

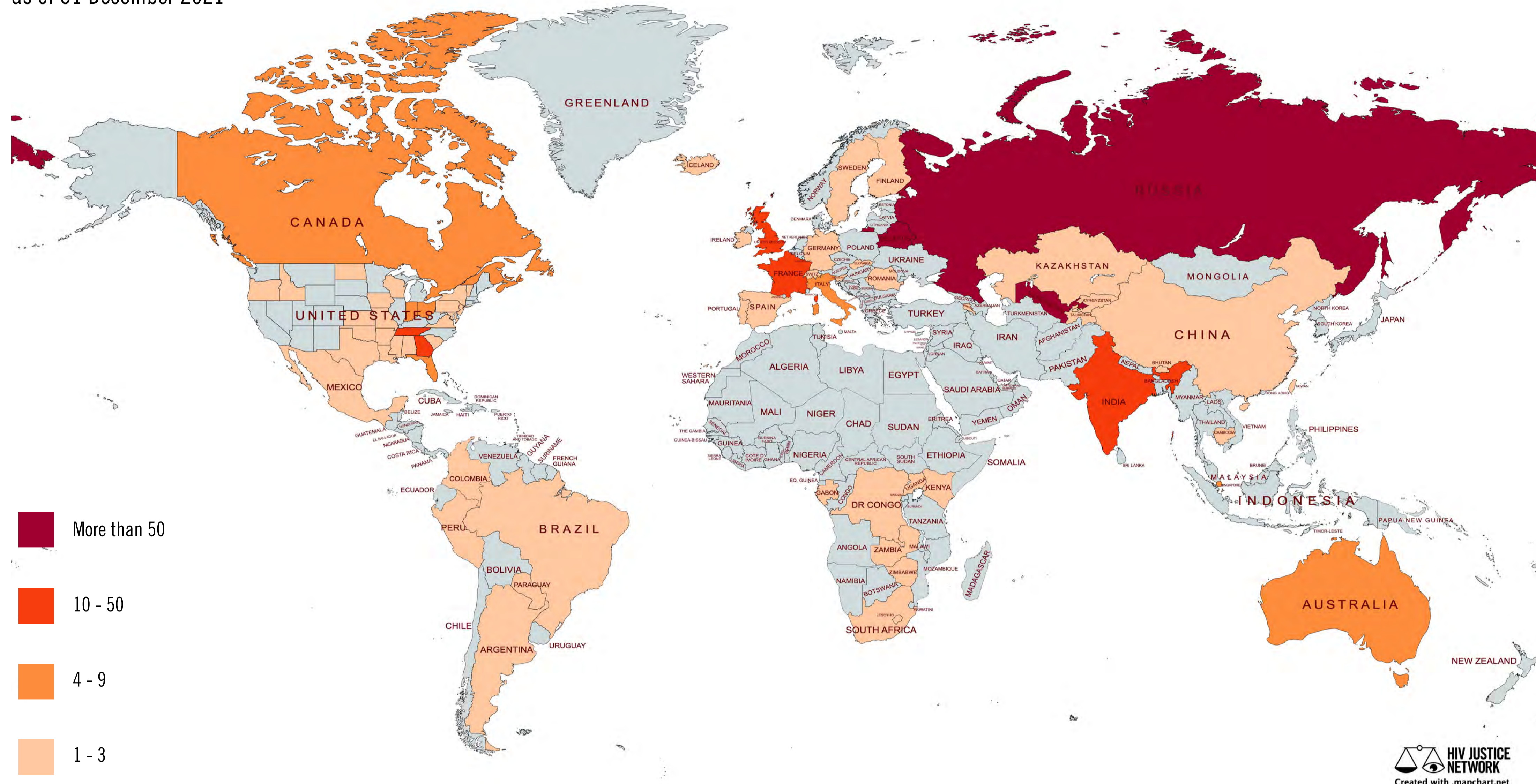
NO JUSTICE, NO PEACE FOR PEOPLE LIVING WITH HIV: A GLOBAL ANALYSIS OF HIV-RELATED CRIMINAL CASES, 2019-21

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WHERE HIV-RELATED CRIMINAL CASES HAVE BEEN REPORTED 2019-21

as of 31 December 2021



Prosecutors and courts continue to ignore global guidance as well as scientific developments on HIV-related risk, harm, and proof of transmission.

