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**Criminalisation of HIV transmission in the Democratic Republic of Congo:
lack of evidence, repressive abuses and human rights issues - Critical analysis
and prospects for reform in light of *the S.M. case***

Pénalisation de la transmission du VIH en République démocratique du Congo : carences
probatoires, dérives répressives et enjeux de droits de l'homme - Analyse critique et
perspectives de réforme à la lumière de l'affaire S.M.

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Abstract

This article offers a critical and in-depth analysis of the legal framework governing the criminalisation of HIV transmission in the Democratic Republic of Congo, using *the S. M. case* as a starting point for broader reflection. This emblematic case highlights the excesses of a justice system that is still too often influenced by fear, prejudice and stigmatisation of people living with HIV, to the detriment of the required standards of scientific evidence. Through a rigorous examination of this decision, the article reveals the systemic flaws and repressive excesses that still characterise the Congolese justice system, where HIV-positive status is often wrongly equated with automatic proof of guilt, particularly when it is invoked in proceedings related to sexual violence. Far from limiting itself to denunciation, this study takes a resolutely constructive perspective by calling for a thorough reform of the legal treatment of cases of alleged HIV transmission. It highlights the urgent need to develop clear guidelines for magistrates, to strengthen the training of justice professionals on the biomedical realities of HIV, and to promote a coherent approach that reconciles the fight against sexual violence, respect for human rights and public health requirements.

Keywords: HIV – criminalisation – scientific evidence – human rights – enlightened justice –stigmatisation – Democratic Republic of Congo.

Résumé

Cet article propose une lecture critique et approfondie du cadre juridique encadrant la pénalisation de la transmission du VIH en République démocratique du Congo, en prenant l'affaire S. M. comme point d'ancrage d'une réflexion plus large. Ce cas emblématique met en lumière les dérives d'une justice encore trop souvent influencée par la peur, les préjugés et la stigmatisation des personnes vivant avec le VIH, au détriment des standards requis en matière de preuve scientifique. À travers l'examen rigoureux de cette décision, l'article dévoile les failles systémiques et les excès répressifs qui marquent encore la justice congolaise, où le statut sérologique positif est souvent assimilé, à tort, à une preuve automatique de culpabilité, en particulier lorsqu'il est invoqué dans le cadre de procédures liées à des violences sexuelles. Loin de se limiter à la dénonciation, cette étude adopte une perspective résolument constructive en appelant à une réforme en profondeur du traitement juridique des cas de transmission présumée du VIH. Il souligne la nécessité urgente de développer des lignes directrices claires à l'usage des magistrats, de renforcer la formation des professionnels de la justice sur les réalités biomédicales liées au VIH, et de favoriser une approche cohérente qui concilie lutte contre les violences sexuelles, respect des droits de l'homme et exigences de santé publique.

Mots-clés : VIH – pénalisation – preuves scientifiques – droits de l'homme – justice éclairée – stigmatisation – République démocratique du Congo.

Introduction

In the Democratic Republic of Congo (hereinafter DR Congo), efforts to combat HIV have led to significant progress, including a reduction in new infections and improved access to testing and antiretroviral treatment¹. This progress is part of the global 95–95–95 strategy for 2030². It has reduced HIV transmission and improved the quality of life of those affected³.

However, this progress remains fragile, particularly in rural areas and regions affected by armed conflict, where access to HIV testing remains severely compromised. These vulnerabilities are particularly pronounced in the east of the country, which is marked by chronic socio-political instability, where recurrent clashes disrupt health facilities, disrupt the supply of essential medicines and hinder access to care for people living with HIV and key populations at increased risk of infection.

In addition to these constraints, there has been a worrying decline in international funding⁶. The drastic reduction in external aid, particularly following the freezing of US aid and the redefinition of donor priorities, has led to a decline in the technical and financial resources mobilised for the national response⁷. This disengagement threatens the gains made in

¹According to the 2023–2024 Demographic and Health Survey (DHS), the Democratic Republic of Congo has an HIV prevalence rate of 1%. Furthermore, the Report on the Status of the Response to the HIV Epidemic published in 2023 reveals that 449,455 people living with HIV, or approximately 87%, are aware of their HIV status, while 444,592 are receiving antiretroviral treatment, representing 86% of those diagnosed. Among those whose viral load has been measured, 151,188, or 77%, have a suppressed viral load. Available at: <https://www.pnmls.cd>, accessed on 4 October 2025. See also UNAIDS — "DRC: more than 400,000 people living with HIV have access to antiretroviral treatment", ACP, 30 November 2023. Available at: <https://acp.cd/science-sante-environnement/rdc-plus-de-400-000-personnes-vivant-avec-le-vih-accident-au-traitement-antiretroviral>, accessed on 30 August 2025.

² The global 95–95–95 strategy for 2030 aims to ensure that 95% of people living with HIV know their HIV status, 95% of those who know their status are on antiretroviral treatment, and 95% of those on treatment achieve an undetectable viral load. The Political Declaration on HIV and AIDS: Ending Inequalities and Achieving the 2030 AIDS Ending Goal can be found at Resolution adopted by the General Assembly on 8 June 2021, A/RES/75/284, 75th session of the United Nations General Assembly. Available at: https://www.unaids.org/sites/default/files/media_asset/2021_political-declaration-on-hiv-and-aids_fr.pdf, accessed on 30 June 2025.

³ Ibid.

⁴ At the time of publication, it should be noted that this significant progress is seriously jeopardised by declining funding and ongoing conflict in the east of the country. ⁵ Recent data highlighting inequalities in access to HIV services among different population groups, particularly children, pregnant women, and those living in rural and unstable areas. Available at: https://hlpf.un.org/sites/default/files/vnrs/2023/VNR%202023%20DRC%20Report_0.pdf, accessed on 30 June 2025.

⁶ UNAIDS, *AIDS, crisis and transformative power: UNAIDS Global AIDS Report 2025*, Geneva, 2025. Available at: https://www.unaids.org/sites/default/files/2025-07/2025-global-aids-update-summary_fr.pdf, accessed on 5 December 2025. See also the Alert Report on Funding Cuts: PEPFAR and Other Donors — Discontinuation of US Aid for HIV Response in DR Congo. In DR Congo, the discontinuation of US aid for HIV response could cost thousands of lives. Available at: <https://www.ungeneva.org/fr/news-media/news/2025/03/104299/en-rdc-linterruption-de-laide-americaine-la-reponse-au-vih-pourrait>, accessed on 15 September 2025.

⁷ Ibid.

prevention, testing and treatment, and risks undermining the progress made over the last decade⁸.

In addition to these structural challenges, legal and social barriers continue to hamper the national response to HIV and AIDS. The persistence of criminal laws imposing particularly harsh penalties, including life imprisonment and significant fines, for alleged HIV transmission contributes to maintaining stigma, discouraging voluntary testing and exacerbating systemic discrimination against people living with HIV.

Although these legal provisions were initially drafted from a public health perspective, with the laudable aim of preventing the spread of HIV within society, their practical application has gradually shifted towards an essentially punitive approach. This shift from a logic of care to a logic of punishment is particularly worrying in the judicial handling of cases of sexual violence involving alleged HIV transmission.

In cases of sexual violence involving alleged HIV transmission, the mere invocation of infection, often unsupported by solid scientific evidence, tends to lead to a more serious reclassification of the facts and a significant increase in the penalties incurred.

In these contexts, the desire to prove guilt tends to override the essential requirement that judicial decisions be based on solid, rigorous and scientifically validated evidence. This primacy of suspicion over objective and conclusive analysis is manifested by a lack of knowledge, or even ignorance, of recent biomedical advances concerning HIV, particularly those relating to modes of transmission, the concept of undetectable viral load and the effectiveness of antiretroviral treatments.

As a result, judicial decisions are too often influenced by fear, persistent social stereotypes and outdated representations of virological reality, contributing to the perpetuation of stigmatisation.

This phenomenon is not limited to the specific context of the DRC. It can also be observed in many other countries around the world¹¹, reflecting a global trend.

⁸ Ibid.

⁹ Law No. 06/018 of 20 July 2006 amending and supplementing the Decree of 30 January 1940 establishing the Congolese Penal Code and Law No. 09/001 of 10 January 2009 on child protection.

¹⁰ National Multisectoral Programme to Combat HIV/AIDS in the DRC, *Index of Stigmatisation and Discrimination against People Living with HIV, Survey Report*, January 2020. Available at: <https://www.pnls-rdc.org/wp-content/uploads/2022/06/Rapport-Index-Stigma-PVV-2020.pdf>, accessed on 10 December 2023. See also Jean Bedel Kaniki Tata, *Legal protection for people living with HIV, key populations and other sexual and gender minorities facing stigma and discrimination associated with HIV and AIDS in the Democratic Republic of Congo*, 2024. Available at: https://www.researchgate.net/publication/398421245_La_protection_juridique_des_PvVIH_des_populations_cles_et_d'autres_minorites_sexuelles_et_de_genre_face_a_la_stigmatisation_et_a_la_discrimination_associee_s_au_VIH_et_au_sida_en_RD_Congo, accessed on 30 November 2025. Also available at: <https://www.ssoar.info/ssoar/handle/document/106397>, accessed on 30 November 2025.

¹¹ HIV Justice Worldwide, *Working with the media in the fight against HIV criminalisation. An introduction for activists opposing HIV criminalisation*, 2018, p. 6. Available at:

global response to the excessive criminalisation of people living with HIV, in defiance of principles of justice and scientific evidence.

These judicial abuses are emblematically illustrated by *the case of the Public Prosecutor and Civil Party K. v. Defendant S. M.*¹² (hereinafter referred to as *the S. M. case*), the facts of which sparked heated debate on the relationship between criminal law and biomedical reality. Tried in the first instance by the Bukavu High Court under case number RP 14.855, then reviewed on appeal by the South Kivu Court of Appeal under case number RPA 3313, this case resulted in the defendant's conviction.

The legal classification of the facts, as well as the severity of the sentence handed down, appear to have been strongly influenced by the assumption that HIV transmission resulted from the rape of a child, even though there is no conclusive scientific evidence to confirm such a causal link.

Although a medical certificate attested to the victim's HIV status, there was nothing in the case file to confirm the defendant's HIV status at the time of the events, nor to establish that he was aware of it. His statement that he might be HIV-positive was an unverified hypothesis with no conclusive basis. Therefore, there was no evidence to conclusively link the HIV infection to the sexual assault.

Even though this case dates back to 2014, it would be wrong to consider it an isolated or exceptional event. On the contrary, it is a symbolic and revealing example of judicial practices that are still widespread in the DRC, where simply being HIV-positive tends to be penalised in the absence of tangible evidence of actual transmission, malicious intent or a real and documented risk to others.

Beyond a simple critical observation, this analysis takes a proactive approach, advocating for profound judicial reform, informed by scientific advances and respectful of human rights. Based on international standards and human rights principles, it proposes concrete guidelines for reform and is structured around two main areas.

