



Summary of main issues and conclusions
**International Consultation on
the Criminalization of HIV
Transmission**

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Background

Susan Timberlake, Senior Law and Human Rights Adviser, UNAIDS Secretariat; **Seema Paul**, Chief, Policy Coordination, UNAIDS Secretariat; and **Julian Fleet**, Chief, HIV/AIDS Liaison Unit, United Nations Development Programme (UNDP), opened the meeting and welcomed all those present to the international consultation on the criminalization of HIV transmission, hosted jointly by the UNAIDS Secretariat and UNDP. They noted that, since the beginning of the epidemic, some jurisdictions have applied criminal law to the transmission of HIV. In 2002, UNAIDS issued a policy options paper on this issue.¹ In light of renewed calls for the application of criminal law to HIV transmission and concerns raised in this regard by the UNAIDS Reference Group on HIV and Human Rights and others, UNDP and the UNAIDS Secretariat decided to bring together a number of legal experts and other concerned stakeholders to discuss this issue in the context of an effective human rights and public health response to HIV. The discussion would inform a UNAIDS/UNDP policy brief on this subject. It was clarified that the consultation would focus primarily on HIV transmission through sexual contact, although it was noted that concerns exist in relation to applying criminal law to HIV transmission in other contexts.

Introduction to the issues²

In recent years there has been:

- An increase in the number of prosecutions for HIV transmission or endangerment, particularly in Europe and North America, with cases now numbering in the hundreds in the English-speaking world alone,³ and
- Increased attention to criminalization of HIV transmission in sub-Saharan Africa, parts of Asia, and parts of Latin America and the Caribbean, resulting in legislative proposals and enactments (often as part of the introduction of broader “AIDS laws”) and some prosecutions.

Cases of sexual transmission remain the primary focus, but in some cases criminal law has been applied to other situations. The push to apply criminal law appears to be driven principally by the wish to impose retribution for wrongdoing, that is, to punish behaviour perceived as wrongful — although some have argued that criminalization of HIV transmission also advances the objective of HIV prevention.

In light of the increased application of criminal law to persons who transmit HIV (or expose others to HIV), concern has grown about the potential adverse consequences of this application for both public health and human rights, including its potential to:

- spread misinformation about HIV and its transmission
- create an additional disincentive to get tested for HIV
- reinforce HIV-related stigma and discrimination
- hinder access to HIV counselling and support services which also play a role in HIV prevention

¹ UNAIDS (2002), *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*.

² This section is based on an opening presentation given by Richard Elliott, Canadian HIV/AIDS Legal Network, 31 October 2007.

³ For some data from the United States of America on the frequency and distribution of prosecutions, see Zita Lazzarini, Sarah Bray and Scott Burris (2002), “Evaluating the Impact of Criminal Laws on HIV Risk Behavior”, *Journal of Law, Medicine & Ethics* 30:239-253. The article notes that between 1986 and 2001, 316 HIV-positive people were prosecuted for exposing others to or transmitting HIV in the United States. For data from Europe, see Global Network of People Living with HIV/AIDS Europe 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 on-line at <http://www.gnpplus.net/criminalisation/rapidscan.pdf>.

- create a false sense of security on the part of those who are (or believe themselves to be) HIV-negative
- create a risk of selective prosecution of particular individuals or communities
- be disproportionately applied to women living with HIV as they are often the first to learn of their status and are often accused of “bringing the virus into the relationship”; and
- involve invasions of privacy (e.g. medical records being subpoenaed) and of bodily integrity (e.g., forced testing in conjunction with criminal prosecutions).

Generally, there is limited evidence to help guide policy with respect to the effects that criminalization of HIV transmission may have. However, four central questions need to be addressed in determining the parameters of any criminalization of HIV transmission:

- a. Which acts should be subject to criminal prohibition, if any? In particular, should conduct that creates a risk of transmission be included (and if so, what degree of risk is required?), or should the criminal law deal only with cases where transmission actually occurs?
- b. What degree of mental culpability should be required for criminal liability? Only intentional behaviour or should some lower threshold be accepted?
- c. What defenses to criminal liability should be recognized?
- d. Should HIV-specific legislation be enacted instead of applying general criminal law?

Among these, the most difficult issues to resolve are:

- a. Whether only cases where transmission actually occurs should be subject to criminal prohibition, or also conduct that creates a risk of transmission;
- b. Whether only intentional behaviour is sufficient to impose criminal liability, or whether it is justified or desirable to extend liability further to include lesser degrees of culpability.

Starting Points

On the first day of the consultation, participants agreed on the following starting points for discussion:

Building on earlier work

In 2002, UNAIDS issued guidance on criminalization of HIV transmission entitled *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*.⁴ Participants noted that the document contains most of the essential background material, much of the necessary policy discussion, most of the options for consideration and decision, and many sensible and balanced conclusions and recommendations. Participants therefore agreed that the consultation should build on the 2002 policy options paper and focus on what value can be added to it.

Two other significant reports were placed before the participants which the participants recognized contained useful insights, often of a highly compelling nature:

- The Report of the WHO European Region Technical Consultation on the criminalization of HIV and other sexually transmitted infections (October 2006).⁵
- The report of the AIDS and Rights Alliance for Southern Africa (ARASA) and Open Society Initiative for Southern Africa (OSISA) Civil Society Consultative Meeting on the

⁴ See *supra*, note 1.

⁵ World Health Organization Regional Office for Europe (2006), *Report of the WHO European Region Technical Consultation, in collaboration with the European AIDS Treatment Group (EATG) and AIDS Action Europe (AAE), on the criminalization of HIV and other sexually transmitted infections*. Copenhagen. Available on-line at http://www.euro.who.int/Document/SHA/crimconsultation_latest.pdf

Criminalisation of the Wilful Transmission of HIV, Southern African Development Community (SADC) (June 2007).⁶

A common feature of these reports was a general inclination against the introduction of HIV-specific statutes criminalizing HIV transmission, in light of the fact that there were no persuasive data to support the utility or effectiveness of such measures. It was therefore said, by several participants, that those who wished to change the recommendations contained in the earlier reports bore a heavy onus of persuasion that some new features had emerged that justified a recommendation to UNAIDS that it should change direction in this regard.

Participants emphasized that any new or revised policy guidance on criminalization of HIV transmission needs to be able to provide clear and persuasive answers about why the use of criminal law in the context of HIV should be limited, explain how exposure to HIV is different from other situations in which criminal law is used against people who expose others to potential risk of harm, and speak to people's hearts and minds.

Understanding the push for criminalization of HIV transmission

Participants felt that it was important to understand the motivations for enacting laws specifically criminalizing HIV transmission or exposure and for pursuing such criminal prosecutions. Participants underlined the need to be respectful of the democratic character of legislatures and appreciate that elected lawmakers, on such subjects, ordinarily have the last say, whatever experts may advise. In this regard, however, it is important that lawmakers have the opportunity to fully discuss the issues particularly with those most affected and other experts, and that policy-making not be driven by prejudice, misinformation or over-reaction that are all too common in responses to HIV.

Acknowledging the desire for retribution and deterrence

In introducing criminal laws relating to HIV transmission, legislators appear to be responding to deep human motivations, including the desire for retribution and deterrence. In particular, participants acknowledged that there is anger and frustration about the continuing ravages of HIV, and hence a desire to do something that is perceived as preventing its spread and to impose punishment on people living with HIV who transmit HIV or risk transmitting the virus. Thus, there is a need to acknowledge the desire for retribution on the one hand, as well as a need to explain why it can only be justified for conduct that is blameworthy and only when it makes most public policy sense for HIV prevention, on the other hand.

Dealing with the concerns of women, particularly in countries where they suffer from inequality

Participants recognized the need to address the concerns that women in Africa and elsewhere have raised in support of criminalizing HIV transmission or exposure. These appear to stem from a drive for justice on the part of women who have been infected with HIV through rape and sexual coercion, including in marriage and other intimate relationships. A critical question in this context is whether criminalization of HIV transmission represents an effective way to deal with the entrenched and complex problem of violence against women and other factors that affect women's vulnerability to HIV, or whether there are better alternatives. It is also important to consider how criminalization of HIV transmission or exposure might negatively affect women, particularly those living with HIV.

All policies should be based on sound data

Participants emphasized that the best available scientific evidence regarding modes of HIV transmission and levels of risk must be one key factor for rationally determining if, and when, conduct should attract criminal liability.

⁶ ARASA/OSISA (2007). *Report on the ARASA/OSISA civil society consultative meeting on the criminalisation of the willful transmission of HIV – 11-12 June 2007*. Windhoek. Available on-line at <http://www.arasa.info/publications.php>.

Policy on the criminalization of HIV transmission must respect human rights

Any legal or policy responses to HIV, particularly the coercive use of State power, should not only be pragmatic in the protection of public health but should also conform to international human rights norms. In particular, the principles of non-discrimination, equality and due process must be respected. *The Universal Declaration of Human Rights* and the human rights treaties ratified by governments contain many provisions relevant to the questions at issue. In addition, the *International Guidelines on HIV/AIDS and Human Rights*⁷ are a useful source of guidance for policy-makers regarding human rights obligations in the context of HIV. Guideline 4 states:

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 that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.

Differences between common law and civil law jurisdiction, and other legal traditions

Participants acknowledged the importance of taking into account the differences between common law and civil law jurisdictions, and other legal traditions. In particular, terminology used to describe degrees of mental culpability associated with certain actions varies, and it is important to understand the substance of what is meant by terms such as “recklessness” (used in common law systems to describe a lesser degree of culpability than intention) and *dolus eventualis* (used in civil law systems in similar fashion). In crafting guidance for legislators, UNAIDS and UNDP will need to be clear so that such guidance translates accurately into domestic legal systems to avoid the inappropriate use of the criminal law.

