Meeting Report
Geneva, Switzerland

31 August – 2 September 2011

EXPERT MEETING ON THE SCIENTIFIC, MEDICAL, LEGAL AND HUMAN RIGHTS ASPECTS OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION

NOTE TO THE READER

The present report benefits from the Concluding Remarks made by Michael Kirby, former Justice of the High Court of Australia, at the Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-disclosure, Exposure and Transmission (the Expert Meeting) convened by the UNAIDS Secretariat in Geneva on 31 August to 2 September 2011. The full version of his Concluding Remarks is available at http://bit.ly/kirbyunaids. UNAIDS is grateful to him for allowing the use of some of his remarks for the present report.

The report also benefits from information, evidence and analyses found in two research papers commissioned by the UNAIDS Secretariat for the Expert Meeting, namely: (a) *Criminalisation of HIV Non-disclosure, Exposure and Transmission: Background and Current Landscape* and (b) *Criminalisation of HIV Non-disclosure, Exposure and Transmission: Scientific, Medical, Legal and Human Rights Issues*. Readers are advised to consult these papers for further discussion on the issues raised in this report.

DISCLAIMER

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I BACKGROUND

1. Since the early years of the HIV epidemic, many countries, particularly high-income countries, have prosecuted individuals under the criminal law (either HIV-specific or existing criminal law) for HIV non-disclosure, exposure and/or transmission. The majority of prosecutions appear to have taken place in North America, Western Europe, and Australia and New Zealand.[1] In recent years, many developing countries have also adopted HIV-specific laws that criminalise HIV non-disclosure, exposure and/or transmission, although there are insufficient data yet as to whether they are in fact prosecuting significant numbers of cases.[2]

2. Over the years, the Joint United Nations Programme on HIV/AIDS (UNAIDS) and many others involved in the response to HIV have raised public health, legal and human rights concerns regarding the overly-broad criminalisation of HIV non-disclosure, exposure and transmission. These include:
   a) Prosecutions for acts that represent no risk, or insignificant risk, of HIV transmission;
   b) Prosecutions that do not appear to be based on an understanding of the aetiology of HIV transmission or the latest scientific developments regarding HIV;
   c) Prosecutions of individuals who have used condoms or followed other HIV prevention messages for safer sex;
   d) Failure to apply standard requirements for criminal liability such as intent, causation and proof, to people charged under these offences;
   e) Application of excessive penalties to people found guilty under these offences;
   f) Risk that members of marginalised communities may be more subject to prosecution;[3] and
   g) Media coverage that is based on and fuels public misunderstanding about HIV and increases stigma against people living with HIV.

3. In spite of these concerns, many high-income countries continue to prosecute, and may even be increasing the number of prosecutions, under these laws. The potential and actual negative impact of overly-broad criminalisation of HIV non-disclosure, exposure and transmission on individuals, public health and communities remains a cause of alarm.[4] In light of these concerns, a number of countries have begun, in the last few years, to review their laws and practise in this area (e.g. Denmark, Finland, Guinea, Norway, Switzerland and United States).[5]

4. In order to ensure that the application of criminal law to HIV non-disclosure, exposure and transmission is limited to truly blameworthy cases and does not undermine HIV prevention and treatment public health goals, the UNAIDS Secretariat has undertaken to examine the latest and most critical medical and scientific data, as well as legal concepts that should inform criminal law and practice in this area.[6] A key component of this work was to convene this Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-

[1] Global Network of People Living with HIV (2010) *The Global Criminalisation Scan Report 2010: Documenting trends, presenting evidence.* Available at http://www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf.

[2] For instance, in sub-Saharan Africa, some 20 countries have passed HIV-specific criminal statutes in the last 5 years. Eba P (2008) "One Size Punishes All: A critical appraisal of the criminalisation of HIV transmission", *ALQ* Sept-Nov 2008. Available at http://www.aln.org.za/downloads/ALQ%20Criminalisation.pdf. See also International Planned Parenthood Federation, GNP+ and ICW (2008), *Verdict on a Virus: Public Health, Human Rights and Criminal Law.* Available at http://www.ippf.org/NR/rdonlyres/D858DFB2-19CD-4483-AEC9-1B1C5EBAF48A/0/VerdictOnAVirus.pdf.

[3] GNP+ and Terrence Higgins Trust (2005) *Criminalisation of HIV transmission in Europe: A rapid scan of the laws and rates of prosecution for HIV transmission within signatory States of the European Convention of Human Rights*. Available at http://www.gnpplus.net/criminalisation/rapidscan.pdf.

[4] For an overview of the potential and actual negative impacts of overly-broad criminalisation of HIV non-disclosure, exposure or transmission, see UNAIDS (2002) *Criminal Law, Public health and HIV transmission: A policy options paper* pp 23-27. Available at http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf.

[5] For an overview of recent positive developments on the criminalisation of HIV transmission or exposure, see UNAIDS, "Countries questioning laws that criminalize HIV transmission and exposure" 26 April 2011. Available at http://www.unaids.org/en/resources/presscentre/featurestories/2011/april/ 20110426criminalisation.

[6] This work has benefitted from the financial support of the Government of Norway.

disclosure, Exposure and Transmission (the Expert Meeting). The present report describes the proceedings and outcomes of this meeting.

5. UNAIDS' work in this area is a critical part of its efforts to advance human rights and gender equality in the HIV response as outlined under the UNAIDS' *Strategy 2011-2015: Getting to Zero* which provides as its vision: zero new infections, zero discrimination and zero AIDS-related deaths.[7]

II METHODOLOGY AND OBJECTIVES OF THE MEETING

6. The Expert Meeting brought together some 60 leading scientists, medical practitioners, legal experts and civil society representatives to discuss the scientific, medical, legal and human rights aspects of criminalisation of HIV non-disclosure, exposure and transmission. The meeting adopted a methodology that combined various approaches:
   a) *Multi-disciplinary*: The Expert Meeting was informed by specialists across several disciplines, relevant sciences, technologies and medical practices; experts in social and political sciences; and legal academics and practitioners, including prosecutors and judges.
   b) *Participation of people living with HIV*: The principle of meaningful involvement of people living with HIV in policy and programme formulation lies at the foundation of the HIV response. It is a gauge of inclusiveness and of the quality of policies and programmes.[8] Several participants at the Expert Meeting were persons openly living with HIV. Their perspectives on HIV, shaped by their personal experience of HIV-related issues, greatly enriched the discussions.
   c) *International perspectives*: Participants came from a range of countries and international agencies (UNAIDS, UNDP, OHCHR and WHO). The meeting focused on high-income countries because the vast majority of prosecutions for HIV non-disclosure, exposure and transmission have occurred in these countries, and therefore it is the law and practice of these countries that are at issue.
   d) *Diversity*: There was a diverse range of expertise present at the meeting, including government experts from public health agencies and prosecutorial offices. It was noted, however, that individuals who support a strong role for the criminal law in the context of HIV non-disclosure, exposure and transmission were under-represented.

7. The unique combination of these methodologies, perspectives and expertise ensured the quality of discussions at the meeting. Participants also benefitted from two reference documents prepared for the meeting. These papers were entitled: (a) *Criminalisation of HIV non-disclosure, exposure and transmission: background and current landscape* and (b) *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*. Together, these papers provided participants with an overview of recent legal developments in all regions of the world. The papers also highlighted key considerations relating to risk, harm, intent, defences, proof and penalties in the context of criminalisation of HIV non-disclosure, exposure and transmission and alternatives to the criminal law.

8. The aforementioned approach and reference materials were aimed at ensuring that the meeting achieved its objectives, namely to:
   a) Review and examine together the relevant scientific, medical and public health data on HIV-related harm and risk, causality and proof of HIV transmission, as well as the impact of recent breakthroughs in HIV prevention and treatment;
   b) Analyse how these scientific and medical issues should influence legal concepts and practices currently being implemented by police, prosecutors and courts;

[7] UNAIDS (2010) *Getting to zero: 2011-2015 Strategy*. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/JC2034_UNAIDS_Strategy_en.pdf.
[8] UNAIDS (2006) *Policy Brief: The Greater Involvement of People Living with HIV (GIPA)*. Available at http://data.unaids.org/pub/BriefingNote/2007/jc1299_policy_brief_gipa.pdf.

c) Provide input to inform the development of materials that build on the position taken by the 2008 UNAIDS and UNDP *Policy Brief on Criminalisation of HIV Transmission*[9]; and
d) Identify current and future best practice to more effectively address these issues.

III RENEWED ATTENTION TO THE CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION

9. For years, many stakeholders, including UNAIDS, have attempted to address concerns raised by the continued overly-broad criminalisation of HIV non-disclosure, exposure and transmission. The second International Consultation on HIV/AIDS and Human Rights organised by UNAIDS and the Office of the High Commissioner for Human Rights (OHCHR) discussed the issue in September 1996. The *International Guidelines on HIV and Human Rights* which were adopted by that consultation recommended that:

> "Criminal and/or public health legislation should not include specific offences against the deliberate or intentional transmission of HIV, but rather should apply general criminal offences to those exceptional cases. Such applications should ensure the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties."[10]

10. In 2002, UNAIDS commissioned a policy options paper on the issue.[11] The policy options paper identified guiding principles and policy considerations that should inform policy makers on criminalisation of HIV non-disclosure, exposure and transmission. It also identified possible alternatives to the use of criminal law.

11. UNAIDS and UNDP convened an expert meeting in November 2007 to address the criminalisation of HIV non-disclosure, exposure and transmission.[12] The meeting led to the development of a *Policy Brief on the Criminalisation of HIV Transmission*[13] published in 2008 that, among other recommendations, urged States to:
    a) Avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission where transmission has actually occurred;
    b) Issue guidelines to limit police and prosecutorial discretion in the application of the criminal law; and
    c) Ensure that any application of general criminal law is consistent with international human rights obligations (particularly the rights to privacy; to the highest attainable standard of health; freedom from discrimination; equality before the law; and liberty and security of the person).

12. The first Global Parliamentary Meeting on HIV/AIDS, organised by the International Parliamentary Union (IPU) in 2007 further recommended that:
    "Before rushing to legislate ... we should give careful consideration to the fact that passing HIV-specific criminal legislation can further stigmatise persons living with HIV; provide a disincentive to HIV testing; create a false sense of security among people who are HIV-

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[9] UNAIDS & UNDP (2008) *Policy Brief: Criminalisation of HIV Transmission*. Available at: http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalisation_en.pdf.

[10] See UNAIDS and Office of the High Commissioner for Human Rights (OHCHR), *International Guidelines on HIV and Human Rights*, 2006 Consolidated edition, Guideline 4(a), p 29. Available at http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf.

[11] UNAIDS (2002) *Criminal Law, Public health and HIV transmission: A policy options paper*. Available at http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf.

[12] UNAIDS, *International consultation on the criminalisation of HIV transmission: Summary of main issues and conclusions*, 31 October -02 November 2007. Available at http://data.unaids.org/pub/Report/2008/20080919_hivcriminalisation_meetingreport_en.pdf

[13] See note 9 above.

negative; and rather than assisting women by protecting them against HIV infection, impose on them an additional burden and risk of violence or discrimination."[14]

13. The view of most participants at the 2011 Expert Meeting was that existing policy documents, particularly the 2008 *Policy Brief on the Criminalisation of HIV Transmission,* continues to provide relevant policy guidance for countries on this issue. They cautioned against taking positions that would make it more acceptable for countries to use the criminal law in the context of HIV non-disclosure, exposure or transmission when earlier international policy, including the 2008 *Policy Brief*, clearly advise that the criminal law should be limited to cases where there is intent to transmit HIV and actual transmission of HIV occurs.

