



# Challenging HIV Criminalisation in the East African Community:

A BRIEF FOR PARLIAMENTARIANS

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# Abbreviations and Acronyms

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<b>BAI</b>	<b>Bodily autonomy and integrity</b>
<b>CEDAW</b>	<b>The Convention on the Elimination of all Forms of Discrimination against Women</b>
<b>EAC</b>	<b>East African Community</b>
<b>SADC-PF</b>	<b>Southern Africa Development Community Parliamentary Forum</b>
<b>SRHR</b>	<b>Sexual and reproductive health and rights</b>
<b>UN</b>	<b>United Nations</b>
<b>UNAIDS</b>	<b>Joint United Nations Programme on HIV/AIDS</b>
<b>UNDP</b>	<b>United Nations Development Programme</b>
<b>WHO</b>	<b>World Health Organisation</b>

# Introduction

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Experts across the world agree that HIV criminalisation is bad for public health and violates human rights.

From the World Health Organisation ("WHO") to the Joint United Nations Programme on HIV/AIDS ("UNAIDS") to the African Commission on Human and Peoples' Rights ("African Commission"), the consensus is that criminalising HIV is a barrier to the interventions that we know to be effective in preventing and treating HIV.

Yet in our communities, HIV criminalisation can be a contentious issue. High rates of impunity for sexual violence informs the way we think and feel about HIV criminalisation. The public discourse on the issue is also often grounded in fear and misconceptions about HIV and in stigma against people living with HIV. In the context of a pressing concern to prevent HIV transmission and control HIV, legislators have therefore sometimes responded by reaching for their strongest tool – the criminal law.

In this context, in which fear, anger, stigma and misinformation determine how we think and feel about HIV, it can be very difficult for legislators to lead our communities away from the criminal law and towards responses to HIV that are grounded in evidence, HIV science, dignity and human rights, including to lead difficult reforms to deal meaningfully with sexual and gender-based violence.

This is where this brief comes in. It aims to be an accessible tool for parliamentarians in the East African Community ("EAC") to understand HIV criminalisation. It aims to equip you with the tools to address misinformation and stigma about HIV with facts, science and human rights, and to develop strategies to rationalise, modernise and improve our communities' legal responses to HIV.

# What is HIV Criminalisation?

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HIV Justice Worldwide describes "HIV criminalisation" as –

“ the unjust application of criminal and similar laws to people living with HIV based on HIV-positive status, either via HIV-specific criminal statutes or general criminal or similar laws. ”<sup>1</sup>

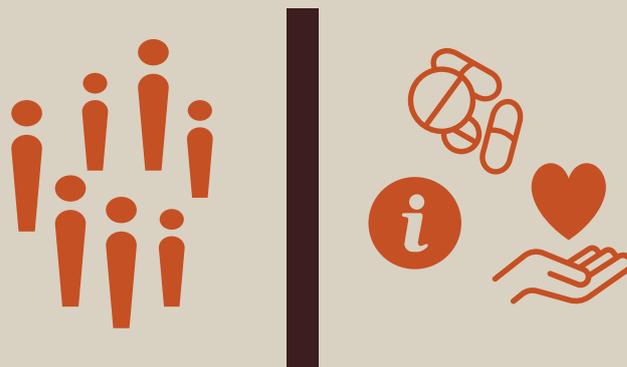
This includes laws that directly or indirectly criminalise HIV exposure, transmission or the non-disclosure of a person's HIV-status.

A 2019 audit by the HIV Justice Network and HIV Justice Worldwide found 75 countries across the world with HIV-related criminal laws. Sub-Saharan Africa is the region with the greatest number of countries with HIV criminalisation laws, being 29 countries.<sup>2</sup>

The audit further found HIV-related arrests, investigations and prosecutions in at least 72 countries, 37 of which applied general criminal laws to HIV, 29 of which applied only HIV-specific criminal laws, and 6 countries that applied both types of law.

We will show below that HIV criminalisation is a human rights issue of global concern and a barrier to universal access to HIV prevention, testing, treatment and care.

While HIV criminalisation is a global phenomenon, law reform and decriminalisation are gaining momentum. Legislators are starting to heed the calls of human rights and HIV activists, public health experts, scientists, and clinicians to end HIV criminalisation.



**HIV criminalisation is a human rights issue of global concern and a barrier to universal access to HIV prevention, testing, treatment and care.**

# HIV Criminalisation in the EAC

Up until now, the EAC as a regional body has been silent on the issue of HIV criminalisation. There is no HIV-specific criminal law at the EAC-level. The EAC **HIV and AIDS Prevention and Management Act of 2012** does not criminalise HIV exposure, non-disclosure or transmission. Instead, it embodies a human rights-based approach to HIV treatment and prevention.

Amongst others, the Act includes the following key provisions:



- **Article 4** obliges member States to promote and protect the rights of people living with and affected by HIV, to provide HIV prevention, treatment, care and support without discrimination, and to provide care and support to people living with HIV.
- **Article 5** establishes a duty on all persons in the EAC, not just people living with HIV, to take reasonable steps to protect themselves and others from HIV infection during sexual intercourse and to refrain from harmful cultural practices that enhance the spread of HIV.
- **Article 6** requires States to develop education and information campaigns that are evidence-based and scientifically proven, which encourage voluntary testing, promote gender equality, challenge stigma and discrimination and address misinformation against people living with HIV and members of vulnerable groups. **Article 7** imposes specific duties on the State to develop policies to prevent sensationalisation of HIV and AIDS-related issues in the media.
- **Article 12** establishes a range of HIV-prevention duties on the State and emphasises access to treatment and condoms and the use of scientifically-proven and effective measures and practices.
- **Articles 21-23** prohibit compulsory HIV-testing, protect informed consent to testing, and guarantee a person's right to confidentiality. **Article 25** specifically guarantees the right to privacy and confidentiality of one's HIV-status.
- **Article 24** prohibits discrimination against people living with or affected by HIV and guarantees the right to legal redress with this occurs.
- **Article 32** guarantees the right to access quality health care services.
- **Article 34** provides for special protections to ensure the equality of women and girls and to protect women and girls from all forms of violence and exploitation.