Key issues discussed

Is the application of criminal law to HIV transmission justified as punishment (i.e. retribution) for causing or risking harm?

One of the reasons often advanced for criminalizing HIV transmission is to achieve justice for those infected (or put at risk) by punishing the offender. There was consensus among participants that imposing criminal penalties as retribution is only justifiable in those cases where the conduct is clearly and sufficiently morally blameworthy so as to deserve punishment using society’s harshest sanctions. Participants agreed that in the absence of a sufficiently guilty mind — such as the situation in which a person knows of his or her own infection and deliberately acts with the purpose of infecting another person — criminal sanctions cannot be justified. There was consensus that:

1. Most cases of transmission of, or exposure to, HIV are not sufficiently blameworthy to qualify as subjects of the criminal law.
2. Criminal penalties could be justifiably imposed on a person who acts with the malicious purpose of causing harm (i.e. the purpose of their act is to infect another with HIV). In general terms, this would constitute the highest form of criminal *intention* in common law systems and would be characterized as *dolus directus* in civil law systems.⁸

⁷ Office of the United Nations High Commissioner for Human Rights and UNAIDS (2006), *International Guidelines on HIV/AIDS and Human Rights: 2006 Consolidated Version*. Available on-line at http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf

⁸ Participants acknowledged that different terminology is used in relation to mental culpability across different legal systems. However, it was generally agreed that the concept of “*intentional* transmission” of HIV should be limited to those rare cases where a person acts *with the purpose* of infecting someone.

Although ultimately no consensus was reached on this issue, most participants expressed the view that it would not be justified to extend criminal liability to lower degrees of culpability – including the concept of recklessness found in common law systems or *dolus eventualis* found in many civil law systems. Participants were concerned that a more widespread application of the criminal law is likely to have a negative impact on HIV prevention, treatment, care and support and hence the overall response to HIV.

These issues are addressed further below. See sections:

- *Could application of criminal law undermine public health objectives?*
- *Could application of criminal law result in other potential harm?*
- *Should criminal law be applicable only in cases of “intentional” transmission, or also in cases of “reckless” and “negligent” transmission?*

Is the application of criminal law to HIV transmission justified as a measure for reducing transmission of HIV?

Another of the reasons often advanced by policy makers for criminalizing HIV transmission is that it could promote public health by stopping HIV transmission or exposure by *incapacitating* or *rehabilitating* a particular person and/or by *detering* the specific individual, or others more generally, from the conduct that is criminally prohibited.

Participants agreed that incapacitation, rehabilitation, and deterrence offer, at best, a limited basis for resorting to the criminal law as a policy response to the HIV epidemic. They were concerned that the application of criminal law represents a “sideshow” that risks diverting attention from HIV prevention measures that work. They argued that instead of more criminalization (i.e. of HIV transmission or exposure), what is needed is more *decriminalization* in order to facilitate HIV prevention efforts aimed at those whose vulnerability to HIV is often exacerbated in many countries by their being effectively or actually criminalized, such as sex workers, people who inject drugs, and men who have sex with men.

Incapacitation

There was general agreement that imprisoning a person with HIV does little to prevent the transmission of HIV. Rape, sexual violence and HIV risk behaviours are prevalent in prisons around the world, and most prison systems continue to reject introduction of evidence-informed prevention measures, such as providing confidential access to condoms and sterile injecting equipment, and undertaking measures to reduce the prevalence of rape and other forms of sexual violence. Quite apart from this fact, a study undertaken in the United States of America ruled out prosecutions of people for HIV-related crimes as a major influence on the epidemic, saying that “far too few people were being imprisoned to have a serious impact on transmission”.⁹

Addressing the epidemic from a public health perspective, the haphazard and capricious operation of criminal law means that it can never be a major player in the response of any community to HIV.

– Justice Michael Kirby, Australia

Rehabilitation

Participants pointed out that there is little evidence to suggest that criminal penalties for conduct that transmits, or risks transmitting, HIV will “rehabilitate” a person such that they avoid future conduct that carries the risk of transmission. In particular, they highlighted that most cases of HIV transmission are related to sexual activity and/or drug use – human behaviours that are complex and very difficult to change through the “blunt tool” of criminal penalties. Individual behaviour change is more likely to result from interventions such as

⁹ Lazzarini, Bray, Burris, *supra*, note 3.

counselling and support for behaviour change, as well as measures that address underlying reasons for engaging in activities that risk HIV transmission.

Deterrence

Participants further pointed out that it is unlikely that criminal sanctions will in practice act as a significant deterrent to behaviour that may result in HIV transmission. They highlighted that:

1. During the time when there is the greatest risk of HIV transmission (the first months following infection),¹⁰ most people do not know their HIV status, limiting the preventive value that any criminal offence could have.
2. Most people who test positive for HIV substantially reduce any behaviour that would transmit HIV,¹¹ particularly if they receive good-quality voluntary counselling and testing, highlighting the importance of ensuring access to such services, and to other support services that can assist in addressing underlying factors that may contribute to risk behaviours.

Participants heard that, at this time, there is no scientific data supporting the claim that criminal prosecution, or the threat thereof, has any appreciable effect in encouraging disclosure to sexual partners by people living with HIV or deterring conduct that risks transmission.

A study undertaken in the United States provided the first empirical data on the actual effect of criminal law on the behaviour of those with HIV or at risk of HIV infection.¹² All states in the United States have criminal laws that can be used to punish sexual behaviours that pose some risk of HIV transmission; half have HIV-specific laws criminalizing sexual contact by people with HIV unless they abstain from unsafe sex, or disclose their HIV status and obtain consent from their partners. The study compared the attitudes and behaviour of people at elevated risk of HIV infection in two states, one that has enacted a criminal law to explicitly regulate the sexual behaviour of people with HIV (Illinois) and one that has not (New York).

The study tested the hypothesis that that there would be no difference in self-reported sexual risk behaviour between (1) people who believe the law requires HIV-positive people to practice safe sex and those who do not, or (2) between people living in a state with an HIV-specific statute and those in a state without one.

People who lived in a state with a criminal law explicitly regulating sexual behaviour of HIV-positive people were little different in their self-reported sexual behaviour from people in a state without such a law. People who believed the law required the infected to practice safer sex or disclose their status reported being just as risky in their sexual behaviour as those who did not. The data did not support the proposition that passing a law prohibiting unsafe sex or requiring disclosure of infection influences people's normative beliefs about risky sex. Most people in the study believed that it was wrong to expose others to the virus and right to

¹⁰ Maria J Wawer et al (2005), "Rates of HIV-1 Transmission per Coital Act, by Stage of HIV-1 Infection, in Rakai, Uganda", *Journal of Infectious Diseases* 191:1403-1409.

¹¹ For example, see R Bunnell et al (2006) "Changes in sexual risk behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda", *AIDS* 20(1):85-92, and G Marks et al (2005), "Meta-analysis of high-risk sexual behavior in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs", *Journal of Acquired Immune Deficiency Syndromes* 39(4):446-53.

¹² S Burris, L Beletsky, J Bureson, P Case, Z Lazzarini (2007), "Do criminal laws influence HIV risk behavior? An empirical trial", 39:467-517. In the study, 490 people at elevated risk of HIV were interviewed, 248 in Chicago (Illinois) and 242 in New York City. Approximately half in each state were men who have sex with men and half were people who inject drugs. One-hundred sixty two subjects reported known HIV infection (Chicago 58; New York City 104), and 328 reported being HIV negative or not knowing their HIV status. Indicators of the law were 1) residence in the state, and 2) belief that it is a crime for a person with HIV to have sex with another person without disclosing his or her serostatus. The study examined independent predictors of unprotected sex. The presentation by Scott Burris at the consultation about this study can be obtained via UNAIDS.

disclose infection to their sexual partners. These convictions were not influenced by the respondents' beliefs about the law or whether they lived in a state with such a law or not. The study concluded that there is little support for the claim that criminal law makes people with HIV behave more safely or makes people without HIV behave less safely. On the other hand, moral values influence behaviour, but are not themselves a product of HIV-specific laws. However, the moral values are those of the population studied (the sexually active) and may have little relation to those of lawmakers.

A “sideshow” in the struggle against HIV

There was a large degree of consensus among participants that introduction of criminal laws constituted, in effect, a “sideshow” in the struggle against HIV.

Participants expressed concern that pressure for the use of criminal law has been building especially where there have been insufficient HIV prevention programmes to prevent the spread of HIV. They said that some countries are reluctant to implement evidence-informed and human rights-based (but sometimes controversial) HIV prevention measures, but want to be seen as “doing something”. Legislators are tempted to use the criminal law, substituting criminalization for positive action such as implementing evidence-informed prevention programmes.

Participants underlined that this risks diverting attention and resources from measures that make a difference in curbing the epidemic, such as: HIV education and information; access to the means of protecting against infection; access to HIV testing, treatment and support services; and addressing some of the root causes of vulnerability to HIV infection, such as income and gender inequality, sexual violence, discrimination, and problematic substance use.