14. Participants also acknowledged that, in addition to current overly-broad criminalisation of HIV non-disclosure, exposure and transmission, there were other reasons for renewed attention to this issue, including: (a) the need to clarify certain aspects of the 2008 *Policy Brief*, (b) the significance of recent scientific, medical and legal developments to the issue, and (c) the importance of expanding guidance and renewing dialogue with policy-makers, prosecutors and the judiciary:

    a) Need to clarify aspects of the 2008 Policy Brief: Participants noted that the 2008 *Policy Brief* and earlier guidance documents did not fully address a number of important questions including:

    i. While the 2008 *Policy Brief* recommended that countries should avoid HIV-specific criminal laws as both unnecessary and discriminatory, it did not address the fact that, in most jurisdictions, relevant general criminal laws could be applied, and in fact are being applied in an uninformed and overly-broad manner, encompassing behaviours far less blameworthy than the intentional transmission of HIV. For instance, a broad range of general criminal laws are being applied to HIV non-disclosure, exposure and transmission with many different interpretations of intent, harm, and risk. The charges laid under these laws include: "terroristic threats", "physical or sexual assault", "poisoning", "infliction of grievous bodily harm", "attempted murder" and "murder".[15]

    ii. Because the common law offence of "assault" can be sufficiently constituted by placing another person in *fear* of an act of violence or intrusion upon that person's body, many jurisdictions have used this offence to prosecute people for merely "exposing" someone to the risk of HIV infection, even where actual infection could not or does not occur.

    b) Significance of recent developments: In the past few years, there have been a number of scientific, medical, legal and human rights developments that warrant re-examination of the practices, laws, policies and guidance relating to HIV and the criminal law. These include:

    i. In January 2008, leading Swiss HIV experts published an article stating that HIV-positive individuals on effective antiretroviral therapy who have an undetectable viral load for at least 6 months and have no sexually transmitted infections are non-infectious.[16] This scientific statement has led to important discussions in scientific and legal communities worldwide. It was used as evidence by a Geneva court that ruled that there could be no criminal case relating to HIV transmission against an individual who is in such a situation (see further discussion below).[17]

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[14] International Parliamentary Union (IPU) "First Global Parliamentary Meeting on HIV/AIDS, Parliaments and leadership in combating HIV/AIDS, Final conclusion", Manila, Philippines, 28-30 November 2007, para 17.

[15] For a discussion on the nature of charges brought against individuals for HIV non-disclosure, exposure and transmission, see Bernard EJ, Hanssens C, Roose-Snyder B, Scarborough S and Webber D *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*, 2011.

[16] See 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.

[17] See S v. S and R, Geneva Court of Justice, February 23, 2009. Available at http://www.aidslex.org/site_documents/CR-

ii. The results of the recent HTPN 052 study examining the impact of antiretroviral treatment on HIV transmission confirmed observational studies that had suggested that treatment significantly reduces HIV transmission. The study found a 96 percent reduction in heterosexual HIV transmission in sero-discordant couples where the HIV-positive person started treatment at CD4 count level above the 350 cells/mm3 recommended by the World Health Organisation[18].[19]

iii. There is greater understanding of the limitations of phylogenetic analysis as "definitive evidence of the route, direction, and timing of HIV transmission".[20]

iv. In 2010, Norway established a Law Commission to look into issues related to criminalisation of transmission of communicable diseases that are hazardous to public health, and to assess and propose amendments to the existing legislation. Section 155 of the Penal Code of 1902 criminalises the wilful or negligent infection or exposure to communicable disease that is hazardous to public health, but it has mainly been applied to HIV-related cases. Similar provisions have been adopted in the new Penal Code of 2005, which is not yet in force.

v. In June 2010, UNDP launched the *Global Commission on HIV and the Law* that is currently reviewing the evidence on key HIV-related legal issues and will make recommendations for an improved legal response to the HIV epidemic. A part of its focus involves issues relating to the criminalisation of HIV non-disclosure, exposure and transmission.[21]

vi. The US National HIV and AIDS Strategy, adopted in July 2010, raised concerns about HIV-specific laws that criminalise HIV transmission/exposure in at least 32 US states and territories and calls on *"State legislatures [to] consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches to preventing and treating HIV"*.[22]

vii. On 15 July 2011, the England and Wales Crown Prosecution Services (CPS) updated its policy and legal guidance on "Intentional or reckless sexual transmission of infection" which sets out how prosecutors should handle allegations of HIV transmission.[23] The guidelines assist prosecutors in making appropriate decisions on HIV and STI-related cases and provide detailed advice on evidential and other matters.

c) *Expanding guidance*: In this context, UNAIDS and others perceived a need to expand guidance and renew dialogue with key policy-makers and officials engaged with laws, policies, and practices relating to the criminalisation of HIV non-disclosure, exposure and transmission. The Expert Meeting presented a unique opportunity to examine the latest developments and issues involved, and to provide the UNAIDS Secretariat and other stakeholders with recommendations that would promote an application of criminal law to HIV non-disclosure, exposure and transmission that serves justice, without jeopardising public

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0066E.pdf. For discussions of the case, see, among others, Bernard E "Swiss court accepts that criminal HIV exposure is only 'hypothetical' on successful treatment, quashes conviction" 25 February 2009. Available at http://www.aidsmap.com/Swiss-court-accepts-that-criminal-HIV-exposure-is-only-hypothetical-on-successful-treatment-quashes-conviction-updated/page/1433648/.

[18] World Health Organization (2010) *Antiretroviral therapy for HIV infection in adults and adolescents. Recommendations for a public health approach, 2010 revision*. Available at http://whqlibdoc.who.int/publications/2010/9789241599764_eng.pdf.

[19] Cohen MS "Prevention of HIV-1 Infection with Early Antiretroviral Therapy", *New England Journal of Medicine,* 2011 365:493-505. http://www.nejm.org/doi/full/10.1056/NEJMoa1105243.

[20] See Bernard E et al *The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission*, February 2007. Available at http://www.nat.org.uk/Media%20library/Files/PDF%20Documents/HIV-Forensics.pdf. For further discussion, see also Bernard E "Claims that phylogenetic analysis can prove direction of transmission are unfounded, say experts", 24 November 2010. Available at http://www.aidsmap.com/news/Claims-that-phylogenetic-analysis-can-prove-direction-of-transmission-are-unfounded-say-experts/page/1556716/

[21] For further information on the Global Commission on HIV and the Law, see http://www.hivlawcommission.org.

[22] Government of the United States of America, *National HIV/AIDS Strategy for the United States,* July 2010, pp 36-37. Available at http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf.

[23] See Crown Prosecution Service "Legal guidance on intentional or reckless sexual transmission of infection". Available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

health objectives and fundamental human rights. It was also intended that these recommendations would be presented to a High Level Policy Consultation on HIV and the Criminal Law in February 2012 in Norway to enable further dialogue with those who can influence policy in this context.

IV KEY ISSUES DISCUSSED AND ELEMENTS OF POLICY FORMULATION

15. The discussions at the meeting were articulated around the main elements to be taken into consideration in determining criminal liability in relation to HIV non-disclosure, exposure and transmission. These elements are: risk, harm, intent, defences and proof.

16. In most criminal law systems, for an individual to be found guilty of an offence, the prosecution must establish that the person engaged in: (a) a *prohibited conduct*, with (b) a *specific state of mind* that (c) *caused harm* to another or society as a whole. The elements of risk, harm, intent, defences and proof that were discussed at the Expert Meeting are based on these three generally accepted components of criminal offences.

17. The Expert Meeting also discussed alternatives to the criminal law as a response to HIV non-disclosure, exposure or transmission. Discussions on these elements and alternatives led to the identification of key points to guide policy formulation. These key points were further reviewed in working groups on day 3 of the Expert Meeting. At the end of the discussions on each of these themes in this report, the reader will find a summary of the key points that meeting participants considered relevant for purposes of policy formulation. Although consensus was not reached on all key points during the meeting, these points were generally viewed as critical considerations for policy and law-makers.

Understanding the threshold of risk sufficient to warrant criminal prosecution

18. Criminal penalties are a society's highest level of sanction and are generally attached to serious misconduct and serious potential or actual harm. Thus, criminal liability is usually reserved for an act (or omission) that has been committed against an individual or society that either potentially or actually so threatens, endangers or harms that it warrants punishment by the State. In relation to the criminalisation of HIV non-disclosure, exposure and transmission, this raises the issue of whether an act, such as HIV exposure or transmission, or an omission, such as non-disclosure of known HIV-positive status, has placed another person at such undue or unwarranted risk of harm that the person committing the act should be punished by criminal sanctions. Generally, in criminal prosecutions, the risk of such acts must rise to a certain level to be subjected to criminal sanctions.

19. Many participants stressed their concern that, in various jurisdictions, laws and prosecutions for HIV non-disclosure, exposure and transmission often fail to take into account evidence concerning the scientific estimation of the level of risk associated with specific acts and practices relevant to HIV transmission. An analysis of court cases and practices prepared for the meeting showed that in many jurisdictions, courts have considered a wide range of acts as representing "significant", "substantial," "unjustifiable", "serious" or "likely" risk of HIV infection, even though such characterisations are not supported by current scientific and medical evidence.[24] Such prosecutions have involved acts that represented no risk or insignificant risks of HIV infection such as spitting, throwing urine or faeces, non-penetrative sex, sex with a condom or sex with undetectable viral load. These sorts of prosecutions appear to indicate either a lack of understanding of how HIV is transmitted or fear or prejudice regarding HIV and those living with it.

20. Assessing the level of risk of HIV infection from various sexual and other acts rests primarily on medical and scientific evaluation of a complex combination of circumstances and elements that

[24] For further discussion, see Bernard EJ, Hanssens C, Roose-Snyder B, Scarborough S and Webber D *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*, 2011, pp 13-16.

are considered to influence (i.e. heighten or reduce) the risk of HIV transmission. Such circumstances and elements discussed at the meeting included:

a) The type of sexual activity: vaginal, anal, oral, other;
b) The roles of sexual partners during penetrative sex, i.e. insertive or receptive;
c) Whether or not a male or female condom or other effective barrier to prevent HIV exposure during penetrative sex has been used correctly and consistently;
d) Whether or not the penis of the insertive partner was circumcised;
e) The presence or absence of other sexually transmitted infections (STIs) in the individuals involved;
f) The concentration of HIV (viral load) in the bodily fluid to which the at-risk person has been exposed; and
g) Whether or not the HIV-positive person was on effective antiretroviral therapy (ART) which significantly reduces the concentration of genital secretions of HIV to potentially non-infectious levels.