As explained in more detail below, HIV criminalisation violates these rights that the Act protects.

Article 50 of the HIV and AIDS Prevention and Management Act specifically provides that the Act supersedes the provisions of any other law that is inconsistent with it. And yet, despite this, five of the members States of the EAC (Burundi, Kenya, South Sudan, Tanzania and Kenya) have overbroad HIV-specific crimes in their domestic laws and Rwanda, while not having any HIV-specific crime, does have a general criminal sanction against sexually transmitted infections.



### The Republic of Burundi

*Status: Overbroad HIV-specific criminal law*

Article 42, read with article 41 of Burundi's **Law on the Legal Protection of Persons with Human Immunodeficiency Virus and People with Acquired Immunodeficiency Syndrome**<sup>3</sup> criminalises people who are aware of their HIV-positive status and who don't abstain from having "unprotected sex". Article 42 states that any person who, by any means, "deliberately transmits HIV/AIDS" will be prosecuted for voluntary homicide and punished in accordance with the country's Criminal Code. The offence does not provide for any defences.



### The Republic of Kenya

*Status: Overbroad HIV-specific criminal law*

In addition to a general disease transmission offence in its **Penal Code**, Kenya has a number of HIV-specific crimes.

Section 24 of the **HIV and AIDS Prevention and Control Act 14 of 2006** criminalises the failure by a person living with HIV to take "all reasonable measures and precautions" to prevent HIV transmission and the failure to inform "sexual contacts" of their HIV-status. In 2015, the Kenyan High Court declared this provision to be unconstitutional and invalid on the basis that it is vague and overbroad and to violate the protection of privacy unjustifiably.<sup>4</sup> While the provision has not since then been enforced, the legislature has not yet amended the Act to remove the provision.

Section 26 of the **Sexual Offences Act 3 of 2006** criminalises doing anything or permitting anything to be done which the person should reasonably know is likely to transmit HIV. Inaccurately titled an offence of "deliberate transmission", the offence does not in fact require proof of HIV transmission or for an accused to have an intention to transmit HIV. The constitutionality of this provision is currently being challenged by the **Kenya Legal and Ethical Issues Network on HIV and AIDS**.

Section 43(3)(c) of the Sexual Offences Act further classifies sex as rape if a sexual partner fails to disclose their HIV-status, a formulation similar to the law applicable in Canada, which has led to grave injustices against people living with HIV, particularly women.



### The Republic of Rwanda

*Status: General criminal provision potentially applicable to HIV*

There is no HIV-specific criminal law in Rwanda. However, article 29 of the **Law No 59 of 2008 on Prevention and Punishment of Gender-Based Violence** punishes the sexual transmission of a "terminal disease" with life imprisonment.



### The Republic of South Sudan

*Status: Overbroad HIV-specific criminalisation*

Section 262 of the **Penal Code Act 9 of 2008** criminalises the "deliberate transmission of HIV/AIDS", punishable by a maximum of 14 years' imprisonment, a fine, or both imprisonment and a fine. The language of the provision is, however, broader than covering only intentional transmission and on its face requires neither actual transmission to be proved (it requires only conduct which involves a real risk or possibility of infection) nor necessarily any proof of actual intent to transmit HIV.



### The United Republic of Tanzania

*Status: Overbroad HIV-specific criminalisation*

Tanzania's **HIV/AIDS Prevention and Control Act 28 of 2008** creates two very broad HIV-specific criminal offences. Section 47 criminalises "intentional transmission", punishable by five to ten years' imprisonment. Section 48 criminalises the breach of any of the Act's provisions "relating to safe procedures and practices leading to spreading of HIV".

Section 179 of the **Penal Code** further creates a general misdemeanour of unlawfully or negligently doing an act which the person knows or believes to be likely to spread the infection of any disease dangerous to life.



### The Republic of Uganda

*Status: Overbroad HIV-specific criminalisation*

Uganda's **HIV and AIDS Prevention and Control Act of 2014** includes two broadly worded provisions criminalising conduct in relation to HIV. Section 41 of the Act criminalises "attempted transmission of HIV" which is punishable by a fine and / or five years' imprisonment. Section 43 punishes "intentional transmission of HIV" and is punishable by a fine and / or imprisonment of up to ten years. The section provides a defence if the accused's partner was aware of, and accepted, the risk of transmission; or if transmission occurred during sexual intercourse and protective measures were used.

In addition, the section 171 of the **Penal Code Act** further creates a broad offence of doing a negligent act likely to spread infection of disease, with a penalty of seven years' imprisonment.



## WHAT DO PROSECUTIONS LOOK LIKE?

Here are two recent examples of HIV criminal prosecutions in the EAC.

In **Kenya**, a man was charged in 2018 with an HIV transmission offence for allegedly biting a police officer during his arrest. This is despite the **expert consensus** that there is no possibility of HIV transmission through biting, kissing or spitting.

In **Uganda**, a woman living with HIV was convicted in the Magistrate's Court in 2018 for allegedly injecting a baby with her blood. After lawyers from the Uganda Network on Law Ethics and HIV/AIDS assisted the woman in appealing, the High Court in Gulu overturned the conviction in 2019. On examining the evidence, the Court found that there was no evidence to support the facts as alleged. The baby remains HIV-negative. Commenting on the successful appeal, the woman's lawyer, Ms Immaculate Owomugisha said:

**“ Most convictions are based on unfair, inaccurate and overblown facts. The media usually joins to hype up stories [and] this sensationalism crowds out good judgment, resulting in a miscarriage of justice. ”**

# The Impact on Human Rights and Public Health

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HIV criminalisation violates human rights that the EAC's HIV Prevention and Management Act strives to protect.

