European AIDS Treatment Group

POSITION PAPER ON THE OVERLY BROAD CRIMINALISATION OF HIV TRANSMISSION, EXPOSURE AND/OR NON-DISCLOSURE

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Introduction

Founded in 1992, the European AIDS Treatment Group (EATG) is a network of expert patients and treatment advocates from 54 countries in Europe and Central Asia. EATG's mission is to achieve the fastest possible access to state of the art medical products, devices and diagnostic tests that prevent or treat HIV infection, and to improve the quality of life of people living with HIV/AIDS (PLHIV) in Europe.

A large body of jurisprudence has developed across the world criminalising the conduct of people living with HIV who potentially expose others or are accused of transmitting HIV, primarily through consensual sexual activity. Such laws and prosecutions are an equivocal attempt to achieve 'justice' and/or to be seen to be doing something about HIV, which disproportionally impacts stigmatized populations (such as gay men and other men who have sex with men, transgendered individuals, injecting drug users, sex workers and their partners, prisoners, asylum seekers, migrants and ethnic minorities), who are often perceived to be driving the HIV epidemic, and are thus placed under special surveillance. The Global Commission on HIV and the Law estimates over 60 countries where it is a crime to expose another person to HIV or to transmit it.[1] After North America, Europe and Central Asia is the global region with the most number of documented prosecutions of people living with HIV. Consequently, EATG's constituency is being directly affected by such HIV criminalisation laws and policies.

Therefore, EATG, on the initiative of its Policy Working Group (PWG), reflected on various aspects related to the prevention and transmission of HIV and other sexually transmitted infections and/or blood borne viruses; the latest evidence supporting different legal models, including recommendations on the priority changes needed in legal frameworks and practice. The Position Paper (PP) defines EATG's position in the area of the overly broad criminalisation of HIV transmission, exposure and/or non-disclosure (which we will refer to simply as 'criminalisation' in the rest of this paper) and informs EATG's policy, science and other related work.

This PP does not provide a fully detailed analysis of the every possible application of the criminal law to every circumstance in which conduct may risk HIV transmission. Nor does the PP present a comprehensive review of the current state of criminal law systems worldwide relating to HIV/AIDS.[2] Rather, the PP addresses key barriers and opportunities, evaluates the justifications offered for criminalisation, positions arguments against such criminalisation, thus offers alternatives that may enhance the goals of public health.

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[1] Report of the Global Commission on HIV and the Law, "Risks, Rights & Health" (2012). Available at: http://www.hivlawcommission.org/

[2] These have been undertaken by the Global Commission on HIV and the Law (see: http://www.hivlawcommission.org/) and UNAIDS (see: https://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/BackgroundCurrentLandscapeCriminalisationHIV_Final.pdf)

Executive Summary

Overall, **EATG argues that while the criminal law may be applied to exceptional and extremely rare cases of malicious and deliberate HIV transmission, the criminal law is too blunt and rigid a tool for dealing effectively with public health initiatives, controling the spread of HIV, and deterring harm-risking conduct. The overly broad use of the criminal law is, therefore, detrimental to contemporary public health goals and human rights**.

Rather, these controversial behaviours will be forced underground, where their change will be much more difficult, if not impossible. The ultimate effect may be that more people are unnecessarily infected with HIV and that more people are either not tested or not adequately treated, thus reducing their life expectancy in general terms.

This is consistent with the recommendations of UNAIDS, the Global Commission on HIV and the Law and the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.[3]

EATG calls for voluntary and confidential testing to promote HIV testing by individuals or couples who may have reason to suspect their infection. Ensuring the results of these tests remain confidential is an important factor in inducing individuals or couples to participate in testing. An important aspect of such confidentiality is the inability of prosecutors to use statements made to public health authorities in criminal proceedings.

Coupling voluntary and confidential testing with adequate pre and post-testing counseling has been shown to be an effective way to reduce risk behaviour by people living with HIV.[4] Counseling and education targeted at people living with HIV about the state of the law in their jurisdiction has been recommended by the World Health Organization (WHO) as a means to ensure individuals are aware of the possible criminal sanctions they face, but also so that they are aware of how to avoid being prosecuted, for example, by engaging in safer-sex, obtaining treatment, and/or disclosing their status to partners where appropriate.[5]

EATG considers as necessary the following: voluntary, timely, appropriate, affordable, uninterrupted and unimpeded life-long access to antiretroviral therapy (ART) and other forms

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[3] Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Human Rights Council, 14th Sess., U.N. Doc. A/HRC/14/20, 27 April 2010. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf

[4] UNAIDS, "Criminal Law, Public Health and HIV Transmission: A Policy Options Paper," June 2002, at page 38.