21. While in-depth discussions on the risk of HIV transmission resulting from each one of the aforementioned circumstances or elements did not occur at the meeting, many participants felt that all of these elements should be fully understood and taken into consideration when determining whether there was sufficient level of "risk" to warrant the initiation of prosecution. Up-to-date knowledge of the latest HIV research and evidence are key to this understanding. For instance, a combined analysis of all studies of HIV transmission risk undertaken to date in high-income countries estimates that the average per act risk for a woman who engages in unprotected vaginal intercourse with a chronically infected, untreated HIV-positive man is 0.08% (1 in 1,250).[25] The average per act risk for a man who has unprotected vaginal intercourse with a chronically infected, untreated HIV-positive woman is estimated to be 0.04% (1 in 2,500).[26]

22. Participants noted the inherent difficulty in estimating and fixing (in abstract and general terms) the level of risk associated with specific sexual acts because transmission risk is determined by the various factors described above and because scientific understanding of the impact of these factors is constantly evolving. Nevertheless, they called for all relevant medical and factual elements to be taken into consideration when evaluating the specific risk of HIV transmission when a case is being considered for prosecution and in any subsequent court proceedings.

23. Particular attention was devoted to discussing the impact of ART on the risk of HIV transmission. The 2008 Statement by the Swiss Federal Commission for AIDS-related issues reached beyond the scientific and medical community. It signalled a call for re-assessing criminal liability for those individuals meeting the "requirements" of the statement.[27] The release in early 2011 of the HPTN 052 trial results further demonstrated – this time with the strength of randomised controlled trial evidence – that ART contributed to a significant reduction of the risk of HIV transmission.[28] This study found a 96% reduction in infectiousness among discordant couples where the HIV positive person is on treatment.[29]

24. Participants agreed that such clear evidence of the impact of treatment on infectiousness cannot be ignored by the legal and judicial systems. It should be acknowledged and legal consequences should be drawn from such findings. The decision by the Geneva Court of

[25] See Boily MC *et al* "Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies" *Lancet Infectious Diseases,* 2009, 9: 118-29.
[26] As above.
[27] The findings of the 2008 statement applied to HIV-positive individuals on effective antiretroviral therapy who have an undetectable viral load for at least 6 months and have no sexually transmitted infections. See 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.
[28] Cohen MS "Prevention of HIV-1 Infection with Early Antiretroviral Therapy". *New England Journal of Medicine,* 2011 365:493-505. http://www.nejm.org/doi/full/10.1056/NEJMoa1105243.
[29] As above.

Justice to acquit an individual charged with HIV exposure on the basis of the "Swiss Statement" was cited as an example of how prosecutorial and judicial decisions should be guided by medical and scientific evidence (see box below).

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 the "Swiss statement" regarding the significant reduction of risk of HIV transmission when taking effective antiretroviral treatment.[30] Geneva's Deputy Public Prosecutor, who had called for the appeal, told Swiss newspaper, *Le Temps*: "On ne condamne pas les gens pour des risques hypothétiques" ("One shouldn't convict people for hypothetical risks").[31] A primary purpose of the statement, according to one of its authors, was to prevent further prosecutions under Article 231 of the Swiss Criminal Code.[32]

25. Participants noted several scientific, evidential and ethical questions relating to treatment's impact on viral load for the purpose of determining criminal liability for HIV exposure or transmission. One scientific issue concerned the relevance of the results of HPTN 052 to anal sex.[33] Trial participants in the HPTN 052 study were mainly heterosexual individuals, with only 3% of men who have sex with men involved in the study. HTPN 052 does not appear to have specifically focused on the efficiency of early initiation of treatment between men who have sex with men, even though the study results did not show any significant variation in efficacy of earlier treatment between homosexual and heterosexual couples. Further, there were questions about whether there is a threshold viral load level below which transmission is not possible. To date, such a threshhold has not been conclusively established.[34] Evidential concerns were related to the fact that viral load at the time of the sexual act(s) in question may be difficult, if not impossible, to establish because long periods of time may separate the occurrence of the act(s) and prosecution. During this time period, the individual's response to treatment may have changed, resulting in either an increase or decrease in viral load. Ethical concerns centred around the fairness for those who have access and respond to treatment to escape criminal liability on the basis of low viral load; whereas those who do not have access to treatment or those who are not responding to HIV treatment cannot. Although participants did not reach any position on these issues, the discussion indicated that they are important elements that deserve further exploration.

26. Participants also considered whether the duration of a sexual relationship is a relevant factor in terms of the risk element in criminal liability. Evidence suggests that the majority of sexually transmitted HIV infections result from transmission within longer-term sero-discordant sexual partnerships that involve several sexual acts over time, thereby increasing the risk of transmission. Although HIV can be transmitted through a single sexual act, the odds are extremely low.[35] Although participants did not reach a clear agreement on this issue, some felt that the duration of sexual relations may be a relevant factor in assessing the level of risk of HIV transmission. Therefore, evaluating criminal liability for HIV non-disclosure, exposure or

[30] S v. S and R, Geneva Court of Justice, 23 February 2009. Available at http://www.aidslex.org/site_documents/CR-0066E.pdf.
[31] See Arsever S "Soigné, un séropositif échappe aux poursuites" *Le Temps*, 24 February 2009. Available at http://www.letemps.ch/Page/Uuid/e7e224fa-0289-11de-8b0c-b7ae8853512b/Soign%C3%A9 un_s%C3%A9ropositif_%C3%A9chappe_aux_poursuites.
[32] Regan Hoffmann interview with Bernard Hirschel on 12 February 2008 at the 15th Conference on Retroviruses and Opportunistic Infections (CROI) in Boston. Available at http://www.aidsmeds.com/articles/hiv_condoms_virus_2151_14010.shtml.
[33] Wilson DP *et al* "Relation between HIV viral load and infectiousness: a model-based analysis", *Lancet* 372:314-320, 2008.
[34] Wilson DP "Data are lacking for quantifying HIV transmission risk in the presence of effective antiretroviral therapy" *AIDS* 23 (11): 1431-1433, 2009.
[35] For a discussion of per act risk of HIV transmission, see Bernard EJ, Hanssens C, Roose-Snyder B, Scarborough S and Webber D *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*, 2011, pp 16-17.

transmission within longer-term sexual relations may differ from that in the context of casual sexual encounters.

27. Overall, most participants agreed on the need for a case-by-case analysis of the risk relevant to specific sexual acts in terms of the factors outlined above. They emphasised that the legal and judicial systems do not always understand and rely on accurate information on these factors in terms of assessing the significance of risk. An example of reliance on scientific and medical evidence relating to the risk of specific sexual acts exists in England and Wales where the Crown Prosecution Services' (CPS) decision to press charges is to be informed, among others, by medical standards and guidance on risk.[36] In particular, the guidance states that:

> "Where someone who is HIV+ is receiving treatment, one of the effects is a reduction of the amount of the virus in their system (in some cases this may result in an undetectable viral load). In these circumstances, the prospect of the infection being transmitted to another is potentially significantly reduced. It may be argued that taking medication may, in some circumstances, be as effective a safeguard as, for example, the use of a condom in reducing risk and therefore negating recklessness. Prosecutors should take great care with such cases however, as medical opinion on the reduction of the risk of infection is not settled, and evidence of the actual taking of medication in accordance with medical instructions may not be as clear-cut as evidence of the use of other safeguards such as condoms."[37]

28. On the basis of the above discussions, the following key points were noted for consideration in policy guidance on risk in the context of the criminalisation of HIV non-disclosure, exposure and transmission:
    a) To warrant criminal prosecution, the risks of HIV exposure or transmission should be significant.
    b) Any legal concept of "significant risk" in the context of HIV non-disclosure, exposure or transmission should be evidence-informed and include only instances where the level of risk of HIV transmission is substantiated by epidemiological evidence.
    c) Risk of transmission should not be considered "significant", "substantial", "unjustifiable", "serious" or "likely" by the law when there is correct use of condoms, no vaginal or anal penetrative sex or the person living with HIV has an undetectable or very low viral load.
    d) As there is no significant scientific or medical risk of HIV transmission from biting (regardless of whether or not there is blood in saliva), from scratching or hitting, or from spitting or throwing bodily fluids or excretions (such as urine and faeces), no court of law should find any legally significant risk of HIV-related harm from these acts.
    e) There is a need to more uniformly define the elements of "significant" or "substantial" risk in scientific and legal terms in the context of the transmission of sexually transmitted infections, including HIV, to guide public health officials, law enforcement and the courts.

Re-defining harm and its implications in the context of HIV infection

29. Preventing, deterring and punishing harm to others or to society is a key justification of the criminal law. Where an act (or omission) and its results are harmful to others, there is a clear rationale for invoking the criminal law. However, in most societies, not all possible harms fall within the purview of the criminal justice system. Each society determines a threshold of harm for the purpose of criminal liability. In the context of HIV, the question is whether the harm resulting from HIV non-disclosure, exposure or transmission is significant enough to constitute harm for the purpose of criminal liability.

30. The facts that statutes exist which consider HIV non-disclosure, exposure and transmission to be offences and that prosecutions are brought against individuals in relation to such acts or

[36] See Crown Prosecution Service "Legal guidance on intentional or reckless sexual transmission of infection". Available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.
[37] As above.

omissions indicate that the harm involved in HIV non-disclosure, exposure and transmission is considered by many legal and judicial systems as significant enough to warrant recourse to the criminal law. Participants at the meeting discussed whether such characterisation was appropriate in light of current scientific and medical evidence relating to infection by HIV.

31. Participants discussed how, prior to the discovery of effective HIV treatments in the mid-1990s and their subsequent rollout, infection with HIV almost always led to AIDS-related illnesses and an early death. This is still the case where HIV treatment is not available or affordable and/or where people are diagnosed too late to benefit from treatment.

32. However, where antiretroviral therapy is accessible or soon to be accessible, HIV infection is no longer the "death sentence" that it represented earlier in the HIV epidemic. The discovery and subsequent use of new classes of antiretroviral drugs in the mid-to-late 1990s resulted in dramatic reductions in HIV-related illnesses and deaths in contexts where these drugs were available.[38] Recent cohort and modelling studies from high-income countries suggest that, if people are diagnosed in a timely manner and begin taking ART when recommended,[39] they may go on to have a near-normal lifespan.[40] [41] Thus, for the majority of people living with HIV who have access to treatment, HIV has become a chronic but manageable health condition.

33. Participants expressed concerns that in many cases, decisions to prosecute, court rulings and media coverage of HIV non-disclosure, exposure and transmission cases still consider HIV a "death sentence" with some characterising an HIV-positive person's bodily fluids – from saliva to semen – as "deadly weapons"[42] [43].

34. Participants largely agreed, however, that calls for an appropriate and evidence-informed characterisation of the harm of HIV infection should not underestimate the impact of HIV infection on those who are living with HIV. Although, with treatment HIV has become a manageable health condition, several participants pointed out that it remains a major health condition with significant physical, financial, emotional, social and other impacts.

35. Participants called for the criminal law to reflect an evidence-informed and accurate understanding of HIV and its impact on individuals living with HIV. The fact that treatment renders HIV a chronic manageable health condition means that HIV infection can no longer be reasonably characterised as a "death sentence", "murder", "attempted murder", "manslaughter"

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[38] For example, the age-adjusted HIV-related death rate in the United States dropped from 17 per 100,000 people in 1995 to about five per 100,000 people by the end of the decade. US Centers for Disease Control and Prevention "Trends in Annual Age-Adjusted Rate of Death due to HIV Disease, United States, 1987−2006", available at http://www.cdc.gov/hiv/topics/surveillance/resources/slides/mortality/index.htm. See also Mocroft A *et al* "Changes in the cause of death among HIV-positive subjects across Europe: results from the EuroSIDA study" *AIDS* 16(12) 1663-71, 2002.

