

# ADVANCING HIV JUSTICE: ACHIEVEMENTS AND CHALLENGES IN GLOBAL ADVOCACY AGAINST HIV CRIMINALISATION

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## ISSUES

Laws criminalising HIV non-disclosure, exposure and/or transmission exist and are enforced in every continent. Although North America is the continent with the most known prosecutions, 26 African countries have overly broad and/or vague HIV-specific criminal laws with a further three countries considering new HIV-specific criminal laws. This is worrying and disappointing given the growing evidence base and consensus of international agencies that such laws are counterproductive to HIV prevention efforts and generally fail to deliver 'justice'.

## DESCRIPTION

A global overview of HIV-related criminal laws, prosecutions and successful advocacy against them was conducted based on data from the HIV Justice Network<sup>1</sup> and the GNP+ Global Criminalisation Scan<sup>2</sup>. This analysis reviewed global efforts in five broad areas: building the global evidence base; generating persuasive social science; challenging new laws; advocating for law reform; and addressing legal processes and enforcement. In addition, nine African country PLHIV Networks have produced individual country HIV Criminalisation Scan reports.<sup>3</sup> As well as providing information for the country pages of the Global Criminalisation Scan, the reports are being used as a fact finding tool to document all potentially punitive laws in relation to key affected populations.

## LESSONS LEARNED

The African continent has more countries with overly broad and vague HIV-specific laws relating to HIV non-disclosure, exposure and/or transmission than any other global region, nearly all of which have been enacted in the past decade. The very existence of these laws creates fear, exacerbates HIV-related stigma and erroneous notions that the criminal law can protect women

from HIV. Although there are few known prosecutions the majority of those prosecuted have been women – who are usually the first in a couple to know their HIV status due to routine antenatal testing and who are often erroneously accused of bringing HIV into a relationship.<sup>4</sup> In addition, South Africa recently prosecuted alleged criminal HIV transmission as attempted murder despite no evidence of intent to harm. However, there have been some positive legal changes brought about by local advocacy supported by international civil society and UN agencies. Since 2010, at least four countries – Congo, Guinea, Senegal and Togo – have revised their existing HIV-related legislation or adopted new legislation that restrict use of criminal law to cases of intentional transmission. In 2013, advocacy in Malawi and Nigeria has resulted in the removal of overly broad HIV-specific criminal statutes from draft omnibus HIV Bills.

## NEXT STEPS

Despite some important advocacy successes, more work is still required to further strengthen advocacy capacity across the African continent, and worldwide. HIV criminalisation is a complex issue. It entails a detailed understanding of diverse aspects of the criminal justice system; collection and analysis of evidence of the scope and impact of prosecutions across local and national boundaries; articulation and argument about complex moral and ethical issues of trust, blame and responsibility; and inclusion of HIV prevention and human rights priorities. Networks of people living with HIV and other civil society organisations, in partnership with donor agencies and multilateral and UN agencies, must invest further in understanding the drivers and impact of criminalisation, and work pragmatically with lawmakers and governments to repeal laws and/or reduce their unintended negative impacts through implementation of UNAIDS recommendations<sup>5</sup> on critical scientific, medical and legal considerations.

## BOTSWANA

Despite a strong civil society response, a draconian Public Health Bill containing a vague and overly broad HIV criminalisation statute – and which also allows for forced HIV testing, mandatory HIV disclosure and limits to the right of freedom of movement for people with HIV – was approved by Parliament in April 2013 and signed into law by President Ian Khama in September 2013. The Botswana Network on Law and AIDS (BONELA) plans to challenge the law as unconstitutional. In October 2013, a woman was charged with 'deliberate HIV transmission' for breastfeeding her neighbour's baby.<sup>6</sup>

## ETHIOPIA

The 2004 revision of the Criminal Code criminalises the intentional or negligent transmission or spreading of communicable human disease. The law is not HIV-specific. Actual transmission, rather than exposure is a crime. The Network of Networks of HIV Positives in Ethiopia (NEP+) found four recorded HIV-related prosecutions in Ethiopia (prior to December 2011), three in Addis Ababa and one in Bahirdar. In all cases the defendants were accused of other offences (rape, incest, sex with a minor and sex with a prostitute) and their HIV status was considered to be an aggravating factor. The NEP+ report also found that Ethiopia criminalises same sex sexual relations and use of narcotic substances and that consequently no HIV services are targeted at men who have sex with men or people who use drugs.<sup>7</sup>

