

# CONCEPT NOTE:

## LAWYERS FOR HIV AND TB JUSTICE: STRATEGIC LITIGATION, LEGAL DEFENCE AND ADVOCACY TRAINING

9 October 2017

### Background

This training is focused on human rights based responses and approaches to the use of criminal law and coercive State action in relation to HIV and tuberculosis (TB).

Coercive State action to isolate and incapacitate individuals considered carriers of infectious diseases have a history dating back to the 14<sup>th</sup> century.<sup>1</sup> Until recently, however, few jurisdictions have enforced *criminal* laws in relation to disease transmission.<sup>2</sup> Since the beginning of the HIV epidemic, however, policymakers and politicians have been tempted to punish those living with, and at risk of, HIV.<sup>3</sup> One way has been to use the criminal law.

“HIV criminalisation describes the unjust application of the criminal law to people living with HIV based solely on their HIV status – either via HIV-specific criminal statutes, or by applying general criminal laws that allow for prosecution of unintentional HIV transmission, potential or perceived exposure to HIV where HIV was not transmitted, and/or non-disclosure of known HIV-positive status.”<sup>4</sup>

HIV criminalisation is a growing, global phenomenon. Some 70 countries across the world have adopted laws that specifically allow for HIV criminalisation and prosecutions for HIV non-disclosure, potential or perceived exposure and/or unintentional transmission have been reported in more than 65 countries.<sup>5</sup> This latter figure includes countries that have applied generally-worded criminal or public health laws to people with HIV. In sub-Saharan Africa, while there were no HIV-specific criminal laws at the start of the 21<sup>st</sup> century, 31 countries

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<sup>1</sup> Quirk H and Stanton C “Disease transmission and the criminal law: A growing concern?” (2016) *Criminalising contagion: Legal and ethical challenges to disease transmission and the criminal law* (Cambridge: Cambridge University Press) p 1.

<sup>2</sup> *Id.*

<sup>3</sup> Cameron E “Foreword” in HIV Justice Network and the Global Network of People Living with HIV (GNP+) (2016) *Advancing HIV Justice 2*, available at: <http://www.hivjustice.net/advancing2/>, at p 5.

<sup>4</sup> HIV Justice Network and the Global Network of People Living with HIV (GNP+) (2016) *Advancing HIV Justice 2*, available at: <http://www.hivjustice.net/advancing2/>, at p 9.

<sup>5</sup> HIV Justice Network and the Global Network of People Living with HIV (GNP+) (2016) *Advancing HIV Justice 2*, available at: <http://www.hivjustice.net/advancing2/>, at p 10.

have now enacted overly broad and/or vague HIV-specific criminal statutes with prosecutions documented in 16 countries.<sup>6</sup>

Similarly, current responses to TB often fail to respect human rights including through criminalising a person due to their TB status, enforcing involuntary treatment, hospitalisation, isolation and detention of people living with TB (who are often also living with HIV) in prisons, home arrests and travel restrictions.<sup>7</sup>

Tuberculosis (TB) criminalisation is defined for the present purposes as the unjust use of the criminal law, criminal sanctions, criminal detention and other coercive or punitive State action against people living with TB. Prosecution for failing to comply with TB treatment regimes has been documented in the USA,<sup>8</sup> and in Kenya and Israel involuntary confinement in prisons has been used in efforts to force treatment adherence.<sup>9</sup> Furthermore, evidence suggests that “legislative control of TB transmission has recently regained attention due to the threat” of multi-drug-resistance TB.<sup>10</sup>

## Justification

Coercive approaches to disease control, and the use of criminal law in the particular context of HIV and TB, have frequently been criticized as violating human rights and being harmful to public health.

HIV criminalisation has been criticized for being overly broad, fuelling unjust and discriminatory prosecutions, being based on notions of transmission and exposure not grounded in scientific evidence, for disregarding human rights and criminal law standards of foreseeability, intent, causality, proportionality, defence and proof, and for perpetuating stigma and discrimination against people living with HIV and people vulnerable to HIV. Public health and human rights concerns have been raised against HIV criminalisation by the Global

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<sup>6</sup> Id at p 13.

<sup>7</sup> AIDS and Rights Alliance for Southern Africa (2015) Closing the Gap: TB and Human Rights: An Activist Guide for Southern and East Africa, available at:

[http://arasa.info/files/3914/4922/6648/Activist\\_guide\\_final\\_double\\_spread.pdf](http://arasa.info/files/3914/4922/6648/Activist_guide_final_double_spread.pdf).

<sup>8</sup> See, for example case reports from California (<http://www.theblaze.com/news/2012/05/17/authorities-criminally-charge-tuberculosis-patient-for-not-taking-meds/>) and Memphis (<http://wreg.com/2016/06/16/man-arrested-for-reportedly-violating-tuberculosis-law/>).

<sup>9</sup> <https://www.hhrjournal.org/2016/06/petition-329-a-legal-challenge-to-the-involuntary-confinement-of-tb-patients-in-kenyan-prisons/>.

<sup>10</sup> Mburu G et al “Detention of people lost to follow-up on TB treatment in Kenya: A need for human rights-based alternatives” (2016) *Health and Human Rights Journal* (Volume 18: Issue 1), available at: <https://www.hhrjournal.org/volume-18-issue-1/>, citing: R. Coker, M. Thomas, K. Lock, et al., “Detention and the evolving threat of tuberculosis: evidence, ethics, and law,” *Journal of Law, Medicine, and Ethics* 35/4 (2007), pp. 609-615; D.P. Fidler, L.O. Gostin, and H. Markel, “Through the quarantine looking glass: drug-resistant tuberculosis and public health governance, law, and ethics,” *Journal of Law, Medicine, and Ethics* 35/4 (2007) pp. 616-628.