[39] National and local guidelines on the recommended time to start treatment can vary but most high-income countries' guidelines currently recommend starting treatment at a CD4 count < 350-500 cells/mm3.

[40] Van Sighem A *et al* "Life expectancy of recently diagnosed asymptomatic HIV-infected patients approaches that of uninfected individuals" Seventeenth Conference on Retroviruses and Opportunistic Infections, San Francisco, abstract 526, 2010. (Reported on Aidsmap.com)

[41] May M *et al* "Impact on life expectancy of late diagnosis and treatment of HIV-1 infected individuals: UK CHIC" Tenth International Congress on Drug Therapy in HIV Infection, Glasgow. Abstract O233, 2010.

[42] *Campbell,* 2009 WL 2025344; *Weeks*, 1992 832 S.W.2d 559. *Campbell v. State* presented the Texas Court of Appeals an opportunity to revisit whether or not the saliva of an HIV-positive person could be considered a "deadly weapon". In 1992, the same court in Weeks v. State upheld the attempted murder conviction of an HIV-positive man for spitting on a prison guard, allegedly believing that his saliva could kill the guard. In Weeks the defendant was sentenced to life in prison because he had two former felony convictions. In both the Weeks and Campbell cases the state medical witness testified that there was a theoretical possibility of HIV transmission through saliva, and Campbell's 35 year prison sentence was upheld.

[43] *Mathonican v. State* 194 S.W.3d 59, 6 (Tex. App. 2006). Citing *Najera v. State*, 955 S.W.2d 698, 701 (Tex. App. 1997). The court found that evidence of unprotected sex by an HIV-positive man, even if there was no evidence of ejaculation by defendant, is sufficient for a finding that penis and seminal fluids are deadly weapons under the aggravated assault statute.

or "attempted manslaughter" under the criminal law. Rather, in terms of harm, HIV infection should be recognised for what it is and treated equally with comparable health conditions, such as hepatitis B and C infection, chronic heart disease, and some forms of cancers or diabetes. A number of recent developments highlighted at the meeting suggest that some countries are beginning to re-characterise the harm of HIV infection along these lines. These included:

a) In October 2010, the Manitoba Court of Appeal in Canada concurred with an expert opinion that "with the advances thus far achieved in HIV care, many, if not most, persons infected with HIV who receive and are compliant with optimal care will die of a non-AIDS cause".[44]
b) In February 2011, the Danish Justice Minister decided to suspend 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.[45]

36. Because the harm resulting from a particular act activates the criminal law process and determines the sentencing, it is expected that a more accurate characterisation of the harm of HIV infection or exposure would translate into a more appropriate charge and a more proportionate sentence for any person who is found guilty under these statutes. This is important as analyses of sentences and penalties for HIV exposure or transmission reveal much higher penalties compared to sentences for comparable or more serious offences such as driving under the influence of alcohol (which is arguably comparable to HIV exposure) or vehicular homicide (which is arguably a more serious offence than HIV transmission). For example, the maximum prison sentence for vehicular homicide in the US state of Georgia is one year[46], whereas the maximum sentence under its HIV-specific criminal law is 20 years. [47] It is also noteworthy that, in many countries that criminalise HIV non-disclosure, exposure or transmission, transmission of other sexually transmitted infections (e.g. hepatitis B, C, human papilloma virus, genital herpes simplex-2, etc) – some of which are more easily transmitted than HIV – are never or very rarely prosecuted.

37. On the basis of the above discussions, the following key points were noted as critical elements for consideration for policy guidance on harm in the context of the criminalisation of HIV non-disclosure, exposure and transmission:

a) HIV infection is a chronic health condition/disease that can be treated but not cured; with access to timely treatment, a person living with HIV can be expected to live a near-normal lifespan.
b) HIV infection does not necessarily prevent a person from living a full, productive and satisfying life.
c) HIV infection, however, does constitute a serious health condition with physical, psychological and social consequences. It should therefore be treated by the law in ways that are proportionate to comparable health conditions (e.g. hepatitis B and C infection, chronic heart disease, some cancers, some diabetes).
d) Because HIV infection is a chronic treatable health condition, it is inappropriate for criminal prosecution of HIV non-disclosure, exposure or transmission to involve charges of "murder", "attempted murder", "grievous bodily harm", "reckless homicide" or "terroristic acts".
e) "Harm" related to non-disclosure or exposure, where no transmission has occurred, should not be considered significant enough to warrant prosecution under the criminal law.

[44] See R v. Mabior (CL), 2010 MBCA 93, para 142. Available at http://www.canlii.ca/en/mb/mbca/doc/2010/2010mbca93/2010mbca93.html.
[45] See Bernard EJ "Denmark: Justice Minister suspends HIV-specific criminal law, sets up working group" 17 February 2011. Available at http://criminalhivtransmission.blogspot.com/2011/02/denmark-justice-minister-suspends-hiv.html.
[46] GA. CODE ANN. § 40-6-393(C) (2011) (2nd degree vehicular homicide).
[47] GA. CODE ANN. § 16-5-60(D) (2011) (person with HIV who knowingly uses bodily fluids against a correctional officer).

Relevance of intent and its definition

38. In most criminal prosecutions, an element of the case that must be proved by the prosecution is the *mens rea* or the state of mind (intent) of the accused. Participants at the meeting discussed the fact that an analysis of existing legal provisions and practices relating to HIV non-disclosure, exposure and transmission shows great variety across countries and jurisdictions in the standards and requirements relating to state of mind. In some jurisdictions, it is required to prove deliberate or purposeful intent to expose others to, or to transmit, HIV to secure a conviction. In other jurisdictions, there is no requirement for proving any state of mind. Rather, intent to cause harm is inferred from knowing one's HIV-positive status and subsequently engaging in the prohibited conduct. Once the prosecution proves the knowledge of status and the conduct, the accused is found guilty. Such an interpretation of intent effectively creates strict liability for HIV non-disclosure, exposure or transmission, disallowing any consideration of the risk and harm factors described above. Between these two positions, there are those jurisdictions that require the states of mind of "negligence" or "recklessness" for criminal liability for HIV non-disclosure, exposure or transmission.

39. Participants discussed how strict liability, which abolishes proof of intent, facilitates prosecutions in the context of the criminalisation of HIV non-disclosure, exposure or transmission, usually through HIV-specific laws. Proof of intent is often the main challenge in securing a guilty verdict in HIV-related criminal cases. Aside from HIV-related cases, strict liability is virtually never applied to crimes involving adult consensual behaviour. In the US, for instance, strict liability is most commonly applied to regulatory offenses – those in which occupational safety, anti-pollution laws, fish and gaming regulations have been violated. It is also applied to situations in which the action and related harm are viewed as so consistently dangerous or harmful (e.g. driving under the influence of alcohol or drugs, pornography involving minors) that proof of intent to harm is deemed unnecessary. Many participants expressed serious concern that laws that criminalise HIV non-disclosure, exposure and transmission without requiring intent as an element of the crime highlight HIV in a discriminatory manner and are not based on an appropriate assessment of the level of harm involved. These participants called for such laws to be re-considered.

40. Many participants expressed their support for the position of the 2008 *Policy Brief* regarding state of mind in relation to the criminalisation of HIV transmission. The 2008 *Policy Brief* states that criminal liability should be limited to "cases of intentional transmission i.e. where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it". UNAIDS' position is further supported by the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health who recently noted that laws criminalising HIV transmission should only be used when there is "intentional [and] malicious" transmission, and are inappropriate otherwise.[48]

41. The main point of contention in relation to this discussion was whether states of mind below this threshold of intentional, including recklessness and negligence, should attract criminal liability. For some participants, limiting criminal liability to deliberate or intentional acts renders laws and prosecutions for HIV non-disclosure, exposure and transmission close to meaningless because of the difficulty in proving deliberate intent in HIV-related cases. They therefore called for an application of the criminal law against individuals who act knowingly, negligently and recklessly. One problem with this approach is that courts define these terms in many different ways. For purposes of discussion at the meeting, these states of mind were defined as follows:

[48] Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, p 58, 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.

a) *Knowingly*- the person acts with the knowledge that harm is nearly certain to occur (acts in a certain way with the knowledge that HIV transmission is near-certain).[49]
b) *Recklessly*- the person is aware of, but disregards, a substantial, unjustifiable risk of harm (acts in a certain way with the knowledge of substantial risk that is consciously disregarded).
c) *Negligently*- the person was not, but should have been, aware of a substantial, unjustifiable risk that harm would occur (i.e. *ought* to have known that his/her conduct poses a substantial risk).[50]

42. The majority of participants at the meeting felt that criminal liability should not be extended beyond cases of deliberate or intentional HIV transmission. They felt that to broaden the scope of the criminal law beyond intentional transmission potentially exposes large numbers of people to possible prosecution who may not have been able to foresee their liability for such prosecution. It may also discourage HIV testing and disclosure for fear of prosecution.

43. On the basis of the above discussions, the following key points were noted for consideration as elements of policy guidance on state of mind (intent) in the context of the criminalisation of HIV non-disclosure, exposure and transmission:

a) Data indicate that most people living with HIV do not want, or intend, to transmit HIV when they engage in unprotected sex or have a pregnancy without taking steps to prevent vertical transmission.
b) No criminal prosecution for HIV non-disclosure, exposure or transmission should occur on the basis of strict liability, i.e. finding the defendant guilty if that person does not disclose a known positive HIV status and engages in acts deemed by legislators and courts to pose a risk of HIV exposure or transmission regardless of intent to harm.
c) Criminal prosecution of alleged harms that occur in the context of intimate relationships should require that the State proves the intention to cause harm – a culpable mental state.
d) Intent to transmit cannot be presumed or solely derived from knowledge of positive HIV status and/or failure to disclose HIV status.
e) Intent to transmit cannot be presumed or solely derived from intent to engage in unprotected sex or have a baby without taking steps to prevent mother-to-child transmission.
f) Proof of intent to cause harm in the context of HIV non-disclosure, exposure or transmission must involve the following elements: (i) knowledge of positive HIV status; (ii) purposeful action that poses a significant risk of transmission; and (iii) acting with the intent to do harm through exposure to/transmission of HIV.
g) Active deception regarding positive HIV status can be considered an element in establishing the required state of mind but is not necessarily dispositive on the issue.
h) No prosecution can proceed, for failure of the required state of mind, if the defendant:
   i. Did not know his/her positive HIV status;
   ii. Did not know how HIV is transmitted;
   iii. Reasonably believed the other person had consented to the risk;
   iv. Feared violence or other significant harm if s/he disclosed;
   v. Took reasonable measures to reduce risk by practicing safer sex (such as use of condoms for anal or vaginal sex, or by not engaging in anal or vaginal sex); or
   vi. Had undetectable or very low viral load and believed this rendered him/her uninfectious.