## KENYA

The HIV and AIDS Prevention and Control Act (2006) and the Sexual Offences Act (2006), both have overly broad provisions for criminalising 'knowing, reckless or intentional' HIV exposure or transmission, as well as a person with HIV permitting 'the doing of anything' that might lead to HIV transmission. The National Empowerment Network of People Living with HIV and AIDS in Kenya (NEPHAK) have found no known prosecutions for HIV transmission to date.<sup>8</sup>

## MALAWI

In 2007, the Malawi Special Law Commission on HIV and AIDS produced a report that recommended criminalising "deliberate, reckless or negligent acts or omissions that are likely to infect another person with HIV" and this was included in the 2008 draft HIV Bill. Following a great deal of public debate, in 2012 the Malawi Network of People Living with HIV and AIDS (MANET+) and other civil society organisations collaborated with the United Nations Development Programme (UNDP) to facilitate the creation of a legal environment assessment. As a result of the assessment's recommendations, the latest version of the draft HIV Bill no longer contains any HIV criminalisation provisions.<sup>9</sup>

## NIGERIA

Two states in Nigeria – Enugu and Lagos – have overly broad HIV-specific criminal laws. However research undertaken by the Network of People Living with HIV and AIDS in Nigeria (NEPWHAN) found no known cases of documented prosecutions to date.<sup>10</sup> In February 2013, NEPWHAN and other civil society advocates were successful in arguing for the removal of an HIV-specific criminal statute from the draft HIV and AIDS Anti-Discrimination Bill, assisted in their advocacy by data obtained from the HIV Criminalisation Scan report.<sup>11</sup>

## SOUTH AFRICA

Although South Africa does not have an HIV-specific criminal law, the issue has been debated intensely since the 1990s and earlier this year the first successful prosecution for 'HIV exposure' was upheld as attempted murder by Pretoria High Court, despite no evidence of a malicious intent to harm.<sup>12</sup> In addition, the 2012 Criminalisation Scan report by the National Association of People Living with HIV and AIDS (NAPWA) found that both sex work and non-prescription narcotic drug use are criminalised, resulting in barriers to HIV prevention, treatment and care for sex workers and people who inject drugs. However, South Africa does have a number of laws and policies that ensure that people living with HIV are protected within the labour market.<sup>14</sup>

## TANZANIA

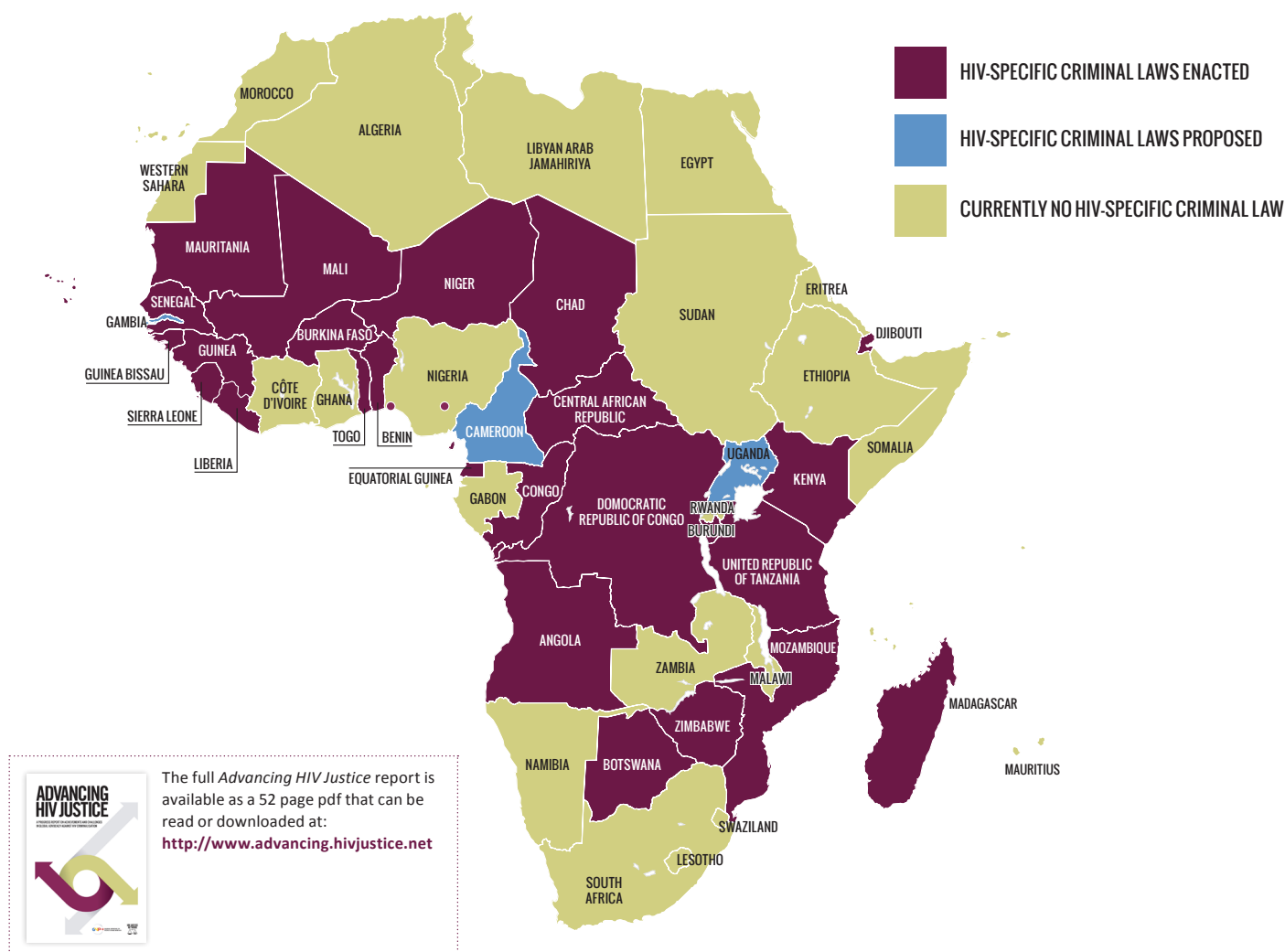
The HIV and AIDS (Prevention and Control) Act, 2008, which came into effect in April 2008, contains an overly broad provisions allowing for prosecution for 'intentional' transmission and creating a duty for a person living with HIV to disclose. Research undertaken by the National Council of People Living with HIV (NACOPHA) found that there was one attempt to prosecute 'intentional' transmission in Moshi-Kilimanjaro but the court could not proceed because it lacked guidance on what really amounts to intentional transmission and the judge advised the parties to settle out of court. Furthermore, the criminalisation of same sex relationships, sex work and drug use are creating a barrier to providing an effective HIV response.<sup>15</sup>