[5] Report of the WHO European Region Technical Consultation in collaboration with the European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections, Copenhagen, 16 October, 2006, at page 21, citing UNAIDS & Inter-Parliamentary Union, *Handbook for Legislators on HIV/AIDS, Law and Human Rights* (Geneva: UNAIDS/IPU, 1999) at 50. See also: Justice Edwin Cameron, "The Criminalization of HIV Transmission and Exposure," (Public Lecture hosted by the Canadian HIV/AIDS Legal Network, Osgoode Hall Toronto, 12 -13 June 2009), at page 10; and UNAIDS/UNDP Policy Brief: "Criminalization of HIV Transmission" (Geneva 2008), at page 3.

of medication to treat HIV. Proper medical intervention will lower viral loads, often to undetectable levels, greatly reducing the risk of transmission. Access to medical intervention is premised on the wide availability of testing and counseling. The suppression of HIV viral load is critical to ensuring the health of the person living with HIV, with the secondary benefit of reducing infectiousness. Timely and appropriate access to ART, by ensuring both individual health and community protection, must be promoted in order to meet public health goals. Moreover, impediments to ART caused by incarceration raises concerns of distributive justice, as an already marginalized group faces barriers to treatment that are not present in society at large, threatening their health and well-being as well as the safety and health of their communities.

As a result, **EATG seeks to ensure that a single Europe-wide standard relating to up-to-date scientific evidence is used appropriately in criminal cases, including the impact of ART on infectiousness and life-expectancy** as well as a better understanding of the merits and limitations of phylogenetic evidence,[6] RITA testing[7] and other scientific methods used as evidence in criminal cases. To this end, **EATG recommends that the legal assessment of HIV-related risk should follow epidemiological conclusions** i.e. that effective viral suppression is associated with a significant reduction of infectivity as recommended in the UNAIDS 2013 guidance note: 'Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations'.[8]

EATG considers as equally important education for the population at large to dismantle stigma in relation to HIV and to ensure that there truly is an equitable concept of shared responsibility, especially if HIV-related prosecutions continue in a highly tailored fashion. Ensuring that media reports do not draw erroneous conclusions about people living with HIV acting as 'criminals' will reduce the stigma associated with HIV, which can facilitate testing and treatment as a means to reduce new HIV infections.

EATG recommends as essential the adoption of clear prosecutorial and police guidelines to limit the overly broad use of the criminal law, on both national- and European-wide levels. Prosecutors must be educated regarding the means and likelihood of HIV transmission, and must make appropriate decisions about prosecution to avoid harming both public health and human rights. Educating the judiciary and police officers about all aspects of HIV, including occupational exposure risk, is equally important..

The overly broad use of the criminal law can have a dramatic impact on public health, AIDS policy and people living with HIV, with unintended but real harmful effects on prevention,

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[6] Bernard EJ et al. HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission. HIV Medicine (2007), 8, 382–387.

[7] UNAIDS. New report explores implications of tests to estimate timing of HIV infection for criminal prosecutions. 4 August 2011. Available at: http://www.unaids.org/en/resources/presscentre/featurestories/2011/august/20110804nat/

[8] UNAIDS. Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations . Geneva, 2013.

treatment and care, both for society at large and for people living with HIV in particular.[9] Therefore, **EATG recommends the use of evidence-informed, non-punitive public health interventions rather than criminal law** since it offers a more flexible and less blunt means of reducing new HIV infections, **and adopting evidence-informed, human rights-based health interventions,** consistent with the recommendations of UNAIDS and findings of the Global Commission on HIV and the Law.[10]

EATG will work with members and other stakeholders to help support change in-country, such as by working with the criminal justice system and the media on education and training, and by lobbying any relevant EU institutions.

1. The Rationale for the Use of the Criminal Law

Criminal law serves several purposes: deterrence, denunciation, rehabilitation, and retribution.[11] Each of these purposes is reflected in the most common rationales for applying the criminal law to behaviours that may risk HIV transmission.

One common rationale is that it will reduce transmission rates by providing an incentive (through the creation of fear of impisonment and/denunciation) to individuals who are aware they are living with HIV to change their behaviour. This rationale, that behavioural change will result, will be addressed in Section 2.1, where we show that the vast majority people living with diagnosed HIV do what they believe is the right thing to do (and protect their partners) and are not deterred by the prospect of criminal sanctions.

The second rationale is that incarceration will isolate the convicted individual from the rest of society, thereby reducing that individual's ability to further spread the virus thus reducing transmission. EATG considers this justification to be problematic because there is evidence that the incarceration of individuals with HIV actually serves to increase transmission, at odds with the public health goals it seeks to achieve. This is in contravention of the goals of public health to protect the public from harm and to use effective interventions.