Available defences for charges for HIV non-disclosure, exposure and transmission

44. Defences accepted to date in laws and court cases relating to HIV non-disclosure, exposure and transmission vary between countries and jurisdictions. Accepted defences include:

[49] It is worth noting that in some jurisdictions "knowing" and "intentional" are treated as similar state of mind. This is the case for instance in South Africa. See South African Law Commission *Fifth Interim Report on Aspects of the Law relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour*, Project 85, 2001, pp 137-138. Available at http://www.info.gov.za/view/DownloadFileAction?id=123790

[50] These definitions are adapted from Model Penal Code, § 2.02, General Requirements of Culpability.

a) Disclosure of HIV-positive status;
b) Consent to the risk and/or harm by the person exposed;
c) Use of condoms or the practice of other safer sex methods to reduce the risk of HIV infection; and
d) An undetectable viral load.

45. In some jurisdictions, these elements are alternative defences, while in others, they are considered cumulative, meaning that each one of them must exist for a person to avoid criminal liability.

46. Some participants noted that, though generally referred to as defences, these elements are in some jurisdictions part of the offence itself. Where these elements are part of the offence, the burden of proof lies on the prosecution, which must establish that the defendant failed to perform the required act, such as disclosing his/her positive HIV status, using a condom or obtaining the consent of the sexual partner. Several participants expressed preference for the onus of proof being placed in this way on the prosecution, an approach that tends to protect individuals against the possibility of illegitimate legal action.

Undetectable viral load as a defence

47. Participants discussed whether an undetectable viral load and/or adherence to ART should be more widely considered a defence for individuals charged with HIV non-disclosure, exposure or transmission.[51] As discussed above, recent scientific and medical developments, particularly the results of the HTPN 052 study, confirm a 96% reduction in infectiousness among discordant couples where the HIV positive person is on treatment. [52]

48. Many participants were of the view that the reduction in HIV transmission risk with effective antiretroviral therapy must be appropriately reflected in the legal and judicial response to HIV, including by considering it a defence to charges of HIV non-disclosure, exposure and transmission. They noted that, given the strength of the evidence and the fact that many people living with HIV are aware of the impact of treatment and rely on it in their sexual relations, it would seem inappropriate and unjust for courts of law not to allow such a defence. Several participants closely involved with HIV-related counselling and support services pointed to anecdotal evidence suggesting that the implications of treatment, now confirmed by the HTPN 052 findings, in relation to infectiousness and criminal liability, have been topics of discussion between people living with HIV, their medical practitioners and their counsellors. Thus, participants felt that failing to recognise HIV treatment and undetectable or very low viral load as defences runs contrary to current evidence-informed HIV prevention messages and could contribute to confusion among people living with HIV.

Disclosure and consent as defences: morality, privacy and criminal responsibility

49. Participants discussed how the criminalisation of HIV non-disclosure, exposure and transmission has transformed knowledge of one's HIV status and disclosure of it into a central feature of the criminal law. In several jurisdictions and countries, non-disclosure of one's HIV-positive status prior to a sexual act or any act that might be considered to carry a risk of HIV

[51] In addition to the Geneva Court of Justice finding that undetectable viral load was a valid defence to HIV exposure charges, there have been similar developments in Canada. In the case of *R. v. Mabior [C.L.]*, 2010 M.B.C.A. 93 (10 October 2010) the Manitoba Court of Appeal found error in the lower tribunal's ruling that only a combination of low viral load and proper condom use could reduce infectiousness enough to excuse non-disclosure of HIV status. It held that either factor, by itself, could bring the potential injury from intercourse below the threshold of "significant risk of bodily harm" prohibited by the statute. It undertook separate analyses of the several complainants' contentions, sustaining some of the defendant's convictions and reversing others depending on the specifics of each complainant's interactions with the defendant. The Crown has since appealed this ruling, and the case will be heard by the Supreme Court of Canada along with a similar case (R v DC) in early 2012.

[52] Cohen MS "Prevention of HIV-1 Infection with Early Antiretroviral Therapy" *New England Journal of Medicine,* 2011 365:493-505. http://www.nejm.org/doi/full/10.1056/NEJMoa1105243.

infection is sufficient to incur criminal liability regardless of any other elements, such as actual risk, the intent to cause harm, and whether HIV was transmitted. Such laws or provisions are generally referred to as "HIV disclosure laws" as they rely on disclosure, or the lack thereof, as the sole determinant of criminal liability. In other countries, HIV disclosure is considered either an element of the crime or a defence available for the person accused. Participants discussed the complexities of human behaviour related to disclosure of HIV status.

50. The meeting was presented with research suggesting that, although many people expect their sexual partners to disclose their positive HIV status, non-disclosure appears to be common. In the 2006 UK Gay Men's Sex Survey, 75% of respondents said they expected HIV-positive partners to disclose their positive status prior to sex.[53] About one third of all HIV-positive respondents, however, said that they had never disclosed their status to a sex partner.[54] The same survey showed that 50% of all respondents had never inquired about someone else's HIV status and never disclosed their own. Only 12% always did both.

51. Participants further discussed how disclosure of one's positive HIV status is a personal decision that is affected by many factors, including the view that no risk is posed by the act in question, denial, gauging trust, fear of rejection and threat of violence. They noted that, in certain situations, disclosure may lead to threats to physical safety, especially where there is unequal power in a relationship. In this regard, the requirement of disclosure may affect women disproportionately, as they are more likely to be subject to abuse, violence and stigma if they reveal their HIV status.[55] Under such circumstances of duress, it does not appear reasonable to expect or require disclosure.

52. Many participants expressed several concerns about "HIV disclosure laws", because these laws do not take into consideration fundamental issues relating to risk, harm and intent, as well as other elements which affect disclosure. They pointed out that such laws fail to take into account the fact that HIV transmission can be avoided in many ways without disclosure and that disclosure in and of itself does not protect against HIV transmission. Participants also pointed out that to disclose or not disclose is an aspect of the human right to privacy. Though the right to privacy may be abridged to protect the public health, many participants felt that, in situations where there is no risk or harm, disclosure should not be required. Thus, some participants expressed the view that disclosure should not be necessary in circumstances where there is no risk of harm or no harm either because steps to avoid transmission had been taken by the HIV-positive person or the acts involved pose no risk. Many participants recommended that HIV disclosure laws be re-considered to ensure due regard to all scientific, medical, legal and human rights elements that are pertinent to HIV transmission.

53. However, participants also noted that the emphasis on an obligation to disclose suggests that many people and legal systems consider that there is a moral duty to disclose one's HIV status prior to sex to avoid exposing another to HIV without their knowledge or informed consent. This view considers that those who have sex without knowing their partner's HIV-positive status are making decisions under false pretences.

54. While agreeing that disclosure could legitimately represent a defence and the failure to disclose could constitute one element of the offence of HIV exposure or transmission (not the sole element as under "HIV disclosure laws"), many participants called for the law and the criminal justice system to appropriately delineate the conditions under which disclosure may be

[53] Weatherburn P *et al Multiple chances Findings from the United Kingdom Gay Men's Sex Survey 2006*. Available at http://www.sigmaresearch.org.uk/files/report2008c.pdf.
[54] As above.
[55] See Athena Network "10 Reasons why criminalisation of HIV transmission harms women", 2010. Available at http://www.athenanetwork.org/assets/files/10%20Reasons%20Why%20Criminalisation%20Harms%20Women.pdf. This document discusses, among others, the harm that women face in having their HIV status disclosed, including that HIV-positive women are ten times more likely to experience violence.

warranted or required. These participants felt that the requirement of disclosure should depend on the level of risk of HIV infection relating to certain acts. Thus, they felt that a blanket requirement of disclosure is not appropriate. In particular, disclosure should not be required in circumstances where individuals engage in acts that carry no or insignificant risk of HIV infection (e.g. anal or vaginal sex with a condom or non-insertive mutual masturbation). They also called for any requirement of disclosure to take into account factors such as fear of violence and other concerns relating to physical safety, as well as the fact that disclosure can take various forms, including implicit or coded disclosure.

55. Participants further discussed the issues raised by deception, that is, the act of lying about or failing to disclose one's positive HIV status when asked expressly and directly. Some participants felt that active deception about positive HIV status should be considered a significant element in a criminal prosecution. Other participants called attention to the fact that failure to disclose one's HIV-positive status, even when asked, may not indicate malice or intent to deceive, but may be associated with others factors such as those described above, a consequence of denial of one's HIV status or a result of mental health issues associated with HIV status or diagnosis. While this element was considered pertinent to the discussion on the state of mind, participants were not able to further explore it during the meeting.

56. Consent is closely associated with disclosure. It refers to the acceptance by the sexual partner of the risk of HIV infection inherent to a sexual or other act. Although under general criminal law in a number of jurisdictions, consent to harm does not prevent the possibility of prosecution, participants were of the view that it is very relevant in the context of criminalisation of HIV non-disclosure, exposure and transmission. Failing to recognise consent as a defence would subject all individuals living with HIV to the possibility of prosecution for HIV exposure or transmission, including those in sero-discordant relationships where one partner's positive status is known by the other partner. Many participants therefore expressed support for laws and practices in jurisdictions where consent has been treated as a defence.

57. Participants also discussed consent in the broader context of HIV prevention efforts and the treatment of other sexually transmitted infections. Some participants felt that, particularly in communities where HIV prevention messages emphasise shared responsibility, the person who is consenting to have unsafe sex (whether or not disclosure occurs) is broadly consenting to take on the health risks associated with sex, including HIV. These participants pointed out that this may be a reason why other sexually transmitted infections are often not brought to courts because society – and law enforcement agents – may consider these infections "an inherent risk of sexual contact". Participants underlined that, from a public health perspective, messages should be "practice safe sex or risk peril from sexually transmitted infections," given that large numbers of people who either do not know they are infected or will not disclose their infection. However, these participants also noted that the legal system does not necessarily base its decisions on public health goals.

58. On the basis of the above discussions, the following key points were noted as elements for consideration for policy guidance on disclosure and consent in the context of the criminalisation of HIV non-disclosure, exposure and transmission:
    a) Because the risk of HIV transmission can be made negligible by many means, including using a condom and having an undetectable or low viral load; because privacy is a human right; and because disclosure may place an HIV-positive individual at risk of physical, mental or social harm, disclosure of positive HIV status should not be required by criminal law, and non-disclosure alone should not be the basis for criminal prosecution.
    b) Disclosure of positive HIV status (whether explicit or reasonably implicit) should indicate that the necessary intent to cause harm (*mens rea)* does not exist.
    c) Since sex carries with it a variety of health risks, and since undiagnosed HIV infection cannot be disclosed, public health campaigns must emphasise the need for all sexually

active individuals to take steps to protect themselves from HIV and other sexually transmitted infections.

Proof

59. For an individual to be found guilty of an offence relating to HIV non-disclosure, exposure or transmission, a number of elements of the alleged crime must be proven, as they must be for any crime. These include: (a) proof of intent to do wrong; (b) proof of engaging in prohibited conduct to act on that intent; and (c) proof that the conduct resulted in or caused the intended or foreseeable harm.