Decriminalization, not more criminalization, is needed

A common theme of the discussion was the need to introduce more *decriminalization* so as to address the issue of HIV prevention more effectively. Participants pointed out that many of those at highest risk of HIV have one thing in common: their status is effectively criminalized by law. Punitive approaches to drug use, sex work, and homosexuality fuel stigma and hatred against socially marginalized groups, pushing them further into hiding and away from services to prevent, treat, and mitigate the impact of HIV and AIDS. There are continued reports of police officers, charged with enforcing laws against drugs, prostitution or same-sex sexual activity, who routinely extort bribes and confessions from those belonging to socially marginalized groups. There was consensus among participants that, instead of more criminalization, a more effective HIV prevention strategy would be to adopt measures including:

Criminal laws are being used as substitutes for investment in effective, evidence-informed prevention.
– Scott Burris, United States of America

- removal of criminal offences against men who have sex with men
- removal of criminal sanctions on sex work so as to promote empowerment of sex workers
- enactment of anti-discrimination laws protective of people living with HIV, or at risk of infection
- significantly expanding HIV prevention efforts, including education, the availability of condoms and sterile drug use equipment, and other strategies designed to reduce infection.

Is the application of criminal law to HIV transmission justified as a measure to protect women and girls?

The third reason often advanced by policy makers for criminalizing HIV transmission, particularly in African countries, is that its deterrent and retributivist functions are particularly

important for women and girls — that is, it could protect those who may be especially vulnerable to HIV, such as women and girls, by changing men's sexual behaviour toward them and would punish men who pass HIV onto their female partners.¹³ This is of particular concern as many women acquire HIV in marriage and other intimate relationships with male partners, including where rape and sexual coercion have occurred.

Representatives of some women's rights groups have pointed out that women are ill-served when the law and the justice system fail to address the effects of the 'other epidemic' — namely that of gender-based violence, particularly within long-term intimate relationships. Participants pointed out that the following issues confronting women in many societies are well documented:

- high levels of violence against women and children;
- high prevalence of multiple concurrent sexual relationships;
- women's relative lack of autonomy in decision-making involving their sexual rights and health;
- social and cultural norms that place and keep women in a subordinate position within their society; and
- discrimination, including in inheritance and other property laws that leave women and children vulnerable to impoverishment and its attendant ills.

As a result, women are more vulnerable to infection, more likely to face multiple layers of discrimination and violence, and less likely to receive the services that should be in place to defend them from violence, disease and death.¹⁴

There was consensus among participants that the concerns of women's organizations cannot be dismissed, as they are legitimate and serious concerns. However, participants pointed out that criminalization of HIV transmission or endangerment does not represent an effective way to deal with the entrenched and complex problem of violence against women. Indeed, it is women themselves who potentially stand to be the most harmed by laws criminalizing HIV transmission or endangerment as women are more likely to know their HIV status due to their health-seeking behaviour (e.g., prenatal HIV testing), and are therefore at greater risk of being prosecuted under HIV-specific criminal laws for several reasons:

- The trend towards provider-initiated HIV testing in health care settings will result in even more women knowing their HIV status and thus being exposed to criminal liability under HIV-specific criminal laws. To avoid the risk of being prosecuted, women who test HIV-positive would have to disclose their HIV status to their sexual partners and/or take precautions to reduce the risk of transmission. However, for many women it is either

¹³ Participants heard from Priscilla Misihairabwi-Mushonga, a Member of Parliament from Zimbabwe, who said that calls for criminalization in her country came from those who wanted to protect women and victims of rape from HIV. She highlighted that the debate about criminalization in Zimbabwe was a very emotional one and that many female Members of Parliament argued for criminalization of HIV transmission. However, she pointed out that the debate missed many important points, namely the fact that criminalization would not offer protection, and instead, would put women at risk of negative consequences.

¹⁴ Michaela Clayton reported on a consultative meeting on criminalization of HIV transmission hosted by the AIDS and Rights Alliance for South Africa (ARASA) in collaboration with the Open Society Initiative for Southern Africa (OSISA) in June 2007. The meeting brought together representatives of women's organizations that are strong advocates for criminalization of HIV transmission and people living with HIV and lawyers and advocates that oppose criminalization. Clayton reported that one of the participants at the meeting, an HIV-positive man who had held focus group discussions with people living with HIV, said that men and women had responded differently to whether the deliberate transmission of HIV should be criminalized. While HIV-positive men felt that it was acceptable to create a new crime relating to the deliberate transmission of HIV, women did not. They were opposed to the criminalization of HIV transmission as they were afraid of the impact it would have on them. See ARASA/OSISA (2007). *Report on the ARASA/OSISA civil society consultative meeting on the criminalisation of the willful transmission of HIV – 11-12 June 2007.*

difficult or impossible to negotiate safe sex or disclose one's status to a partner, as this would place them at risk of violence, loss of child custody, disinheritance, and other abuses. The combination of more routine forms of testing (particularly during pregnancy) and criminalization thus places women in a difficult position. Women may face the possibility of prosecution as a result of their failure to disclose, even though they could not disclose without facing the real possibility of very severe negative consequences.

The concerns of women's organizations that are pushing for criminal law approaches to HIV need to be addressed clearly and positively. In particular, action needs to be taken against domestic violence and women's subordination.

– MP Priscilla Misihairabwi-Mushonga, Zimbabwe

- Men are more likely to access traditional court systems (most of which have some level of recognition within African legal systems), and are more likely to receive a favourable outcome in highly patriarchal customary law systems. This may also result in women being more likely to be victimized by criminalization trends.
- Experience suggests that women are more likely to be blamed by their communities for 'bringing HIV into the home' than men, and that this can result in eviction, ostracism, and loss of property and inheritance. This is especially true in so far as apportionment of blame is still an important part of both customary and formal legal systems in East and Southern Africa in relation to divorce and inheritance. The pressure to disclose one's HIV status, exerted by HIV-specific criminal law, increases these risks for women.

Participants agreed that:

1. Policy makers should take into account the effect of invoking the criminal law against women living with HIV. For women who are unable to disclose their HIV status or to take precautions to reduce the risk of transmission, invoking the criminal law may not ultimately serve to protect them, and may, instead, impose an additional burden and risk of violence or discrimination.
2. Alternatives to criminalizing HIV transmission need to be explored, acknowledging that certain types of behaviour are not acceptable, but that criminalization of transmission does not provide victims with a remedy, nor does it deal with the root causes of the problem.
3. In order to protect women, instead of focusing on criminalizing HIV transmission, countries need to take concerted action to deal with the needs of women and devote adequate resources to prosecuting cases of rape, including marital rape, increase general HIV prevention efforts, and secure legislative and policy changes to protect the rights of women, including passing legislation on issues such as domestic violence, equality in marriage, HIV-related discrimination and protecting women's property and inheritance rights.

Could application of criminal law undermine public health objectives?

Participants considered the possible effects of the application of criminal law on levels of stigma and discrimination and the uptake of HIV prevention modalities, HIV testing, disclosure of HIV status, and HIV treatment, care and support.

They acknowledged that, as with every aspect of the question of criminalization as a policy response to HIV, sufficient research on the potential negative implications for public health interventions of criminalizing the transmission of HIV has not been conducted. However, given the high levels of stigma and discrimination that people living with HIV and populations at risk already face, as well as anecdotal evidence and data from related policy areas, participants expressed concerns that applying criminal law will conflict with public health objectives. The general consensus was that the introduction of criminal laws could often be counter-productive when viewed from a public health perspective addressed to containing the epidemic through providing people with HIV prevention, treatment, care and support. According to participants, possible negative consequences for public health objectives include:

- **Disincentives to HIV testing and, ultimately, to treatment, care and support:** Participants were concerned that criminalizing HIV transmission comprises a disincentive to get tested and find out one's status, as ignorance of HIV status might be perceived as the best defense to prosecution. If this is the result of criminalization of transmission it is directly contrary to current efforts to increase knowledge of HIV status through expanded provider and client-initiated testing. Increased knowledge of HIV status is essential to both prevention and treatment efforts. At the same time, some participants pointed out that, even in the absence of laws criminalizing HIV transmission, studies have shown that people are sometimes reluctant to seek HIV testing because they are afraid that their status would become known and/or they would have to disclose their HIV status.
- **Spreading misinformation about HIV:** Participants expressed concern that inappropriate, overly broad use of the criminal law risks spreading misinformation about how HIV is and is not transmitted. They pointed out that in some jurisdictions serious criminal charges have been laid against HIV-positive people for activities such as biting, spitting, or scratching, despite the evidence that the risk of HIV transmission in this fashion is extraordinarily small and in some cases, completely non-existent. Such prosecutions risk undermining efforts to educate the public about HIV and how it is, and is not, transmitted.
- **False sense of security and increase in risk-taking behaviours:** Participants expressed concern that criminalization of HIV transmission appears to place most of the burden to avoid transmission on people living with HIV. This is in contradiction to the public health message that everyone has a responsibility to practice safe behaviour, regardless of their status, as sexual health is a shared responsibility between sexual partners. Participants underlined that people should not be led to rely on disclosure by their partners – perceiving this as “mandated” by law – and thereby fail to take their own measures to protect themselves from HIV infection. Some participants argued that “we are now in a world in which any sexually active person should assume that there is a possibility of HIV infection and act accordingly.” Participants acknowledged, however, that people may not always be able to protect themselves because of power imbalances in their relationship.
- **Enhancing HIV-related stigma and adding to the burden of HIV the stigma of criminalization:** Participants pointed out that the introduction of HIV-specific criminal laws, and of individual criminal prosecutions against people with HIV for conduct that transmitted or risked transmitting HIV, has often been accompanied by inflammatory and ill-informed media coverage or commentary by high-profile figures, such as prosecutors, government officials, or legislators. This has contributed to the stigma surrounding HIV and further stigmatizes people living with HIV as “potential criminals” and as a threat to others. Stigma also deters HIV testing.
- **Creating distrust in relationships with health service professionals:** Because courts can subpoena medical records in prosecutions of cases involving HIV transmission, criminalizing HIV transmission may make HIV-positive people fearful of discussing or revealing their status to their health care providers, and providers of other support services, such as counsellors. This could negatively affect the relationship of trust between service-providers and people living with HIV, and lead to less effective HIV prevention and treatment.