The African Commission says that these laws perpetuate stigma and discrimination and "expose already marginalised groups (such as sex workers or people who inject drugs) to further discrimination and persecution".<sup>5</sup> The African Commission considers that:

**“ Overly broad HIV criminalisation is likely to infringe upon the rights to liberty, security, health, privacy, access to justice and non-discrimination.”<sup>6</sup>**

Human Rights bodies in the United Nations (“UN”) have raised similar concerns. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health said that criminalising HIV transmission and exposure infringes many human rights, including the rights to privacy and equality, the prohibition against discrimination, and the right to health.<sup>7</sup> The UN Committee on the Elimination of Discrimination against Women (“CEDAW”) has observed that HIV criminalisation poses a particular threat against the human rights of women living with HIV.<sup>8</sup>

The Global Commission on HIV and the Law is an independent body that was convened by the United Nations Development Programme (“UNDP”) and UNAIDS to consider the relationship between the law and HIV and to develop evidence-informed recommendations for effective legal responses to HIV. The Commission published its first report in 2012 and an updated supplement in 2018.

In its 2012 Report, the Commission described HIV criminalisation as “fundamentally unjust, morally harmful and virtually impossible to enforce with any semblance of fairness”.<sup>9</sup> In addition, the Global Commission raised concerns that these kinds of laws blatantly disregard up-to-date knowledge on the science of HIV-related risks and harms. Appreciating that these laws are often used to prosecute conduct that has no risk of transmitting HIV and are disproportionately applied against socially marginalised persons, the Global Commission described HIV criminalisation as doing no more than “punishing vulnerability”. The Global Commission has therefore called for countries to remove HIV-specific criminal laws.

UNAIDS has similarly stated that overly broad application of criminal law to HIV non-disclosure, exposure and transmission “raises serious human rights and public health concerns.”<sup>10</sup>

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If there is such strong international consensus about the human rights and public health concerns of HIV criminalisation, why do these laws exist? Proponents of HIV criminalisation do often give reasons and motivations that on their face seem like important and defensible goals. Below, we look at some of the justifications that are often used for HIV criminalisation and compare these against what the evidence and science show us about how these laws work in practice. What we see is that, while HIV criminalisation is often based on what seem like noble goals, these laws in fact create barriers to effective HIV responses and undermine the rights of the most vulnerable people in our communities.

## Does HIV Criminalisation Prevent HIV?



### MYTH:

HIV criminalisation prevents HIV transmission.

### THE FACTS:

HIV criminalisation has no positive impact on reducing HIV transmission and may increase the risk of HIV transmission.

Proponents of HIV criminalisation often say that the aim of these laws is to prevent people from transmitting HIV and to encourage people to adopt safe behaviour.

However, as stated by the WHO, the cumulative effect of these laws is that they "may actually increase rather [than] decrease HIV transmission."<sup>11</sup> The Global Commission cites research from AIDS service organisations that indicates that "the threat of prosecution neither empowers people living with HIV to avoid transmission nor motivates [people] to protect themselves."<sup>12</sup>

In some countries where these laws exist, studies have been done to measure the actual impact on public health. None of these studies have shown any positive impacts of HIV criminalisation.

For example, a study conducted in the United Kingdom, Canada and several states in the USA, showed that for the majority of people, HIV criminalisation had **no effect** on their sexual practices, on whether or not they tested for HIV or whether or not they disclosed their HIV-status to their sexual partners.<sup>13</sup> For the minority of people whose behaviour was affected by these laws, the study showed **negative effects** on HIV-prevention. For example, HIV criminalisation tended to correlate with people avoiding testing for HIV and increased unprotected and anonymous sexual contacts. Similarly, a 2017 study in the USA showed that men who have sex with men, who are aware of HIV criminalisation laws in their states, are more likely to not use a condom when having sex.<sup>14</sup>

Another worrying impact shown by the research is that HIV criminalisation tends to inhibit people from voluntarily accessing HIV-testing.<sup>15</sup> People may avoid testing because they are scared that being diagnosed with HIV or knowing their status, puts them at risk of being prosecuted. This negative impact of discouraging HIV testing has been particularly documented in populations who are at higher risk of HIV<sup>16</sup> who most need to be encouraged to test. This includes amongst sex workers<sup>17</sup> and men who have sex with men.<sup>18</sup> This is a serious threat to public health.

So, where the healthcare system may be working to encourage people to test and access information, HIV criminal laws are pushing people away from healthcare services.

The African Commission is also concerned that HIV criminalisation “undermines the relationship between health-care workers and their patients who are living with HIV”.<sup>19</sup> Under HIV criminalisation, people living with HIV become fearful of being open and honest with healthcare workers for fear of having their confidential medical information being disclosed and being prosecuted. This negative effect on the relationships between patients and healthcare workers has been found in studies in the United Kingdom, the USA, Australia, and in Canada<sup>20</sup> and particularly among women living with HIV.<sup>21</sup> For effective HIV-prevention, people living with HIV need to be able to speak openly and without fear with healthcare workers so that they can be counselled and encouraged to stay on treatment and adopt safe HIV-prevention behaviours.

## A FALSE SENSE OF SECURITY

The negative impact of these laws on safer sexual practices likely relate to how HIV criminalisation creates a false sense of security as people wrongly believe it is safe to assume their partners are HIV-negative if they don't disclose their HIV-status and therefore they do not take measures to protect themselves, such as using a condom.

This contradicts proven public health messaging that encourages all people – whether they are HIV-positive or negative – to take responsibility for their sexual health.



## HIV TESTING IS KEY TO HIV PREVENTION

- HIV testing is one of the most important measures to help prevent HIV.
- If a person knows of their HIV-positive status, they are able to access treatment. And effective treatment can eliminate the risk of HIV transmission.
- Once someone is diagnosed with HIV, it also means that they can receive information and tools to understand how to prevent HIV in other ways, such as by using condoms or preferring sexual conduct that poses no risk of transmission such as oral sex.

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## Does HIV Criminalisation Target the “Deliberate transmitter”?



### MYTH:

HIV criminalisation is a tool to target people who deliberately transmit HIV to others.