The first chapter will examine the shortcomings of criminalising HIV transmission based on outdated representations and a lack of understanding of tangible scientific evidence. The second chapter will formulate concrete proposals for reform aimed at promoting a Congolese justice system informed by science, reconciling the punishment of sexual violence, respect for human rights and public health requirements in the response to HIV transmission.

https://toolkit.hivjusticeworldwide.org/wp-content/uploads/2019/08/HIV_Justice_Media_toolkit_FR-Final.pdf, accessed on 30 June 2025.

¹² In order to guarantee the privacy of the defendant while ensuring the protection of the victim's identity, we felt it necessary to anonymise the case by using initials.

Chapter I – Criminalisation of HIV transmission based on outdated representations and a misunderstanding of tangible scientific evidence

This chapter examines *the S. M. case*, in which the alleged transmission of HIV was used as an aggravating circumstance in the absence of conclusive scientific evidence (**section 1**). It highlights shortcomings in the assessment of the constituent elements of the offence, as well as in the legal classification of the facts relating to HIV (**section 2**). This case is a prime example of the potential abuses of criminalisation influenced by fear and stigma, to the detriment of rigorous empirical data.

Section 1 – *S. M. v* : a judicial decision guided by fear and stigma, to the detriment of scientific evidence

First, we will present the factual context and the issues related to the evidence (**paragraph 1**), before analysing the legal proceedings and the evolution of the decisions rendered in this case (**paragraph 2**).

Paragraph 1 – Factual context and issues of evidence in the *S. M.* case

By request No. 0612/PR/RMP 10.301/BOL/SEC/2014 of 27 March 2014, the Public Prosecutor referred the case to the High Court of Bukavu, registering it under number RP 14.855, in order to bring criminal proceedings against the defendant *S. M.*, then aged 25. The defendant was prosecuted on the basis of Articles 171 and 170 of Law No. 09/001 of 10 January 2009 on child protection¹³ for having, on 24 November 2013, in Bukavu, forced the 16-year-old *C. B. K.* to have sexual intercourse, with the alleged aggravating circumstance of transmitting HIV.

A. Main facts

During the investigation, the defendant *S. M.* claimed that *C. B. K.* was his wife, stating that she had told him she was of legal age, 18 years old, and that she had voluntarily moved into his home after, according to her, being expelled from her family home. He stated that they had lived together as cohabitants for a period of approximately five months, between November 2013 and March 2014, sharing a life as a couple similar to a common-law marriage. He acknowledged that he had had regular sexual relations with her during this period.

In his statements, particularly after learning of his partner's HIV status, he suggested that he himself might be HIV-positive, without however stating this with certainty. He explained that at the time of the events, he was unaware of his own HIV status, as he had never been tested before.

For her part, the victim reported that she had been in a romantic relationship with the defendant before he took her to his home in November 2013 and forced her to have sexual intercourse. She stated that this situation led to a prolonged cohabitation lasting five months. She also stated that the defendant had promised her a formal marital future, in

¹³ Available at: <https://www.leganet.cd/Legislation/JO/2009/JO.12.01.2009.pdf>, accessed on 10 March 2025.

committing to seek his parents' approval, which had initially strengthened her trust in him.

It is important to note that during the investigation, the civil party K. withdrew her civil action, which was also taken into account by the judges in their assessment of the case.

B. Lack of conclusive medical and scientific evidence

The medical certificate dated 6 March 2014, included in the court file, certifies that the person named C. B. K. is HIV-positive. However, this isolated finding, made after the events, does not in any way establish that she was HIV-negative before the alleged period of sexual relations, i.e. between November 2013 and March 2014, nor does it determine, even approximately, the probable period of her infection.

Furthermore, although the defendant mentioned the possibility of being HIV-positive during the investigation, particularly after learning of his partner's HIV status, this statement remained hypothetical, with no concrete evidence to support it. No material evidence was produced during the proceedings to prove with certainty that he was indeed HIV-positive before or at the time of the alleged offences, or that he was aware of his status before or during that period, as he maintained that he was unaware of his HIV status at the time of the offences. Similarly, no judicial measures were taken to order a subsequent screening test, which would have made it possible to determine whether the defendant was indeed HIV-positive at the time of the proceedings.

It should also be noted that the court file contains no medical or virological expert reports whatsoever, and in particular no phylogenetic analyses. Such analyses would have made it possible, on a rigorous scientific basis, to explore a possible causal link between the victim's serological status and that of the defendant, which remains hypothetical. This lack of evidence deprives the proceedings of essential information for objectively assessing the reality of transmission attributable to the defendant, thereby undermining the soundness of the judicial conclusions.

Nor did the judges conduct an in-depth analysis of the circumstances surrounding the sexual relations between the parties or the actual risks of HIV transmission that they could have entailed. Furthermore, other potential sources of infection for the victim were not considered either. This process of exclusion, which requires a thorough investigation supported by consistent statements, reliable testimony and, as far as possible, conclusive medical evidence, was not carried out.

Thus, in the absence of reliable and accurate medical and scientific evidence concerning HIV, the demonstration of guilt rests on uncertain grounds.

Paragraph 2 – Judicial proceedings and developments in decisions

First, it will be necessary to present the judgment handed down by the Bukavu High Court before examining the appeal lodged by the public prosecutor and the subsequent ruling by the South Kivu Court of Appeal.

A. Judgment of the Bukavu High Court

The defendant, S. M., was initially prosecuted for the rape of a child, which allegedly resulted in the transmission of HIV. He was brought before the High Court of Bukavu, which has jurisdiction over this type of offence¹⁴.

In his closing arguments, the public prosecutor relied on the conflicting statements of the defendant and the victim, as well as a medical certificate dated 6 March 2014 confirming the victim's HIV status. On this basis, he requested a sentence of 15 years' imprisonment, accompanied by a fine of 800,000 Congolese francs, with 30 days' imprisonment in the event of non-payment within the legal time limit. He also requested that damages be awarded to the victim and that legal costs be paid, under penalty of 15 days' imprisonment.

Assisted by his lawyer, the defendant admitted to the charges against him, offering only a brief confession without providing any details. At the same time, he asked the court to grant him mitigating circumstances. To justify this request, he argued that he was unaware of the victim's actual age at the time of the offence, claiming that he did not know she was a minor.

In a judgment dated 22 October 2015, the Bukavu High Court found the defendant S. M. guilty of child rape under Articles 171 and 170(1) of Law No. 09/001 of 10 January 2009 on child protection. This decision was based primarily on the statements of the defendant, who admitted to having had repeated sexual relations with the victim, then aged 16, with whom he had cohabited for about five months as a couple.

In determining the sentence for child rape, the judges took into account several mitigating circumstances, including the defendant's lack of a criminal record, his simple-mindedness and his cooperation during the proceedings. On this basis, the defendant was sentenced to 16 months' imprisonment and a fine of 100,000 Congolese francs. In addition, the judges took note of the civil party's withdrawal and ordered the defendant to pay the legal costs within the legal time limit, failing which he would be required to serve fourteen days of imprisonment for non-payment.

The Bukavu High Court also considered the aggravating circumstance set out in Article 170, paragraph 2, point 3, of the same law, which provides for a heavier sentence when the act of rape committed against a child results in the transmission of HIV. However, after analysing the case file, the judges considered that this circumstance could not be taken into account in the absence of conclusive evidence of HIV transmission.

Indeed, it is clear from the court file that the medical certificate, dated 6 March 2014, merely states that the victim was HIV-positive on that date. However, this isolated finding, made after the events, does not in any way establish that the victim

¹⁴ Organic Law No. 13/011-B of 11 April 2013 on the organisation, functioning and powers of the courts of law, Article 89. Available at: <https://www.droitcongolais.info/files/loi-organique-no-13-011-b-du-11-avril-2013.pdf>, accessed on 11 August 2025.

was HIV-negative before the alleged period of sexual relations, i.e. between November 2013 and March 2014, nor to determine, even approximately, the probable period of her infection.

Furthermore, although during the investigation, particularly after learning of the HIV-positive status of his partner with whom he had had regular sexual relations for five months, the defendant suggested that he himself might be HIV-positive, this statement remained hypothetical, with no concrete evidence to support it.

There was no evidence to confirm that the defendant was HIV-positive at the time of the events or that he was aware of his HIV status, as he claimed that he did not know he was HIV-positive at the time of the events. Similarly, no virological analysis or phylogenetic testing was carried out to investigate a possible causal link between the victim's HIV status and the defendant's hypothetical HIV status.

B. Appeal by the public prosecutor and subsequent ruling by the South Kivu Court of Appeal

Considering that the sentence handed down by the Bukavu High Court was manifestly lenient in view of the seriousness of the charges, the public prosecutor lodged an appeal with the South Kivu Court of Appeal, under number RPA 3313. It argued that the court of first instance had misapplied the law by imposing a derisory sentence without taking into account the seriousness of the offences. In its submissions, it therefore requested a heavier sentence, calling for 20 years' imprisonment and a fine of 200,000 Congolese francs.

For his part, the defendant, still assisted by his lawyer, once again acknowledged the charges against him, without providing detailed explanations, while asking the judges for leniency. He highlighted his cooperative attitude, his lack of previous immoral behaviour, his profession as a mechanic and his permanent residence in Bukavu, in order to obtain significant mitigating circumstances.

In its ruling handed down on 8 September 2016, the South Kivu Court of Appeal declared the public prosecutor's appeal admissible and well-founded. It considered that the sentence handed down at first instance did not reflect the seriousness of the offences or the scope of the aggravating circumstances provided for by the applicable legislation.

The judges recalled that, in accordance with Article 170, paragraph 2, point e, of the Penal Code, Book II¹⁵, "*anyone found guilty of rape shall be punished with a term of imprisonment of between five and twenty years and a fine of not less than one hundred thousand Congolese francs*". They also highlighted Article 174, point i, of the same Code, which provides for a sentence of life imprisonment and a fine of 200,000 Congolese francs when the perpetrator has deliberately infected a person with an incurable sexually transmitted infection.

¹⁵ Available at: <https://www.leganet.cd/Legislation/JO/2006/JO.1.8.2006.pdf>, accessed on 10 March 2025.

In this context, the South Kivu Court of Appeal ruled that the defendant's case constituted an aggravating circumstance. It found that the defendant's claim that he was unaware of his HIV status was not sufficient to exclude his criminal responsibility. For the judges, this ignorance, whether sincere or feigned, could not constitute a justification, insofar as the defendant "*should have, on the contrary, known his HIV status before having sexual contact with other partners*".

This assumption, which was not supported by facts or expert evidence, was used to establish the moral element of the offence, i.e. the awareness and intention to transmit HIV. Furthermore, the South Kivu Court of Appeal did not conduct a thorough assessment of the individual and social circumstances that could explain this ignorance.

Despite the absence of conclusive scientific evidence establishing that the defendant S. M. was indeed HIV-positive before, at the time of the events, or at least during the investigation, that he was aware of this at the time of the alleged events, or that the transmission of HIV to the victim could be directly attributed to him, and without taking into account the relational context in which the events took place, the South Kivu Court of Appeal increased the initial sentence, sentencing the defendant S. M. to life imprisonment¹⁶ and a fine of 200,000 Congolese francs.