Could application of criminal law result in other potential harms?

In addition to concerns that imposing criminal sanctions for conduct that transmits HIV or risks transmission will conflict with public health objectives, participants expressed concerns that it could undermine human rights and result in other potential harms. In particular, participants raised the following concerns:

- **Risk of selective or “capricious” prosecution:** Given the stigma that still surrounds HIV and the persistence of HIV-related discrimination, participants expressed concern that criminal sanctions will be directed disproportionately at those who are socially and/or

economically marginalized. Participants emphasized that, if States are to use criminal sanctions in response to conduct that risks transmitting HIV, they must ensure that those accused are not being punished simply for being HIV-positive, or because of their sexual orientation, their involvement in sex work, their use of illegal drugs, or other disfavoured status such as being a prisoner (or ex-prisoner) or immigrant. In addition, participants pointed out that, in jurisdictions where HIV transmission is criminalized, very few cases are prosecuted out of the numerous infections that occur each year; this led some participants to describe the intervention of the criminal law as largely "capricious" and therefore unjust. Several cases suggest that criminal law is invoked in sensational circumstances, sometimes in relation to accused who are migrants or otherwise perceived as "foreign", and occasionally in response to emotional media campaigns.

- **Insufficient evidence/proof and risk of miscarriage of justice:** Participants pointed out that proving that the accused was aware of his or her HIV infection at the time of the offence, proving who infected whom, and proving that the complainant did not in fact consent to the risky sex knowing his/her partner's status may pose serious challenges. The person who first learns of his or her HIV-positive status may be accused of having "brought" the virus into the relationship though it may not be clear who was first infected. Depending on the circumstances, it may also not be clear that it was the accused, rather than someone else, who actually infected the complainant. There is the potential for miscarriages of justice as a result of such criminal prosecutions. Furthermore, even if a person living with HIV is not ultimately convicted, irreparable damage may be done to individuals caught up in investigation and prosecution that is driven by unfounded accusations.

In recent years, prosecutors handling cases of HIV transmission increasingly have resorted to phylogenetic testing¹⁵ — which seeks to establish a genetic relationship between the viruses with which each the complainant and the accused are infected — in attempting to prove the defendant was the source of the complainant's infection and to rule out other possible sources of infection. However, participants pointed out that such technical evidence is not available in resource-poor countries and has limitations which are not well understood by police, prosecutors, defence lawyers, courts or the media, nor by people living with HIV or HIV organizations. Phylogenetic analysis can only provide an estimate of the relatedness of the samples and cannot on its own answer the critical questions: whether the virus in the complainant is the same as that in the accused; who infected whom; when the infection occurred; or whether the complainant and accused were both infected by third parties with similar strains of HIV. These limitations, combined with little technical understanding on the part of actors in the justice system, leaves considerable potential for a miscarriage of justice. Participants pointed out that, in some cases, the results of phylogenetic analysis have been misused, with overstated claims as to its conclusiveness in "proving" beyond a reasonable doubt the guilt of the accused.

- **Invasions of privacy:** Participants expressed concern that the privacy of "confidential" records kept by health professionals, counsellors or other service-providers can be lost in the search for evidence during criminal prosecutions. In particular, they were concerned that the confidentiality of counselling sessions is sacrificed by prosecutors seizing counsellors' notes in a search for evidence of alleged criminal activity, to be used against the HIV-positive person, or by judicial orders compelling counsellors to testify about confidential discussions. They noted that compromising confidentiality may affect the willingness of HIV-positive people to discuss risk behaviours with counsellors and to seek help, as well as on the willingness to seek treatment of other sexually transmitted infections, the presence of which increases the risk of HIV transmission.
- **Cost of criminal prosecutions:** Participants expressed concern that, particularly in resource-poor countries that are currently introducing criminal legislation, it is a mistake to allocate limited resources to prosecutions, rather than to HIV prevention measures that

¹⁵ See NAM and National AIDS Trust (2007), "HIV Forensics: The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission". Available on-line at www.nat.org.uk

have proven to work and to programmes to deal with the underlying issues, such as domestic violence and women's subordination.

Participants stressed the importance of States establishing guidelines for prosecutors in order to prevent inappropriate criminal prosecutions and to guide prosecutorial conduct during proceedings.

Should criminal law be applicable only in cases of actual transmission of HIV, or also in cases of exposure to HIV without transmission?

One of the most contentious issues discussed at the consultation was whether criminal law should be applied only to cases where HIV has actually been transmitted, or also in cases of exposure to HIV without actual transmission. Extending criminal liability to cases of *exposure* to HIV allows prosecution for conduct that puts others at risk, without actual transmission having occurred. In such cases, to establish liability it is only necessary to provide proof that the accused exposed the complainant to the risk of infection (with the level of risk required for criminal liability being a follow-on question), along with any required degree of mental culpability.

Participants at the consultation noted that proponents of extending criminal liability to cases of exposure to HIV argue that such a move could *deter* risky behaviour, in addition to *punishing* those who have exposed others to the risk of HIV transmission. They identified the following arguments that could be used in favour of criminalizing exposure to HIV in some circumstances:

- Under certain circumstances, knowingly exposing someone to HIV could be seen as sufficiently morally blameworthy and therefore deserving of punishment. There is a strong sentiment that people deserve justice if they have been exposed to HIV without being explicitly made aware of this. In particular, criminalization could be justified if someone exposes another person to HIV with the intent to infect the other person. Participants noted that this is the case in the United Kingdom, where intentional – but not reckless – exposure is criminalized.
- If policy-makers are concerned about preventing HIV transmission, it makes most sense for the law to target conduct that creates a risk of HIV transmission, rather than imposing criminal penalties only in those rare cases where the risk actually materializes. It is not an unreasonable hypothesis that there is a rational connection between punishing conduct that risks HIV transmission and preventing HIV transmission, because it is often assumed that the law has some effect on modifying the behaviour of at least some people (though there is little or no scientific evidence that this is so with regard to the behaviours that transmit HIV).
- Because there are various areas where criminal law is applied to behaviour that risks harming others, even if the harm does not actually result, participants recognized that there would have to be persuasive reasons to make a distinction for exposure to HIV.

Participants acknowledged that, as a matter of legal reasoning, it is logical to criminalize intentionally exposing someone to HIV with the purpose of infecting them. They noted that most jurisdictions adopt a moral framework that emphasizes *culpability* over harm. However, some participants suggested that it may not be appropriate to use legal categories and legal reasoning to frame policy guidance on how best to respond to prevention of HIV transmission. As one participant said, “doing that would mean allowing the precepts and principles of criminal law to determine what the approach adopted by public health promoters should be.”

Participants were concerned that, as a matter of HIV prevention, it will do no good – and potentially cause more harm – to criminalize exposure. They raised all the broader arguments mentioned above (see the sections: *Could application of criminal law undermine public health objectives? Could application of criminal law result in other potential harms?*), and further noted that:

- Criminalizing exposure, versus only actual transmission, would cast the net of criminalization far too wide. Even if a statute criminalizes only “intentional exposure”, in practice this would risk being applied not just to those who act with the malicious purpose of infecting another but also to anyone who knows s/he is HIV positive and exposes someone else to a risk of infection.
- While the number of criminal prosecutions has been small (compared to the total number of people living with HIV), cases have regularly resulted in sensational media coverage, including the negative portrayal of people living with HIV as “vectors of disease”. Enlarging the scope of criminalization to include exposure (where the law does not already extend this far) would result in more prosecutions, likely leading to more discrimination, spreading of misinformation about HIV, and creation of a false sense of security that the law can protect people from HIV. As one participant said: “Criminalization sends out the message that people living with HIV are responsible for the spread of HIV and that others are victims or potential victims. If criminal law is used, it will lead to more stigma, which in turn will lead to more transmission because it will discourage disclosure and openness about HIV/AIDS.”

In the end, participants did not come to a consensus on whether criminal liability should only exist where conduct that risks transmitting HIV actually results in transmission, although many participants favoured this approach.

Most – but not all – participants expressed the view that, even though exposing someone to HIV with the purpose of transmitting the virus is morally culpable and imposing retribution for such wrongdoing could in theory be justified, this should be avoided because of the negative public health effects it could have. They added that the penalties of the criminal law, society’s harshest tool, should be reserved for those cases where actual harm is caused, and that it would be inappropriate and undesirable to extend the law to also criminalize HIV exposure.

A few participants suggested that exposure to HIV should be exempt from criminal punishment unless it is intentional (i.e. with the purpose of infecting someone with the virus). In their view, this would acknowledge that there may be some limited scope for criminalizing exposure, while minimizing the potential negative effect of prosecutions on public health goals.

Legislators in Mauritius decided not to criminalize exposure to HIV or even HIV transmission. Legislators realized that legislation criminalizing HIV exposure and/or transmission would not be able to withstand a constitutional challenge, because of the difficulties with proof, the likely vagueness of the definition of exposure, and the risk of selective prosecution. The main reason for not criminalizing HIV transmission was, however, the concern about detrimental impacts on public health and the conviction that it would not serve any preventive purposes. Criminalization would have created more problems than solving them. Therefore, Mauritius decided to put its resources where they are most likely to have a positive impact on reducing the spread of HIV: increased funding for HIV testing and counselling and for evidence-informed prevention measures.