For example, the rate of HIV in prisons is ten times higher than in the general population,[12] which is the result of a number of factors. **EATG notes that the use of incarceration as a means of reducing transmission is not the least restrictive option available, and therefore undermines public health ethics.** As indicated within the Report of the Global Commission on

[9] O'Byrne P et al. HIV criminal prosecutions and public health: an examination of the empirical research Med Humanit. Published Online First 30 July 2013, 10.1136/medhum-2013-010366

[10] *Supra*, note 4, at page 8. In addition, the main principles in the UNAIDS guidance call for restricting the use, if any, on use of criminal law in the context of addressing HIV thus upholding criminal justice principles where it is used, including: harm; legality and certainty; proportionality among acts, charges and sanctions; appropriate state of mind; and proof. Moreover, UNAIDS stipulates that the best scientific evidence should guide any use of criminal law, including: evidence on risk of HIV transmission; evidence on harm of HIV transmission; and evidence on the prevention benefits of treatment.

[11] *Supra*, note 4, at page 20.

[12] Canadian HIV/AIDS Legal Network "Health care costs in prisons rising fast," (2009) 14:1 *HIV/AIDS Policy & Law Review*, at page 24.

HIV and the Law, there are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application undermines public health and human rights.

EATG considers as erroneous the justification that incarceration will reduce new HIV infections, as it relies on an outdated rationale that HIV will lead to death in a short period of time. As Grant notes, incarceration of a person living with HIV was once viewed as a "*de facto*" life sentence due to the short life expectancy of HIV positive inmates.[13] The reality today is that inmates with HIV will be released into the community. Incapacitation will serve no purpose in reducing transmission, but due to impediments to accessing treatment and preventive measures, will likely increase transmission and compromise the health of all inmates. EATG notes that this does not reflect the need for efficacy in public health interventions. The goal of distributive justice requires that inmates have equal access to medication, in order to reduce HIV transmission risk in prisons.

2. Negative Impacts of Criminalisation

A number of authors have suggested frameworks, principles, goals, and analytical tools to evaluate public health efforts, and a number of common themes emerge from their work.[14] EATG uses these common themes to evaluate the arguments for and against criminalisation of HIV exposure and transmission. Incorporating the framework by *Childress et al*.[15], and Singer's analysis of the SARS outbreak,[16] EATG also uses the following factors in the analysis: effectiveness, least infringement, protection of communities from undue stigmatisation, proportionality, necessity, and protection of public from harm.

2.1. Ineffective at Reducing Transmission

Commentators cite empirical evidence to show that the majority of HIV transmissions will not be affected by the deterrent power of the criminal law.[17] This is for two reasons.

First, the highest HIV transmission risk, according to current available data, is the result of transmission by persons in acute phase of the infection,[18] and by those who are not treated.[19]

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[13] Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" 31 Dalhousie L.J. 123, at page 14.

[14] See for example: UNAIDS Policy Paper; Open Society Institute, "10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission," 2008. See also findings of the Global Commission on HIV and the Law, which reiterate the premise that criminal law is not a HIV prevention tool, thereby suggesting the following: no evidence that criminal prosecutions prevent new HIV infections; such laws do not increase safer sex practices; instead, criminalization of HIV transmission reinforces stigma and discrimination against PLHIV (Report of the Global Commission on HIV and the Law, "Risks, Rights & Health."

[15] *James F. Childress et a*l., "Public Health Ethics: Mapping the Terrain" (2002) 30 J.L. Med. & Ethics 170.

[16] *Peter A. Singer et al*., "Ethics and SARS: Lessons from Toronto" (2003) 327 British Medical Journal 1342.

[17] UNAIDS/UNDP Policy Brief: "Criminalization of HIV Transmission" (Geneva 2008), at page 2, citing Bunnell R et al (2006) "Changes in Sexual risk behavior and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda" AIDS 20:85-92, and Marks G. et al (2005) "Meta-analysis of high-risk sexual behavior in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs" *Journal of Acquired Immune Deficiency Syndromes* 39:446-53.

