantly, the new bill does not contain provisions criminalising HIV. Moreover, the term “deliberate transmission” is defined to only include intentional transmission.

By explicitly defining this often-misused term, prosecutions under other criminal provisions could be blocked, if a case was ever to be brought forward. Civil society will remain engaged in the process.



Advocacy to end HIV criminalisation in **Zimbabwe** came to fruition in March 2022 with the full repeal of section 79 of the Criminal Code — “Deliberate transmission of HIV.” The provision to repeal section 79 was contained within the new Marriages Act, which had been before parliament since July 2019.

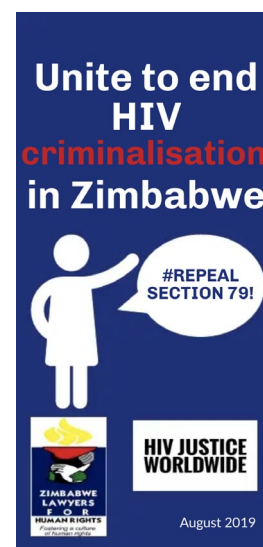
A pamphlet on the harms of Section 79, produced by Zimbabwe Lawyers for Human Rights and HIV JUSTICE WORLDWIDE in August 2019.

This victory was the result of several years of litigation and campaigning led by Zimbabwe Lawyers for Human Rights (ZLHR). Beginning with an unsuccessful constitutional challenge of the law (see *Advancing HIV Justice 2*, p. 43), efforts to educate and mobilise continued over the next five years. A strategy session convened by ZLHR and HIV JUSTICE WORLDWIDE, with partners ARASA and SALC, galvanized advocacy around six key messages around section 79:

- It is vague, overly broad and open to unjust application.
- It violates human rights and increases HIV stigma.
- It is unscientific.
- It does not prevent HIV.
- It is a barrier to HIV testing, treatment and prevention.
- It is harmful to women.

Highlighting the disproportionate impact of the law on women was especially important to engaging parliamentarians, including Honourable Dr Ruth Labode, Chairperson of the Parliamentary Portfolio Committee on Health and Child Care. The repeal campaign was supported by a wide range of stakeholders, including HIV JUSTICE WORLDWIDE, the Zimbabwe Network of People Living with HIV (ZNPP+) and UNDP.

Zimbabwe was the first African country to enact an HIV-specific criminal law and becomes the second country on the continent to repeal such a law, after the Democratic Republic of Congo did so in 2018. We can draw both lessons and inspiration from their success.



EUROPE AND CENTRAL ASIA

Belarus saw a dramatic increase in prosecutions for HIV exposure and transmission in 2017 and 2018, adding fuel to the law reform imperative. In July 2019, an amendment came into force that added a disclosure exception to Article 157 of the Criminal Code, which criminalises HIV exposure and transmission. As a result, at least 15 prosecutions were reviewed and revised “to remit the punishment and consider as not having a criminal record.”

A roundtable meeting about Belarus’ EMTCT validation and HIV criminalisation with government officials, UNAIDS and WHO country offices, and civil society representatives. September 2020. Credit: GNP+.

Despite this important development, Article 157 remains in force and high numbers of prosecutions have continued. As discussed in [In Pursuit of Rights-Based Public Health Approaches](#), the WHO’s EMTCT Global Validation Advisory Committee (GVAC) had previously flagged concerns regarding Belarus’ legal provisions criminalising HIV and made Belarus’ validation contingent on



revising or repealing the law. Further proposals to amend the Criminal Code were formed at a round-table meeting on maintaining the validation status and Criminal Code Articles 157-158, held in September 2020. Participants included Deputies of the House of Representatives of the National Assembly of the Republic of Belarus, the Deputy Minister and heads of departments of the Ministry of Health of the Republic of Belarus, country offices of UNAIDS and WHO, the Belarusian Red Cross Society and the people living with HIV network, People PLUS.

In December 2020, the Belarus government confirmed that proposals to repeal Articles 157-158 were under consideration, although no further developments have since been reported.

In 2021, Ex Aequo called on the Belgian government to decriminalise HIV non-disclosure during the country’s Universal Periodic Review at the United Nations. Credit: Stephen Barris, Ex Aequo.