BACKGROUND:

HIV-related criminal cases have taken place in 81 countries since the first reported prosecution in 1986.¹ 52 jurisdictions in 35 countries have applied HIV-specific criminal laws, and 89 jurisdictions in 48 countries have applied non-HIV-specific, general criminal laws.

Despite UN recommendations aimed at limiting HIV-related criminal cases to the use of general criminal laws to prosecute extremely rare instances of intentional HIV transmission (i.e., where there is proven malicious intent to transmit HIV and the fact of transmission is proven beyond reasonable doubt),² few countries or jurisdictions have repealed or reformed their laws or legal frameworks, and only a handful limit the overly broad use of the criminal law as recommended.³ Far from being a legitimate tool for public health, HIV criminalisation is often used as a proxy mechanism for increased state control, policing of marginalised groups, the enforcement of morality, and punishment of social vulnerability – thus exacerbating existing inequalities and power imbalances.

METHODS:

To establish whether HIV-related criminal cases adhered to global recommendations and guidance, and incorporated up-to-date knowledge of HIV-related science, we undertook a global audit of case reports contained within the HIV Justice Network's Global HIV Criminalisation Database⁴ reported between January 2019 and December 2021. Given the lack, or inadequacy, of systems to track HIV-related criminal cases in many jurisdictions, it is not possible to record every case. Much of what is known about individual cases comes from media reports, and often the outcome of a reported arrest, or the legal disposition of a criminal case, remains unknown. Therefore, our audit should be seen as an illustration of what may be a more widespread, but generally undocumented, inappropriate use of the criminal law against people living with HIV.

The following electronic databases were used to search for and retrieve court judgments: Lexis Library for UK and Commonwealth cases, Westlaw for United States cases, JustisOne for Caribbean cases, BAILII for British and Irish cases, CanLII for Canadian cases, AustLII for Australian cases, SAFLII for South African cases and CommonLII for additional cases from the Commonwealth and common law jurisdictions.

RESULTS:

We recorded a total of 275 arrests, prosecutions, convictions, appeals and/or acquittals in 39 countries. However, the actual number of cases during the audit period is likely to be much higher. For example, when we include numbers from countries that provide official data – Belarus, Russian Federation, and Uzbekistan – we estimate almost 700 cases.⁵

Of the 275 cases in our Database, the majority concerned non-disclosure of known HIV-positive status prior to consensual sexual activity, with fewer than 30% of cases alleging HIV transmission. No case involving consensual sexual activity proved beyond reasonable doubt that the defendant had both malicious intent to transmit HIV and was, in fact, the source of the complainant's HIV. A minority of cases concerned spitting, biting, breastfeeding, or blood donation.⁶

We found that HIV-related arrests, prosecutions, and convictions disproportionately impact marginalised populations and those in a position of vulnerability. Women, racial and ethnic minorities, migrants, men who have sex with men, transgender persons, and sex workers represented approximately half of all defendants in our audit. Disparity along racial and ethnic minority lines was most stark in the United States with at least 55% of arrests, prosecutions and convictions directed towards Black people and other people experiencing racism.⁷

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Persons prosecuted for biting and spitting were often institutionalised or were accused of committing offences during arrest or while being temporarily restrained. All complainants in these cases were persons in positions of authority to them. Breastfeeding and comfort nursing cases mostly arose in Africa – Kenya, Uganda, Zambia and Zimbabwe – with one case from Russia. The women prosecuted were mainly employed as caregivers and in many instances, the fact of their HIV status was not confirmed prior to arrest.

Arrests and prosecutions of HIV-related offences often proceed on inaccurate assumptions regarding HIV-related risk and harm. In alleged transmission cases,

these shortfalls are compounded by the failure of prosecutors and the courts to ensure correct interpretation of scientific evidence and its forensic limitations when seeking to prove actual transmission of HIV. In far too many cases, the first person diagnosed in the (sexual) relationship was assumed to be the first infected and the guilty party, without any further scientific or medical evidence.

Of particular concern are the number of alleged HIV 'exposure' cases that fail to reflect scientific advances regarding HIV, in particular with respect to the prevention effects of antiretroviral treatment and the inability to transmit HIV with an undetectable viral load. Perversely, some courts are still using the fact that the accused was on antiretroviral therapy as evidence of criminality, rather than evidence that the accused could not be guilty.