### THE FACTS:

HIV criminalisation is an ineffective tool to deal with the extremely rare cases of deliberate transmission.

HIV Justice Worldwide has monitored HIV-related arrests and prosecutions across the world for many years. They consider that cases of people living with HIV intentionally and maliciously transmitting HIV are extremely rare.<sup>22</sup>

Many HIV criminal laws in the EAC use the term “deliberate transmission” in describing the offences, indicating that this is the law’s main target. However, the language of the offences and their application make clear that they are much broader than only targeting those rare cases of actually deliberate transmission. In addition, many of these laws are vague and ambiguous. This leaves the law vulnerable to arbitrary and selective application. These reasons combined are why the African Commission has expressed its concern that HIV criminalisation poses a serious risk of unfair application and miscarriage of justice.<sup>23</sup>

Being broader than only targeting truly “intentional” transmission, and being vaguely worded, many HIV criminal laws in the EAC cast a very big net to target such rare and exceptional cases.

### “DELIBERATE TRANSMISSION” OFFENCES OFTEN DON’T REQUIRE EITHER TRANSMISSION OR A DELIBERATE INTENTION TO TRANSMIT HIV

- For example, both Kenya and South Sudan have “deliberate transmission” offences in their laws but neither offence actually requires proof of HIV transmission nor proof of a specific intention to transmit HIV.
- Under Article 26 of Kenya's Sexual Offences Act, this means that a husband who is living with HIV, who has sex with their HIV-negative wife intentionally, can be convicted of HIV transmission regardless of her knowledge of his status and her consent, regardless that the husband did not have sex with the purpose of transmitting HIV to his wife, and regardless of whether he even in fact transmits HIV to his spouse.
- Courts and prosecutors all over the world too often wrongly presume a specific intention to transmit HIV by accused persons merely because the person knows that they are HIV positive or has sex without a condom.

But there is an additional reason why HIV criminalisation is unlikely to be an effective tool to find and punish people who deliberately transmit HIV: the laws are not scientifically applied.

By following prosecutions, parliamentarians may observe that in most HIV-related prosecutions in the EAC, expert evidence is seldom used to prove that transmission occurred between two people, never mind to prove which person transmitted the virus to whom beyond a reasonable doubt. This means that transmission is often assumed to have happened merely because one or both parties are HIV-positive. The direction of transmission is often assumed merely because one person was the first to find out about their HIV-status.

Although advances in HIV science have improved significantly over the years, it is still extremely difficult to prove beyond a reasonable doubt that one person in fact transmitted HIV to another. HIV criminalisation is therefore neither an accurate nor effective tool to punish those rare cases of "deliberate transmission."

Courts have also generally tended to over-estimate the risk of HIV transmission in the accused persons' conduct. They have also failed to appreciate the role of effective treatment in both evaluating the risk of transmission and assessing the harm of HIV infection. This has meant that convictions have occurred in many cases where there is scientifically no proof that transmission is even possible in the particular circumstances.

By removing HIV criminal laws, countries are not left defenceless against those rare cases of truly intentional transmission. Both UNAIDS and the Global Commission consider that in cases of both actual and intentional transmission, the use of general (and not HIV-specific) criminal laws should be sufficient, such as, for example, through applying laws on assault or causing bodily harm. Both UNAIDS and the Global Commission warn, however, that such prosecutions should only be pursued with due care and a high degree of evidence and proof.<sup>24</sup>

## Does HIV Criminalisation Protect Women?



### MYTH:

HIV criminalisation protects women.

### THE FACTS:

HIV criminalisation is harmful to women.

The State has a duty to protect the rights of women and girls' rights as part of its response to HIV. This is recognised in the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Maputo Protocol"). Indeed, women and girls are at a disproportionate risk of HIV infection and there is a close correlation between women's vulnerability to HIV and to sexual and gender-based violence.

One of the most dangerous misunderstandings about HIV criminalisation, is the idea that it will protect women from HIV. The African Commission says that HIV criminalisation does not protect women; rather it exposes them to greater risks of prosecution because of the unequal social and economic power between women and men.<sup>25</sup>

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Women are often the first in a relationship to know their HIV-status because of routine HIV testing when women access antenatal care. Because of this, their partners or spouses may wrongly assume that the woman is the person who brought HIV into the relationship.

Women are also less likely to be able to safely disclose their HIV-positive status to their partner because of unequal power in relationships, economic dependency, and high levels of gender-based violence.

Because of these circumstances, HIV criminalisation places women living with HIV at risk of false allegations, extortion, blackmail, abuse, and unwarranted and invasive criminal trials. The threat of being reported for a crime by a disgruntled or abusive partner is a lived reality for women living with HIV in countries where HIV criminal laws apply.

It is for these reasons that organisations like the ATHENA Network (a global network of national organisations and networks of women living with HIV and disproportionately affected by HIV) considers that HIV criminalisation does not protect women. Instead, it increases the risk of violence and abuse women face, strengthens existing gender inequalities, and promotes fear and stigma against women living with HIV.<sup>26</sup>



### **EXAMPLES OF HOW HIV CRIMINALISATION INCREASES WOMEN'S VULNERABILITY**

ARASA has examined cases in Botswana, Kenya, Malawi, Zambia and Zimbabwe where women living with HIV have been arrested and prosecuted because of suspicions that they breastfed other people's babies.

In none of these cases was there any allegation that the women actually transmitted HIV to the children or harmed the children in any way. In fact, there is barely an infinitely small risk of transmitting HIV in such a case where a woman living with HIV breastfeeds a child once-off. In only one of these cases was there compelling proof that any breastfeeding even took place. Instead, what underlay these arrests and prosecutions was stigma, superstition and misinformation.

Despite this, even in cases where convictions were overturned or the arrested women eventually not prosecuted to finality, sensational media attention and community stigma had devastating impacts on these women's lives. The publicity of the prosecutions also harmed public health messaging that encourages women on antiretroviral therapy to safely breastfeed their children.

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## Does HIV Criminalisation Advance Sexual and Reproductive Health and Rights?