Second, there is evidence to suggest that the criminal law has little power to affect sexual risk behaviour.[20] This evidence suggests that the deterrent power of criminal sanctions will not influence individuals to change their behaviour, and people are instead motivated to change their behaviour based on the view that it is wrong to infect others with the virus.[21] As Grant points out, even using criminal sanctions as a last resort will not be effective in reducing HIV transmission, as the few individuals who refuse to comply with public health orders and instructions will unlikely be swayed to change their behaviour with the threat of criminal sanction.[22] Further, there are no data supporting the deterrent effect of criminal sanctions, with no change in risk behaviours in jurisdictions where exposure to or transmission of HIV is not criminalised *versus* jurisdictions where it is.[23]

2.2. Stigma

One of the ethical rationales of public health law described by Singer is to protect communities from undue stigmatisation.[24] The possibility of criminal sanctions for people living with HIV (as opposed to those living with any other sexually transmissable or blood borne virus) further stigmatises people living with HIV.[25] Stigma in relation to HIV status is, *"often based upon the association of HIV with already marginalized and stigmatized behaviours, such as sex work, drug use and same sex and transgender sexual practices."*[26] Criminal law, rather than redressing the stigmatising attitudes against HIV, instead promotes and reproduces the stigma in society at large.[27]

As the IPPF advocacy tool, *Verdict on a Virus*, states, criminalisation *"combines the attitudes, perceptions and morality associated with HIV with those relating to criminality."*[28] Four consequences of criminalisation are discussed in this document, each of which contributes to the stigmatisation of people with HIV.

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[18] *Supra*, note 5 at page 15.

[19] *Supra,* note 17 at page 3, citing Brenner BG et al (2007) "High rates of forward transmission events after acute/early HIV-1 infection" *Journal of Infectious Diseases* 195: 951-59, Marks G, Crepaz N and Janssen R (2006) "Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA" AIDS 20:1447-1450.

[20] *Supra*, note 5 at page 15, citing S. Burris et al., "Do Criminal Laws Effect HIV Risk Behavior? An Empirical Trial." 1st Annual Conference on Empirical Legal Studies Paper (2007). See also: International Planned Parenthood Federation, "HIV: Verdict on a Virus: Public Health, Human Rights and Criminal Law" (2008) at page 9.

[21] *Ibid.*

[22] *Supra*, note 13 at page 15.

[23] *Supra,* note 17 at page 4.

[24] *Ibid.*

[25] International Planned Parenthood Federation, "HIV: Verdict on a Virus: Public Health, Human Rights and Criminal Law" (2008) at page 20.

[26] *Ibid.* at page 21.

[27] In Erving Goffman's theory of social stigma, a stigma is an attribute, behaviour, or reputation which is socially discrediting in a particular way: it causes an individual to be mentally classified by others in an undesirable, rejected stereotype rather than in an accepted, normalised way. Goffman, a noted sociologist, defined stigma as a gap between *virtual social identity* and *actual social identity*..

[28] *Supra*, note 25 at page 20.

First, criminalisation *"influences the relationship between health professionals and their clients."*[29] People living with HIV have a reason to be less than forthcoming about their behaviours with public health officials if they know that such information can be used as evidence in a criminal case. EATG notes that the result is ineffective treatment and counseling. Second, criminalisation impacts the self-esteem of people living with HIV by deeming them *"potential criminals."* EATG notes that this can affect the individual's decision to seek treatment, counseling and other support. Next, the advocacy tool notes that criminalisation can affect general perceptions of people living with HIV, as it equates HIV with criminality, which, *"fosters prejudice and stigma"* and hampers prevention efforts. Finally, the privacy concerns raised by criminalisation affect not only the potential defendant, but previous sexual partners of both complainant and defendant.[30]

In addition to the four consequences listed above, **EATG is extremely concerned that criminalisation increases stigma** in two additional and powerful ways. First, criminalisation garners significant media attention that influences public perception of HIV and HIV positive individuals. Second, the resulting HIV exceptionalism fuels and perpetuates stigma associated with HIV.

2.3. Adding to Stigma – Media Sensationalism

EATG notes that significant media attention is focused on cases where people living with HIV are subject to criminal sanctions. However, EATG notes that the number of people who allegedly intentionally expose or infect others is miniscule in comparison to the number of individuals living with HIV. EATG is concerned that the media frenzy when reporting on such a case further fuels the public perception that many people living with HIV frequently act in a way that jeopardises public health, adding to their stigmatisation. UNAIDS cautions that inflammatory media coverage *"contributes to the stigma surrounding HIV/AIDS and people living with the disease as 'potential criminals' and as a threat to the 'general public."*[31] The burden of criminalisation will fall disproportionately upon already marginalised and powerless communities, resulting in a vicious circle of stigma and blame, often exaggerated by sensationalist media reporting.

2.4. Adding to Stigma – HIV Exceptionalism

EATG notes that HIV is the only medical condition where criminal charges are routinely pursued when it alleged that an individual has acted in a way that may have exposed or transmitted the virus. **This is not rational and results in *"HIV Exceptionalism,"*** whereby HIV is treated differently than other medical conditions on the basis of being perceived as

29 *Ibid.*
30 *Ibid.*
31 *Supra*, note 4, at page 7.

"exceptional" and warranting different treatment.[32] As UNAIDS and the Global Commission on HIV and the Law both note, defining HIV-specific offences in fact violates international human rights standards.