In **Belgium**, the general law is applied to HIV-related prosecutions. In December 2021, the leading Belgian HIV and sexuality health charity for gay men and other men who have sex with men, Ex Aequo, called for the law to recognise that condom use or undetectable viral load should serve as defences for non-disclosure cases. Their call was supported by the Federal Secretary of State for Equal Opportunities, Sarah Schlitz, and 25 other associations. However, no further developments have been reported.



Several law reform advocacy initiatives are ongoing in the EECA region — subject to local political situations. In **Moldova**, the Coalition for the Decriminalisation of HIV Transmission, comprised of 13 organisations, has consulted extensively with people living with HIV, lawyers and members of parliament. While there have only been a few prosecutions in Moldova, as the coalition worked together, they came to understand the problem of having HIV criminalisation laws on the books and set their goal as full decriminalisation.

ASIA PACIFIC

In **Taiwan**, Persons with HIV/AIDS Rights Advocacy Association of Taiwan (PRAA) leads the way in pushing for amendments to the HIV law. They produced a policy brief and educational materials in 2021

to increase awareness among policy makers and community of the prevention benefit of antiretroviral treatment (U=U) in the context of criminalisation.

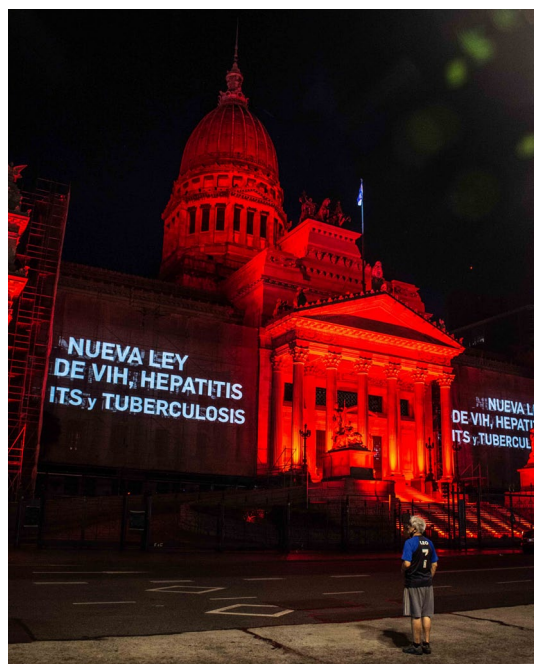
LATIN AMERICA AND CARIBBEAN

To raise awareness about HIV in Argentina and the campaign to change the criminal law, Asociación Ciclo Positivo mounted a display at the National Congress on World AIDS Day 2020. Credit: Tomás Ramírez Labrouse, Asociación Ciclo Positivo.

In **Argentina**, Ciclo Positivo has been engaged in a law reform campaign for several years. They have organised meetings with government officials to advocate for a new, rights-based law. On World AIDS Day, 1 December, 2020, they put on an impressive public display on the facade of the National Congress building, which was broadcast by the national news agency and local media throughout the country. Attempts to change the law in Argentina have so far been unsuccessful, but the desire remains alive.