Section 2 – Shortcomings in the assessment of the constituent elements and in the criminal classification of HIV-related offences

An examination of *the S. M. case* reveals four major shortcomings in the way the judges approached the facts of child rape where alleged HIV transmission is alleged. These shortcomings reflect a partial understanding of the legal requirements for establishing the offence, as well as the use of criminal classifications that are sometimes inappropriate or disconnected from the established facts.

Paragraph 1 – Legal uncertainty and regulatory confusion in cases of child rape with presumed HIV infection

First, we will present the initial classification of the facts, then examine the severity attributed to HIV infection and the justification for the increased sentence, before analysing the expected but unproven evidence and the interpretation given by the South Kivu Court of Appeal.

A. Initial classification of the facts

The charges against the defendant initially fell within the legal framework applicable to child rape, an offence that is precisely defined and severely punished by Article 171 of Law No. 09/001 of 10 January 2009 on child protection. This text establishes a specific, autonomous and comprehensive offence, taking into account the particular vulnerability of minors and the intrinsic seriousness of sexual offences committed against them.

¹⁶Life imprisonment is a penalty that imposes a definitive deprivation of liberty, meaning that the convicted person must remain incarcerated for the rest of their life, except in exceptional circumstances such as a presidential pardon.

In the event that the rape resulted in the transmission of HIV to the victim, without any deliberate intention or specific desire to infect having been demonstrated, this transmission should not have been made a separate offence. In the absence of specific intent to infect, the damage to health resulting from the transmission of the virus is legally considered to be a harmful consequence of the rape, and not a separate, criminally punishable act. It should therefore have been treated as an aggravating circumstance increasing the severity of the main charge, and not as the basis for a separate prosecution.

In this regard, a more rigorous interpretation of the applicable law should have led the appeal judges to correctly apply section 170(2)(3) of the same law. This provision explicitly states that any rape resulting in serious damage to a child's physical or psychological health, or causing lasting consequences, constitutes an aggravating circumstance. The transmission of HIV, as a chronic condition affecting the physical health, psychological stability and entire life of the victim, undoubtedly falls within the scope of this legal aggravating circumstance.

Thus, correct application of positive law should have led to the aggravating circumstance provided for in Article 170, paragraph 2, point 3 of the aforementioned law being taken into account, thereby strengthening the punishment for child rape while ensuring a legal analysis faithful to the structure and spirit of the law on child protection.

B. Seriousness of HIV infection and justification for increasing the penalty

Although HIV infection is no longer considered a death sentence¹⁷ thanks to major advances in medicine and the availability of antiretroviral treatments that can control the progression of the disease over the long term, allowing people living with HIV to lead long, healthy and fulfilling lives¹⁸, the impact of this infection on the victim's life remains particularly severe.

HIV contracted in the context of rape represents a significant violation of the survivor's physical, psychological and emotional integrity. They must now face lifelong antiretroviral treatment, constant monitoring of their health, and the psychosocial repercussions of being HIV-positive, including stigmatisation, anxiety and various psychological disorders. This type of harm, which is profound, lasting and multifaceted, fully meets the criteria set out in the law for qualifying as a serious health impairment.

Thus, rather than seeking an autonomous classification of deliberate transmission of HIV, without sufficient evidence establishing the perpetrator's intent, the judges could have relied on Article 170, paragraph 2, point 3, cited above, to consider a circumstance

¹⁷Alison Symington, *Expert Consensus Statement on Scientific Knowledge of HIV in the Context of Criminal Law – Five-Year Impact Study: Science in the Service of Justice*, HIV Justice Network, July 2023.

p. 15. Accessible via the website : https://academy.hivjustice.net/wp-content/uploads/2023/07/HJN_ECS5_Report_FR.pdf, accessed on 30 June 2025. See also UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, New York, 2021, foreword. Available at: <https://www.undp.org/publications/undp-guidance-prosecutors-hiv-related-criminal-cases>, accessed on 15 November 2024.

¹⁸ Ibid.

aggravating circumstance related to the consequences of the offence. Indeed, the increased sentence could have been justified by the serious damage to the victim's physical or psychological health, as well as by the lasting effects of the act of sexual violence, which would have made it possible to base the punishment on objectively verifiable and legally sound criteria.

The application of this aggravating circumstance results in a substantial increase in the penalties provided for by law. The minimum sentence of imprisonment is increased from seven to fourteen years, while the fine, initially set at eight hundred thousand Congolese francs, is doubled. The maximum sentence is increased to twenty years' imprisonment, accompanied by a fine of one million Congolese francs, illustrating the desire to impose particularly severe punishment for such offences.

Such a criminal response appears to be both more in line with positive law and better suited to the reality of the facts, as it takes into account the harm suffered by the victim without resorting to scientifically or legally unfounded charges.

C. Evidence expected but not proven

In order for the aggravating circumstance to be upheld, there must be clear, precise and consistent evidence establishing that HIV was actually transmitted to the victim¹⁹ and that the defendant was aware of his HIV status at the time of the events²⁰.

However, in this case, it has been established that, although a medical certificate dated 6 March 2014 attests to the victim's HIV-positive status on that date, this isolated finding, made after the events, cannot, on its own, prove that the victim was HIV-negative before the alleged period of sexual relations, i.e. between November 2013 and March 2014. There is no additional medical evidence to confirm his previous status or to determine, even approximately, the probable period of his infection.

Furthermore, although during the investigation, particularly after learning of his partner's HIV status, the defendant suggested that he himself might be HIV-positive, without making any categorical statement, there is no conclusive scientific evidence to confirm that the defendant was indeed HIV-positive prior to the events, or at least at the time of the events. During the investigation, no legal measures were taken to prescribe a subsequent screening test to confirm or refute the defendant's HIV status.

Furthermore, no virological analysis or phylogenetic examination was undertaken to investigate a possible causal link between the victim's HIV status and the defendant's hypothetical HIV status. The defendant, for his part, consistently maintained that he was unaware of his HIV status at the time of the events, which ruled out any possibility that he acted with the deliberate intention of transmitting HIV. No serious, specific or scientific evidence was added to the court file to convincingly contradict or refute this statement.

¹⁹ UNDP, *A training resource for judicial officers: HIV, tuberculosis, key and vulnerable populations and the law in Africa*, 2024, p. 61. Available via the website <https://www.undp.org/africa/publications/training-resource-judicial-officers-hiv-tb-key-and-vulnerable-populations-and-law-africa>, accessed on 30 June 2025.

²⁰ Ibid, p. 63.

Therefore, in the absence of rigorous medical and factual evidence, the legal conditions necessary to characterise the existence of aggravating circumstances were not met. This lack of evidence fully justifies the High Court's decision not to apply it.

D. Interpretation given by the South Kivu Court of Appeal

Despite the clear lack of indisputable scientific and factual evidence to justify the application of the aggravating circumstance, and although the victim's status as a minor was unequivocally established, the South Kivu Court of Appeal nevertheless opted for a questionable approach.

Firstly, the court chose to disregard the clear provisions of the regulatory framework, in particular those enshrined in Law No. 09/001 of 10 January 2009 on child protection.

Subsequently, while continuing to follow the line of argument developed by the Bukavu High Court in finding the defendant guilty of rape, the South Kivu Court of Appeal nevertheless provided its own analysis. Not only did it choose the legal basis of Article 170, paragraph 2, point e, of the Penal Code, Book II, but it also decided to introduce a specific distinction concerning the facts relating to HIV transmission, considering that these called for a separate and autonomous legal classification and treatment.

With this in mind, rather than linking the facts relating to HIV transmission to the offence of rape, it reclassified them as a separate offence, based on the provisions of Article 174(i) of the same Code, which expressly punishes

"anyone who deliberately infects another person with an incurable sexually transmitted infection".

This reclassification reflects the desire to distinguish the specific seriousness of the deliberate transmission of an incurable sexually transmitted infection by recognising it as a separate criminal offence, distinct from that applicable to sexual offences.

However, this provision, which is exceptionally strict, can only be applied if it can be demonstrated that there was a clear intention to cause harm to another person. It requires proof that the transmission of HIV, considered an incurable sexually transmitted infection, was carried out deliberately and with the conscious intention of harming the victim²¹.

In the present case, it remains established that no independent and rigorous evidence has been produced to prove that the defendant was aware of his HIV status, that he understood the risk of transmission associated with the sexual act of which he is accused, or that he had expressed an explicit desire to infect the victim, whether through actions, words or behaviour revealing such an intention.

²¹ UNDP, *A Training Resource for Judicial Officers*, Op. cit., p. 62.

By choosing to retain this separate offence, the judges adopted an approach that reflects a worrying trend, namely the mistaken belief that an individual's HIV status alone constitutes sufficient grounds for criminal liability. This shift leads to HIV-positive status being considered proof of dangerousness, or even guilt in itself.

Such an approach is troubling in several respects. On the one hand, it exacerbates the stigmatisation of people living with HIV, thereby undermining public health efforts based on voluntary testing, transparency and trust between partners²². On the other hand, it violates the general principles of criminal law, in particular the requirement to prove, beyond reasonable doubt, each of the constituent elements of the offence, a burden that rests entirely with the public prosecutor, in accordance with the fundamental principle of law that "*actori incumbit probatio*"²³.

Finally, this decision disregards constitutional and international human rights standards, in particular the principle of presumption of innocence, guaranteed by Article 17, paragraph 9, of the Constitution of the Democratic Republic of Congo of 18 February 2006, according to which "*any person accused of an offence shall be presumed innocent until proven guilty by a final judgment*"²⁴.

Paragraph 2 – Failure to provide evidence and legal uncertainty in the absence of scientific proof of actual HIV transmission

Another major shortcoming observed in the South Kivu Court of Appeal's ruling is the complete absence of any scientific evidence proving that HIV transmission actually took place. However, international guidelines recommend that criminal proceedings should only be brought ^{when} HIV transmission has occurred²⁵. No legal action for deliberate HIV infection should be brought without the public prosecutor having solid, credible and admissible evidence establishing that HIV was indeed transmitted from the defendant to the victim²⁶.

A. Lack of scientific evidence of actual HIV transmission

In the case in question, the defendant's conviction for alleged HIV transmission is based more on conjecture, subjective judgements, stereotypes and prejudices than on scientifically established evidence.

Indeed, there is no conclusive evidence to show that the victim was HIV-negative prior to the alleged period of the events, nor that the defendant was actually HIV-positive

²² UNAIDS, *Policy Brief: Criminalisation of HIV transmission*, August 2008, p. 4. See also UNAIDS, *Criminalisation of HIV*, Human Rights Fact Sheet Series, 2021.

²³ Nyabirungu mwene Songa, *Traité de droit pénal congolais* (Treatise on Congolese Criminal Law), second edition, Collection Droit et Société, Éditions universitaires africaines, Kinshasa, 2017, p. 442.