### MYTH:

HIV criminalisation advances sexual and reproductive health and rights ("SRHR") and bodily autonomy and integrity ("BAI").

### THE FACTS:

HIV criminalisation is a threat to SRHR and BAI.

Sexual and reproductive health is a state of physical, emotional, mental and social well-being in relation to all aspects of sexuality and reproduction, not merely the absence of disease, dysfunction or infirmity.<sup>27</sup> To achieve sexual and reproductive health, it is necessary to fully and equally realise sexual and reproductive health and rights ("SRHR").

BAI is the agency we have over our own bodies as human beings with equal rights. There is a growing recognition that a lack of respect for and protection of the right to BAI is central to human rights abuses that undermine the HIV response and perpetuate inequality.

Both the WHO<sup>28</sup> and the UN Committee on Economic, Social and Cultural Rights<sup>29</sup> have expressed concern about the negative effect of HIV criminalisation on SRHR and women's rights in particular. There are many ways in which HIV criminalisation undermines SRHR and BAI.

For example, criminalising the failure to disclose your HIV status to a sexual partner is sometimes justified as advancing BAI. Proponents of HIV criminalisation may claim that the criminal law will encourage people to disclose their status to their sexual partners, which in turn will improve people's abilities to make decisions about sex, such as whether or not to use a condom. However, studies across the world have shown that criminalisation does not positively impact HIV-status disclosure.<sup>30</sup> Instead, the threat and fear of prosecution, and the stigma surrounding HIV-related prosecutions, inhibits disclosure by making disclosing your HIV-status riskier and more difficult.

HIV criminalisation is also a barrier to people living with and at risk of HIV from accessing SRHR-related services and information when they need it most. This is because criminalisation drives away people most in need of services and healthcare and breaks the necessary trust between patients and healthcare workers.

For people who are already vulnerable to discrimination and to HIV, criminalisation creates barriers to the ability to freely exercise your SRHR and BAI. As a sex worker, for example, the possibility or threat that a client might report you to the police as having exposed them to HIV, is a barrier to that sex worker's decision to report a client's violence or abuse to the police.

## Does HIV Criminalisation Impact Stigma?



### MYTH:

HIV criminalisation only stigmatises bad people.

### THE FACTS:

HIV criminalisation stigmatises all people living with HIV.

HIV stigma remained one of the most pressing challenges in the struggle to end HIV.

UNAIDS and the UNDP say that overbroad HIV criminalisation increases stigma and discrimination against people living with HIV, driving people further away from HIV prevention, treatment, care and support services.<sup>31</sup> The Global Commission says that by dividing the population into the sick versus the healthy and the guilty versus the innocent, criminalisation fractures the shared sense of moral responsibility that we all have for our health, which is crucial to combatting HIV.

Criminalisation sends a false and stigmatising public message that people living with HIV are dangerous and worthy of punishment.

Studies also show that HIV criminal laws are disproportionately enforced against already marginalised people in our communities. In the global north, the burden of prosecutions has been disproportionately against migrants and black men.<sup>32</sup> In Africa, it appears as if women living with HIV have borne the brunt of the most publicised prosecutions.



### STIGMATISING MEDIA COVERAGE OF PROSECUTIONS

Sensational, stigmatising and inaccurate media coverage is a key feature of HIV-related prosecutions across the world, as it is in the Africa region.



In Uganda, a paediatric nurse living with HIV was branded a "killer nurse" for years in the press after being prosecuted for accidentally sustaining a needle stick injury while treating a child.

There was no evidence that the child suffered any harm. The child did not acquire HIV and there was no evidence that the child was even exposed to HIV.

Nevertheless, the nurse was arrested on live TV, convicted and publicly shamed in the press. She lost her job, ending an over-30 year career caring for children. She was shunned in her community and, fearful for her safety, went into hiding for a number of years.

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**My life will not be the same after facing HIV criminalisation. My 30 years as a nurse and dedicated to saving lives have been erased. I have spent almost a year in prison. I have been branded a criminal and a killer even though I have harmed no one.**

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Rosemary Namubiru, (2018 Global Commission report, p 28)

# What Can Parliamentarians Do?

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UNAIDS has called for an end to overly broad criminalisation of HIV.<sup>33</sup> UNAIDS and the UNDP recommend that, instead of applying criminal law to HIV, governments should expand proven HIV prevention programmes and strengthen human rights.<sup>34</sup>

Parliamentarians have a critical role to play in leading the EAC away from HIV criminalisation and towards effective responses to HIV that are founded in the human rights-based vision of the EAC's HIV and AIDS Prevention and Management Act.

The justifications sometimes used to legitimise HIV criminalisation have been shown above to be founded on incorrect understandings of HIV, epidemiology and human behaviour. Parliamentarians are in a good position to meet these myths with truth, resources and public education.

Importantly, parliamentarians also have a vital role to play in recognising where the concerns that underly these justifications (even though misdirected) may need political attention. Parliamentarians can lead our communities to direct those concerns more constructively. HIV criminalisation may not be the answer to protecting women, for example, but there are many more constructive and effective ways that we can advance women's rights and safety.

In this section, we look at recommendations and examples of concrete actions that Parliamentarians can undertake in the EAC to use human rights-based measures to address some of these underlying concerns that sometimes drive HIV criminalisation.

## Coordinating Regional Action

The EAC HIV and AIDS Prevention and Management Act provides a binding framework for parliamentarians to coordinate regional solidarity for reform of discriminatory and punitive HIV-related laws at country level. The case study below shows how parliamentarians acting at regional level can engage the resources and support of partners in civil society and institutions like UNAIDS, the UNDP and the African Commission to generate momentum for reform.