EATG acknowledges the fact that advances in medicine since the initial discovery of HIV has significantly extended the life expectancy of infected individuals, and also significantly reduced the risk of transmission. Far from the *"death sentence"* that HIV was thought to be only a decade ago, it is now considered a chronic and manageable health condition.[33] There is no longer any justification for this exceptional treatment.

2.5. Shared Responsibility

HIV has been a known sexual transmission risk for 30 years. In the context of transmission through sexual contact, education campaigns promoting safer sex have existed around the globe for nearly as long.

EATG previously noted that the highest HIV transmission risk, according to current available data, is the result of transmission by persons in acute phase of the infection,[34] and by those who are not treated.[35] The overly broad use of the criminal law creates a false sense of security for those who are at risk of HIV. Relying on the person with HIV to disclose their condition or to unilaterally protect you is not a reliable HIV prevention method. This is why HIV prevention must be a shared responsibility when sex is between two consenting adults, As Justice Edwin Cameron points out, *"the risk is part of the environment, and practical responsibility for safer sex habits rest on everyone who is able to exercise autonomy in deciding to have sex with another."*[36] Criminalisation, which places the legal responsibility on the person living with HIV *"dilutes the public health message of shared responsibility between sexual partners."*[37] **EATG also notes that the idea of an *"HIV-negative"* status is erroneous, and individuals can only ever be *"HIV-positive"* or *"unknown"* due to the 'window period' during the seroconversion process**, **which delays the ability to test positive for HIV after infection**. This can be a helpful way of demonstrating that it is always important for both partners to be responsible for engaging in safer sex, despite recent tests indicating an HIV-negative result.

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[32] Mary Ann Bobinski, "HIV/AIDS and Public Health Law" in Tracey M. Bailey, Timothy Caulfield, Nola M. Ries, eds, *Public Health Law and Policy in Canada*, 2nd Ed, (Markham: LexisNexis Canada 2008), 179, at page 189.

[33] *Supra*, note 17, at page 7. See also note 8.

[34] *Supra*, note 5 at page 15.

[35] *Supra,* note 17 at page 3, citing Brenner BG et al (2007) "High rates of forward transmission events after acute/early HIV-1 infection" *Journal of Infectious Diseases* 195: 951-59, Marks G, Crepaz N and Janssen R (2006) "Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA" AIDS 20:1447-1450.

[36] Justice Edwin Cameron, "The Criminalization of HIV Transmission and Exposure," (Public Lecture hosted bythe Canadian HIV/AIDS Legal Network, Osgoode Hall Toronto, 12 -13 June 2009), at page 12.

[37] Supra, note 17, at page 4.

2.6. Disincentive for Testing and Treatment

Overly broad HIV criminalisaiton may provide an additional disincentive for individuals to be tested for HIV, for fear of criminal sanctions being imposed on them.[38] The result is that some people living with HIV will not know their status, will not receive appropriate, timely treatment, and will thus be more likely to contribute to new infections.

HIV testing and counseling are the most effective ways to reduce new HIV infections as it is the most significant determinant of risk behaviour.[39] An individual receiving a positive test result will then receive counseling, including information about treatment and reducing transmission risks through treatment adherence as well as through behavioural changes.[40] Nevertheless, **EATG considers that behaviour change alone is simply not possible without broader linkages to other social and structural determinants of health**, **and without a person with HIV having dignity to begin with**. Therefore, **EATG does not want to suggest that once diagnosed a person with HIV can easily change their behaviour, or that people living with HIV are simply perceived as vectors of transmission**.

It is now established that the use of ART can reduce the viral load in people living with HIV to such a point that the risk of transmission during unprotected anal, oral or vaginal sex is "extremely low".[41] Antiretroviral therapy has also been shown to reduce HIV transmission among people who inject drugs.[42] This supports the **EATG`s view that voluntary, informed and timely testing and treatment are highly effective means of reducing the transmission of HIV**. Moreover, a universal 'test and treat' strategy is projected to reduce new infections by 95% within 10 years and to reduce HIV prevalence to less than 1% within 50 years.[43] **However, EATG does not support the idea to use treatment alone as a prevention strategy in Europe and Central Asia without an enabling and supportive legal environment and until universal access to uninterrupted life-long treatment is available to all people living with HIV who first require it for their own health.**

Further, advances in recent years in the use of Post-Exposure Prophylaxis (PEP) suggest that a person potentially exposed to HIV taking prophylactic drugs within a certain period following the exposure has a significant reduced likelihood of being acquiring HIV.[44] **EATG expresses concern that fear of prosecution might work as a disincentive for a person with HIV to**

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[38] *Supra*, note 4, at page 24.