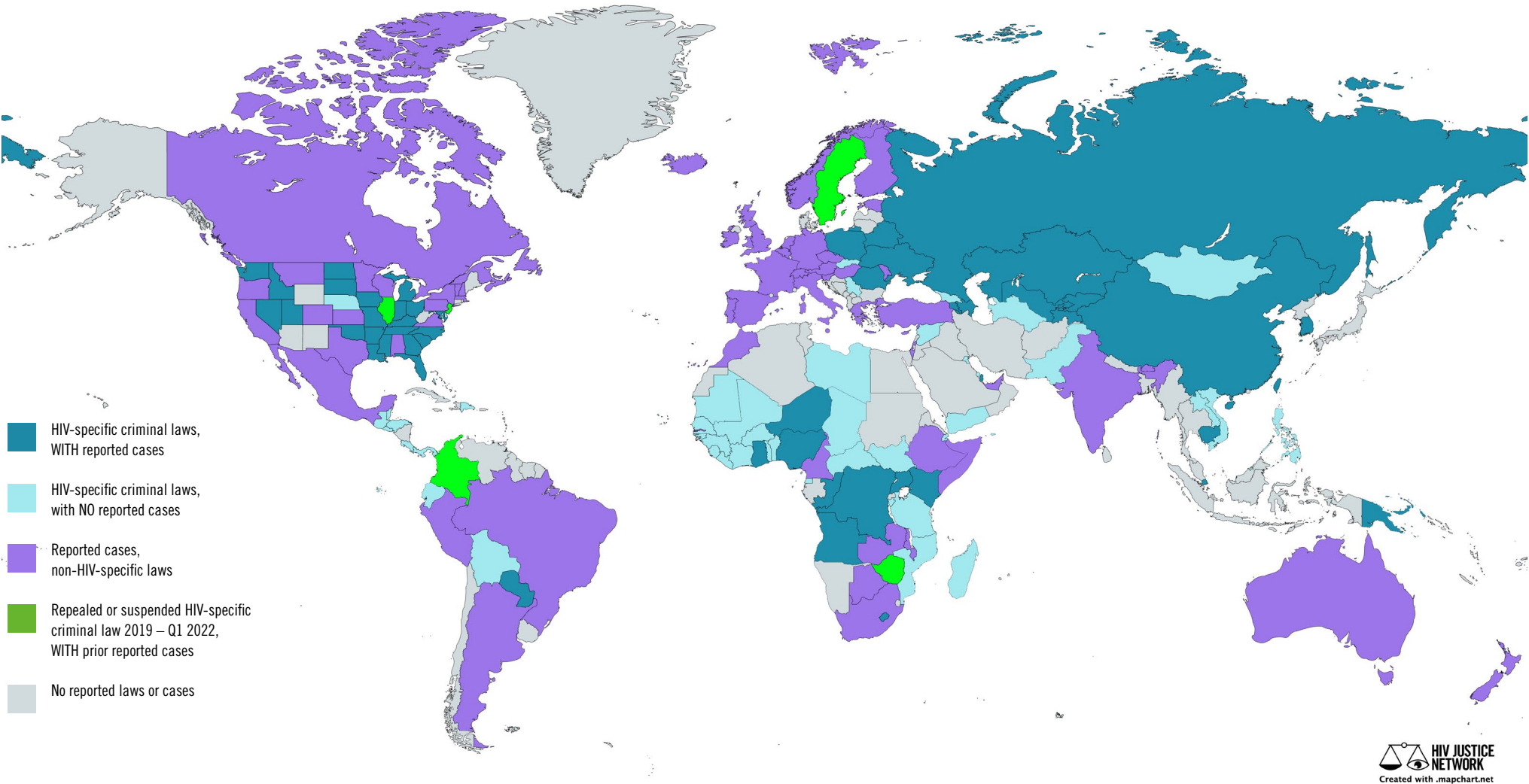
The Penal Code of **Brazil** includes two general provisions criminalising the spread of sexually transmitted diseases and serious illnesses, the latter of which has been used against people living with HIV, along with general bodily harm laws including aggravated homicide. Grupo de Incentivo à Vida (GIV) published a booklet in May 2021 to increase awareness of U=U and the inappropriateness of ongoing HIV criminalisation.⁸⁹

The **Mexican** Network against the Criminalisation of HIV was successful in challenging the HIV criminalisation provisions of the state of Veracruz at the Mexican Supreme Court and is waiting for a decision in a similar case challenging the law in Nuevo León. Work is underway in the states of Nuevo León, Jalisco, Aguascalientes and Quintana Roo to reform the laws — combining strategies of community mobilisation, law reform advocacy and potential court challenges.



⁸⁹ <http://giv.org.br/criminalizacao-da-transmissao-do-hiv/prefacio.html>

GLOBAL OVERVIEW OF LAWS AND CASES as of 31 March 2022*



* Data on reported cases up to 31 December 2021. Data on laws as of 31 March 2022.