²⁴ This principle is also clearly reiterated and affirmed in the various international legal instruments ratified by the DR Congo, notably in Article 11, point 1, of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, Article 66 of the Rome Statute establishing the International Criminal Court, and Article 7, point b, of the African Charter on Human and Peoples' Rights.

²⁵ UNDP, *A Training Resource for Judicial Officers*, Op. cit., p. 61.

²⁶ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 6. See also UNDP, *A Training Resource for Judicial Officers*, Op. cit., p. 61.

before, at the time of the events or, at the very least, during the investigation, and that he was aware of her status. Furthermore, no rigorous medical or scientific evidence has established the existence of a direct, certain and objectively proven causal link between the victim's infection and the defendant's hypothetical infection.

It is clear from the court file that the only medical certificate, dated 6 March 2014, merely states that the victim was HIV-positive at that specific time. However, this isolated finding, made after the events, does not in any way establish, with a reasonable degree of certainty, that the victim was HIV-negative prior to the alleged period of sexual relations, i.e. between November 2013 and March 2014, nor does it determine, even approximately, the probable period of infection. Yet such anteriority is essential to establish the existence of a plausible causal link between the victim's serological status and the possible transmission of HIV by the defendant.

In the absence of formal evidence proving the defendant's HIV-positive status and the anteriority of the victim's seroconversion, it is legally impossible to establish a causal link between the victim's infection and the defendant's hypothetical infection.

B. Absence of testing of the defendant and phylogenetic analysis

Although during the investigation, particularly after learning that his partner, with whom he had had regular sexual relations for five months, was HIV-positive, the defendant suggested that he himself might be HIV-positive, this statement remained purely hypothetical. It reflected more a concern arising from the situation than any real certainty about his own HIV status, as there was no concrete evidence to corroborate such an infection²⁷.

The court file is particularly lacking in evidence that the defendant had tested HIV-positive before the alleged offences, or at least at the time of the offences. No screening test was ordered during the investigation to verify his possible HIV-positive status. In the absence of any medical screening of the defendant before, at the time of the offences or, at the very least, during the investigation, the judges had no evidence on which to rely to establish beyond reasonable doubt that the defendant was HIV-positive at the time of the offences.

Furthermore, it is particularly worrying that no phylogenetic analysis was carried out during the proceedings²⁸. This method, which is based on the comparative analysis of the genetic sequences of the viral strains present in the two individuals concerned, makes it possible to assess the degree of similarity between the HIV strains in question and, consequently, to evaluate the plausibility of inter-individual transmission of HIV.

²⁷ The information mentioned was collected during an interview with the defendant's solicitor in March 2025, in the context of the drafting of this document.

⁽²⁸⁾ For more information on phylogenetics, see Françoise Barré-Sinoussi et al., *Expert consensus statement on scientific knowledge regarding HIV in the context of criminal law*, July 2018. Available in French: <https://www.hivjusticeworldwide.org/wp-content/uploads/2018/07/French-Expert-Consensus-Statement.pdf>. See also UNAIDS and UNDP, *Policy Brief: Criminalisation of HIV Transmission* (2008), www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_fr.pdf, accessed 10 February 2025.

Phylogenetic analysis results suggesting that one person's HIV is closely related to another person's HIV may be consistent with the allegation that the defendant transmitted HIV to the victim, but they cannot prove this conclusively.

Importantly, it should be noted that phylogenetic results could be used to rule out the possibility that the defendant was responsible for transmitting HIV to the victim by showing that the two strains are not closely related²⁹.

Based on current scientific knowledge, when strictly applied and interpreted by qualified experts, these tests are among the most effective tools for confirming or, conversely, ruling out the possibility of a causal link between the two parties or the likelihood of interpersonal transmission of HIV³⁰. Its absence deprives the justice system of a decisive scientific element for objectively assessing the facts.

In the absence of such investigations, in particular screening and phylogenetic analysis, any conclusion regarding the defendant's responsibility is pure speculation and not based on verifiable evidence.

C. Impossibility of determining the source of infection

It is well established, both in legal doctrine and in forensic practice, that the fact that a person was tested first, or initiated legal proceedings, is not sufficient to determine with certainty who, between the victim and the accused, was the first person to be HIV-positive³¹. In other words, the fact that someone was tested or filed a complaint first does not constitute reliable evidence of the chain of HIV transmission.

In this particular case, it is highly likely that the young age of the victim strongly influenced the perception of the facts, leading to the perhaps hasty assumption that the defendant was necessarily the source of the infection. This implicit association between minority status and absolute vulnerability may have obscured the examination of other plausible hypotheses regarding the source of HIV infection.

It cannot be ruled out with certainty, and this possibility should have been thoroughly investigated, that the victim, whose HIV status was only discovered after the events, contracted HIV before the events, or that she was infected by another previous or current sexual partner, or by another means of transmission³², such as blood transfusion, risky behaviour unrelated to the defendant, etc. The investigation should have explored these alternative avenues in order to determine whether another person, or another cause, could reasonably have been the source of the victim's infection.

In this context, the fact that the victim was the first to know her HIV status does not in any way constitute proof that she was infected by the defendant. This chronology

²⁹ UNDP, *A Training Resource for Judicial Officers*, Op. cit., p. 61. See also Françoise Barré-Sinoussi et al., *Expert Consensus Statement on Scientific Knowledge of HIV in the Context of Criminal Law*, Op. cit., p. 21.

³⁰ UNDP, *Guidance for Prosecutors on Criminal Cases Related to HIV*, Op. cit., p. 20.

³¹ Françoise Barré-Sinoussi et al., *Expert consensus statement on scientific knowledge regarding HIV in the context of criminal law*, Op. cit., p. 21.

³² Ibid.

apparent does not necessarily reflect the reality of transmission. It remains entirely possible that the infection came from an unidentified third party.

These considerations highlight the need for a rigorous investigation, which, in this case, was unfortunately not conducted due to a failure to examine alternative hypotheses, thereby undermining the principle of impartiality and the requirement to seek the truth.

D. Failure to assess the actual risk of transmission

The judges limited themselves to noting that sexual intercourse had taken place over a period of five months, between November 2013 and March 2014, without, however, conducting an in-depth assessment of the circumstances of these acts and the actual risks of transmission they entailed.

In a case based on an allegation of HIV transmission, it would have been essential to determine precisely the nature of the sexual intercourse (protected or unprotected, and of what type), the frequency and total number of sexual encounters, the roles of the sexual partners during penetrative sex (i.e. insertion or reception), the correct and consistent use of condoms, whether the insertive partner was circumcised, the presence or absence of other sexually transmitted infections in the individuals concerned, etc.³³

Such an analysis would have made it possible to estimate the level of risk associated with each sexual act and, consequently, the likelihood of infection attributable to the defendant³⁴. Without this analysis, any prosecution is without valid legal basis.

Thus, the mere fact of sexual intercourse cannot, on its own, form the basis for a presumption of HIV infection without a detailed analysis of the facts. Indeed, if the acts alleged against the defendant did not involve any real risk of transmission, it would logically follow that no prosecution for deliberate transmission could be brought, since it would then be established that he could not have been the source of the infection.

E. International standards and case law require that any conviction be based on conclusive and factual evidence.

International standards and recommendations on the criminalisation of HIV transmission emphasise the need to establish causality not on the basis of assumptions, but through multiple medical, scientific and factual evidence, including medical records, rigorous scientific methods and information on sexual history³⁵.

³³ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 13. See also UNDP, *A Training Resource for Magistrates*, Op. cit., p. 60.

³⁴ Ibid.

³⁵ UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations (Ending excessive criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations)*, Geneva, 2013. Available at [via](#) on the following website:

This requirement for rigour is also found in Congolese case law, notably in *the Djuma Mosi case*³⁶, heard by the High Court of Goma under number RP 19.488, dated 7 April 2009. In this case, the judges clearly stated that the prosecution of the offence of deliberate transmission of HIV could only succeed if it could be established, with certainty and objectively, that HIV had actually been transmitted, which had to be demonstrated by scientifically valid and recognised medical tests.

Far from being a mere formality, the requirement for scientific proof serves as an essential procedural safeguard, guaranteeing the fairness and objectivity of the trial. It protects individuals from the risk of arbitrary arrest or conviction based on mere allegations, unsubstantiated suspicions, unfounded assumptions or stereotypes linked to the stigmatisation of people living with HIV.

It thus constitutes an essential bulwark against moralising or discriminatory interpretations of sexual behaviour, which could lead to the criminal justice system being used to the detriment of fundamental rights.

This judicial caution also aims to prevent abuses where charges are based more on social constructs or cultural prejudices than on verifiable and scientifically established facts.

This judicial approach is fully in line with the United Nations guiding principles applicable to the role of prosecutors³⁷. It is also in line with the professional standards adopted by the International Association of Prosecutors³⁸, which emphasise the need for all judicial action to be based on tangible, reliable and scientifically sound evidence in order to prevent abuse and ensure fair justice.

https://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf, accessed on 30 January 2025.

³⁶ UNDP, *Review of the Congolese legal framework for the response to HIV/AIDS*, Kinshasa, June 2012, pp. 81-85. Available at the following :

<https://documentation.pnmls.cd/uploads/PNUD%20-%20REVIEW%20OF%20THE%20CONGOLESE%20LEGAL%20FRAMEWORK%20FOR%20THE%20RESPONSE%20TO%20HIV-AIDS.pdf>, accessed on 30 June 2025.

³⁷ The United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, paragraph 14, stipulate that "*prosecutors shall not initiate or continue proceedings, or shall make every effort to suspend proceedings, where an impartial investigation shows that the charge is unfounded*". Available at: <https://www.ohchr.org/fr/instruments-mechanisms/instruments/guidelines-role-prosecutors>, accessed on 30 January 2025.

³⁸ According to the professional standards adopted by the International Association of Prosecutors, "*prosecutors and prosecutors shall only initiate criminal proceedings if they reasonably believe that a case is based on reliable and admissible evidence and, in the absence of such evidence, shall abandon the prosecution*." See also International Association of Prosecutors and Prosecutors, *Standards of Professional Responsibility and Declaration of Essential Rights and Duties of Prosecutors and Prosecutors* (1999) ["IAP Standards"], paragraph 4, point 2(d). Available at: [www.iap-association.org/Ressources-Dokumentation/IAP-Standards-\(1\)](http://www.iap-association.org/Ressources-Dokumentation/IAP-Standards-(1)), accessed on 30 January 2025.

Paragraph 3 – Erroneous assessment of criminal intent based on the unjustified disregard of ignorance of HIV status

Firstly, it should be noted that there is no formal evidence establishing that the person concerned was aware of his HIV status. Secondly, it should be noted that the presumption of a deliberate desire to ignore this status remains unfounded and unsubstantiated. Finally, as the defendant's real motives have not been proven, it is important to recall that, in accordance with international standards and case law on the subject, any conviction must be based on proof of a clear intent to cause harm.

