

Challenging the (overly broad) criminalisation of HIV non-disclosure, exposure and transmission

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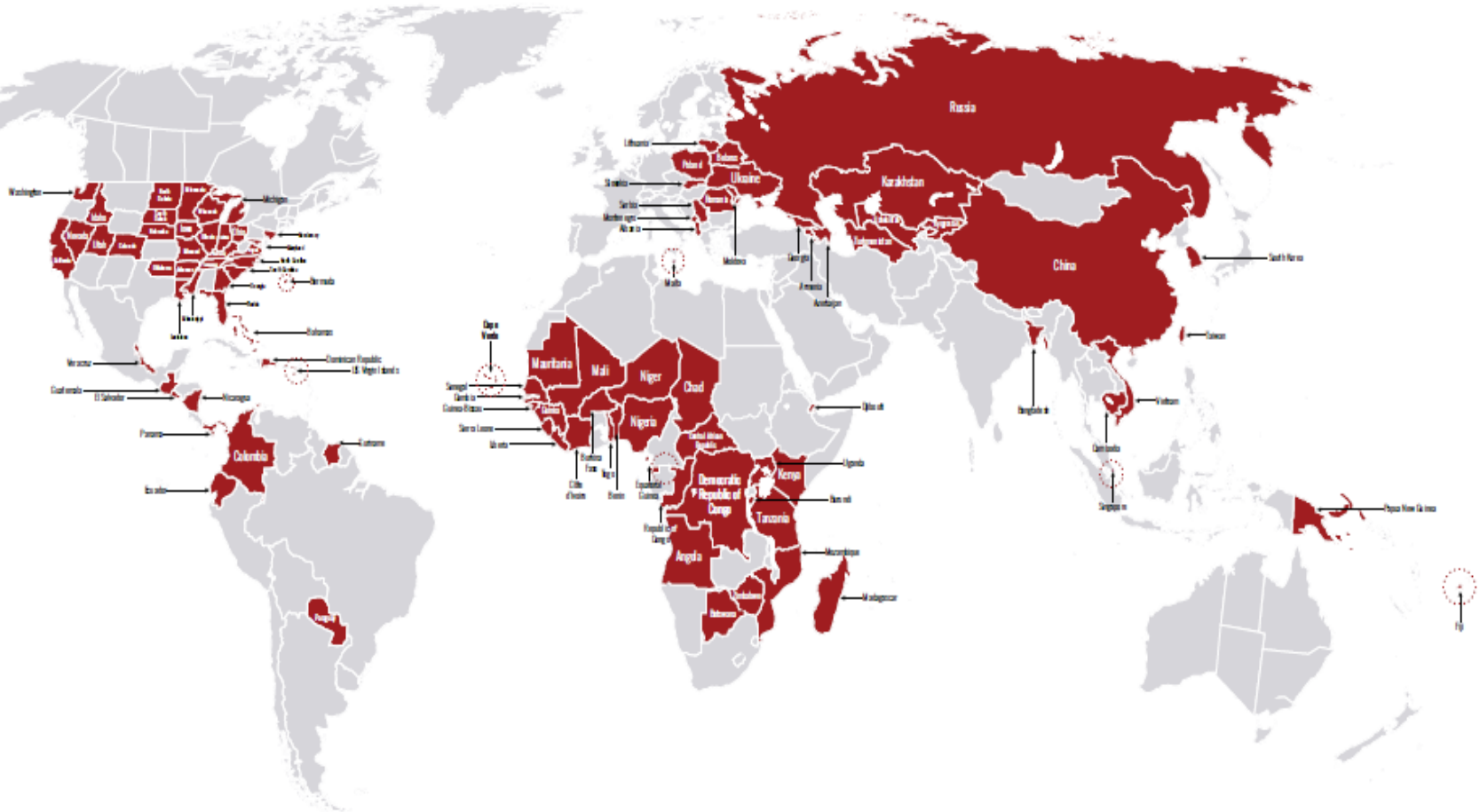
Patrick Eba