60. While proof of intent and proof of engaging in a prohibited conduct rely mainly on factual evidence, proof of causation, especially in relation to *HIV transmission*, is increasingly based on evidence derived from medical and scientific methods. In the few jurisdictions that solely prosecute HIV transmission (as opposed to HIV non-disclosure or exposure), for individual A to be found guilty of HIV transmission to individual B, the prosecution has to establish that A actually transmitted HIV to B, that is, that it was A (not someone else) that caused the infection in B.

61. The discussions at the meeting focused on the available scientific methods used in the context of the criminal law to support the hypothesis of HIV transmission from one individual to another, particularly phylogenetic analysis. Phylogenetic analysis uses complex computational tools to create a hypothetical diagram (known as a phylogenetic tree) that estimates how closely related the samples of HIV taken from two individuals (e.g. complainant and defendant) are likely to be in comparison to other samples.

62. Participants noted that phylogenetic analysis can be an important forensic tool to refute or support the hypothesis that individual A infected individual B.[56] However, participants underlined that phylogenetic analysis does not eliminate the possibility that a third party may have passed HIV to someone else who then infected the complainant. Thus, phylogenetic analysis is not "HIV fingerprinting", and it is a misconception to think that it can prove that A infected B with the same sort of certainty as human genetic "fingerprinting".[57] Rather, to prove that A infected B, phylogenetic evidence should be used as one important piece of evidence that should be combined with other evidence, particularly the sexual histories of the complainant and his/her previous partners.

63. Participants agreed, however, that phylogenetic analysis can provide strong evidence that an individual cannot have been the source of HIV infection in another person. Where the samples are not closely related with a high degree of confidence, this is evidence enough to show that the defendant could not have infected the complainant. Consequently, there is enough reasonable doubt to allow the prosecution to drop the charges, or for the judge to recommend to the jury that they acquit. Experts in virology note that relying on phylogenetic analysis alone can only be considered "safe" in criminal HIV transmission cases when it is used to exonerate the accused.[58]

64. A key concern with current circumstances in which phylogenetic analysis is conducted is that the direction of infection (that is, who was infected first and then transmitted to the other person) is often assumed in criminal cases based on who tested HIV-positive first. Such assumptions often mean that the police and/or prosecution fail to examine the possibility that the complainant

[56] Learn GH and Mullins JI *The Microbial Forensic Use of HIV Sequences*, 2003. Available at http://www.hiv.lanl.gov/content/sequence/HIV/COMPENDIUM/2003/partI/Learn.pdf.
[57] Abecasis AB "Science in court: the myth of HIV fingerprinting" *The Lancet Infectious Diseases* 11 (2): 78 - 79, 2011.
[58] Pillay D *et al* "HIV phylogenetics: criminal convictions relying solely on this to establish transmission are unsafe" *British Medical Journal* 335: 460 – 461, 2007.

infected the defendant rather than the other way around, or as stated above, that other sexual partners may have also posed potential transmission risks.[59]

65. A number of jurisdictions that routinely use phylogenetic analysis as evidence in criminal cases – notably England and Wales, and Sweden – have now established that all sexual partners of the complainant(s) prior to their testing HIV-positive must be considered potential sources of HIV infection. In these countries, cases where past partners cannot be traced to provide samples for testing, or where the samples from past partners are also closely related to the complainant(s), have resulted in acquittal[60], dismissal[61], or abandonment.[62]

66. Participants also discussed the use of evidence on viral load and CD4 count to establish timing of HIV transmission. While noting that these could be useful elements when combined with other factual and scientific evidence, participants cautioned against the reliability of viral load and CD4 counts to estimate when someone was infected or how long they have been living with HIV. There is a great deal of individual variability in these measures at all stages of HIV infection and, therefore, no firm conclusions in terms of the timing of HIV infection can be drawn from such data. It is important that the limitations relating to such data and evidence be appropriately highlighted in court cases.

67. Participants further considered the validity and limitations of laboratory tests to estimate the likelihood of a recent infection in persons diagnosed as HIV-positive in order to establish timing of HIV transmission. It was noted that these tests – generally referred to as RITA tests (Recent Infection Testing Algorithm) – are important for estimating HIV incidence at the population level. However, concerns were raised about the serious limitations of such tests in the context of individual court cases.[63]

68. A further point of discussion concerned the use of medical records as evidence in HIV-related criminal cases. Investigations in the context of HIV non-disclosure, exposure and transmission cases generally focus on securing medical records that would normally be subject to heightened privacy protection. In proving their case, prosecuting authorities must obtain, through warrant or subpoena, relevant records of diagnoses, viral load trends, and a medical history that may include other sexually transmitted infections, as well as health care providers' notes about behavioural changes recommended to the defendant. Participants expressed concern that such

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[59] *Jacksonville Man Arrested for Criminal Transmission of HIV*, FirstCoastNews.com, 5 July 2010, http://www.firstcoastnews.com/news/local/story.aspx?storyid=158235 (In July 2010, a 39-year old, HIV-positive man was arrested after he allegedly had unprotected sex with a woman without disclosing his HIV status. The man's partner tested positive for HIV after she went for her yearly doctor appointment but it was not determined if any of her other sexual partners were HIV-positive.); Vince Tuss, *Assault Charges in HIV Case*, Star Trib. (Minneapolis), 25 March 2010, at 1B. (In March 2010, a 28-year old, HIV-positive man was charged with third-degree assault after he engaged in sexual intercourse with two men without disclosing his HIV status. At least one of the men tested positive for HIV a month after the encounter but no investigation was done to determine if another person could have exposed the complainant to HIV); *State v. Gonzalez*, 796 N.E.2d 12 (Ohio Ct. App. 2003), (the defendant was convicted of two counts of felonious assault for failing to tell his sexual partner, who tested positive for HIV, that he was HIV-positive. He was sentenced to sixteen years imprisonment and was required to register as a sex offender though no investigation was done to determine the source of the complainant's infection); *HIV Trial Hears Women May Have Contracted Virus from Other Men*, CP24, 20 February 2009, http://www.cp24.com/servlet/an/local/CTVNews/20090220/090220_HIV_trial/20090220/?hub=CP24Home (defendant accused and later convicted of transmitting HIV to 7 women. Crown relied on evidence that the infected women and the defendant shared the same subtype of HIV, but defense pointed out that another man with the same subtype of HIV had sex with two of the women).

[60] Carter M "Prosecution for reckless HIV transmission in England ends with not guilty verdict". Aidsmap.com, 9 August 2006.

[61] "HIV-Positive Doc Gets Jail for Sex", The Local, 21 June 2010 available at http://www.thelocal.se/27366/20100621/.

[62] Bernard EJ "UK: HIV transmission case dropped against gay Doncaster man. Criminal HIV Transmission", 19 May 2010.

[63] Bernard EJ *et al HIV Forensics II: Estimating the likelihood of recent HIV infection – implications for criminal prosecution*. NAT, London, July 2011. Available at http://www.nat.org.uk/Media%20library/Files/Policy/2011/RITA%20Testing%20Report.pdf.

practices are likely to decrease trust in the privileged nature of the relationship between patients and health care providers.

69. On the basis of the discussions above, the following key points were highlighted as elements for consideration for policy guidance on proof in the context of the criminalisation of HIV non-disclosure, exposure and transmission:
    a) Phylogenetic evidence alone is insufficient to establish beyond a reasonable doubt that one person infected another person.
    b) Phylogenetic evidence can establish conclusively that one person did *not* infect another person, but expert administration is necessary to ensure interpretable results.
    c) CD4 count, viral load and RITA evidence alone cannot establish beyond a reasonable doubt that the HIV infection occurred within a certain period of time.
    d) Expert witnesses must make the limitations of phylogenetic analysis, RITA and other scientific evidence clear to the judge, prosecution, defence and/or jury.
    e) Communications between defendants and healthcare workers should remain privileged to the extent afforded to these communications in other legal contexts.
    f) Healthcare workers' primary ethical and professional duty is to their patients, and blurring the lines between care provision and law enforcement can violate this duty and undermine the ability to maintain patient trust.
    g) Health care providers should refuse to release a patient's HIV-related records and information in the absence of patient authorisation or a court order.

Alternatives to overly-broad criminalisation of HIV transmission

70. Participants at the Expert Meeting discussed existing and potential alternatives to current overly-broad laws and law enforcement relating to HIV non-disclosure, exposure and transmission. The discussion initially focused primarily on two approaches, namely the use of prosecutorial guidelines and the use of public health measures that were presented as "case studies" for consideration by the participants.

71. Participants were presented with the case of the prosecutorial guidelines developed by the Crown Prosecution Service (CPS) in England and Wales, with the input of civil society organisations. The prosecutorial guidelines provide guidance to prosecutors regarding which cases should be subject to prosecution, i.e. according to English and Welsh law, those involving the intentional or reckless sexual transmission of infection.[64] The guidelines also address evidential, witness and victim care issues. For instance, the guidelines advise against bringing prosecutions against an individual in the following cases:
    a) "[T]here is evidence that the suspect took appropriate safeguards to prevent the transmission of infection throughout the entire period of sexual activity, and evidence that those safeguards satisfy medical experts as reasonable in light of the nature of the infection";[65]
    b) "[S]omeone who is HIV-positive is receiving effective antiretroviral therapy, one of the effects is a reduction of the amount of the virus in their system (in some cases this may result in an undetectable viral load). In these circumstances, the prospect of the infection being transmitted to another is potentially significantly reduced".[66]

72. These prosecutorial guidelines were viewed by participants as a positive attempt to circumscribe prosecution to truly blameworthy cases. Furthermore, police guidelines have subsequently been developed through a similar collaborative process. These guidelines provide

[64] See Crown Prosecution Service "Legal guidance on intentional or reckless sexual transmission of infection". Available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.
[65] As above.
[66] See note 64 above.

clear protocols for dealing with complaints, arrests, confidentiality and other sensitive issues relating to HIV. [67]

73. Ongoing efforts to adopt prosecutorial guidelines in the Canadian province of Ontario were also presented. As in the case of England and Wales, civil society organisations are playing an important role in the development of the prosecutorial guidelines in Ontario. Participants highlighted that a key to success in the adoption and implementation of such guidelines lies in ensuring that these processes are driven and owned by law enforcement agents and the judicial system.

74. The second case study presented to participants concerned the use of public health legislation in Australia to address behaviours that place others at risk of HIV infection. Under Australian public health provisions, individuals living with HIV who expose others to the risk of HIV infection may be subjected progressively to a variety of measures that increase in seriousness in proportion to need. The process is initiated when a physician contacts a public health office to express concern about a patient's behaviour. The case is referred to a panel comprised of sexual health physicians, epidemiologists and members of local organisations of people living with HIV. At level 1 of the procedure, the identified individual is provided with comprehensive counselling, education and support aimed at ensuring that the person understands the risk posed to others by his/her conduct. In the rare cases where the least restrictive measures do not prove successful, the panel may recommend increasingly coercive measures which at the highest stages may involve isolation or detention under public health orders. In some Australian jurisdictions, the ultimate measure under this process, if everything else fails, is to refer the individual to the police for prosecution. This model was described as one that focuses on public health approaches and is centred on the welfare of the individual living with HIV through an emphasis on counselling and support.