– Rama Valayden, Attorney General and Minister of Justice and Human Rights, Republic of Mauritius

No criminalization where no significant risk of transmission

While participants did not reach consensus on whether criminal liability should only exist where there is actual transmission of HIV, they all agreed that, if exposure is criminalized, it would be crucial to also consider the degree of the risk of HIV transmission in determining the physical acts to which the criminal law may apply. They agreed that only conduct that carries a ‘significant’ risk of HIV transmission is legitimately the target of the criminal law.

Participants pointed out that, to extend the criminal law to actions that pose no significant risk of transmission:

- does not advance the objective of preventing HIV transmission
- risks undermining that objective by perpetuating the misperception that the conduct carries a significant risk of transmission due to its having been targeted for criminal prosecution, and
- runs against the principle of restraint in the use of coercive measures which suggests that the criminal law is most appropriately used with regard to those acts that carry the highest risk of transmitting HIV, rather than those that carry a low or negligible risk.

Participants noted that this issue has arisen in a number of cases regarding the risk of exposure:

- In Canada, the prosecution in one case acknowledged that unprotected oral sex is conduct that carries only a low risk of HIV transmission and would not be the basis for a prosecution;¹⁶ more recently, a trial judge interpreted the law to mean that there was no crime for not disclosing one's HIV-positive status where a condom was used for vaginal sex.¹⁷
- In a New Zealand case, the trial court concluded that neither vaginal sex with a condom, nor oral sex without a condom, carried a sufficiently high risk that the person with HIV could be held liable for criminal nuisance.¹⁸
- The Supreme Court of the Netherlands has ruled, in a case involving even unprotected anal and oral sex, that there was not a "substantial" per-act risk of transmission, and therefore a prosecution for recklessness could not succeed.¹⁹

In addition, participants noted that, given the negligible, or at most theoretical, risk of transmission, there is no justification for imposing criminal liability in cases such as spitting, scratching or biting.

Finally, participants noted that there is also need to address definitions of exposure (and recklessness) in the context of unprotected sexual acts where a person's viral load is low or negligible as a result of anti-retroviral therapy. Participants noted that in the case of an HIV-positive person with a very low or undetectable viral load, the per-act risk of transmission is lowered considerably, such that unprotected sex may no longer pose a significant risk of transmission.²⁰

¹⁶ *R. v. Edwards*, 2001 NSSC 80 (Nova Scotia Supreme Court) at para. 6.

¹⁷ *R. v. Nduwayo*, 2006 BCSC 1972 (British Columbia Supreme Court) at paras. 7-8.

¹⁸ *New Zealand Police v. Dalley*, New Zealand District Court, 4 October 2005.

¹⁹ "AA" [January 2005 judgment of Supreme Court of the Netherlands] at para 3.5.

²⁰ Since the time of the consultation, the Swiss National AIDS Commission (EKAF) released a statement on risk of HIV transmission while under antiretroviral treatment and in the absence of other sexually-transmitted infections. The Commission states that "an HIV-infected person on antiretroviral therapy with completely suppressed viraemia ('effective ART') is not sexually infectious, i.e. cannot transmit HIV through sexual contact." However, the Commission qualifies its statement, noting that it is considered valid only so long as: (a) the person adheres to antiretroviral therapy, the effects of which must be evaluated regularly by the treating physician, and (b) the viral load has been suppressed (< 40 copies/ml) for at least six months, and (c) there are no other sexually transmitted infections. With regards to the law, the EKAF goes on to state its view that "unprotected sex between a positive person on antiretroviral treatment and without an STI, and an HIV-negative person, does not comply with the criteria for an 'attempt at propagation of a dangerous disease' according to section 231 of the Swiss penal code nor for 'an attempt to engender grievous bodily harm' according to section 122, 123 or 125." See P Vernazza et al (2008), "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* 89:165-169. Available on-line at http://www.saez.ch/pdf_f/2008/2008-05/2008-05-089.PDF In response to the statement, UNAIDS and the World Health Organization have reiterated the importance of a comprehensive approach to HIV prevention, including correct and consistent use of condoms. The joint UNAIDS/WHO statement acknowledges that research suggests that when the viral load is undetectable in blood the risk of HIV transmission is significantly reduced, but goes on to note that it has not been proven to completely eliminate the risk of transmitting the virus. See "Antiretroviral

Should criminal law be applicable only in cases of “intentional” transmission, or also in cases of “reckless” and “negligent” transmission?

Intent

There was consensus among consultation participants that criminalization could be justified in cases of conduct that intentionally transmits HIV (meaning conduct with the purpose of infecting another person). In such a case, the application of criminal law is necessary to achieve justice and punish the wrong-doer because of the combination of the person’s state of mind (s/he knows s/he is positive and intends to cause harm), the behaviour (that risks or causes harm), and the actual harm that results (the HIV infection). It was pointed out that cases involving such intentional transmission of HIV infection are rare. Most HIV-positive people who know their status try to avoid transmitting HIV to others.²¹

As noted above, participants did not reach consensus about whether criminalization could be justified in cases in which a person seeks to transmit HIV, but infection does not occur.

Recklessness or dolus eventualis

From the start, participants recognized that one of the most difficult issues that required consideration was that of *reckless*²² transmission of HIV, as characterized in common law systems, or conduct that in civil law systems could be characterized as marked by *dolus eventualis* — that is, the situation where a person foresees that his or her conduct may cause harm but nevertheless unjustifiably runs this risk. These concepts, and how they might apply in this context, constituted the focus of much of the debate at the consultation.

Participants noted that while reckless conduct is sometimes prohibited and punished with the weight of criminal law, this is not always the case and depends on how an offence is defined. While ultimately no consensus could be reached on this issue, a majority of the participants concluded that recklessness or *dolus eventualis* alone should not be sufficient to justify imposition of criminal sanctions or prosecution.

In addition to all the concerns about potential negative consequences raised above, participants against the imposition of criminal sanctions on the reckless transmission of HIV felt that lowering the threshold for criminal liability below *intentional* transmission of HIV raises a serious concern about the potential for bias and prejudice to enter into the interpretation and application of the criminal law if liability rests on a difficult and loosely-defined concept such as “recklessness”. They pointed out that a concept like “recklessness” assumes a common psychology, a common set of concerns, and a common way of viewing the world. With all the stigmas around HIV, they feared that the risk would be substantial that one or more biases would influence who gets investigated, charged and convicted. A participant noted that “When sexual risk-taking is at issue, there is a risk that jurors will be predisposed to see HIV-positive defendants as reckless.”

However, a minority of participants felt that the case against criminalization of reckless transmission of HIV – i.e. where a person knows he or she is HIV-positive, engages in behaviour that carries a significant risk of transmission, knows that this may cause HIV infection and nevertheless takes this risk unjustifiably – has not been convincingly made, particularly in societies in which women and girls are heavily represented among those who

therapy and sexual transmission of HIV” (1 February 2008). Available on-line at http://data.unaids.org/pub/PressStatement/2008/080201_hivtransmission_en.pdf

²¹ For example, see R Bunnell et al and G Marks et al, *supra*, note 11.

²² In common law systems, a person is generally considered criminally “reckless” when she or he foresees that his or her conduct may cause the prohibited result but, nevertheless, takes a deliberate and unjustified risk of bringing it about. In other words, in order to be reckless, a person must be aware that their conduct carries a risk of harm, and “unjustifiably” run that risk. In civil law systems, the same basic concept is reflected in the standard of culpability known as *dolus eventualis*. See *supra*, note 1.

are newly infected by HIV. In such places, the vulnerability of women and girls is linked to HIV-positive men, in many cases husbands or long-term partners, who act recklessly. The women and girls who contract HIV because of the reckless behaviour of their partners are seeking justice, and States are seeking additional ways to deter such behaviour. These participants suggested that such circumstances might mitigate or outweigh at least some of the concerns about the application of criminal law to HIV transmission, notably the risk of bias against particular socially-marginalized populations (e.g., sex workers, men who have sex with men, or people who inject drugs). While generally recognizing the limitations of, and concerns about, the application of criminal law, they felt that certain types of reckless behaviour are sufficiently blameworthy to warrant criminalization.

Negligence

Participants noted that, ordinarily, conduct that is merely negligent is not subject to criminal sanction, although it may attract civil liability. In a few circumstances, however, negligent conduct may attract criminal liability. In such cases, the person is deemed blameworthy and deserving of punishment because he or she failed to be aware of the possible harm from their conduct. Even in such cases, though, generally it is a particularly exaggerated form of negligence that must be proved in order to be guilty of a crime, such as “gross” negligence in the form of conduct that falls markedly below the care that a “reasonable person” would have exercised in the circumstances. Participants pointed out that in the realm of sexual relations, it is difficult to establish such a standard of care or to explain it in a way that people would be able to foresee that their conduct was potentially criminal.

There was consensus that applying criminal law to negligent transmission would cast the ambit of the criminal law too widely, potentially threatening many HIV-positive people who did not intend harm or realize they were acting unreasonably and thus are not sufficiently blameworthy to warrant criminal prosecution.

How should criminal liability be limited and what defences should be open to people charged with HIV transmission or exposure?