Human Rights and Law Division, UNAIDS

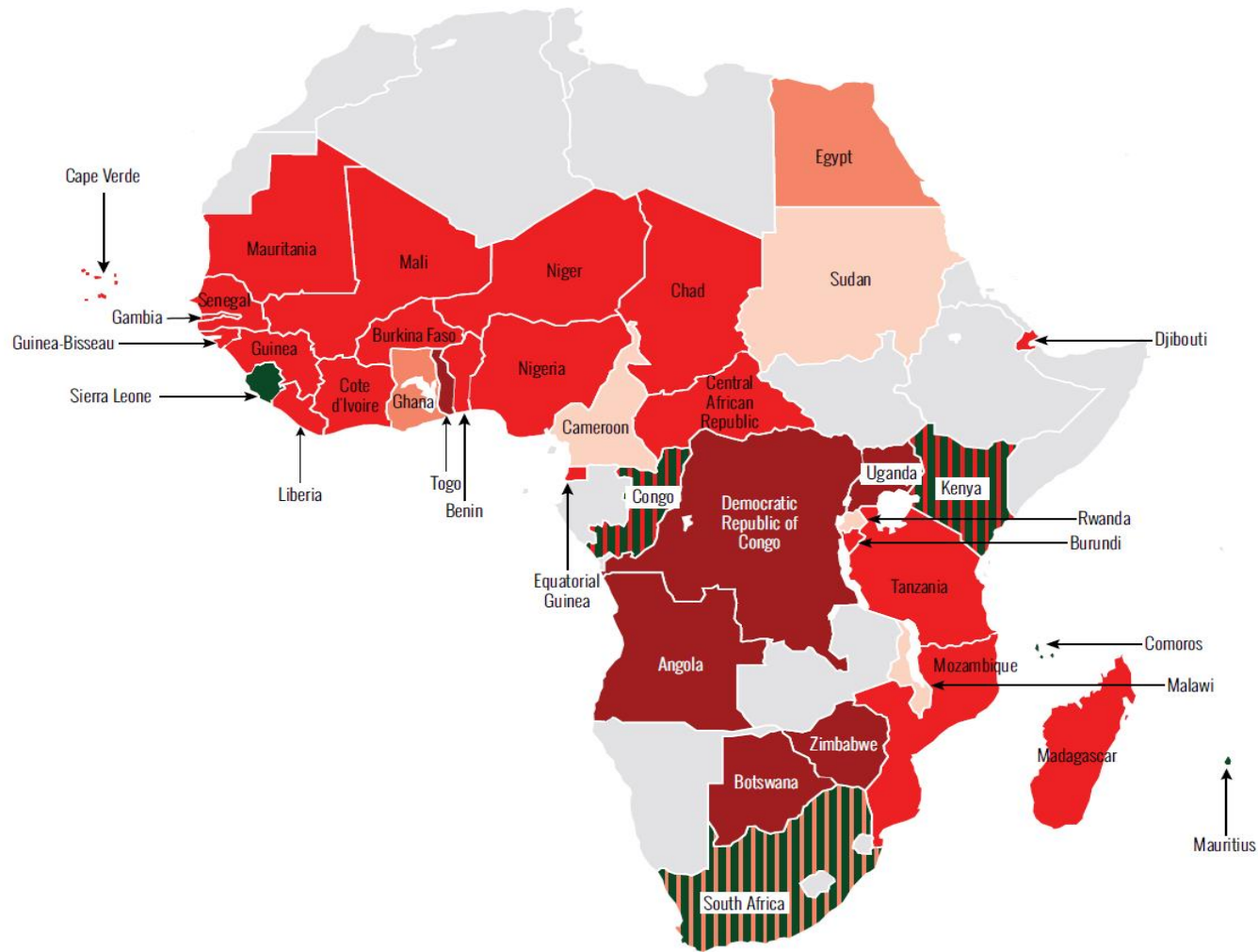
Overview

- HIV criminalisation globally and in Africa
- Defining HIV criminalisation
- Evolution of concerns against HIV criminalisation – From public health to human rights rights
- Normative challenges of litigating HIV criminalisation
- Using UNAIDS guidance note to identify challenges in HIV criminalisation laws
- Reflecting on key cases (Jacintha on Kenya)
- Way forward
- Example of key materials

Global situation on criminalisation of HIV



Source: GNP+ & HJN, 2013



- HIV-specific criminal laws, reported arrests/prosecutions
- HIV-specific criminal laws, no reported prosecutions
- Reported arrests/prosecutions using general laws
- HIV-specific criminal laws proposed
- Improved legal environment for criminalisation
- No reported HIV-specific criminal laws or arrests/prosecutions, or no data

AIDS

Defining overly broad HIV criminalisation

- Unjust application of the criminal law to people living with HIV based solely on their HIV status.
- Uses HIV-specific criminal statutes, or other criminal law
- To prosecute unintentional HIV transmission, exposure to HIV where HIV was not transmitted, or mere non-disclosure of known HIV-positive status.
- Laws and prosecutions that ignore best available scientific evidence about HIV
- Laws and prosecution that fails to uphold the principles of legal and judicial fairness (including principles of legality, foreseeability, intent, causality, proportionality and proof).