75. Many participants expressed reservations about the Australian model and other public health approaches that lead to restriction of individual rights. These reservations were related mainly to the following concerns:
    a) The standard for public health confinement is lower than that generally required under the criminal law. Public health law does not offer judicial guarantees and due process protections (including judicial review of public health measures). There is indeed evidence in some jurisdictions of the use of public health measures to confine individuals for up to several months or years without due process.
    b) Public health measures are sometimes used as an initial stage towards criminal prosecution for HIV-non disclosure, exposure or transmission. Elements from the public health process may be invoked as evidence in criminal court cases against individuals living with HIV.
    c) Using the public health system to focus on a few *diagnosed* individuals who are placing others at risk of HIV infection ignores the fact that many more *undiagnosed* individuals are also placing others at risk of HIV infection. The use of public health measures could affect trust in the health care providers who refer cases to public health officials in the first place and in the health care system more generally. Both may be perceived by people living with HIV as collaborating with police and prosecutorial authorities.

76. Participants therefore called for countries that apply public health measures involving deprivation of liberty to ensure that they meet relevant standards of due process and that they are subject to judicial review. They further emphasised the importance of ensuring that the use of public health powers in the context of HIV non-disclosure, exposure or transmission does not jeopardise relationships between patients and health practitioners.

[67] NAT and Association of Chief Police Officers (ACPO). *ACPO Investigation Guidance relating to the Criminal Transmission of HIV.* NAT, 2010. Available at: http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Police-investigations.aspx.

77. In addition to these two approaches, participants also discussed the merit of the civil law as an alternative to the criminal law for HIV non-disclosure, exposure or transmission. It was highlighted that in a number of jurisdictions, civil law suits have been instituted in relation to non-disclosure, exposure or transmission of HIV or other sexually transmitted infections.

78. Opinions were divided among meeting participants about the appropriateness of encouraging the use of civil, rather than criminal law, to pursue allegations of HIV non-disclosure, exposure or transmission. Some participants felt that criminal law should be applied only in the most blameworthy cases – those marked by intent to transmit and actual transmission. In lesser cases (involving negligence or recklessness), some participants were of the view that civil law could be invoked by the aggrieved individual.

79. Several participants warned against encouraging civil law suits as an "alternative" to criminal prosecution for HIV non-disclosure, exposure or transmission. They pointed that in most jurisdictions, civil remedies do not necessarily remove the threat of subsequent criminal charges. Indeed, elements and representations in civil law suits may be used and relied upon for criminal prosecution.

80. On the basis of the discussions above, participants noted the following key points as elements for consideration for policy guidance relating to possible alternatives to current approaches to the criminalisation of HIV non-disclosure, exposure and transmission:
    a) The criminal law should be reformed in ways that circumscribe its application in the context of HIV non-disclosure, exposure and transmission to clear parameters based on HIV-related scientific and medical evidence regarding risk, harm, proof and defences that are described above.
    b) Guidelines for prosecutors and police should be developed, through a participatory and inclusive process, involving all key stakeholders, to guide an evidence-informed and just application of the criminal law to HIV non-disclosure, exposure and transmission.
    c) Police, prosecutors, judges, defence attorneys and the media should benefit from basic sensitisation/training on HIV and relevant medicine/science.
    d) HIV prevention programmes should be expanded so that all people understand the routes and related probabilities of HIV transmission, know how to avoid HIV infection, and have access to the means, services and support by which to do so.
    e) HIV prevention programmes and the law should promote shared responsibility for sexual health and for avoidance of HIV infection.
    f) HIV prevention programmes should support people who test positive for HIV to become informed about how to protect others from infection, as well as how to protect themselves from legal liability on the basis of their HIV status, including through legal literacy and legal aid programmes.
    g) National HIV responses should include programmes on Positive Health, Dignity and Prevention[68] that provide comprehensive support to people living with HIV so that they have the skills and means by which to safeguard their health and well-being and those of others.
    h) For individual problematic cases, provision should be made for progressive public health responses to support behaviour change, including intensive counselling and support to the individual living with HIV, as well as attention to co-morbidities and social factors that exacerbate the behaviour.
    i) In countries where public health legislation may be invoked to restrict individual rights, judicial guarantees and due process protections should be made available to the individuals concerned.

[68] For information on the background, content and applications of Positive Health, Dignity and Prevention, see UNAIDS & Global Network of People Living with HIV, *Positive Health, Dignity and Prevention Technical Consultation Report,* 27-28 April 2009, Hammamet, Tunisia. Available at http://data.unaids.org/pub/Report/2009/20091128_phdp_mr_lr_en.pdf.

V- CONCLUSION AND WAY FORWARD

In conclusion, the following overall points emerged from the meeting:

The best available scientific and medical evidence should guide any recourse to the criminal law in the context of HIV.

81. The criminal law's response to HIV non-disclosure, exposure or transmission should be informed by the latest available scientific and medical evidence relating to the risk and harm of HIV infection. The merits and limitations of scientific methods used to prove or refute individual liability should be clearly understood by all actors of the criminal justice system.

82. Specific guidance for police, prosecutors and judges in the criminal justice system that provides clear directives based on the latest available scientific and medical knowledge on risk, harm and proof should be developed in consultation with members of the criminal justice system, lawyers, scientists, medical practitioners, representatives of civil society organisations and people living with HIV. Where available data or knowledge may be insufficient to guide decisions by the criminal justice system on specific aspects relating to risk, harm and proof, efforts should be made to encourage and fund further research.

Criminal law principles that define individual liability should be followed in cases relating to HIV, including treating like harms alike.

83. General criminal law principles which comprise foreseeability, certainty, clarity and proof beyond a reasonable doubt should be strictly followed in the context of criminalisation of HIV non-disclosure, exposure or transmission, as they are in all other criminal cases. High levels of prejudice against people living with HIV and misunderstandings about HIV should not lead to inappropriate application of criminal law concepts in relation to cases involving HIV.

84. The fact that treatment renders HIV a chronic manageable health condition means that HIV infection can no longer be reasonably characterised as a "death sentence", "murder" or "attempted murder" under the criminal law. Rather, HIV infection should be treated by the law in ways that are proportionate, in terms of charging and sentencing, with that of comparable health conditions or harms. "Harm" related to HIV non-disclosure or exposure, where no transmission has occurred, should not be considered significant enough to warrant prosecution under the criminal law.

Guidelines for police and prosecutors are needed to circumscribe appropriately the use of the criminal law in the context of HIV.

85. Guidelines for police and prosecutors can play a role in avoiding inappropriate application of the criminal law in the context of HIV. By providing clear guidance regarding cases in which investigation and court action are or are not warranted, such guidelines can be useful in reducing the overly-broad application of the criminal law to HIV non-disclosure, exposure and transmission. Such guidelines should state which acts should warrant criminal liability, under which circumstances, and what evidence is required and/or can be used in cases relating to non-disclosure, exposure or transmission of HIV and other infectious diseases.

86. Major determinants of the relevance and success of these guidelines in achieving their expected objectives rest on (a) whether their content is based on the best available scientific and medical evidence relating to HIV and (b) whether the process of their development has ensured the involvement of all key stakeholders, including actors of the criminal justice system, lawyers, scientists, medical practitioners, civil society organisations and representatives of people living with HIV.

87. In addition to these guidelines for investigators, prosecutors and judges in the criminal justice system, countries should also pay due attention to the minimum qualifications required for medical and scientific experts involved in HIV-related criminal cases, ensuring that their involvement is limited to their specific area of expertise.

HIV prevention, treatment, care and support efforts should not be undermined by the criminal law.

88. At a time where the world is calling for increased commitment to achieving universal access to HIV prevention, treatment, care and support by 2015, [69] it is important that countries ensure that laws and law enforcement do not become a barrier to this objective. Key successes in reducing HIV infections and in expanding access to HIV treatment are the result of the many years of sustained effort to advance evidence-informed policy and programmatic responses to HIV.

89. It is feared that these still fragile gains may be jeopardised by inappropriate and overly-broad enforcement of criminal law in respect to people living with HIV, which may result in mistrust and may deter people from seeking HIV prevention, treatment, care and support services.

90. Prosecution of HIV non-disclosure, exposure and transmission cases diverts already overstretched national resources. There is no evidence of the effectiveness of such prosecutions in preventing HIV transmission or in deterring individuals from engaging in acts that could lead to HIV exposure or transmission.

Education and sensitisation is needed for the law enforcement and general communities.

91. Recent cases relating to HIV non-disclosure, exposure and transmission have revealed widespread misconceptions and prejudices about HIV and people living with HIV. Thirty years into the HIV epidemic, people living with HIV are still perceived and depicted as "morally-lacking vectors of disease". Confusion and ignorance about the routes and associated likelihood of HIV transmission, the benefit of condoms, and the impact of treatment on life-expectancy and infectiousness contribute to fuelling prejudice by the public, the media and the criminal justice system against people living with HIV.

92. Addressing public and media misconceptions on HIV is therefore a key priority. Public education in relation to HIV and the criminal law should focus on:
    a) Providing accurate, nuanced information regarding HIV transmission risks, defining near-zero and low-risk, as well as higher-risk practices and behaviours, and explaining how available HIV prevention measures and tools (going beyond consistent and correct condom use to include effective antiretroviral therapy) may affect these risks;
    b) Promoting a pragmatic approach to preventing HIV transmission, highlighting that HIV prevention should be a shared responsibility. People should not base their decisions about condom use or other ways to reduce risk on the assumption that sexual partners already know their HIV status and that if they are HIV-positive, they will disclose it.
    c) Education campaigns that reach the general public, as well as campaigns tailored to all levels of the judicial and criminal/civil justice systems.

93. National AIDS programmes, as well as people living with HIV and their advocates, should prioritise legal literacy programmes, i.e. programmes that inform people living with HIV of their rights and the laws that are relevant in their lives. Legal literacy for people living with HIV is as important as treatment literacy. It is a first-line tool for defending against abusive prosecution for HIV non-disclosure, exposure or transmission.

[69] United Nations General Assembly *2011 Political Declaration on HIV/AIDS*. Available at http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2011highlevelmeetingonaids/

94. Finally, the Expert Meeting highlighted the importance of building on the discussions and key points from the meeting, as well as ensuring proper dissemination of the evidence presented. Participants therefore called on UNAIDS to undertake the following:
    a) Coordinate a prominent focus on the science and law of the criminalisation of HIV non-disclosure, exposure and transmission at the International AIDS Conference in Washington DC in 2012;
    b) Design a communication and outreach strategy to ensure that policy considerations from the meeting are accessible to a variety of audiences including parliamentarians, prosecutors and judges. A number of specialized newsletters and periodicals should be targeted for the publication of short articles on the issue;
    c) Develop materials based on the key points and discussions from the meeting that could serve as basis for national guidelines on the issues; and
    d) Ensure that the key points and discussions from the meeting are provided to the *Global Commission on HIV and the Law* to inform its final deliberation on this issue.