## CASE STUDY: SADC-PF'S MOTION ON HIV CRIMINALISATION

In 2015, the Southern Africa Development Community Parliamentary Forum ("SADC-PF") unanimously adopted a motion on the criminalisation of HIV transmission, exposure and non-disclosure. The motion acknowledges that laws criminalising HIV are harmful to HIV prevention, treatment and care and undermine human rights. The motion calls on States to review harmful HIV-specific laws and enact laws that support evidence-based HIV prevention and treatment that are consistent with human rights standards

In 2017 SADC-PF then worked with UNAIDS and civil society partners to provide input, analysis and resources to parliamentarians in Malawi when considering the HIV (Prevention and Management) Bill, to support the removal of discriminatory and punitive provisions in the Bill.

**“ Building parliamentary momentum is necessary in the fight against HIV/AIDS. Policies are strongest when partners rally behind champion MPs to advocate for progressive change on the issue of HIV criminalisation or protection of key populations. In this respect, laws that are consolidated by Parliament with the thrust of civil society organisations and multi-stakeholders are the ones which have the best reception at national level. ”**

Boemo Mmandu Sekgoma, Secretary General, SADC Parliamentary Forum

## Guiding Law Reform

Parliamentarians shape laws, policies and programmes to address the issues of their constituents. As representatives of the people, parliamentarians can ensure that the voices of those most affected by HIV are heard.

## Advancing HIV Justice

Parliamentarians should not enact laws that criminalise HIV and can work to repeal HIV-specific criminal laws.<sup>35</sup> All domestic laws should promote non-discriminatory access to HIV prevention, treatment, care and support and comprehensive sexual and reproductive health and rights in line with the EAC HIV and AIDS Prevention and Management Act.

Parliamentarians can coordinate a review by the EAC of domestic laws and policies' alignment with the EAC HIV and AIDS Prevention and Management Act. Such a review would be a valuable tool not only to identify areas for reform, but further to coordinate support and resources and to monitor and track improvements over time.



## **CASE STUDY: MALAWI'S HIV AND AIDS (PREVENTION AND MANAGEMENT) BILL**

In 2017, the Malawi government tabled a Bill that combined a rights-based approach to HIV with certain rights-infringing provisions including new sanctions to criminalise HIV transmission and exposure.

The HIV Committee in Parliament spearheaded consultations with networks of people living with HIV and civil society. The Committee produced a report making recommendations to remove certain of the right-infringing provisions.

When a revised version of the Bill was tabled a few months later, women living with HIV remained concerned that some provisions remained that criminalised HIV exposure and transmission. Parliamentarians listened to and engaged women living with HIV and took the time to understand what the law would mean for their daily lives and why it threatened their rights and safety.

When the Bill finally came to vote, parliament rejected the provisions criminalising HIV and voted in a final Act that largely embodies a rights-affirming approach to HIV prevention and management. The final HIV and AIDS (Prevention and Management) Act, and the responsive approach of Parliament received regional and international acclaim.

### **Preventing HIV**

Criminalisation is neither necessary nor effective to prevent HIV. Some of the most effective ways that we do know to prevent HIV, is to ensure universal and equitable access to HIV testing, treatment and other related services. We know that where a person is on effective antiretroviral therapy, HIV transmission is prevented.

Parliamentarians are well-placed to ensure that domestic laws protect the rights of all persons to access HIV-related services equally, without discrimination, and with respect for their confidentiality and right to make informed decisions.

### **Protecting and Advancing the Rights of Women and Girls**

Developing the law to realise the substantive equality of women and girls in all areas of life is a long-term investment in health, sustainability and development of the EAC. Parliamentarians can review and reform laws that undermine women's equality and which perpetuate sexual and gender-based violence.



## **CASE STUDY: THE MAHÉ DECLARATION - REGIONAL ACTION TO ADVANCE WOMEN'S RIGHTS**

In July 2017, parliamentarians from 14 countries in the Southern Africa Development Community ("SADC") adopted the Mahé Declaration, a framework for sustained engagement by SADC parliaments to implement Resolution 60/2 of the United Nations (UN) Commission on the Status of Women (CSW) entitled "Women, the Girl Child and HIV and AIDS".

The declaration makes recommendations to address the root causes of HIV among women and girls, including to take rapid action to reduce poverty, to ensure access to quality, integrated and adolescent and youth-friendly services, to advance comprehensive sexuality education, and eradicate child marriage.

The Declaration recognises the intersecting discrimination and vulnerabilities of certain key populations such as sex workers, persons with disabilities, migrants, girls living in poverty, and transgender persons. Parliamentarians committed to review, revise, amend or repeal all laws, regulations and policies including cultural and religious practises and customs that have a discriminatory impact on youths, especially girls and young women.

On 13 July 2017, the Mahé Declaration was adopted by the 41st Plenary Assembly Session of the SADC Parliamentary Forum.

## **Advancing SRHR and BAI**

Parliamentarians can review and reform laws that undermine SRHR and BAI.



## **CASE STUDY: SADC-PF MODEL LAW ON ERADICATING CHILD MARRIAGE**

In January 2016, the African Commission launched a continental campaign for the decriminalisation of abortion. The Campaign calls on governments to demonstrate their commitment to preserving the lives of women and girls by decriminalising abortion in their countries.

In Launching the Campaign, Commissioner Lucy Asuagbor, the Special Rapporteur on the Rights of Women in Africa, said the following:

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“ Millions of girls and women in Africa are dying from the consequences of unsafe abortion. Countless others are sustaining serious injuries and disabilities. ... Laws that criminalise abortion presume that the threat of arrest or imprisonment will prevent women and girls from having abortions. ... As a consequence, women and girls are punished for making reproductive decisions in the interest of their own health and wellbeing. However the evidence that exists shows that restrictive laws do not prevent women from seeking abortions: they only make them unsafe. ”

## Reducing Stigma and Discrimination

Instead of reinforcing stigma through discriminatory criminal laws, Parliamentarians can enact laws to protect people living with HIV from stigma and discrimination.



### CASE STUDY: THE KENYAN HIV AND AIDS TRIBUNAL

Kenya's HIV and AIDS Tribunal is the only statutory body in the world with an exclusive HIV-specific mandate. Some experts have shown that the Tribunal has faced operative challenges in its work and have called for caution before replicating the Tribunal as an institutional model. However, aspects of the Tribunal's mandate show the potential for enacting a range of remedies to respond to complaints of HIV-related discrimination. These remedies do not necessarily need an institution like a tribunal to function and could well be applied in the ordinary court system.