A. Lack of formal evidence regarding knowledge of serological status

Another major weakness in the South Kivu Court of Appeal's decision is the total absence of medical or scientific evidence to establish with certainty that the defendant was aware of his HIV status at the time of the events³⁹. It was incumbent upon the public prosecutor to provide such evidence, in accordance with the fundamental legal principle of "*actori incumbit probatio*"⁴⁰. However, no conclusive evidence was presented to this effect, as confirmed by the following observations.

It is true that during the investigation, the defendant, particularly after learning that his partner, with whom he had had regular sexual relations for five months, was HIV-positive, suggested that he himself might be HIV-positive, but his comments were uncertain and reflected above all his concern about the situation rather than a conviction that he might be infected.

However, it should be emphasised that this simple statement, made hypothetically, cannot, in the absence of any probative evidence, constitute sufficient proof to establish his criminal liability⁴¹.

Indeed, only the presentation of a previous medical file attesting to a formal diagnosis and information clearly communicated by a health professional, or the presentation of credible testimony demonstrating that the defendant was aware of his HIV status before or at the time of the alleged offences⁴², would have provided solid support for such a conclusion.

In his defence, the defendant insisted that he was unaware of his HIV status at the time of the events and that he could not, therefore, be presumed to have acted with the intention of transmitting HIV. This statement was by no means insignificant. It should have led to independent verification, in particular through medical examinations or specialist assessments, in order to clarify this issue objectively.

Conducting a screening test during the investigation would, at most, have made it possible to determine whether the defendant was indeed HIV-positive at the time of the proceedings. However,

³⁹ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 14. See also UNDP, *A Training Resource for Judicial Officers*, Op. cit., p. 63.

⁴⁰ Nyabirungu mwene Songa, Op. cit., p. 442.

⁴¹ UNDP, *Guidance for Prosecutors on Criminal Cases Related to HIV*, Op. cit., p. 13.

⁴² Ibid, p. 14.

Such an examination alone cannot establish that he was aware of his HIV status at the time of the alleged offences.

Only the production of a previous medical file attesting to a formal diagnosis and information provided by a health professional, or credible testimony confirming that he had been explicitly informed of his status, could have provided proof of this prior knowledge, which is essential for establishing criminal liability in this context.

Reasonable doubt in criminal matters cannot be an imaginary or frivolous doubt arising from sympathy or prejudice. It must be based on logic and common sense, and have a rational connection with the evidence, the absence of evidence or contradictions in the evidence⁴³.

In the absence of medical or scientific evidence formally proving that the defendant was aware of his HIV status at the time of the events, he cannot be held criminally liable.

B. The hypothesis that the defendant deliberately ignored his HIV status is unfounded

The judges rejected the defendant's argument that he was unaware of his HIV status at the time of the events, without, however, examining its credibility in depth or deeming it necessary to conduct additional medical or factual investigations to verify its veracity.

They preferred to base their reasoning solely on a general assertion that the defendant *"should, on the contrary, have known his HIV status before having sexual contact with other partners"*, without demonstrating how such an essentially subjective obligation could apply in practice to his particular situation.

Such an assessment remains questionable, insofar as it was made without any conclusive evidence being provided to establish that the defendant was actually aware of his HIV status at the time of the events, or that he had previously tested positive for HIV.

No evidence was found of a prior medical diagnosis, documented therapeutic follow-up, or the presence of clinical symptoms characteristic of HIV that might have made him aware of his condition. Furthermore, no forensic medical expertise was sought to verify with certainty the reality of his knowledge at the time of the events.

Furthermore, the judges did not take care to examine whether the defendant had deliberately avoided any information about his HIV status, an attitude which could, at a pinch, fall under the concept of

⁴³ International Criminal Tribunal for Rwanda, *Rutaganda v. The Prosecutor*, Appeal Chamber judgement of 26 May 2003, paragraph 488. Available at: <https://hrlibrary.umn.edu/instree/ICTR/RUTAGANDA ICTR-96-3/RUTAGANDA ICTR-96-3-A.htm>, accessed on 20 May 2025.

of "*willful blindness*"⁴⁴. In criminal law, this concept refers to the attitude of an individual who, despite strongly suspecting that he or she is HIV-positive, knowingly chooses not to find out about his or her HIV status in order to be able to claim ignorance.

In this case, it should be noted that there is no evidence in the court file to establish that the defendant had plausible and serious grounds for suspecting a possible HIV infection. No history of documented exposure to a high risk of transmission, nor any suggestive clinical symptoms, has been reported to justify such suspicion. Furthermore, there is no evidence that he deliberately or through conscious negligence chose not to undergo testing in a context where he would have had reason to be concerned about his HIV status.

In the absence of evidence of such avoidance behaviour, the characterisation of criminal intent linked to awareness of HIV status appears legally unfounded and is based essentially on assumptions rather than objectively verifiable certainties.

Such assumptions ignore local realities, particularly the difficulties of accessing testing in the DRC. According to UNAIDS estimates in 2022, approximately 17% of people living with HIV in the country are unaware of their HIV status⁴⁵. This figure can be explained by multiple structural factors, such as the scarcity of testing centres, persistent stigma in health services, institutionalised discrimination, and fear of the social repercussions of a positive diagnosis⁴⁶.

These structural barriers cannot be held against the defendant, nor can they be used as grounds for a presumption of guilt. On the contrary, these factors, which have been widely documented by international institutions such as UNAIDS and the UNDP, should instead be interpreted as evidence of the absence of deliberate intent to transmit HIV to others.

Equating ignorance of one's HIV status with an intention to transmit the virus is a legal and logical error. A person cannot be held responsible for deliberately transmitting HIV if they were unaware of their positive HIV status. If a person does not know their HIV status, it goes without saying that they cannot be prosecuted for deliberately infecting another person⁴⁷.

Furthermore, legal doctrine emphasises that it is not sufficient for transmission to have occurred through sexual contact; the transmission must also have been deliberate⁴⁸. Proof of intent

⁴⁴ See the following website: https://criminalnotebook.ca/index.php/Knowledge_and_Wilful_Blindness, accessed on 28 June 2025.

⁴⁵ UNAIDS, *Country Factsheets, Democratic Republic of the Congo*, 2022. Available at: <https://www.unaids.org/en/regionscountries/countries/democraticrepublicofthecongo>, accessed on 30 June 2025.

⁴⁶ UNAIDS, *News – HIV discrimination is still a reality* (4 May 2020). Available at: https://www.unaids.org/fr/resources/presscentre/featurestories/2020/may/20200504_hiv-discrimination, accessed on 5 January 2025.

⁴⁷ Ngoto Ngoie Ngalingi, *L'essentiel du Droit pénal congolais* (The Essentials of Congolese Criminal Law), Presse universitaire du Congo, 2008, p. 264. Available at: <https://fr.scribd.com/document/697478602/Lessentiel-du-droit-pe-nal-Prof-Ngoto>, accessed on 20 December 2024.

⁴⁸Ibid.

Transmitting HIV should require not only knowledge of one's HIV status and how HIV can be transmitted, but also evidence of certain deliberate acts performed with the intent to transmit it⁴⁹.

The absence of evidence of a deliberate desire to ignore one's HIV status deprives the judicial decision of any solid basis for establishing an intention to transmit HIV.

C. Uncertainty surrounding the defendant's real motives

The analysis of the intention to transmit HIV must take into account the relational context in which the events took place. The defendant stated that the victim was his partner, with whom he had been in a cohabiting relationship lasting approximately five months, a relationship comparable to a common-law marriage. This point was confirmed by the victim herself, who acknowledged having been in a long-term romantic relationship with the defendant prior to the alleged events, which led to prolonged cohabitation.

In such a context of emotional closeness and intimacy, it is legitimate to question the defendant's true motives at the time of sexual intercourse. Was it a deliberate intention to transmit HIV, or was his act motivated by something else, such as the pursuit of sexual pleasure, the expression of emotional intimacy, or even a desire to build a lasting relationship or have children?

This distinction is fundamental, particularly in cases where the accused was unaware of their HIV status. In criminal law, proving intent to cause harm is a central element in determining the nature of the offence. If the moral element is lacking, i.e. in the absence of awareness of HIV status and intent to cause harm, criminal liability cannot be upheld with the rigour required by the principles of law.

This requirement stems from Article 174(i) of the Criminal Code, Book II, and Article 177 of Law No. 09/001 of 10 January 2009 on child protection, which require cumulative proof of a material act of transmission and clearly established criminal intent⁵⁰.

Proof of criminal intent to transmit HIV should require not only knowledge of one's HIV status and how HIV can be transmitted, but also evidence of certain deliberate acts carried out with the aim of transmitting it⁵¹.

D. International and jurisprudential standards require that any conviction be based on proof of a clear intent to cause harm.

International standards and recommendations support this approach. In their policy statement published in 2008, UNAIDS and UNDP recommend limiting the application of criminal law to rare cases of deliberate HIV transmission, i.e. when a person living with HIV is aware of their HIV status, acts with the intention of transmitting HIV and actually transmits HIV. In all other cases, the application of criminal law is not appropriate.

⁴⁹UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 15.

⁵⁰Ngoto Ngoie Ngalingi, Op. cit., p. 264.

⁵¹UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 15.

This has been confirmed by case law, notably in *the Djuma Mosi case*⁵², heard by the High Court of Goma, under case number RP 19.488, dated 7 April 2009. In this decision, the judges emphasised that only the perpetrator's prior knowledge of their HIV status constitutes an essential prerequisite for criminal liability. In other words, it is not sufficient to establish that unprotected sexual intercourse took place; it must also be demonstrated that the perpetrator was aware of their HIV-positive status at the time of the offence.

Thus, the court established the principle that the sincere ignorance or genuine uncertainty of the person prosecuted regarding their own HIV status excludes any criminal intent or even criminal negligence justifying a conviction.

By imposing this strict evidentiary requirement, the judges emphasised that criminalisation must be reserved for cases of clear intent to cause harm, and cannot be based on mere assumptions or social stereotypes.

Consequently, criminal intent to transmit HIV cannot be inferred solely from the fact of unprotected sexual intercourse in an intimate setting. It must be established by evidence demonstrating both the alleged perpetrator's knowledge of their HIV status and a clear intention to transmit HIV⁵³.

Paragraph 4 – Life sentence based on assumptions and lacking objective medical evidence

It is essential to remember that this analysis in no way minimises the seriousness of sexual violence or the need to punish it severely, particularly when perpetrated against minors. Such acts constitute major violations of human dignity and deserve a firm and unequivocal criminal response.

However, even in the face of the extreme seriousness of the alleged acts, in this case rape followed by the alleged transmission of HIV, the fundamental requirements of criminal law must be strictly observed. Emotional charge or seriousness cannot justify an expedited approach or a departure from the usual rules of evidence.

Guilt must be proven by clear, consistent evidence established beyond reasonable doubt. This principle is a cornerstone of fair trial and the protection of fundamental rights.

The requirement for rigour is even greater when the charge is based on the specific classification of "*deliberate transmission*" of HIV. Such a charge requires not only proof of a physical act, but also proof of clear criminal intent⁵⁴, based on a body of evidence that is objective, precise and consistent.