Commission on HIV and the Law,<sup>11</sup> the Joint United Nations Programme on HIV/AIDS (UNAIDS),<sup>12</sup> the United Nations Special Rapporteur on the Right to Health,<sup>13</sup> and the World Health Organisation,<sup>14</sup> amongst others. Justice Edwin Cameron, a judge of the South African Constitutional Court, states that:

“HIV criminalisation is bad, bad policy. There is simply no evidence that it works. Instead, it sends out misleading and stigmatizing messages. It undermines remarkable scientific advances and proven public health strategies that open the path to vanquishing AIDS by 2030.”<sup>15</sup>

In relation to TB, health and rights experts have stated that:

“incarceration and detention approaches curtail the rights to health, informed consent, privacy, freedom from non-consensual treatment, freedom from inhumane and degrading treatment, and freedom of movement of people lost to follow-up. Detention could also worsen social inequalities and lead to a paradoxical increase in TB incidence.”<sup>16</sup>

With high rates of HIV and TB in Africa, it is critical that HIV- and TB- human rights activists are poised to respond to efforts by States to apply coercive and criminalizing means in response.

## Objectives

The proposed training seeks to enable and equip lawyers, in the African context, to:

1. Understand the lived experiences of people who are surviving HIV and TB criminalisation.
2. Understand why overbroad criminalisation is harmful to human rights and to effective responses to HIV and TB.

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<sup>11</sup> Global Commission on HIV and the Law. HIV and the Law: Rights, Risks and Health. New York, 2012.

<sup>12</sup> UNAIDS. Policy brief: Criminalization of HIV Transmission. August 2008; UNAIDS. Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Scientific, medical and legal considerations. Geneva, 2013.

<sup>13</sup> Grover A. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. June 2010.

<sup>14</sup> WHO. Sexual health, human rights and the law. June 2015

<sup>15</sup> HIV Justice Network and the Global Network of People Living with HIV (GNP+) (2016) Advancing HIV Justice 2, available at: <http://www.hivjustice.net/advancing2/>, at p 5.

<sup>16</sup> Mburu G et al “Detention of people lost to follow-up on TB treatment in Kenya: A need for human rights-based alternatives” (2016) *Health and Human Rights Journal* (Volume 18: Issue 1), available at: <https://www.hhrjournal.org/volume-18-issue-1/>.

3. Successfully defend cases and institute strategic litigation to protect human rights in cases of unjust or overbroad use of criminal law and coercive means in relation to HIV and TB.
4. Plan, implement and contribute to advocacy on issues of HIV and TB criminalisation.
5. Develop and implement regional / national-level strategies to effectively address HIV and TB criminalisation.

## Methodology

A four-day training will be held for lawyers identified as being well-positioned to respond to HIV and TB criminalisation in the African region. The training will also be attended by a number of key African journalists for the purposes of training and sensitisation.

Presentations, panel discussions, debates and group work will be facilitated by activists, legal practitioners, and experts to train the participants in both theoretical and practical (skills-based) content. Participants will be encouraged to debate and question the themes and content of the training. Facilitators and speakers will be selected on the basis of their contribution, experience and knowledge on evidence- and human rights-based approaches to the issues.

The training will be conducted in English. Simultaneous translation will be provided in French and Portuguese as needed depending on the participants selected.

## Expected results

### Outputs

- Increased knowledge of participants (lawyers and journalists) on HIV and TB and human rights and public health concerns relevant to the use of criminal law and coercive approaches.
- Increased knowledge of participants (lawyers and journalists) of the lived experiences of people affected by HIV and TB criminalisation and the impact of HIV and TB criminalisation on individuals, couples, communities and society as a whole.
- Enhanced capabilities of participants (lawyers) to identify and conduct effective legal defence and strategic litigation aimed at protecting human rights in cases of HIV and TB criminalisation.
- Increased awareness by participants (lawyers) of litigation strategies, case law, expert evidence, and resources available to support effective legal and advocacy responses to HIV and TB criminalisation.
- Participants (lawyers) develop region and country-specific strategies for legal support and advocacy on human rights-based approaches to HIV and TB criminalisation.

- Increased ability by participants (journalists) of how to write accurate, un-stigmatising articles about people with HIV and TB, and to cover issues of criminalisation with balance, sensitivity and accuracy.

## Outcomes

- Participants (lawyers) undertake legal defence work and human-rights-based litigation at country-level on cases relating to HIV and TB criminalisation.
- Participants (lawyers) are supported to run defence work and litigation.
- Participants (lawyers and journalists) contribute towards, support and advance human rights-based advocacy on HIV and TB criminalisation at country and regional-levels.

## Impact

- Conditional: Increased human rights-based advocacy, legal analysis, legal services and litigation improves the protection of the rights and dignity of people living with affected by HIV and TB at domestic level, creating precedents and increasing jurisprudence on health and human rights in the region, and preventing further efforts to enact and enforce unjust criminal and coercive laws in relation to HIV and TB. Public opinion is positively influenced, creating an environment where parliamentarians are more likely to consider law reform relating to the over-criminalisation HIV and TB.