For example, Kenya's HIV and AIDS Prevention and Control Act that establishes the Tribunal, empowers it to award damages to victims of HIV-related discrimination. The Tribunal can also grant orders to require a person or institution which has committed a discriminatory act to take steps to stop discriminatory conduct. This permits the Tribunal to tailor the redress to restore the dignity of the complainant in a way that is proportionate, appropriate to the circumstances and works to build community cohesion.

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## Bringing Science to Justice

The application of HIV criminal laws has been criticised across the world for being applied irrationally and in ways that contradict the science of HIV. Due to the concerns that these laws were being applied inappropriately, a group of 20 top HIV scientists from across the world in 2018 released the a global “Expert Consensus Statement on the Science of HIV in the Context of Criminal Law” (“Expert Consensus Statement”).<sup>36</sup>

The Expert Consensus Statement analyses the best available scientific and medical research data on HIV transmission, treatment effectiveness and forensic evidence and describes the science in language that is suitable to application in legal contexts.

The Expert Consensus Statement is a tool against which parliamentarians can assess the injustices is domestic prosecutions. Through popularising the Statement and endorsing it, parliamentarians can use the Expert Consensus Statement to bring a measure of justice to HIV criminalisation in a way that is scientifically authoritative.



### CASE STUDY ON THE IMPACT OF PARLIAMENTARIANS' LEADERSHIP

The Honourable Dr Ruth Labode is a member of parliament in the Zimbabwe National Assembly. She is trained as a medical doctor and a public health specialist. The Honourable Dr Labode has been a vocal ally of human rights activists and networks of people living with HIV working to decriminalise HIV in Zimbabwe. In 2019, Zimbabwe tabled the Marriage Bill, which included a provision to repeal Zimbabwe's HIV criminal law.

**“ Dr Labode has been a leading voice in a promising process to repeal Zimbabwe's HIV criminal law. Her voice has amplified the discourse. She understands both the negative public health consequences of the law as well as how to talk to her constituents in relatable terms about a topic as sensitive and complex as HIV criminalisation. ”**

Felicita Hikuam, ARASA Executive Director

## Leading the Discussion

As thought leaders and opinion opinion-makers, parliamentarians can help to combat stigma and discrimination against people living with HIV and key populations; they can encourage open and evidence-informed debates about HIV and SRHR; and they can champion rights-based policies and programmes. Parliamentarians can also engage members of the media to ensure that issues relating to HIV criminalisation are ethically and accurately reported on, in ways that don't perpetuate stigma and misinformation.

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## Putting Resources in Place

As overseers of national budgets, parliamentarians can ensure that appropriate and sustainable funding is provided for HIV and SRHR interventions. They can ensure that all HIV and SRHR programmes comprehensively address the needs of people living with HIV, women, girls and key populations. By ensuring that interventions that are founded in human rights are adequately funded, parliamentarians can direct efforts to where they are evidenced to be most effective.

## Holding Power Accountable

Article 47 of the HIV and AIDS Prevention and Management Act of 2012 mandates the Secretariat of the EAC to coordinate regional mechanisms for follow up, monitoring, evaluating and coordinating initiatives under the Act. Article 49 empowers the Council of Ministers of the EAC to make regulations to carry out the provisions of the Act. The Act therefore has inbuilt mechanisms to realise its provisions. Parliamentarians can champion the effective application of these provisions to ensure that domestic laws and policies are in harmony with the Act's rights protections.

Parliamentarians can also initiate research into the adverse impact of HIV criminalisation on human rights and public health. They can investigate whether legal services are available to people living with HIV who are at risk of being charged with an HIV-related offence. They can investigate what laws, policies and programmes can help reduce HIV-related stigma and help more people safely disclose their HIV status. Where they find deficits, parliamentarians can advocate for legal and policy reform.



### FUNDING PROVEN HIV PREVENTION STRATEGIES

Instead of expending resources on criminalising people as an ineffective HIV-prevention effort, parliamentarians can ensure that governments invest in prevention strategies that are proven to be effective. The UNAIDS HIV Prevention 2020 Road Map says that combination prevention strategies need to embody three key principles: (1) they are evidence-informed; (2) they are community-owned; and (3) they are based in human rights. In addition to scaling up access to HIV testing and treatment, UNAIDS recommends that countries strengthen primary prevention responses around 5 key pillars:

1. Combination prevention for adolescent girls, young women and their male partners in high prevalence locations.
2. Combination prevention programmes for all key populations.\*
3. Strengthened national condom and related behavioural change programmes.
4. Voluntary male circumcision.
5. Pre-exposure prophylaxis to populations at substantive risk of HIV.

*\* Key populations are people and groups that include sex workers; gay men and other men who have sex with men; transgender people; people who inject drugs and prisoners. Key populations experience both increased impact of HIV, and decreased access to services.*

# Conclusion

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Parliamentarians in the EAC have a strong legal framework in the HIV and AIDS Prevention and Management Act to lead our communities away from laws that punish people living with HIV and towards laws, policies and practices that are effective and which affirm human rights.

Building regional solidarity and working with and amplifying the voices of people living with HIV are strategies that parliamentarians can use to build momentum for progressive reform.

As community leaders, parliamentarians are also able to recognise where calls for criminalisation are based on stigma and misinformation. Parliamentarians can use their public positions to correct the myths that drive HIV criminalisation and, instead, can provide legal and policy alternatives that are proven to be effective and which fulfil the human rights protections envisioned in the EAC HIV and AIDS Prevention and Management Act.