⁵² UNDP, *Review of the Congolese legal framework for the response to HIV/AIDS*, Op.cit., pp. 81-85.

⁵³ See the UNAIDS press release (2018) calling for judicial systems to incorporate scientific advances in HIV-related cases. Available at: <https://www.unaids.org/fr/resources/presscentre/pressreleaseandstatementarchive/2018/july/science-application-law-criminal-cases-hiv>, accessed on 22 July 2025.

⁵⁴ Ngoto Ngoie Ngalingi, Op. cit., p. 264.

In this context, the seriousness of the legal consequences attached to such a classification reinforces the obligation for the judge to rely on solid arguments. The imposition of such a severe penalty, consisting of life imprisonment with hard labour and a heavy fine, can only be conceived of after a carefully reasoned decision that is rigorously supported by irrefutable and scientifically based evidence.

A. Disproportionate and inconsistent severity of the sentence

In the context of the case in question, it is important to remember that significant advances in medicine, in particular the advent of the latest generation of antiretroviral treatments, have profoundly changed the life expectancy of people living with HIV.

These therapies now make it possible to effectively control HIV by reducing the viral load to an undetectable level, which prevents sexual transmission and guarantees a life expectancy close to, or even equivalent to, that of HIV-negative individuals.

Thanks to these advances, those affected can lead fulfilling emotional, family and social lives. They can have romantic relationships, conceive and raise healthy children, work and participate actively in society⁵⁵, without their health condition being a major obstacle to their inclusion or independence. In this context, which has been profoundly transformed by science, HIV infection can no longer be equated, as such, with a death sentence or irreversible damage to physical integrity.

Therefore, imposing an extremely severe criminal penalty, such as life imprisonment and a fine of 200,000 Congolese francs, solely on the basis of presumed contamination, without taking into account the current state of medical knowledge, the actual therapeutic prospects and the experiences of the persons concerned, appears not only disproportionate, but also legally questionable and contrary to the fundamental principles of justice, rationality and humanity.

Furthermore, when considering the imposition of an exceptionally severe penalty, in this case life imprisonment with hard labour and a fine of 200,000 Congolese francs, the requirement for solid and irreproachable judicial reasoning is particularly acute.

Such a decision, with irreversible consequences for the freedom and dignity of the convicted person, cannot be based on mere presumptions or approximations. On the contrary, it must be based on a solid evidentiary foundation, drawing on specialised expertise, particularly medical and virological, in order to establish with precision and certainty the chain of causality linking the incriminating facts to the alleged harm.

However, in the case in question, the reasoning given by the court raises serious concerns. Indeed, it is flawed in that it is not based on any evidence capable of establishing, with a sufficient degree of certainty, that the alleged harm, in this case presumed HIV infection, actually resulted from the actions of the defendant.

⁵⁵ Françoise Barré-Sinoussi et al., *Expert consensus statement on scientific knowledge regarding HIV in the context of criminal law*, Op.cit., p. 20.

or can be directly and exclusively attributed to him. The attribution of such harm cannot be based on mere conjecture or theoretical reasoning disconnected from biomedical realities.

Furthermore, the severity of the sentence appears grossly disproportionate when compared to those generally imposed in other rape cases. It becomes all the more problematic in light of national case law, in particular that of the South Kivu Court of Appeal, which, even in cases involving rape or other forms of extremely serious sexual violence, very rarely imposes excessively heavy sentences. This trend towards moderation in case law, even in the most shocking cases, is evident in several landmark decisions⁵⁶.

For example, in case number RPA 1720, the Kisangani Court of Appeal sentenced a 45-year-old man, who was close to the victim's family, to 15 years' imprisonment after finding him guilty of raping a two-year-old baby⁵⁷.

Similarly, in another particularly disturbing case heard by the High Court of Mbanza-Ngungu, in case number RP 10601, a teacher was found guilty of raping a pupil under the age of 12 in an isolated location. Despite the seriousness of the offence, the court handed down a sentence of only five years' imprisonment, accompanied by a fine⁵⁸.

The Kalamu High Court, in case number RP 9308, also handed down a decision that reflects this jurisprudential practice. In this case, a man took advantage of the vulnerability of a 14-year-old girl by raping her in exchange for food⁵⁹. Although initially sentenced to 10 years' imprisonment and a fine, his sentence was reduced by half on appeal by the Kinshasa/Gombe Court of Appeal in case number RPA 11.533⁶⁰.

In case number RP 1206, the Ndjili High Court handed down a sentence of only 24 months' imprisonment to a guard found guilty of raping a nine-month-old infant. This act of unprecedented brutality, which caused irreversible physical injury to the victim, would have warranted a much harsher criminal response⁶¹.

In case RPA 135 brought before the Maniema Court of Appeal, a man with close ties to the father of the victim, an eight-year-old girl, was sentenced, with significant mitigating circumstances, to only 11 months of penal servitude for rape. The relative leniency of the sentence contrasts with the trauma suffered by the child and the betrayal of the family's trust, etc.⁶²

⁵⁶ For full information on these and other similar cases, see Ruffin Lukoo Musubao, *La jurisprudence congolaise en Droit pénal, Volume II, Part I, Les violences sexuelles au Congo-Kinshasa et Brazzaville*, Éditions On s'en sortira, Kinshasa, 2011.

⁵⁷ Ibid, p. 73.

⁵⁸ Ibid, p. 81.

⁵⁹ Ibid, p. 109.

⁶⁰ Ibid, p. 121.

⁶¹ Ibid., p. 153.

⁶² Ibid, p. 211.

This discrepancy raises questions about the consistency of justice, suggesting that the exceptional severity of the sentence in this case may have been influenced by HIV-related prejudice rather than by an objective and impartial assessment of the facts.

The sentence of life imprisonment, accompanied by a significant fine, appears disproportionate and raises doubts about the objectivity of the punishment, which may be tinged with stigma related to HIV status.

B. Health and social considerations related to the incarceration of an HIV-positive person

Beyond the legal aspect, it is crucial to consider the health and social impacts of a custodial sentence on a person living with HIV. In the Democratic Republic of Congo, prison conditions are alarming, with chronic overcrowding, widespread unsanitary conditions and very limited access to medical care, particularly antiretroviral treatment⁶³.

These conditions are likely to worsen the health of HIV-positive individuals, interrupt medical care and promote the development of drug resistance. Under the conditions described above, such a sentence is effectively equivalent to a disguised death sentence, imposed in disregard of the State's obligations to respect the right to health and human dignity. This reality is often ignored in prosecutions and court decisions.

Beyond the medical aspect, the prison environment is an aggravating factor for people living with HIV. Not only are they exposed to physical, psychological or sexual violence, but also to forms of isolation and marginalisation that increase their vulnerability. Added to this is the persistence of stigmatising representations linked to their HIV status, which are often used as a pretext for discrimination. The lack of appropriate institutional mechanisms for prevention, protection and care further increases the risk of violations of their dignity and fundamental rights.

C. Prohibition of sanctions based on HIV status, a principle reaffirmed by international standards and case law

International standards specify that a person's HIV status does not in itself justify the imposition of a custodial sentence. Nor is it a reason for imposing more severe or stricter penalties⁶⁴.

This requirement was reaffirmed on 25 October 2022 by the High Court of Lesotho. Sitting as a Constitutional Court in *the case of M. K. v. Director of Public Prosecutions and others*, it ruled that persons convicted of sexual offences should be sentenced on the basis of mitigating or aggravating circumstances

⁶³ Kakule Kinombe Charles, *Prison overcrowding in the Congo: causes, effects and possible solutions*, KAS African Law Study Library – Librairie Africaine d'Études Juridiques 3 (2016). Available at: <https://pdfs.semanticscholar.org/8856/cc5c7388db64d4e9227628fb07f67c144979.pdf>, accessed on 30 January 2025.

⁶⁴ UNDP, *Guidance for Prosecutors on Criminal Cases Related to HIV*, Op. cit., p. 22.

and not on the basis of their HIV status⁶⁵, and that the law should be interpreted in such a way as not to impose a mandatory death penalty on a person living with HIV⁶⁶.

Taking into account all the circumstances and factors specific to the context of HIV-related prosecutions, an alternative approach, incorporating non-custodial measures or a reintegration measure supervised by medical and psychosocial services, would make it possible to reconcile the requirements of criminal justice, public health imperatives and respect for human dignity.

Incarcerating a person living with HIV under the current conditions of detention in the DRC seriously compromises their right to health and violates international standards of dignity and proportionality of punishment.

Chapter II – Towards a Congolese justice system informed by science, reconciling the punishment of sexual violence, the protection of human rights and public health imperatives

The first step will be to defend the need for a coherent approach that strikes a balance between the prosecution of sexual violence, respect for human rights and public health imperatives in the treatment of cases of HIV transmission (**section 1**). This analysis will then lead to a proposal to align the application of criminal law with medical and scientific evidence concerning HIV by developing guidelines for magistrates (**section 2**). Finally, emphasis will be placed on the importance of strengthening the capacities of judicial actors by integrating biomedical knowledge into the interpretation and implementation of legal standards (**section 3**).

Section 1 – Promoting a fair balance between the punishment of sexual violence, the protection of human rights and public health requirements in the response to HIV transmission

For the sake of clarity, the analysis will begin by exploring the tensions that exist between criminal law approaches and public health objectives in the response to HIV (**paragraph 1**), before addressing the need for a judicial response that is more consistent with sound medical and scientific evidence regarding HIV and the specific severity of sexual violence (**paragraph 2**).

Paragraph 1 – Tensions between criminal law and public health in the response to HIV

The response to HIV transmission lies at the intersection of two often contradictory approaches. On the one hand, there is a criminal justice approach, which aims to punish behaviour deemed dangerous to public order and seeks to protect society by punishing individuals perceived as a threat. On the other hand, there is a public health approach, which focuses on prevention.

⁶⁵ *M. K. v. Director of Public Prosecutions and others* (CONST 5 of 2020) (2022) LSHC 238. Available at: https://www.chr.up.ac.za/images/publications/legal_grounds/chapter7/M%20K%20v%20Director%20of%20Public%20Prosecutions%20and%20Others%20CONST%205%20of%202020%202022%20LSHC%20238%2025%20October%202022.pdf, accessed 10 May 2025.

⁶⁶ Alison Symington, *Expert Consensus Statement on Scientific Knowledge of HIV in the Context of Criminal Law – Five-Year Impact Study: Science in the Service of Justice*, Op.cit., p. 15.

⁶⁷ International Covenant on Economic, Social and Cultural Rights, Article 12. See also Constitution of 18 February 2006, as amended by Law No. 11/002 of 20 January 2011, Article 47.

solidarity and inclusion, which favours a collective and caring response to a health problem.

The use of criminal law to respond to alleged HIV transmission is often based on public safety considerations. This assumes that deterrence through punishment will reduce "risky" behaviour. However, this repressive approach, particularly when based on a guilt-inducing or stigmatising view of people living with HIV, tends to be counterproductive. It seriously undermines public health objectives by creating a climate of fear and mistrust, discourages testing and adherence to treatment⁶⁸, and fuels stigmatisation.

