

The background of the cover is a dark blue illustration. It features a large, stylized hand holding a wooden gavel. The hand is positioned as if about to strike the gavel down onto a surface. The gavel is shown in a three-quarter view, with its head and handle clearly visible. The overall composition is centered and conveys a sense of justice and authority.

# **GUIDANCE FOR PROSECUTORS**

on HIV-related criminal cases

## Acknowledgments

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One United Nations Plaza, NEW YORK, NY 10017, USA

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

— UN Guidelines on the Role of Prosecutors (1990)

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# FOREWORD

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

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

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

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

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

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

**Mandeep Dhaliwal**

Director

HIV, Health and Development Group

UNDP



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

— Gary Balch, General Counsel, International Association of Prosecutors



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

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



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

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

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