[39] *Supra*, note 5, at page 15.

[40] *Ibid.*

[41] Cohen MS "Prevention of HIV-1 Infection with Early Antiretroviral Therapy", New England Journal of Medicine, 2011 35:493-505. See alsoThe British HIV Association (BHIVA) and the Expert Advisory Group on AIDS (EAGA) Position statement on the use of antiretroviral therapy to reduce HIV transmission, January 2013. Available at: http://www.bhiva.org/the-use-of-ART-to-reduce-HIV-transmission.aspx

[42] Wood E, Kerr T, Marshall B, Li K, Zhang R, Hogg RS, Harrigan PR, Montaner JSG. Longitudinal community plasma HIV-1 RNA concentrations and incidence of HIV-1 among injecting drug users: prospective cohort study. BMJ 2009;338:b1649.

[43] Granich RM, Crowley S, Vitoria M, et al. Highly active antiretroviral treatment for the prevention of HIV transmission. J Int AIDS Soc 2010 13: 1.

[44] *Supra*, note 32, at page 215, citing David K. Henderson & Julie L. Gerberding, "Prophylactic zidovudine after occupational exposure to the human immunodeficiency virus: an interim analysis" (1989) 160 J. Infect. Dis. 321.

disclose their HIV-positive status following sex that may have risked exposure – thus placing their partner at unnecessary risk by reducing the likelihood that PEP - the most effective way to reduce transmission following potential exposure - will be sought.

EATG is concerned with the fact that the disincentive to known one's status created by overly broad HIV criminalisation places the wider community at risk. More people living with HIV will be unaware of their status, and will not receive treatment. Lack of knowledge of one's status and being highly infectious due to not being treated are the two most common reasons for new HIV infections. Further, the health of the community is compromised by the greater likelihood that individuals who may benefit from PEP will not be informed of their need to do so, for fear on the part of the HIV-positive individual that they will face criminal sanctions for their role in exposing another person to HIV. **EATG notes that the goal of health protection and promotion is clearly compromised by the disincentives that result from a policy of overly broad HIV criminalisation**.

3. Overview of Major Legal Advances in European Jurisdictions

In light of above-mentioned concerns, a number of European countries have begun, in the last few years, to review their laws and practice in this area.[45]

Between 2005 and 2007, the Supreme Court of the Netherland closely examined scientific evidence of sexual transmission risk and found that the per-act risk of unprotected sex does not create a 'considerable chance' of transmission. This substantially narrowed the scope of the law. As a result, only intentional HIV exposure or transmission is now a crime.[46]

In January 2008, leading Swiss HIV experts published an article stating that people living with HIV on effective antiretroviral therapy who have an undetectable viral load for at least six months and have no other sexually transmitted infections are non-infectious.[47] This scientific statement has led to important discussions in scientific and legal communities worldwide. In 2009, the Geneva Court of Justice quashed a lower court's conviction of a man on HIV exposure charges following expert testimony from one of the authors of this "Swiss statement" regarding the significant reduction of risk of HIV transmission when taking effective antiretroviral treatment.[48] Geneva's Deputy Public Prosecutor, who had called for the appeal, told Swiss

[45] For an overview of recent positive developments see GNP+/HIV Justice Network. Advancing HIV Justice: A progress report of achievements and challenges in global advocacy against HIV criminalisation, 2013. Available at: http://www.hivjustice.net/advancing See also: UNAIDS, "Countries questioning laws that criminalize HIV transmission and exposure" 26 April 2011.

[46] van Kouwen W and Bruinenberg K. *Supreme Court of the Netherlands, Criminal Division. HIV Transmission: Criminalisation.* J. Crim. L. 70: 485-489, 2006.

[47] Vernazza P *et al* "Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle", *Bulletin des médecins suisses* 89 (5), 2008.

[48] S v. S and R, Geneva Court of Justice, February 23, 2009.

newspaper, *Le Temps*: "On ne condamne pas les gens pour des risques hypothétiques" ("One shouldn't convict people for hypothetical risks").[49]

In 2008, the England and Wales Crown Prosecution Services (CPS) produced policy and legal guidance on "Intentional or reckless sexual transmission of infection" which sets out how prosecutors should handle allegations of HIV transmission.[50] The guidelines assist prosecutors in making appropriate decisions on HIV and STI-related cases and provide detailed advice on evidential and other matters. In April 2012, similar guidance for prosecutors was adopted in Scotland.[51] Both sets of guidance include reference to reduced infectiousness on effective antiretroviral treatment.