## UGANDA

In late 2009, a group of more than 50 Ugandan and international organisations and individuals released a report criticising many of the provisions of the 2008 HIV and AIDS Prevention and Control Bill.<sup>16</sup> That early advocacy resulted in the removal of a criminal penalty for the transmission of HIV from mother to child through breastfeeding.<sup>17</sup> Still under consideration by Parliament, the current version of the Bill includes a number of problematic provisions including mandatory HIV tests for pregnant women and their partners, victims of sexual offences, those charged with a sexual offence, people convicted of drug use, and those convicted of 'prostitution'. It also permits disclosure of HIV status by a medical practitioner.<sup>18</sup> In addition, the Bill contains two overly broad and problematic HIV-specific criminal statutes<sup>19</sup> Advocacy co-ordinated by the Uganda Network on Law, Ethics and HIV/AIDS (UGANET), continues to argue that the unfavourable clauses must be completely removed and that Uganda must assent to the East African Community (EAC) HIV & AIDS Prevention and Management Act which contains provisions meant to supersede Ugandan law.<sup>20</sup>

## ZIMBABWE

Zimbabwe was the first country on the African continent to pass an HIV-specific criminal law in 2001 and with three known prosecutions is the African country with the most number of reported prosecutions for HIV transmission. Following a 2008 conviction for a woman who was found guilty of infecting her husband, a 2012 a second woman was found guilty of 'deliberate' HIV transmission by a Bulawayo Court despite the real possibility that her husband may have been infected first and transmitted the virus to her. The woman only discovered her HIV-positive status when she became pregnant and went for prenatal care.<sup>21</sup> Following another recent conviction of a husband accused of 'deliberately' infecting his wife, Zimbabwe Lawyers for Human Rights, who represents both defendants, plan to challenge the law as unconstitutional at the Supreme Court.<sup>22</sup>



The full *Advancing HIV Justice* report is available as a 52 page pdf that can be read or downloaded at: <http://www.advancing.hivjustice.net>

<sup>1</sup> Available at <http://www.hivjustice.net>

<sup>2</sup> Available at <http://www.gnpplus.net/criminalisation>

<sup>3</sup> Six of these - Ethiopia, Kenya, Nigeria, South Africa, Tanzania and Zambia - are currently available; reports from Cameroon, Malawi and Senegal will be published in 2014.

<sup>4</sup> Athena Network. *10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women* (2009) Available at: <http://www.athenanetwork.org/assets/files/10%20Reasons%20Why%20Criminalisation%20Harms%20Women.pdf>

<sup>5</sup> UNAIDS. *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations.* (2013) Available at: [http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/20130530\\_Guidance\\_Ending\\_Criminalisation.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/20130530_Guidance_Ending_Criminalisation.pdf)

<sup>6</sup> Mtokozisi Dube. *Zim woman in Botswana court for breastfeeding neighbour's baby.* Africa Review, October 11 2013.