Participants agreed that criminal liability should never fall on persons who:

- Do not know how HIV is transmitted
- Do not know they are HIV-positive
- Have disclosed their status to their partners
- Reasonably believe their partner has consented to the risk of HIV infection, or
- Have taken measures to reduce the risk, such as using condoms or otherwise practising safer sex.

In such cases there is no intent to transmit HIV, no criminal recklessness, and people are actually doing what HIV prevention programmes urge – that is, practising safer sexual practices, getting tested for HIV and/or voluntarily disclosing their status. The criminal law should not undermine these public health efforts.

Knowledge of HIV-positive status

There was strong consensus among consultation participants that criminal liability could only be imposed, whether for transmission or exposure, in the event that the defendant actually knew that he or she has HIV. Participants agreed that a person could not be considered to have acted with intent or criminal recklessness in the absence of this positive knowledge. They felt that, to extend the criminal law beyond those with diagnosed infection – for example, to those who think they *may* be infected, or even further to those that it is felt *ought* to know they are or may be infected – would cast the net of criminal law far too broadly, and would likely open the door to stigma and prejudice against particularly marginalized groups driving the application of the criminal law.

Understanding of HIV transmission

Participants pointed out that it would be unfair to punish persons who have no knowledge that their conduct risks harm to another. They agreed that, in order to be held criminally liable, HIV-positive persons must understand both (a) that HIV is a communicable disease, and (b) how it may be transmitted. Participants emphasized that where individuals do not appreciate their conduct carries a risk, the objective of preventing HIV transmission calls for education, not prosecution.

Consensual conduct and disclosure

Participants agreed that criminal charges should not be imposed where the person at risk is fully aware of the HIV-positive status of their partner, and with that knowledge, consents to the activities and risks involved. They concluded that there is no justification for criminalizing the HIV-positive person whose partner consents to running a known risk.

Participants then discussed at what point is it justified to invoke the criminal law where a person has less than “full” knowledge. In particular, they discussed the following questions:

- Should it be a criminal offence for a person who knows he or she is HIV-positive to obtain a partner’s “consent” to conduct that risks transmitting HIV by deceit, that is, by actively misrepresenting that he or she is HIV-negative?
- Should criminal liability extend further, imposing a positive obligation to disclose HIV infection to the other person who is “consenting” to engage in activity that puts them at risk?

Participants felt that deliberately deceiving someone as to the risk of harm of engaging in unprotected sex may be criminalized. Absent some justification or excuse, it is conduct that may be characterized as morally blameworthy, and therefore deserving of punishment through criminal sanctions.

However, in the absence of deceit, there was consensus among participants that criminal law should not impose a positive obligation to disclose HIV infection. They pointed out that sexual activity, with any partner, always carries some risks of harm. A person engaging freely and voluntarily in sex does not necessarily need to know the HIV status of the sexual partner. He or she may choose not to engage in certain sexual acts so as to avoid the higher degree of risk they pose, may choose to take preventive measures to lower the risk to a level they find acceptable (such as using condoms), or may choose to engage in unprotected sex aware that a risk of HIV transmission may exist. However, participants also acknowledged that making such choices may be difficult or impossible for some, particularly women in relationships of unequal power. Where the HIV-negative sexual partner does not have the ability to avoid sex or practice safer sex, there is an obligation on the HIV-positive person to take full responsibility for preventing the transmission of the virus.

Participants highlighted that for people living with HIV, determining if and how to disclose to actual or potential partners can be difficult. In particular, people living with HIV may choose not to disclose for fear of rejection, stigma, discrimination, or violence; loss of privacy and confidentiality; or the desire to protect the feelings of others. Participants noted that, while people have an ethical obligation not to cause harm, a blanket rule of mandatory disclosure of HIV infection would fall most heavily upon those whose circumstances make disclosure difficult or impossible (which would likely be women disproportionately). There was consensus that where there are reasonable fears of violence or abuse related to HIV disclosure or use of HIV prevention methods, the law must not expose people to criminal liability for transmission or exposure under these conditions. Participants emphasized that those responsible for developing policy and law must take barriers to disclosure (and to taking precautions) into account and develop strategies for overcoming them.

Taking precautions

There was consensus among participants that the alternative of taking precautions to reduce the risk of transmission should suffice to avoid criminal liability, and that States should not require both – taking precautions and disclosure – to avoid criminal liability. They agreed that, whether by statute or by judicial determination, the law should expressly recognize that there is no criminal liability when the HIV-positive person has taken precautions to reduce the risk of transmission such that it is no longer significant, such as using a condom for penetrative anal or vaginal sex.

Participants pointed out that the criminal law should not punish those persons who, even if they do not disclose their HIV-positive status to a sexual partner, nonetheless act responsibly and in accord with standard public health advice by taking precautions to reduce the risk of transmission. They emphasized that it would be entirely counterproductive to the very goal of preventing further transmission to criminalize an HIV-positive person who, although he or she does not disclose his or her HIV status, actually practices safer sex.

If the use of criminal law is justified, should general criminal law or HIV-specific legislation be used?

Participants acknowledged that there are several arguments for the creation of an HIV-specific offence and against the use of general criminal legislation in those limited cases where the use of criminal law is justified. These include:

- While an HIV-specific provision in criminal law is stigmatizing, the prosecutions themselves are also stigmatizing, whatever their legal basis. To date, the majority of prosecutions have occurred in jurisdictions without HIV-specific provisions.
- General criminal law may not be able to distinguish between cases of intentional versus reckless transmission or exposure to HIV. Under such law it is often unclear if: (a) the prosecution must prove the defendant knew his/her status or merely knew they were in a high-risk category; (b) using a condom or taking other precautions to reduce the risk of transmission acts as a defence, for example against a charge of recklessness; and (c) there is a liability if the person who is HIV-positive exposes the partner to the virus but does not transmit the virus.
- A central problem with the use of general criminal law is that of knowledge. A requirement of the law is that people must know and understand, or have the means of knowing and understanding about a particular law. If people do not know about or understand the implications of the general criminal law as it applies in the context of HIV transmission, they cannot change their behaviour to comply with it. Participants noted that the Supreme Court of the Netherlands has stated that if the State is to pursue criminal prosecutions for HIV transmission or exposure, then the legislature should enact legislation that clearly defines what is prohibited.²³
- There is the potential for more narrowly defining the prohibited conduct and punishment within HIV-specific statutes, rather than relying on the courts to interpret if and how traditional criminal offences apply to HIV transmission. A carefully drafted statute in this way could minimize the likelihood the judiciary or prosecution would overextend or misapply the general criminal law.

Participants noted that theoretically one may obtain a better outcome if HIV-specific legislation was crafted, but questioned whether in practice that would be a likely outcome. In addition, they were concerned that, while such a law is drafted and debated, the media and members of parliament may make uninformed, sensational statements that further contribute

²³ However, as a result of extensive dialogue with HIV sector organizations in advance of this ruling, the Ministers of Justice and Health recognized that embarking on such a legislative reform project would be undesirable (in part because of the stigmatizing impact). Therefore, they determined that, for public health reasons, they would accept the ruling of the Supreme Court that effectively circumscribes the possibility and scope of future prosecutions.

to the stigmatization of and discrimination against people living with HIV. In addition, they mentioned the following other reasons for not creating an HIV-specific offence:

- Existing criminal offences may be adequate to address conduct for which the application of criminal law is justified, and it is unlikely an HIV-specific statute would have any additional deterrent effect over and above the deterrent effects (if any) of prosecution under traditional criminal offences.
- Creating a new offence could compound the problems of criminalization, if the new HIV-specific offence is treated by prosecutors as an addition to other criminal law charges.
- Creation of an HIV-specific statute could encourage widening the application of criminal law to other infectious diseases, including other sexually transmitted diseases.

In the end, there was consensus among participants that no HIV-specific offences should be created, primarily because of the concern that it would be highly stigmatizing and counterproductive. In order to limit the potential damaging effects of using general criminal law, participants recommended that prosecutorial guidelines be developed about the application of general criminal offences to health conditions, including but not limited to HIV.

Participants felt that, although HIV should ideally not be singled out for criminal prosecutions, neither is it desirable to expand the scope of the criminal law even further by targeting other sexually transmitted infections.

Could public health law be used as an alternative to applying criminal law to HIV transmission?

Participants discussed whether the application of public health law to the transmission of HIV would accomplish public health goals, as well as criminal justice goals, more effectively than the application of criminal law.

Participants recognized that public health law could be a possible alternative to criminal law in addressing HIV transmission. There was consensus among participants that public health law may:

- have greater flexibility than criminal law in protecting the rights of the individual and supporting public health protection
- be more effective in rehabilitating and deterring people from risk behaviours, as it can take a graduated approach starting with behavioural interventions to reduce risk and moving to more coercive interventions, such as compulsory examination and treatment or detention to prevent onward transmission.

However, public health law can also be subject to abuse, since it has fewer due process protections attached to it than criminal law.²⁴ Therefore participants urged that, when public health law is applied, it be applied with appropriate and adequate due process protection, including in the case of denial of liberty. Like criminal law, it should not be misapplied in the context of HIV.

²⁴ The case of *Enhorn v. Sweden* (2005), European Court of Human Rights, Application No. 56529/00, offers a prime example. In that case, the Court held that Sweden had violated the right to liberty, under the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 5) for the manner in which had approached the compulsory detention of a person living with HIV. Under public health legislation, Swedish authorities had repeatedly extended his involuntary detention for a period eventually totalling almost seven years with the stated objective of preventing him from transmitting HIV to sexual partners, although his conduct was never adjudged to be criminal under Swedish law. The Court found that other, less severe measures had not been explored, with this detention being taken as a last resort, and awarded damages against Sweden for the violation of the complainant's rights under the *Convention*.