In February 2011, the Danish Justice Minister suspended the HIV-specific law of Denmark that has reportedly been used to prosecute 18 individuals since its inception. In support of his decision, the Minister noted that HIV can no longer be considered life threatening because, for people living with HIV in Denmark who are on treatment, HIV has become a manageable chronic health condition.[52]

In March 2013, the Swiss Federal Supreme Court ruled that HIV infection may no longer be automatically considered a serious assault, due to improved outcomes in life expectancy on antiretroviral therapy. The ruling in effect overruled the Federal Court's own jurisprudence that held that HIV infection is a serious injury that qualifies as serious assault and allows a finding of serious assault only if the facts of the case warrant. It thus imposes a duty on lower courts to determine in every case brought before them whether the transmission or attempted transmission qualifies as common assault under article 123 or rather as serious assault under article 122 of the criminal code.[53]

4. What should be the Narrow and Focused Role of the Criminal Law?

EATG argues for a narrow and limited approach to the use of criminal law which should be used only in cases of malicious, intentional HIV transmission.

First and foremost, **EATG recommends the use of general criminal law rather than HIV-specific statutes to deal with truly blameworthy cases (i.e malicious and intentional) of HIV transmission**. This is consistent with the recommendations of both UNAIDS and the Global Commission on HIV and the Law who argue that in order to ensure an effective, sustainable

[49] Arsever S "Soigné, un séropositif échappe aux poursuites" *Le Temps*, 24 February 2009.
[50] Crown Prosecution Service "Legal guidance on intentional or reckless sexual transmission of infection."
[51] COPFS Sexual Transmission or Exposure to Infection - Prosecution Policy
[52] HIV Justice Network. Denmark: Justice Minister suspends HIV-specific criminal law, sets up working group. 17 February 2011.
[53] HIV Justice Network. Switzerland: Swiss Federal Supreme Court rules that criminal HIV exposure or transmission is no longer necessarily a serious assault.

response to HIV that is consistent with human rights obligations, countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law. Although general criminal laws can be applied to a wide variety of situations involving potential or actual HIV exposure, and to HIV transmission, several countries in Europe and Central Asia have HIV-specific laws (including Armenia, Azerbaijan, Czech Republic, Georgia, Kazakhstan, Moldova, Montenegro, Poland, Romania, Serbia, Slovakia and Uzbekistan). Several other countries have laws that relate specifically to the spread of disease (e.g. Austria, Norway and Sweden). A number of new overly broad HIV-specific criminal laws have recently been introduced in Eastern Europe and Central Asia (including Albania, Kyrghyz Republic, Moldova, Turkey and Turkmenistan). [54]

Repealing HIV-specific laws, or laws that have only been used for HIV, and then using general laws may, however, lead to other problems, such as trying to fit the 'risk' and 'harm' of HIV into laws not meant to deal with sexual disease transmission. Rather than criminalising HIV transmission, most of these statutes criminalise behaviour that may or may not risk HIV transmission. This lessens the perception that the ailment is being criminalised, and instead focuses on the alleged wrongful conduct of the individual.[55] However, in an attempt to fit the "harm" of non-disclosure, exposure or transmission into current legal definitions, many jurisdictions may inappropriately characterise the risks and/or harm of these acts, despite the key scientific and medical developments regarding the significant impact of HIV treatment on transmission risk, morbidity and life expectancy.[56]

As a result**, EATG's position is that non-disclosure alone should not attract criminal liability as it undermines personal autonomy in decision-making, and does not reflect the personal responsibility of both partners to engage in safer sex**. **There should be no prosecution, conviction or penalty applied in relation to HIV non-disclosure or HIV exposure in the absence of actual transmission of HIV. In addition, behaviours that are proven to reduce the risk of HIV transmission, specifically practicing safer sex** (i.e the use of a condom or relying on an low or undetectable viral load, or both), **should not to be criminalised**, which also accords with the 2013 UNAIDS guidance note. UNAIDS stresses the importance of, *"sound data regarding the risk levels of various activities should guide the determination of what is considered a 'significant' risk of HIV transmission for the purposes of criminal liability."*[57]

Transmission of HIV should be subject to criminal sanction in very limited situations only. To ensure an effective, sustainable response to HIV that is consistent with human rights obligations, both UNAIDS and the Global Commission on HIV and the Law recommends law

[54] GNP+. 2010 Global Criminalisation Scan Report. See also: Report of the Global Commission on HIV and the Law, "Risks, Rights & Health" (2012).

[55] *Supra*, note 4, at page 9.

[56] World Health Organization (2010) Antiretroviral therapy for HIV infection in adults and adolescents. Recommendations for a public health approach, 2010 revision. See also: Cohen MS "Prevention of HIV-1 Infection with Early Antiretroviral Therapy", New England Journal of Medicine, 2011 365:493-505.