In some jurisdictions, scientific evidence regarding low or no transmission risk has been accepted by courts to acquit people living with HIV. For example, in Germany, the court considered the undetectable status of the accused in acquitting them of attempted dangerous bodily harm.⁸ In a case related to breastfeeding in Uganda, the court noted that "knowing that a person is HIV-positive is no reason to believe that they should or are capable of transmitting the virus except if an additional action is committed which exposes another person to an infection."⁹ In Canada, the courts are timidly acknowledging some scientific advances, but remain hesitant to depart from previous judicial decisions. For example, despite acknowledging the *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law*,¹⁰ the appellate court in *R v N.G.* found that, even with the use of condoms, a realistic possibility of HIV transmission remained for vaginal intercourse (and therefore the guilty verdict was confirmed).¹¹ In earlier cases, however, Canadian courts had accepted that an undetectable viral load in the absence of condom use precluded criminal conviction.

We also note that in most HIV-related criminal cases sentencing was generally disproportionate compared to both other offences and considering the degree of harm, especially in case where HIV transmission was neither alleged nor proven. Non-custodial sentencing was seldom considered.

CONCLUSIONS:

Prosecutors and courts continue to ignore global guidance as well as scientific developments on HIV-related risk, harm, and proof of transmission. Legislative reform efforts must be complemented by sustained judicial and prosecutorial training and effective implementation of the 2021 UNDP *Guidance for Prosecutors on HIV-related Criminal Cases*.¹²

1 For further information please see: A. Symington, E. Bernard, et al. *Advancing HIV Justice 4: Understanding Commonalities, Seizing Opportunities*. HIV Justice Network, Amsterdam, July 2022. Available at: <https://www.hivjustice.net/publication/advancing4>
2 UNAIDS/UNDP. *Policy Brief: Criminalisation of HIV Transmission*. August 2008. Available at: https://www.unaids.org/sites/default/files/media_asset/c1601_policy_brief_criminalization_long_en.pdf UNAIDS. *Ending Overt Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical scientific, medical and legal considerations*. May 2015. Available at: https://www.unaids.org/sites/default/files/media_asset/20150530_Guidance_Ending_Criminalisation_0.pdf
3 *Op cit. Advancing HIV Justice 4*
4 Available at <https://www.hivjustice.net/global-hiv-criminalisation-database/>
5 For further information and analysis of these cases please see: A. Symington, E. Bernard, et al. *Advancing HIV Justice 4: Understanding Commonalities, Seizing Opportunities*. HIV Justice Network, Amsterdam, July 2022. Available at: <https://www.hivjustice.net/publication/advancing4>
6 See also E. Hatt, S. Beaumont, E. Bernard. 'Bad blood: why blood donations by people living with HIV should not be a crime' in OIAFO4 <https://programme.aids2022.org/Abstract/Abstract?abstractid=7717>
7 See also E. Bernard, A. Symington, S. Beaumont, 2022. *Punishing Vulnerability Through HIV Criminalization*, *American Journal of Public Health* 112, S395-S397. Available at: <https://doi.org/10.2105/AJPH.2022.306713>
8 Court judgment unavailable. Decision reported at: <https://www.hivjustice.net/cases/germany-bonn-court-takes-hiv-treatment-into-account-and-acquits-teacher-accused-of-having-unprotected-sec-with-minor/>
9 Court judgment unavailable. Decision reported at: <https://www.hivjustice.net/cases/uganda-32-year-old-woman-sentenced-to-two-years-in-jail-for-allegedly-injecting-a-baby-with-hiv/>
10 Barré-Sinoussi F, et al. *Expert consensus statement on the science of HIV in the context of criminal law*. *J Int AIDS Soc*. 21(7). 2018. e25161. doi:10.1002/jia2.25161. <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>
11 *R. v. N.G.*, 2020 ONCA 494 [Ontario Court of Appeal]
12 Available at: https://hivlawcommission.org/wp-content/uploads/2021/05/UNDP_Guidance-for-Prosecutors-on-HIV-related-Criminal-Cases_Final.pdf

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FURTHER DATA AND ANALYSIS AVAILABLE AT:
[HTTPS://WWW.HIVJUSTICE.NET/PUBLICATION/ADVANCING4](https://www.hivjustice.net/publication/advancing4)