ANNEX 1: MEETING AGENDA

DAY ONE: Wednesday 31 August 2011

8.30 Registration

9:00 – 9:45 Opening: Welcome by Jan Beagle, Deputy Executive Director, UNAIDS

- Introduction
- Presentation and adoption of the agenda
- Meeting logistics

9:45 – 11:15 Plenary Session 1 – Objectives and key issues for discussion
Chair: Anne Skjelmerud

- **Meeting overview and objectives:** Susan Timberlake, UNAIDS (10 minutes)
- **Criminalisation of HIV non-disclosure, exposure and transmission: overview of prevailing laws and practice -** Edwin Bernard (20 minutes)

Key issues to be introduced in overview and session:

- General content and scope of laws (HIV-specific and general criminal laws applied to HIV non-disclosure, exposure and transmission)
- Nature of charges/prosecutions
- Characterisation of HIV transmission risk and harm
- Definition of intent
- Profile of defendants
- Range of verdicts and sentencing
- Possible implications of recent scientific, medical and legal developments

Discussion

11:15 – 11:30 Coffee/Tea break

11:15 – 13:00 Plenary Session 1 – Objectives and key issues for discussion (continued)
Chair: Anne Skjelmerud

Examples of recent developments (5 minutes each) **–** Jan Fouchard (Denmark); Kirsten Been Dahl (Norway); Deborah Glejser (Switzerland): Brianna Harrison (on Global Commission on HIV and the Law)

Discussion

13:00-14:00 Lunch

14:00 – 15:45 Plenary Session 2 – Risk of HIV infection: scientific evidence and legal implications Chair: Myron Cohen

- **Presentation of issues** (10 minutes)**:** Catherine Hankins
- **Respondents:** Pietro Vernazza and Cecile Kazatchkine (5 minutes each)

Key issues/questions to be discussed during session:

- What are the per act risks of HIV infection resulting from various sexual acts under various circumstances?

- How best to quantify the risks of different types of sexual acts to ensure public and policy-maker understanding?
- When should a health risk be characterized as "significant", including for purposes for criminal liability?
- Is it possible to reach a consensus about the varying risks of different types of sexual acts in reaching a definition of "significant risk" under the criminal law?

Discussion

15:45 – 16:00 Coffee/Tea break

16:00 – 17:45 Plenary Session 3 – Harm related to HIV exposure and transmission, implications for criminal charges and sentences Chair: Mark Wainberg

- **Presentation of issues** (10 minutes): Brian Gazzard
- **Respondents:** Nikos Dedes and Matthew Weait (5 minutes each)

Key issues to be discussed during session:

- How does the "harm" of HIV compare to that resulting from other serious communicable diseases, medically, socially and psychologically?
- Should availability of, access to, and adverse effects of HIV treatment be relevant to the criminal law's characterisation of the harm of HIV?
- How should the criminal law treat the alleged psychological harm of HIV exposure in cases of (a) sexual exposure to HIV without prior knowledge that a partner is HIV-positive; (b) other types of "exposure" cases, e.g. being bitten by someone who is HIV-positive?
- How should harm resulting from HIV exposure or transmission be understood and quantified for the purpose of criminal liability and sentence determination?
- How does the criminal law's response to the "harm" of HIV compare to its response to equivalent or greater harms?

Discussion

17:45 Close

<u>DAY TWO: Thursday 1 September 2011</u>

9:00 – 9:15 Recap of Day One

9:15 – 10:45 Plenary Session 4 – Intent in the context of HIV-related non-disclosure, exposure and transmission Chair: Marc Dixneuf

- **Presentation of issues** (10 minutes)**:** Catherine Hanssens
- **Respondents:** Lorraine Sherr and Helmut Graupner (5 minutes each)

Key issues/questions to be covered during the session:

- What combination of knowledge, belief, conscious action or omission should be the minimum basis for HIV-related criminal liability, e.g.
  - Knowledge of positive HIV status and intent to have sex – that is "strict liability" for HIV-positive individuals who are sexually active without prior disclosure of HIV status to partners?
  - Knowledge of positive status, and/or belief that there is a significant risk of transmission, and action that in fact poses a significant risk?

- Knowledge of positive status, an intent to transmit, and action that poses a significant risk?
- To what extent should the HIV-positive individual's reasonable beliefs about actual transmission risk be relevant to a determination of intent to harm or reckless conduct for the purposes of criminal liability?

10:45 – 11:00 Coffee/Tea break

11:00 – 13:00 Plenary Session 5 – Defences in the context of HIV-related non-disclosure, exposure and transmission Chair: Allison Nichol

- **Presentation of issues** (10 minutes)**:** Scott Burris
- **Respondents:** Catherine Dodds and Jacob Hösl (5 minutes each)

Key issues/questions to be covered during the session:

- What should be the defences available to people criminally charged with HIV non-disclosure, exposure or transmission?
- Should "consent" or "disclosure" operate as defences and what do they mean in the context of HIV transmission?
  - Is consent to sex sufficient to presume consent to exposure to STIs, including HIV?
  - Should non-verbal "disclosure" qualify as legally-sufficient disclosure?
- Are there situations (e.g. fear of violence) in which failure to disclose is ethically and legally justified?

13:00-14:00 Lunch

14:00 – 15:30 Plenary Session 6 – Proof of HIV transmission Chair: Yusef Azad

- **Presentation of issues**(10 minutes)**:** Anna Maria Geretti
- **Respondents:** Catherine Moore and Jan Albert (5 minutes each)

Key issues/questions to be covered during the session:

- What are the uses and limitations of phylogenetic analysis in determining causality?
- What scientific evidence, if any, other than phylogenetic analysis may be useful to prove causality?

- What are the implications and limitations of the Recent Infection Testing Algorithm (RITA) – which is sometimes used to estimate the timing of HIV transmission – for the prosecution of alleged cases of criminal transmission of HIV?
- What issues need to be addressed by healthcare workers and other advisors to balance protecting patient confidentiality and their professional and ethical obligation to their patients/clients with their own ethical duties as well as potential legal liability?

15:30-15:45 Coffee Break

15:45 – 17:30 Plenary Session 7 – Circumscribing the criminal law: current practices and alternatives Chair: Dawn Fukuda

- **Presentation of issues** (10 minutes)**:** Lisa Power
- **Respondents:** Ryan Peck and Sally Cameron (5 minutes each)

Key issues/questions to be covered during the session:

- What are the experiences and lessons learnt in jurisdictions that have adopted or are considering the adoption of prosecutorial guidelines?

- What is the role of training for legal practitioners, judges, prosecutors and others in promoting an appropriate application of the criminal law in the context of HIV?
- Are public health guidelines aimed at a graduated response to people with HIV who "place others at risk" a viable alternative model?
- What other strategies and mechanisms can be developed to ensure an appropriate application of the criminal law in the context of HIV?

17:30 Close

17:30 Reception

<u>DAY 3: Friday, 2 September 2011</u>

9:00 – 9:15: Plenary: Recap of Day 2

9:15 – 10:45 Group work towards recommendations on:
Group 1: Risk and harm
Group 2: Intent, defence and proof
Group 3: Programmatic responses within and outside the justice system

10:45-11:00 Coffee/Tea Break

11:00 – 12:30 Plenary Session 8: Presentation/discussion of the groups' recommendations Chair: Michael Kirby

12:30 – 13:00 Closing – Concluding remarks/discussion with Mariangela Simao, Chief, Prevention, Vulnerability and Rights, UNAIDS

13:00 End of meeting

ANNEX 2: LIST OF PARTICIPANTS

	Name	Institution	Country
1	Albert, Jan	Karolinska University Hospital	Sweden
2	Azad, Yusef	National AIDS Trust (NAT)	United Kingdom
3	Baggaley, Rachel	World Health Organisation (WHO)	Global
4	Ball, Andrew	World Health Organisation (WHO)	Global
5	Bernard, Edwin	Independent Consultant	United Kingdom
6	Blagojevich, Aleksandra	Inter Parliamentary Union (IPU)	Global
7	Burris, Scott	Temple University	United States
8	Cameron, Sally	Independent Consultant	Australia
9	Cohen, Myron	University of North Carolina	United States
10	Dahl, Kirsten Miranda Been	Law Commission on penal code and communicable diseases hazardous to public health	Norway
11	Dedes, Nikos	European AIDS Treatment Group (EATG)	Europe
12	Delpech, Valerie	Health Protection Agency	United Kingdom
13	Dixneuf, Marc	Conseil National SIDA; SIDACTION	France
14	Dodds, Catherine	London School of Hygiene and Tropical Medicine	United Kingdom
15	Forbes, Anna	Center for HIV Law and Policy	United States
16	Fouchard, Jan	National Board of Health	Denmark
17	Fransen, Raoul	Dutch AIDS Fund	Netherlands
18	Froland, Stig	University of Oslo	Norway
19	Fukuda, Dawn	Massachusetts Department of Public Health	United States
20	Gazzard, Brian	Expert Advisory Group on AIDS (EAGA)	United Kingdom
21	Geretti, Anna Maria	Royal Free and University College Medical School	United Kingdom
22	Gerstoft, Jan	University of Copenhagen	Denmark

23	Glejser, Deborah	Groupe SIDA Genève	Switzerland
24	Graupner, Helmut	Attorney at law	Austria
25	Hanssens, Catherine	Center for HIV Law and Policy	United States
26	Harrison, Brianna	United Nations Development Programme (UNDP)	Global
27	Hognerud, Inger Lise	HIV Norway	Norway
28	Hösl, Jacob	Lawyer	Germany
29	Jürgens, Ralph	Independent Consultant	Canada
30	Kazatchkine, Cecile	Canadian HIV/AIDS Legal Network	Canada
31	Kirby, Michael	Global Commission on HIV and the Law	Australia
32	Leigh-Brown, Andrew	University of Edinburgh	United Kingdom
33	Maman, Suzanne	University of North Carolina	United States
34	Moore, Catherine (observer)	Crown Prosecution Service (CPS)	United Kingdom
35	Nichol, Allison	US Department of Justice	United States
36	Noko, Abigail	Office of the United Nations High Commissioner for Human Rights (OHCHR)	Global
37	Nyambe, Moono	Global Network of People Living with HIV (GNP+)	Global
38	Nygren-Krug, Helena	World Health Organisation (WHO)	Global
39	O'Reilly, Kevin	World Health Organisation (WHO)	Global
40	Osborne, Kevin	International Planned Parenthood Federation (IPPF)	Global
41	Pasanen, Sini	HIV Finland	Finland
42	Peck, Ryan	HIV and AIDS Legal Clinic Ontario (HALCO)	Canada
43	Power, Lisa	Terrence Higgins Trust (THT)	United Kingdom
44	Sherr, Lorraine	Royal Free and University College Medical School	United Kingdom
45	Skjelmerud, Anne	Norwegian Agency for Development	Norway

		Cooperation (NORAD)	
46	Träskman, Per Ole	Lund University	Sweden
47	Vernazza, Pietro	Swiss Federal Commission for AIDS-related issues	Switzerland
48	Wainberg, Mark	McGill University	Canada
49	Weait, Matthew	Birkbeck College	United Kingdom

UNAIDS

Jan Beagle, Deputy Executive Director, UNAIDS
Mariangela *Simão*, Chief, Prevention Vulnerability and Rights, UNAIDS
Kate Thomson, Head, Civil Society Partnerships Unit, UNAIDS
Rodrigo Pascal, Partnership Adviser, UNAIDS

Meeting Secretariat

Susan Timberlake, Senior Human Rights and Law Adviser, UNAIDS
Catherine Hankins, Chief Scientific Adviser, UNAIDS
Patrick Eba, Patrick, Human Rights and Law Adviser, UNAIDS
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