Participants pointed out that in many settings in which there is currently a push for criminalization of HIV transmission, public health laws are outdated or suffer from lack of sufficient capacity to be properly enforced. In practice, therefore, relying on public health law as an alternative to criminal law is often not an option. Moreover, participants felt that it would be a mistake to devote scarce human and financial resources to increasing the capacity of public health authorities to deal with such cases under public health law when such resources should be spent on programmes that would have broader public health impact, e.g. those that increase access to prevention, treatment, care and support.

What key research questions could further understanding of the application of criminal and public health law to HIV transmission, and help inform optimal public policy?

Participants recognized at the outset that data on the impact of criminalization of HIV transmission are limited, and that further research should be undertaken to provide more and better data on the prevalence of laws criminalizing HIV transmission; the effect of these laws on HIV testing uptake, access to care, and sexual behaviour; and on what conditions facilitate or impede voluntary disclosure.

In particular, the following research questions were suggested:

- What are the trends in criminal prosecutions and legislative/policy developments relating to HIV?
- What are the pressures and motivations behind the trends? To what extent does the aim of protecting women (in Africa especially) play a role? Is xenophobia or other discrimination an issue in 'high-income country' prosecutions?
- Does the medical treatability of HIV – which makes it a chronically manageable condition, which need no longer be fatal – change the criminal impact of HIV transmission or exposure?
- What impact do recently acquired epidemiological and biological insights regarding transmission have on criminal notions of risk such as (a) transmission in the highly infectious post-conversion stage when few are aware of their new HIV status, (b) multiple concurrent partner situations, and (c) reduced infectiousness when on consistent treatment?
- Can trends in selective prosecution be identified?
- To what extent does the application of criminal laws to HIV transmission
 - heighten stigma
 - discourage testing
 - hinder access to counselling and support
 - create a false sense of security
 - impede research
 - impede the efficacy of behaviour change interventions?

What are suggested next steps for UNDP, UNAIDS Secretariat, other relevant UNAIDS co-sponsors and civil society?

Participants were concerned that previous efforts to resist the push for criminalization of HIV transmission have failed. Participants agreed that sharper, more persuasive arguments outlining the positive case against criminalization, in human rights terms and in public health terms, is needed – including the case for not criminalizing exposure and for not criminalizing recklessness.

Participants agreed that there is a need to look at the issues from the perspective of those who argue for criminalization and to speak to “the hearts and minds of those who advocate for criminalization”, recognizing that not only intentional behaviour that results in transmission is considered to be morally blameworthy. In this regard, they pointed out that the 2002 UNAIDS

policy options paper on criminalization does not provide clear enough guidance on the very complicated issues of “intent” and “recklessness” in the context of HIV transmission.

There was consensus that any documents coming out of the consultation should make clear and unequivocal statements against the criminalization of HIV transmission; provide guidance about how existing criminal laws should be revised; and positively address the needs and concerns of vulnerable populations, particularly women in low-resource and high-incidence countries.

Many politicians think that passing criminal laws will help prevent the epidemic. We have to counter this belief and dismiss this argument.
– MP Hendrietta Bogopane-Zulu, South Africa

Participants affirmed that the 2002 policy options paper is good and “deeply accurate”, but said that a much shorter document with the key messages was needed for convincing policy-makers. Hendrietta Bogopane-Zulu, Member of the South African Parliament, emphasized the need for clear and accessible guidance for parliamentarians, saying that their knowledge of these often complicated issues was limited, but that they could not be expected to read a 30-page – or even a 10-page – document. Participants suggested that one short document may not be enough, and that various three-page advocacy documents should be addressed to different audiences, including members of parliament, clinicians, prosecutors, advocates, and others.

Participants representing WHO at the consultation added that health ministries also needed to be engaged, since issues of criminalization, despite their potential impact on public health, are usually left entirely to Ministries of Justice.

Ultimately, participants agreed that any document would not have a major impact unless concerted advocacy by UNAIDS, UNDP, and civil society is undertaken. In particular, the many countries that have already passed laws are unlikely to change those unless serious effort is undertaken. Seema Paul said that UNAIDS was committed to producing a short policy brief, intended for policy-makers, and to revising the 2002 policy options paper. In addition, UNAIDS would need to offer assistance to UNAIDS and UNDP country offices so that they could be more vocal on this issue.

Participants identified a number of additional initiatives that should chart the way ahead. These included:

- A consideration of the desirability of building a database, in conjunction with civil society organizations, on laws criminalising HIV transmission and the features of those laws and of their implementation;
- An examination of the feasibility of monitoring legislation and its impact, as well as documenting initiatives of “decriminalization” and explicit rejections of criminalization (e.g., as observed in Mauritius);
- Cooperation with the Inter-Parliamentary Union and other international parliamentary organizations, and with Members of Parliament;
- Training of country-level United Nations officers in the human rights-based approach and in the way in which it can be used to shape strategies for preventing the transmission of the virus;
- Continuing dialogue between UNAIDS and experts in criminal law, and the dissemination of a report on the outcome of this meeting to United Nations member countries.

One participant pointed out that, while participants had agreed that this issue was a “sideshow”, it could use up a large amount of the energy and the financial resources available within UNAIDS and the small number of organizations working on human rights and HIV – at a time when concerted action is required to eliminate legislative and policy barriers to greater access to prevention, treatment, care and support. Participants agreed that, if advocacy and

multiple documents on criminalization of HIV are needed, there is also a need for far greater resources for work on the legal and human rights aspects of HIV generally.

Conclusions

At the end of the consultation, the following major conclusions had emerged:

The need to adhere to a human rights-based approach to HIV

The first major conclusion was that UNAIDS, WHO and other agencies should stay the course in adhering to a human rights-based approach in the response to the HIV pandemic. Participants noted that, in those countries that have followed this approach, the dimension and spread of the epidemic has generally diminished. In those countries that have refused to do so, the epidemic has continued to spread.

Participants acknowledged that it may sometimes be difficult to explain the rights-based approach to legislators as it often appears paradoxical. As stated by Justice Michael Kirby, “[h]owever, to impact highly personal behaviours, necessary for HIV containment, it is essential and urgent to assure people that they can trust authorities whose major concern is their health and preventing their infection.” Participants called upon the United Nations agencies to promote awareness that the countries that have adopted the rights-based approach have been those most successful in their strategies against HIV and AIDS.

The need for caution in applying criminal law

In the opinion of the consultation, public health arguments and human rights concerns support extreme caution about the criminalization of HIV. In rare cases involving blameworthy behaviour, based on intent to cause harm, the criminalization of HIV transmission might theoretically be justified from a punitive or retributive viewpoint. However, it remains counter-productive as an overall strategy against the epidemic.

Participants suggested that the push for criminalization of HIV transmission depends upon myths about HIV. To dispel these myths, the following facts should be highlighted:

- Most people who know they are HIV-positive try to act responsibly.
- Most transmission of HIV is by people who do not know their HIV status.
- We live in a world of risks, including risks associated with sex which people take all the time.
- People living with HIV have a right to a sex life, to marriage and to having children.
- Uninfected people have a responsibility to protect themselves.
- Infected people have a responsibility to protect others.
- Society has the obligation to support HIV prevention and safe behaviour.
- Many arguments for criminalization are based on prejudice.
- Criminalization encourages sensationalism, high emotions, and irrationality.
- Criminalization will not significantly influence people’s risk behaviours – criminal laws are a crude tool for promoting responsible behaviour in the context of HIV.
- In contrast, HIV prevention works where it is based on evidence and taken to sufficient scale.

Unequivocally, therefore, the consultation concluded that, from the standpoint of a public health response to HIV, enhancing criminal law offences against the transmission of HIV and increasing prosecution of such offences, was not advisable.

The participants recognized the taxonomy into which conduct relevant to transmission of a serious disease might be divided. At the highest level of culpability is purposeful transmission of HIV. Lower on the scale of culpability is recklessness or *dolus eventualis*. Lower still is negligent transmission. Participants agreed that, in any criminal offence regarding the transmission of a disease, the ingredient of intentional conduct, in the sense of wilful and

knowing behaviour with the purpose of transmitting the virus, was essential. Intention on the part of the accused is ordinarily an attribute of serious criminal offences. It should remain an attribute of any offence regarding the transmission of disease, including HIV.

All participants were of the view that negligent transmission of HIV should not be criminalized. Mere carelessness did not betoken criminal intent. Especially in societies with high HIV prevalence, to penalize a person for negligent transmission and to impose criminal and punitive sanctions as well as stigma, could not, in the view of the participants, be justified.

In all cases involving criminalization of HIV transmission, the participants agreed that proof that the accused had observed safer sex practices or informed a sexual partner about elements of risk should be relevant as defences and/or in mitigation of punishment.

Much of the debate therefore centred on those attributes of the will that lay between deliberate and purposeful intention to infect others and mere negligence. A majority of the participants concluded that recklessness alone (or *dolus eventualis* in civil law settings) should not be sufficient to warrant imposition of criminal sanctions or prosecution.

For those limited cases in which application of criminal law was seen as justified, participants recommended the use of general criminal law over introducing HIV-specific laws. They further recommended that States should:

- ensure that any application of general criminal legislation is consistent with their obligations under international human rights law, and
- issue guidelines that guide and restrict prosecutorial and police discretion.