Criticisms against HIV criminalisation – From public health concerns...

- Criminalisation does not reduce the spread of HIV
- Criminalisation undermine the response to HIV
- Criminalisation promote fear and stigma
- Criminalisation disproportionately harms women
- Criminalisation takes attention away from real HIV prevention challenges.

Criticisms against HIV criminalisation – ...to human rights challenges

- Emphasis on challenging laws and prosecutions that ignore best available scientific evidence about HIV (risk, harm, defences, proof)
- Focus on principles of legal and judicial fairness (including principles of legality, foreseeability, intent, causality, proportionality and proof).
- Selective application and other human rights issues

Normative challenges of litigating HIV criminalisation

- Variety of specific criminal provisions (HIV Act, Sexual Offences Act, Public Health Act, Penal Code)
- Over-criminalisation
- Prosecution based on existing criminal law provisions (assault, poisoning, attempted murder, etc)

The UNAIDS Guidance note: A tool for challenging overly broad HIV criminalisation laws and prosecutions



- limit criminal liability to cases of intentional HIV transmission (negligent or reckless transmission should not be criminalised);
- no criminal liability in case of mere non-disclosure or exposure where transmission has not occurred;
- no criminal liability in cases involving condom use;
- no criminal liability where the person living with HIV has low viral or is on effective treatment;
- no criminal liability when the person did not know his or her HIV status; and
- no criminal liability in case of disclosure of HIV status prior to sexual act

Applying the elements of the UNAIDS guidance note to HIV laws in sub-Saharan Africa

Country	Criminalises HIV non-disclosure	Criminalises HIV exposure	Criminalises HIV transmission	Limited to Intentional acts	Negligent or reckless acts	Applicable to MTCT	Elements that exclude criminal liability			
							Knowledge of HIV infection	Disclosure or informed consent	Condom use and other precautions	Effective HIV treatment or low viral load
Angola (Arts 14 & 15)	Yes (art 14)	No	Yes (Article 15(1))	Yes (Article 15(1))	Yes (art 15(2))	Yes	No	No	No	No
Burkina Faso (Arts 20, 22 & 26)	Yes (art 20)	No	Yes (art 22)	Yes (art 22)	No	Yes (art 22)	No	No	Yes (arts 20 and 26)	No
Sierra Leone (secs 37(1) & 37(2))	No	No	Yes (sec 37(1))	Yes (sec 37(1))	No	No (excluded by sec 37(2)(g))	Yes. Sec 37(2)(b)	Yes. Sec 37(2)(e)	Yes. Sec 37(2)(d)	Yes. Sec 37(2)(a)
Tanzania (sec 47)	No	No	Yes. Sec 47	Yes. Sec 47	No	Yes. Sec 47	No	No	No	No
Uganda (secs 41 & 43)	No	Yes (sec 41)	Yes (sec 43)	Yes (sec 43)	No	Yes (secs 41 & 43)	No	No (sec 41)	No (sec 41)	No.

Reviewing cases challenging HIV criminalisation

- In the USA: Supreme Court of Missouri, *State of Missouri v S.F.*, No. SC94923, 2016
- In Canada: Supreme Court of Canada, *R. v. Mabior*, 2012, SCC 47
- In Africa:
 - Zimbabwe: *Pitty Mpofu & Samukelisiwe Mlilo v The State*, June 2016
 - Kenya: High Court of Kenya. *Aids Law Project v Attorney General & 3 others* 2015

Way forward: Issues for consideration by lawyers and litigants on HIV criminalisation

- Carefully identify legal provision(s) to challenge
- Arguments against criminalisation to combine public health and human rights
- Finding strategic approaches in countries that do not have specific prosecution (i.e defending those unfairly prosecuted vs constitutional challenges)
- Beyond litigation
 - Prosecutorial guidelines (England & Wales)
 - Supporting advocacy for law reform (Sierra Leone, Mozambique, Senegal, Guinea, Togo, Cote d'Ivoire)
 - Working with medical and health practitioners

Key materials and resources

- Report of special rapporteur on the right to health, A/HRC/14/20, 27 April 2010.
- UNAIDS guidance note 2013
- Aids Law Project v Attorney General & 3 others 2015
- Canadian HIV AIDS legal network, Resources for lawyers, <http://www.aidslaw.ca/site/our-work/criminalization/>
- HIV Justice Worldwide, <http://www.hivjusticeworldwide.org/>

Thank You!