# Important Resources

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## Resources on HIV Criminalisation

HIV Justice Worldwide "HIV Justice Toolkit", Available at: <https://toolkit.hivjusticeworldwide.org/>

UNAIDS and UNDP "Ending Overly-Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations" May 2013, Available at: [http://www.unaids.org/en/resources/documents/2013/20130530\\_Guidance\\_Ending\\_Criminalisation](http://www.unaids.org/en/resources/documents/2013/20130530_Guidance_Ending_Criminalisation).

International Community of Women Living with HIV "Position Statement 2015: Criminalisation of Women Living with HIV: Non-Disclosure, Exposure and Transmission" 2015, Available at: <https://toolkit.hivjusticeworldwide.org/wp-content/uploads/2017/02/267526864-ICW-Position-Statement-2015-CRIMINALIZATION-OF-WOMEN-LIVING-WITH-HIV-NON-DISCLOSURE-EXPOSURE-AND-TRANSMISSION.pdf>.

The Oslo Declaration on HIV Criminalisation 2012, Available at: [http://www.aidslaw.ca/site/wp-content/uploads/2014/06/Oslo\\_declaration.pdf](http://www.aidslaw.ca/site/wp-content/uploads/2014/06/Oslo_declaration.pdf).

Positive Women's Network - USA, on behalf of HIV JUSTICE WORLDWIDE (2018) "Making Media Work for HIV Justice: An Introduction to Media Engagement for Advocates Opposing Criminalisation", Available at: <https://drive.google.com/file/d/1nBPqag90C5DQjKSpwE-cp9nU5qEDxyXRJ/view>.

## HIV, the Law and Human Rights

African Commission on Human and Peoples' Rights "HIV, the Law, and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses: Report on the Study of the African Commission on Human and Peoples' Rights" (2018) Available at: [https://www.unaids.org/sites/default/files/media\\_asset/HIV\\_Law\\_AfricanHumanRightsSystem\\_en.pdf](https://www.unaids.org/sites/default/files/media_asset/HIV_Law_AfricanHumanRightsSystem_en.pdf)

UNDP and the Inter-Parliamentary Union "Effective Laws to End HIV and AIDS: Next Steps for Parliaments" 2013, Available at: [http://archive.ipu.org/PDF/publications/law\\_hiv\\_en.pdf](http://archive.ipu.org/PDF/publications/law_hiv_en.pdf).

Global Commission on HIV and the Law "Risks, Rights and Health" (2012), Available at: <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf>; 2018 Supplement available at: <https://hivlawcommission.org/wp-content/uploads/2018/09/HIV-and-the-Law-supplement-FINAL.pdf>.

The Inter-Parliamentary Union's Advisory Group on Health works to guide parliaments on implementing international commitments on HIV and maternal, newborn and child health, including through law reform. The Advisory Group involves technical partners in its advisory role including UNAIDS, the Global fund to the Fight AIDS, Malaria and Tuberculosis and the WHO. More information on the Advisory Group can be found here: <https://www.ipu.org/about-ipu/structure-and-governance/governing-council/advisory-group-health>.

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## **The Application of HIV Science to Criminal Law**

Françoise Barré-Sinoussi et al, 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (2018) 21(7) Journal of the International AIDS Society, available at: <https://pubmed.ncbi.nlm.nih.gov/30044059/>

## **Understanding the Global Movement against HIV Criminalisation**

Sally Cameron and Edwin J Bernard. Advancing HIV Justice 3: Growing the global movement against HIV criminalisation. HIV Justice Network, Amsterdam, May 2019, Available at: <https://www.hivjustice.net/wp-content/uploads/2019/05/AHJ3-Full-Report-English-Final.pdf>

## **Videos: Learning from Survivors of Criminalisation**

Zimbabwe Lawyers for Human Rights "Alone But Together – Women and Criminalisation of HIV Transmission: The Story of Samukelisiwe Mlilo" 2015, Available at: <https://www.youtube.com/watch?v=gbuM4xnjRYc>.

The SERO Project "SERO Stories: Kerry Thomas" 2012, Available at: <https://www.youtube.com/watch?v=z3JSP2dKvmc&t=3s>.

Canadian HIV/AIDS Legal Network "HIV Criminalisation in Canada: Testimonials" 2018, Available at : <https://www.youtube.com/watch?v=rlpc64Pspmc&feature=youtu.be>

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- <sup>6</sup> African Commission on Human and Peoples' Rights, n 5 7, para 38.
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- <sup>10</sup> UNAIDS "Policy Brief: Criminalisation of HIV Transmission" August 2008, Available at: [http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731\\_jc1513\\_policy\\_criminalization\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf); UNAIDS; UNAIDS and UNDP "Ending Overly-Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations" May 2013, Available at: [http://www.unaids.org/en/resources/documents/2013/20130530\\_Guidance\\_Ending\\_Criminalisation](http://www.unaids.org/en/resources/documents/2013/20130530_Guidance_Ending_Criminalisation), p 2.
- <sup>11</sup> World Health Organisation, "Sexual Health, Human Rights and the Law" 2015, Available at: [http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984\\_eng.pdf;jsessionid=F4B162A4052B1BC78A0EC6B75DCC58F7?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=F4B162A4052B1BC78A0EC6B75DCC58F7?sequence=1), p 22.
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- <sup>19</sup> African Commission on Human and Peoples' Rights, n 5, p 33
- <sup>20</sup> See: O'Byrne PO, Bryan A and Roy M, n 12; Grierson J, Pitts M and Koelmeyer R "HIV Futures Seven: The Health and Wellbeing of HIV Positive People in Australia" (2013), Available at: <https://apo.org.au/node/53184>; O'Byrne P et al "Nondisclosure Prosecutions and Population Health Outcomes: Examining HIV Testing, HIV Diagnoses, and the Attitudes of Men Who Have Sex with Men Following Nondisclosure Prosecution Media Releases in Ottawa, Canada" *BMC Public Health* (2013) 13:94.
- <sup>21</sup> Patterson S et al "The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: A Comprehensive Review of the Evidence" *Journal of the International AIDS Society* (2015) 18:1, Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689876/>.
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- <sup>25</sup> African Commission on Human and Peoples' Rights, n 5, para 35.
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