The need to increase focus on prevention

The consultation concluded that the more urgent priority was HIV *prevention* and that that priority could be better advanced by initiatives of *decriminalization* of groups whose marginalization by the law contributes to HIV vulnerability, rather than by the generally ineffective, potentially capricious, distracting initiatives of criminalization of transmission that is now spreading in many countries. As stated by Justice Michael Kirby and endorsed by participants, the “truly urgent necessity in most countries is not increased *criminalisation* of HIV transmission. It is *decriminalisation* of the present criminal law impediments that often stand in the way of effective strategies of prevention.”

The cost of anti-retroviral treatments renders a wholly medical response at this stage (in default of an effective vaccine and cure) an unconvincing and ineffective strategy. There will never be sufficient funds to cope with an expanding demand for therapies where the rate of infection is not reduced. It can only be reduced by strategies addressed to prevention. This, therefore, is the major present failing of the international agencies and the governments of many States. In the decade ahead, it should have the priority of attention that it has lacked to this time.
– Justice Michael Kirby, Australia

Many participants pointed to the perceived failings of countries that had failed to adopt sufficient or evidence-informed HIV prevention measures, as well as to the need for WHO and UNAIDS (Secretariat and co-sponsors) to promote these more energetically. It was recognized that, since the “3 by 5 strategy” was adopted by WHO and UNAIDS Secretariat, major initiatives had been introduced to expand the availability of HIV testing and counselling, as well as antiretroviral treatment, including the commitment by States to achieve universal access to HIV prevention, treatment, care and support by 2010. However, participants stressed that any thought that the HIV epidemic can be overcome through medicalization fails to consider the essential need for an effective strategy of HIV prevention, most of which occurs outside of health systems.

There was consensus that governments should prioritize evidence-informed and effective public health interventions that have successfully reduced HIV transmission. Such HIV prevention measures serve to protect and promote the rights and responsibilities of both HIV-positive and HIV-negative people. They involve providing people with the information, means

and support to avoid HIV infection and practice safer behaviours; increasing access to voluntary (as opposed to mandatory) testing and counselling; and addressing HIV-related stigma and discrimination. Such measures are also part of the commitments made by governments in the Declaration of Commitment on HIV/AIDS (2001) and in the Political Declaration on HIV/AIDS (2006).

The need to address the vulnerability of women and girls

Participants emphasized that the best way to protect women and girls against HIV infection and impact was to enact laws and policies that protect their human rights, particularly freedom from sexual violence and educational and economic equality and empowerment. They urged that countries not only ensure that appropriate laws in this regard are enacted but also that they are properly enforced.

The need for increased resources for work on HIV and human rights

Participants noted that the consultation had made many suggestions about what UNAIDS and civil society organizations should do to limit the potential harm of the push for criminalization of HIV transmission. They pointed out that such work cannot be undertaken without an increase in the budget of UNAIDS for human rights work, which ought to have a high priority.

Appendix 1: Summary provided by Justice Edwin Cameron

Justice Edwin Cameron provided the following comments on the final day of the consultation:

The debate over the last two days has revealed many differences between us – but also substantial common ground. We have found broad agreement amongst ourselves that:

- The criminal law is in general an inappropriate tool for regulating HIV infection and transmission.
- There is no public health rationale for invoking criminal law sanctions against those who transmit HIV or expose others to it.
- The sole rationale for so doing must be found in the criminal law aim of retribution.
- The retributive nature of the justification means that a high threshold is required for its invocation to be warranted.
- The use of the criminal law in this context should therefore generally be confined to cases of intentionally transmissive conduct.
- Use of the criminal law can never be justified where the person accused of HIV transmission or exposure has no actual knowledge of his or her HIV infection.

More importantly even than these areas of consensus, and far more important than the issues that continue to divide us is this - that we have in this meeting found our moral and intellectual centre, as well as a clear path to our forward impetus. This lies in what can appropriately be called a crisis of criminalization that is occurring in West and Southern Africa: in these parts, laws are being enacted that appear to be so ill-judged, so poorly formulated and so over-broadly expressed that they unite us in alarm at their enactment and in concern that their adoption might be emulated elsewhere. We have reached strong consensus on the need for a clearly and respectfully expressed, but emphatic and unequivocal response to these laws and to the threat of further such enactments.

In thinking about the terms of this response, there are, as Justice Michael Kirby has observed, questions of both principle and strategy. These require us to be pragmatic in the terms and content of our response, and to bear in mind – as we have rightly been reminded by the legislators among us, Priscilla Misihairabwi-Mushonga (Zimbabwe), Hendrietta Bogopane-Zulu (South Africa) and Shazia Marri (Pakistan) – that those enacting these laws hold positions of authority and come from communities that are feeling the real impact of HIV.

Yet strategy and pragmatism should not mute our commitment to a clearly principled position. We tend to feel defensive in opposing criminal statutes which we know to be detrimental to HIV prevention and to the lives and safety of those living with and at risk of HIV. Yet here we must draw strength by reminding ourselves of the history of other battles that were fought in this epidemic. Often these appeared to involve unwinnably quixotic struggles: yet in each case the viewpoint of justice and rationality ultimately prevailed. Here we should remind ourselves of:

- The struggle to make human rights count at all in global and national responses to the epidemic – a struggle started by Jonathan Mann, and most prominently and eloquently advanced by Michael Kirby over the last twenty years.
- The battle to formulate and adopt the *International Guidelines on Human Rights and HIV and AIDS* – which initially seemed over-ambitious, but which was vindicated when the entire United Nations adopted these human rights principles in the declaration adopted at the UN General Assembly Special Assembly on HIV and AIDS.
- Most signally, the fight to introduce mass public provision of anti-retroviral treatment in resource-poor settings in Africa and elsewhere – until 2000, that seemed an impossible prospect; yet now it is a commonplace of national and international AIDS policy.

For myself, this last issue has an especial resonance, since next week I will mark a significant anniversary. It will be ten years since I started on the ARV therapy that saved me from certain death from AIDS. This for me is not merely a private celebration, but a constant reminder that far too few of those who right now need ARVs are receiving them – and that daily the toll of unnecessary deaths from AIDS continues to climb. While 400 000 people are receiving publicly-provided ARVs in South Africa, and 60 000 in Zimbabwe – figures whose growth we should celebrate – many multiples more people need the life-saving medications but are not receiving them, and are facing death from AIDS. And it bears most directly on our deliberations, for the ill-judged laws that trouble us seem indubitably certain to make access to testing and thence to treatment more difficult in countries where they are adopted. And treatment access represents the most urgent issue in the response to the epidemic in Africa today.

Our response must therefore take into account both the increasing prosecutions of HIV transmission and exposure in resource-rich countries, where HIV prevalence generally remains low; and these enactments in high-prevalence, low-resource countries.

Our response has an especial importance in these countries, for regrettably the capacity for strong, well-informed and assertive civil-society responses to these laws is often lacking there. And it is in these countries, as Priscilla, Hendrietta, Michaela Clayton (Namibia) and Christine Stegling (Botswana) have insistently reminded us, that the burden of the HIV epidemic falls most harshly on women; and it is upon women that the severest impact of these enactments will also fall, for most people in Africa who know their HIV status are women who discover it through their visits to ante-natal clinics.

In formulating the imperative arguments against criminal responses to HIV transmission and exposure we must again go back to the roots of this epidemic. HIV is treated exceptionally for one over-riding reason: the stigma associated with it as a sexually transmitted infection. No other infectious disease, not even any other sexually transmitted disease, is treated as HIV is. From May 1981, when the first case of AIDS was diagnosed within the gay community of San Francisco, HIV has been treated differentially, and more harshly. It can truly be said that stigma lies at the heart of the experience of every person living with HIV – as is poignantly articulated by the witness of persons with HIV recorded at the meeting that the AIDS and Rights Alliance of Southern Africa held with the Open Society Institute in Johannesburg in July 2007. It is stigma that makes those at risk of HIV reluctant to be tested; it is stigma that makes it difficult – and often impossible – for them to speak about their infection; and it is stigma that continues to hinder access to the life-saving ARV therapies that are now increasingly available across Africa.

Legislators bewildered, or baffled, or at a loss as to how to respond effectively to the epidemic may be seduced into erroneously taking recourse to criminalization, which may seem attractive, effective and media-friendly. Yet, tragically, it is primarily stigma that lies behind the drive towards criminal responses to the epidemic. It is stigma, rooted in the moralism connected with the sexual transmission of HIV that too often provides the main impulse behind the enactment of these laws. But the enactment of such laws in turn merely adds fuel to the fires of stigma. It is not only prosecutions for HIV transmission and exposure, but the chilling content of the enactments themselves, that reinforce the idea of HIV as a shameful, disgraceful, unworthy condition. And so prosecutions and laws of this sort, by reinforcing stigma, make it more difficult for those with or at risk of HIV to access testing, to talk about diagnosis with HIV, and to receive treatment and support.

We therefore have a drab but irrefutable calculus: these laws will lead to more deaths, more suffering and greater debilitation from AIDS. As we conclude our meeting today, our deliberations therefore constitute an imperative message to the drafting team in preparing the meeting report and the policy brief, and in updating the 2002 policy options paper: they will speak skillfully and deftly and respectfully, but they will not compromise principle in setting out the case against laws and prosecutions that detrimentally affect a just and rational response to AIDS. Too many lives are at stake for that message to be blunted.

Appendix 2: List of Participants

UNAIDS/UNDP International Consultation on the Criminalization of HIV Transmission

List of Participants

31 October – 2 November 2007

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