Available at: <http://www.africareview.com/News/Zim-woman-in-Botswana-court-for-breastfeeding-neighbours-baby-/979180/2028136/-/1t7yd2/-/index.html>

<sup>7</sup> NEP+. *Global Criminalisation Scan Country Assessment: Ethiopia.* December 2011. Available at: <http://www.gnpplus.net/en/resources/human-rights-and-stigma/item/127-2011-criminalisation-scan-country-assessment-ethiopia>

<sup>8</sup> NEPHAK. *Global Criminalisation Scan Country Assessment: Kenya.* April 2010. Available at: <http://www.gnpplus.net/en/resources/human-rights-and-stigma/item/79-2010-criminalisation-scan-country-assessment-kenya>

<sup>9</sup> Global Commission on HIV and the Law. *Exciting developments from Seychelles and Malawi.* 18 November 2013. Available at: <http://www.hivlawcommission.org/index.php/blog/246-exciting-developments-from-seychelles-and-malawi>

<sup>10</sup> NEPWHAN. *Global Criminalisation Scan Country Assessment: Nigeria.* June 2010.

Available at: <http://www.gnpplus.net/en/resources/human-rights-and-stigma/item/82-2010-criminalisation-scan-country-assessment-nigeria>

<sup>11</sup> GNP+. *PLHIV Advocacy in Nigeria stops HIV criminalisation being made law.* February 14 2013 Available at: <http://www.gnpplus.net/en/programmes/human-rights/global-criminalisation-scan/1859-plhiv-advocacy-in-nigeria-stops-hiv-criminalisation-being-made-law>

<sup>12</sup> SAPA. *HIV+ man loses appeal over unprotected sex.* August 13 2013. Available at: <http://www.iol.co.za/news/crime-courts/hiv-man-loses-appeal-over-unprotected-sex-1.1561786>

<sup>13</sup> Phiri v S (A 400/2012) [2013] ZAGPPHC 279 (8 August 2013) Available at: <http://www.scribd.com/doc/175017571/Phiri-v-S-A-400-2012-2013-ZAGPPHC-279-8-August-2013>

<sup>14</sup> NAPWA. *Global Criminalisation Scan Country Assessment: South Africa March 2012.* Available at: <http://www.gnpplus.net/en/resources/human-rights-and-stigma/>

item/125-2011-criminalisation-scan-country-assessment-south-africa

<sup>15</sup> NACOPHA. *Global Criminalisation Scan Country Assessment: Tanzania* December 2012. Available at: <http://www.gnpplus.net/en/programmes/human-rights/global-criminalisation-scan/1906-global-criminalisation-scan-tanzania>

<sup>16</sup> Human Rights Watch. *Comments to Uganda's Parliamentary Committee on HIV/AIDS and Related Matters about the HIV/AIDS Prevention and Control Bill.* 6 November 2009. Available at: <http://www.hrw.org/news/2009/11/06/comments-uganda-s-parliamentary-committee-hivaids-and-related-matters-about-hivaids>

<sup>17</sup> Human Rights Watch. *Uganda: Protect, Don't Punish, People With HIV.* 19 May 2010. Available at: <http://www.hrw.org/news/2010/05/13/uganda-protect-don-t-punish-people-hiv>

<sup>18</sup> HIV and AIDS Prevention and Control Bill, 2010. Available at: <http://www.scribd.com/doc/31680838/HIV-and-AIDS-Prevention-and-Control-Bill-2010>

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<sup>19</sup> Human Rights Watch. *Comments to Uganda's Parliamentary Committee on HIV/AIDS and Related Matters about the HIV/AIDS Prevention and Control Bill.* 13 May 2010. Available at: <http://www.hrw.org/news/2010/05/13/test>

<sup>20</sup> GNP+ and HIV Justice Network. *Advancing HIV Justice: A progress report of achievements and challenges in global advocacy against HIV criminalisation.* June 2013. Available at: <http://hivjustice.net/advancing>

<sup>21</sup> Sebastian Mhofu. *Zimbabwe Woman Fights Conviction of Deliberately Transmitting HIV.* Voice of America, 2 August 2012. Available at: <http://www.voanews.com/articleprintview/1453764.html>

<sup>22</sup> Staff Reporter. *HIV law challenged.* Newsday, 25 September 2012. Available at: <http://www.newsday.co.zw/2012/09/25/hiv-law-challenged>