These adverse effects are all the more worrying given that early testing is an essential pillar of the response to HIV. The global 95-95-95 strategy for 2030⁶⁹, adopted by the Democratic Republic of Congo, is based precisely on trust, access to care and the fight against stigmatisation. However, the criminalisation of HIV transmission, as provided for in Congolese law, directly undermines these objectives.

Far from promoting prevention or access to care, this legislative measure tends to reinforce the dynamics of exclusion and repression by disproportionately targeting groups that are already marginalised within society. These include women, men who have sex with men, LGBTQ+ individuals, sex workers and people who inject drugs, all of whom are at the intersection of multiple forms of marginalisation, discrimination and criminalisation.

There is no evidence to suggest that criminalisation contributes to reducing new infections in the Democratic Republic of Congo ⁷². As elsewhere in the world ⁷³, to our knowledge, there is no data

⁶⁸UNAIDS, *Policy Brief: Criminalisation of HIV Transmission*, August 2008, p. 4. Available at: https://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_fr.pdf. See also UNDP, *A Training Resource for Judicial Officers*, *Op.cit.*, pp. 57 and 58. See also UNAIDS, *Criminalisation of HIV, Human Rights Fact Sheet Series*, 2021. Available at: https://www.unaids.org/sites/default/files/media_asset/01-hiv-human-rights-factsheet-criminalization_fr.pdf.

⁶⁹ Political Declaration on HIV and AIDS: Ending Inequalities and Achieving the 2030 Agenda. Resolution adopted by the General Assembly on 8 June 2021, A/RES/75/284, 75th session of the United Nations General Assembly.

⁷⁰According to the results of the survey on the Index of Stigmatisation and Discrimination against LGBTQ+ People, conducted in the Democratic Republic of Congo in 2017, there is a high rate of discrimination, with nearly 75% of respondents reporting that they were denied access to basic services such as education, employment, housing, health care and social security. See Progrès Santé Sans Prix, *Report on the Index of Stigmatisation and Discrimination against LGBTI People in the DRC*, 2017, cited by UNDP, *Initiative for Inclusive Governance: Baseline Report, Democratic Republic of Congo*, 2022, p. 7. Available at: <https://www.undp.org/fr/drcongo/publications/rapport-de-base-republique-democratique-du-congo>, accessed on 16 March 2024.

⁷¹ The information mentioned was collected during an interview with a civil society organisation in Bukavu in January 2025, in the context of the drafting of this document.

⁷² Cécile Kazatchine and Modeste Mambo Amisi, *Criminalisation of HIV and sex work in West and Central Africa*, Réseau Réseau Network and HODSAS, 2024, p. 3. Available via the following <https://www.hivlegalnetwork.ca/site/criminalization-of-hiv-and-sex-work-in-western-and-central-africa>, accessed on 30 June 2025.

⁷³ J. Csete, R. Elliott, E. J. Bernard, *So many harms, so little benefit: a global review of the history and harms of HIV criminalisation*, *The Lancet HIV*, Volume 10, Issue 1, 2023, Pages e52-e61.

demonstrating that criminalising HIV reduces risky sexual behaviour. On the contrary, it appears that this punitive strategy only exacerbates marginalisation and compromises the response to the epidemic⁷⁴.

It is therefore essential to reorient public policies towards an approach based on respect for human rights, the integration of medical and scientific data, solidarity and collective responsibility. Only then can the response to HIV be effective, equitable, inclusive and respectful of the dignity of those affected.

Paragraph 2 – Need for a judicial response more consistent with sound medical and scientific evidence on HIV and the specific severity of sexual violence

The issue of criminalising HIV transmission is particularly acute in the context of sexual violence⁷⁵, an endemic phenomenon in the Democratic Republic of Congo, particularly in the east of the country, which has been marked by decades of armed conflict.

Links have been established between HIV and sexual violence during the war that raged from 1996 to 2003. Amnesty International has documented "*the systematic use of rape as a weapon of war (...) to terrorise, humiliate and subjugate civilian populations*"⁷⁶. This widespread sexual violence has had lasting consequences, both in terms of health and human rights, exposing many victims to an increased risk of HIV transmission, while placing them in situations of extreme social and legal vulnerability.

Several analyses highlight its long-term health consequences, particularly with regard to the spread of HIV. Mr Kritz Brian reports a deliberate and shocking willingness on the part of the armed forces to transmit HIV⁷⁷, contributing to the spread of the epidemic among the population. Following on from this observation,

⁷⁴UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations*, Op.cit. See also Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*, New York, 2012. Available at: <https://hivlawcommission.org/report>, accessed on 30 June 2025.

⁷⁵ The World Health Organisation study published in 2013 on the health burden associated with violence against women found that women who had experienced physical or sexual violence were 1.5 times more likely to have a sexually transmitted infection and, in some regions, HIV, compared to women who had not experienced violence from their partner. See WHO, LSHTM, SAMRC, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence*, Geneva, 2013.

⁷⁶Amnesty International, *Democratic Republic of Congo, HIV: the most lasting legacy of war*, Information Bulletin 2004, AI Index: AFR 62/026/2004. Available at: <https://www.amnesty.org/fr/wp-content/uploads/sites/8/2021/09/afr620262004fr.pdf>, accessed on 30 June 2025. See also National AIDS Control Programme, *National Strategic Plan to Combat HIV/AIDS/STDs, 1999-2008*, September 2003.

⁷⁷Kritz Brian, "The crime of the knowing and intentional spread of HIV/AIDS and the International Criminal Court," in *The Interdisciplinary Journal of Human Rights Law*, 2013. Available at: https://www.academia.edu/4700488/THE_CRIME_OF_THE_KNOWING_AND_INTENTIONAL_SPREAD_OF_HIV_AIDS_AND_THE_INTERNATIONAL_CRIMINAL_COURT, accessed on 22 October 2025.

In 2002, the World Health Organisation recognised that HIV infection is a recognised consequence of rape⁷⁸.

In this context, as intolerable as such violence may be, collective outrage at such acts is legitimate. Congolese law responds to this with severe legal measures. The Congolese Penal Code (Articles 174, point i, 170 and 171 bis, paragraph 8), as well as Law No. 09/001 of 10 January 2009 on child protection (Articles 177, 171 and 170, paragraph 2, point 3), establish a particularly severe arsenal of repressive measures for the deliberate transmission of an incurable sexually transmitted infection.

These texts provide not only for penalties of up to life imprisonment, accompanied by significant fines, but also for a significant increase in the penalties of imprisonment and fines, particularly in cases of sexual violence. In the latter case, the penalty can be up to twenty years' imprisonment, accompanied by a significant fine, reflecting the legislator's firm stance on the seriousness of such offences.

However, the seriousness of the facts cannot justify summary justice or violations of the fundamental principles of the rule of law. Collective emotion must never take precedence over the requirements of objectivity, rigorous evidence and respect for the fundamental rights of all parties.

It is therefore essential to strike the right balance between two major legal and ethical imperatives. On the one hand, there is a need to firmly punish sexual violence, which undermines the integrity, dignity and safety of victims, while reaffirming the foundations of justice and the rule of law. These acts, in addition to causing lasting trauma, undermine the foundations of the rule of law and social justice, and call for exemplary judicial responses to ensure the protection of victims' rights and dignity, the punishment of perpetrators of such serious crimes, the deterrence of potential perpetrators, and the reaffirmation of the fundamental values of respect and dignity, and to set clear limits on sexual violence and the deliberate transmission of HIV.

On the other hand, it is equally crucial to apply criminal provisions, particularly those punishing HIV transmission and sexual offences, with scientific rigour, based on contemporary biomedical advances, evidence-based data, and an accurate assessment of the reality of the risk of transmission.

This dual imperative imposes a particular responsibility on Congolese judges to reconcile legitimate severity in the punishment of sexual violence with the requirement for caution, nuance and proportionality in the treatment of evidence, the assessment of situations, and particularly in cases involving possible HIV transmission.

Only this balance will make it possible to preserve the consistency of the legal system, guarantee the dignity of all those concerned, and ensure a judicial response that is compatible with scientific advances and human rights principles.

⁷⁸ World Health Organization (Krug EG et al. eds), *World Report on Violence and Health*, 2002, p. 163. Available at: https://www.who.int/violence_injury_prevention/violence/world_report/en/, accessed on 20 June 2025.

Section 2 – Aligning the application of criminal laws with medical and scientific evidence and s concerning HIV by developing guidelines for magistrates

For the sake of clarity, it is first necessary to analyse the shortcomings in judicial enforcement, despite the existence of a demanding legal framework (**paragraph 1**), before highlighting the urgent need to rethink the judicial approach to presumed HIV transmission in the context of sexual violence in the light of human rights and science (**paragraph 2**).

Paragraph 1 – Failing judicial enforcement despite a demanding legal framework

First, we will examine a legal framework which, despite its apparent rigour, is frequently undermined by judicial practices. We will then examine the shortcomings of the public prosecutor's office in assessing and directing prosecutions, the importance of an active, critical defence based on scientific expertise, and the obligation of judges to conduct an impartial assessment of the facts, strictly governed by the principle of doubt.

A. A legal framework that is rigorous in theory but contradicted by practice

In the Democratic Republic of Congo, the legislative framework governing HIV transmission is characterised by a significant requirement regarding the constituent elements of the offence. For criminal liability to be established, the law requires two cumulative conditions to be met. On the one hand, proof of deliberate intent to transmit HIV, and on the other hand, proof of actual infection of the exposed person. In theory, this double criterion aims to prevent any repressive excesses or abuse of criminal law against people living with HIV.

However, in practice, judicial decisions reveal a considerable gap between the principles set out in legal texts and their actual application in the field. Prosecutions are sometimes brought without rigorous proof of the legal conditions, in particular criminal intent or proof of actual transmission, revealing a worrying gap between the law and its application.

B. Shortcomings of the Public Prosecutor's Office in assessing and conducting prosecutions

The public prosecutor's office plays a decisive role in determining the course of proceedings by deciding whether or not to initiate prosecution. Its mission is to serve and protect the public interest, as set out in the international principles governing the role of the prosecutor⁷⁹.

In this regard, the International Association of Prosecutors emphasises that prosecutors must refrain from any influence from special interests or pressure from public opinion or the media. Their actions must be exclusively in the public interest⁸⁰, ensuring that the court delivers balanced justice that respects the rights of the community, the victim and the accused, in accordance with the rule of law and the principles of fairness⁸¹.

⁷⁹ Guiding Principles on the Role of Prosecutors (1990), paragraph 13(b).

⁸⁰ Standards of Professional Responsibility and Declaration of Essential Rights and Duties of Prosecutors and Prosecutors (1999), "AIP Standards", paragraph 1, point g.

⁸¹ Ibid., paragraph 3(b).

This responsibility requires a rigorous assessment of the facts to be prosecuted, particularly in complex cases such as those involving HIV transmission⁸². However, the examination of *the S. M. case*, analysed in detail in this study, reveals that the decisions taken lacked evidentiary basis, particularly with regard to establishing the HIV status of the individuals concerned or the existence of scientific evidence such as comparative analyses of viral strains.