[57] *Supra*, note 4, at page 9. UNAIDS is concerned with prosecutions for acts that represents no risk, or insignificant risk, of HIV transmission thus upcoming UNAIDS guidance on criminalization calls upon: ensuring that charges/sentences reflect actual risk and harm of actions; treating like risk/harms alike; ensuring any criminal prosecution is based on evidence on how HIV is, is not transmitted.

enforcement authorities not prosecute people in all cases of HIV non-disclosure or exposure (without transmission) as well as cases of HIV transmission where malicious intent cannot be adequately proven. Prosecution may be appropriate only in exceptional situations involving an unequal relation between adults (e.g. rape, other cases of coercion, certain situations involving minors) or where there is proactive deceit (where there are no mitigating factors, such as fear of violence or mental health issues, such as denial) on the strict proviso that there was a genuine malicious intention to transmit HIV and it can be adequately proven that such transmission occurred.

The way the criminal law should be used in the situations described above should be limited to charges other than murder or attempted murder. Assault or bodily harm, for example, could be effectively used in these situations, but only where actual harm has occurred.[58] In other words, **if there's any place for criminalising a particular transmission of HIV, it should only be in circumstances where HIV was intentionally selected as a weapon of assault and that this weapon caused the harm intended**. The causal link between HIV infection and death is arguably becoming more and more remote. The WHO characterises HIV as a chronic manageable condition, which, among the people with access to treatment, can lead to a full life.[59] The 2013 UNAIDS guidance note also states that charges of "murder", "attempted murder" and "assault with a deadly weapon" are not appropriate, as HIV no longer means an untimely death. In the face of long-term beneficial treatment outcomes, equating HIV with death adds to the stigma associated with HIV.

The practical problems associated with pursuing criminal charges must also be considered in determining the appropriate role for criminal law. The most significant of the practical problems is to **ensure that scientific and factual elements meet requirement of proof of causation beyond a reasonable doubt,** as also stated in the 2013 UNAIDS guidance note. Obtaining proof beyond a reasonable doubt is an extremely complex undertaking. Demonstrating that the accused was actually the source of the complainant's infection also requires evaluating the complainant's sexual history. The use of complainants' sexual history by the defense raises a host of privacy and other concerns, and it is an area in which extreme care ought to be taken. **Prosecutors and triers of fact must be vigilant not to *"blame the victim"*** by failing to apply standard requirements for criminal liability to people charged (intent, causation and proof), or by using the complainant's sexual past as a means of exculpating the wrongful conduct of a defendant. Likewise, the difficulty of obtaining accurate scientific evidence indicating the direction of transmission ought not to justify the dilution of evidentiary standards

[58] In Sweden, for example, HIV exposure and transmission are prosecuted using crimes against "life and health" laws, including: inflicting "bodily injury", "gross assault" (if it "constituted a mortal danger or whether the offender inflicted grievous bodily harm or severe illness or otherwise displayed particular ruthlessness or brutality") or "creating danger to another" (if, through "gross carelessness [a person with HIV] exposes another to mortal danger or danger of severe bodily injury or serious illness"). Brottsbalken [BrB] [Criminal Code] 3:5 (Swed.) (maximum sentence of two years). Finland uses assault laws to prosecute both HIV exposure and transmission. Condom use and disclosure may limit the possiblity of being prosecuted, but case law has not established acceptable levels of risk, nor established that consent to unprotected sex via disclosure is an affirmative defence (The Criminal Code of Finland, Chapter 21, Sections 5 (Assault) and 6 (Aggravated Assault).

[59] *Supra*, note 5, at page 7.

in such cases, and rather, should reflect the fact that **criminal charges ought not to be pursued where there is a lack of evidence**.[60]

In order to ensure that the narrow focus of the criminal law for malicious, intentional HIV transmission is maintained, **it is important for law enforcement officials, prosecutors and the judiciary to be well informed of the appropriate legal limits to criminalisation**. Education about HIV transmission and the risks associated with certain behaviours is an important part of this. The WHO stresses that **accurate information is required in criminal cases involving HIV transmission**. Information in relation to the fallibility of phylogenetic testing, for example, presented to prosecutors and the judiciary, can assist in both prosecutorial discretion and reducing the likelihood of convictions based on fallible scientific proof of transmission.[61]

Finally, EATG supports the recommendation of the Global Commission on HIV and the Law that the convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and non-intentional transmission must be reviewed in the light of the latest scientific and medical evidence, and the latest guidance from UNAIDS.

[60] Few jurisdictions explore, if transmission is alleged, the full complement of evidence in determining that the complainant was actually infected by the defendant even in those that do, limitations of scientific evidence regarding proof that the defendant infected the complainant are rarely fully investigated, understood or examined in court.

[61] *Supra*, note 5, at page 16.

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