HIV-specific criminal laws, WITH reported cases, by region (as of 31 December 2021)

Sub-Saharan Africa

Angola
Congo
Democratic Republic of Congo
Ghana
Kenya
Lesotho
Niger
Nigeria (Lagos state)
Uganda
Zimbabwe

Eastern Europe and Central Asia

Armenia
Azerbaijan
Belarus
Kazakhstan
Kyrgyzstan
Moldova
Poland
Romania
Russian Federation
Tajikistan
Ukraine
Uzbekistan

Latin America and the Caribbean

Bermuda
Paraguay

Asia Pacific

Cambodia
China
Papua New Guinea
Singapore
South Korea
Taiwan (PRC)

North America

United States:
Arkansas, Florida, Georgia,
Iowa, Idaho, Indiana,
Kentucky, Louisiana,
Maryland, Michigan, Missouri,
Mississippi, North Carolina,
North Dakota, Nevada, Ohio,
Oklahoma, South Carolina,
South Dakota, Tennessee,
Washington

Middle East and North Africa

Qatar

HIV-specific criminal laws, with NO reported cases, by region (as of 31 December 2021)

Sub-Saharan Africa

Benin
Burkina Faso
Burundi
Cape Verde
Central African Republic
Chad
Cote d'Ivoire
Equatorial Guinea
Guinea
Guinea-Bissau
Liberia
Madagascar
Mali
Mauritania
Mozambique
Nigeria (Enugu state)
Senegal
Sierra Leone
South Sudan
Tanzania
Togo

Eastern Europe and Central Asia

Georgia
Serbia
Slovakia
Turkmenistan

Latin America and the Caribbean

Anguilla
Bahamas
Belize
Bolivia
Costa Rica
Dominican Republic
Ecuador
El Salvador
Guatemala
Honduras
Mexico (Coahuila and
Tamaulipas states)
Panama
Saint Lucia

Asia Pacific

Brunei Darussalam
Laos
Marshall Islands
Mongolia
Pakistan
Philippines
Vietnam

North America

United States:
Delaware, Nebraska, US Virgin
Islands

Middle East and North Africa

Bahrain
Djibouti
Kuwait
Libya
Syria
Yemen

Reported cases, non-HIV-specific laws, by region (as of 31 December 2021)

Western and Central Europe

Austria
Belgium
Cyprus
Czech Republic
Finland
France
Germany
Great Britain
(Scotland, England & Wales)
Greece
Hungary
Iceland
Ireland
Italy
Malta
Netherlands
Norway
Portugal
Slovenia
Spain
Sweden
Switzerland

Eastern Europe and Central Asia

Estonia
Turkey

Middle East and North Africa

Israel
Morocco
United Arab Emirates

Sub-Saharan Africa

Botswana
Cameroon
Ethiopia
Gabon
The Gambia
Malawi
Mauritius
Somalia
South Africa
Zambia

North America

Canada
Alberta, British Columbia,
Manitoba, Northwest
Territories, Nova Scotia,
Nunavut, Ontario, Quebec,
Saskatchewan, Yukon
United States:
Alabama, Arkansas,
California, Colorado, Florida,
Georgia, Indiana, Kansas,
Kentucky, Louisiana, Maryland,
Massachusetts, Michigan,
Minnesota, Montana, New
Hampshire, New Jersey,
New York, North Carolina,
Ohio, Oklahoma, Oregon,
Pennsylvania, South Carolina,
Texas, Vermont, Virginia,
Wisconsin, US Military

Latin America and the Caribbean

Argentina
Brazil
Mexico:
Chihuahua, Ciudad de México,
Estado de México, Nuevo León,
Sonora, Tamaulipas, Veracruz
Peru
Trinidad & Tobago

Asia Pacific

Australia:
Australian Capital Territory, New
South Wales, Northern Territory,
Queensland, South Australia,
Tasmania, Western Australia
Bhutan
India
Maldives
New Zealand

Repealed or suspended HIV-specific criminal law (2019 – Q1 2022, WITH prior reported cases)

Colombia
Illinois, USA
New Jersey, USA
Sweden
Zimbabwe

WHERE HIV-RELATED CRIMINAL CASES HAVE BEEN REPORTED 2019-21 as of 31 December 2021