Such evidentiary shortcomings undermine the necessary rigour of the prosecution, compromise the demonstration of the constituent elements of the alleged offence and also expose the defendants to unfair and disproportionate judicial decisions.

C. The need for proactive, critical defence based on scientific expertise

The role of the defence lawyer is equally crucial to the proper functioning of criminal proceedings. As the guardian of individual freedoms, defence lawyers must go beyond a formal approach to procedure and adopt a proactive, rigorous and intellectually demanding defence strategy based on the latest scientific knowledge and, where necessary, the involvement of qualified experts in highly specialised fields.

In cases involving biomedical issues, such as those concerning alleged HIV transmission, the defence acts as an essential counterweight to the prosecution. It must be particularly vigilant, as the analysis of the facts is often based on complex and specialised technical elements. It must question, deconstruct and challenge all of the prosecution's assertions that are not based on objectively verifiable evidence.

The defence must also insistently point out that, in accordance with the fundamental principle "*the benefit of the doubt goes to the accused*"⁸³, uncertainty, whether scientific, factual or legal, cannot be decided to the detriment of the person being prosecuted.

The Expert Consensus Statement on Scientific Knowledge in the Context of Criminal Law is a useful tool, providing important data on the risks of transmission associated with HIV⁸⁴. It was specifically drafted to support defence arguments in HIV criminalisation cases⁸⁵ and was instrumental in the acquittal of

⁸² See the UNAIDS press release (2018) calling for judicial systems to incorporate scientific advances in HIV-related cases. Available at: <https://www.unaids.org/fr/resources/presscentre/pressreleaseandstatementarchive/2018/july/science-application-law-criminal-cases-hiv>, accessed on 22 July 2025.

⁸³ Nyabirungu mwene Songa, *Op.cit.*, pp. 443 and 444.

⁸⁴ Drafted in 2018 by 20 leading scientists in the field of HIV and endorsed by more than 70 scientists from 46 countries, including Tunisia, DR Congo, Morocco, Nigeria and Senegal, the International AIDS Society, the International Association of Providers of AIDS Care and the Joint United Nations Programme on HIV/AIDS, it describes the current evidence on HIV transmission, treatment effectiveness and forensics so that HIV-related science can be better understood in criminal law contexts. The Declaration was published in the *Journal of the International AIDS Society (JIAS)*, a peer-reviewed scientific journal. Available at: <https://www.hivjusticeworldwide.org/wp-content/uploads/2018/07/French-Expert-Consensus-Statement.pdf>, accessed on 20 February 2025.

⁸⁵ Alison Symington, *Expert Consensus Statement on Scientific Knowledge of HIV in the Context of Criminal Law – Five-Year Impact Study: Science in the Service of Justice*, *Op.cit.*, p. 13.

people living with HIV⁸⁶, or to have charges dropped by demonstrating that there is no risk of transmission⁸⁷.

This critical examination of the evidence and demand for rigorous proof also allows judges to arrive at a pluralistic, contradictory and more informed interpretation of the facts, in accordance with the requirements of a fair trial.

D. The imperative of impartial judicial assessment strictly guided by the requirement of doubt

The judge is the central pillar of the criminal trial. As the ultimate guarantor of procedural fairness, their role cannot be limited to that of a passive arbitrator between the arguments of the prosecution and those of the defence. On the contrary, it is their responsibility to carry out a sovereign, meticulous and impartial analysis of the facts and evidence brought to their attention, relying exclusively on objectively established evidence.

In sensitive and technically complex cases such as those involving alleged HIV transmission, this requirement is even more crucial due to the scientific complexity of the facts. Judges must exercise heightened vigilance with regard to the evidence submitted to them.

The fundamental principle that "*the benefit of the doubt goes to the accused*"⁸⁸ cannot be relativised, even in cases of serious nature, such as sexual violence. This principle forms the basis of a fair criminal trial and prohibits any conviction based on mere conjecture, intuition or unsubstantiated assumptions.

Thus, in cases of alleged HIV transmission, the absence of reliable scientific data, particularly virological evidence, represents a critical shortcoming. Compliance with strict evidentiary requirements remains essential to ensure the legality of prosecutions.

Paragraph 2 – Rethinking the judicial approach to alleged HIV transmission in the context of sexual violence in the light of human rights and science

Firstly, it is important to emphasise the need to provide clear guidelines for criminal proceedings, before addressing the importance of incorporating sexual violence into the legal instruments currently being developed.

A. Framing criminal proceedings with clear guidelines

Given the abuses observed in the implementation of laws criminalising HIV transmission in the DRC, which are particularly evident in the judicial treatment of sexual violence, it is essential to promote a pragmatic, rights-based approach. The current application of these provisions reveals not only misinterpretations of the legal framework, but also persistent confusion between hypothetical risk, real risk and proven transmission, sometimes leading to disproportionate prosecutions that are even contrary to human rights.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Nyabirungu mwene Songa, Op.cit., pp. 443 and 444.

In this regard, a priority measure that can be implemented immediately is to provide judicial actors with clear and harmonised guidelines. The development of guidelines for magistrates, particularly those in the public prosecutor's office, appears essential to ensure that the use of criminal law remains consistent with the principles of legality, necessity, proportionality and non-discrimination⁸⁹. These guidelines should incorporate up-to-date scientific data on undetectable viral load, actual modes of HIV transmission, and relevant contextual factors in situations of sexual violence.

Such guidelines would not only prevent excessive or unjustified criminalisation of people living with HIV, but also enhance the effectiveness of prosecutions where the acts do constitute a criminal offence. They would also help to reduce arbitrariness, provide legal certainty for decisions and promote a more consistent justice system that protects victims while respecting the rights of those accused.

B. Incorporating sexual violence into legal instruments currently under development

While legal instruments are being developed to regulate the application of criminal law in cases of HIV transmission in consensual sexual relations⁹⁰, it is now crucial to extend this reflection to non-consensual relations, particularly sexual violence. These situations, which are criminal in nature, raise specific legal issues that require greater attention.

Cases of sexual violence, which are often complex in terms of evidence and highly publicised, constitute a significant proportion of HIV-related criminal litigation. They pose major challenges at the intersection of criminal law, scientific advances and ethical requirements for the protection of human rights, particularly those of women and people living with HIV.

With this in mind, the fundamental objective of these guidelines is to eliminate any risk of arbitrary or contradictory legal interpretation by proposing a coherent normative framework based on objective criteria.

This framework aims to provide magistrates with methodological tools enabling them, on the one hand, to accurately identify the hierarchy of offences that may be considered when sexual violence is accompanied by presumed HIV transmission and, on the other hand, to base their decisions on the relevant legal provisions governing the punishment of

⁸⁹Although originally designed to guide the actions of magistrates, these guidelines could also prove to be an essential resource for other key actors. Defence lawyers could use them to build strong and nuanced arguments in favour of their clients accused of HIV transmission. Civil society organisations involved in monitoring judicial practices and advocating for the decriminalisation of HIV would find this approach a rigorous methodological tool to support their claims and document abuses. People living with HIV, particularly those facing actual or potential prosecution, could use it to better understand the legal criteria underlying their prosecution.

⁹⁰ This is an adaptation to the specificities of the Congolese context of the "*Guidelines for Prosecutors on HIV-Related Criminal Cases*" developed by the United Nations Development Programme (UNDP), incorporating the legal, social and cultural particularities of the DR Congo.

HIV transmission in this particular context. It also aims to rigorously define the criteria for establishing proof of actual infection of the victim, while specifying the legal conditions under which deliberate intent to transmit HIV can be characterised.

a) Hierarchisation of criminal classifications in cases of sexual violence involving HIV transmission, with a view to making a rigorous distinction between the main offence and aggravating or separate classifications

The analysis of situations of sexual violence involving HIV transmission requires a rigorous approach, based on the prioritisation of offences, clarity of the legal classifications used and respect for the principle of strict interpretation of criminal law.

It is essential that the courts make a clear distinction between the sexual offence as the main offence and the transmission of HIV, which can only be considered as an aggravating circumstance or, in certain specific cases, as a separate offence requiring a separate classification.

The general principle that "*criminal law must be interpreted strictly*"⁹¹ means that each offence must be analysed according to its own constituent elements, without undue broadening or confusion between distinct legal classifications. This means that the same material act can only give rise to multiple charges if distinct and independent constituent elements are duly characterised.

In cases of non-consensual sexual intercourse resulting in HIV infection, the primary offence must remain that of sexual violence, which in itself constitutes a serious violation of the victim's physical integrity and dignity. The transmission of HIV, when it is a direct consequence of this act and no specific intention to infect has been established, must be legally analysed as an aggravating circumstance of the offence of sexual violence, and not as a separate offence.

Congolese law establishes a specific regime for this type of case, providing for substantially increased penalties of up to twenty years' imprisonment, accompanied by significant fines. In this regard, Articles 170 and 171 bis, paragraph 8, of the Penal Code, Book II, apply to adult victims, while Articles 171 and 170, paragraph 2, point 3, of Law No. 09/001 of 10 January 2009 on child protection govern situations involving minor victims.

This approach is also supported by international case law. For example, in *the case of The Prosecutor v. Jean-Pierre Bemba Gombo*, concerning crimes committed in the Central African Republic, the International Criminal Court emphasised in its sentencing decision of 21 June 2016 that the fact that the victims suffered from numerous physical problems, including HIV infection, constituted an aggravating circumstance that increased the seriousness of the offence of rape⁹².

⁹¹Nyabirungu mwene Songa, Op.cit., p. 63.

⁹² Summary of the decision rendered by Trial Chamber III on 21 June 2016, pursuant to Article 76 of the Statute, in *the case of The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, paragraph 13. Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/other/20-06-2016-Summary_of_Sentencing_Decision-Fra.pdf, accessed on 25 June 2025.

However, when there is evidence of a specific intent to infect, HIV transmission may constitute a separate offence. This specific intent may be characterised by prior knowledge of the perpetrator's HIV status, repeated and unexplained refusal to undergo available antiretroviral treatment, explicit threats, clear admissions or behaviour expressing a manifest desire to cause harm, and preparatory acts revealing deliberate exploitation of HIV as a means of domination, revenge or humiliation.

Where such elements are present, the relevant provisions of Article 174(i) of the Penal Code, Book II, should be applied to adult victims⁹³, and Article 177 of Law No. 09/001 of 10 January 2009 on child protection should be applied to minor victims.

These texts punish the deliberate transmission of an incurable sexually transmitted infection and provide for particularly severe penalties in the event of conviction, including life imprisonment and significant fines. This punitive regime reflects the legislator's recognition of the particular seriousness of such behaviour.

In the absence of specific intent, prosecuting for sexual violence and deliberate transmission would amount to double jeopardy for a single act, which would contravene the fundamental principles of criminal law.

However, the guidelines must expressly include a major exception applicable to situations of armed conflict, in particular where it is established that sexual violence is part of a strategy of terror, humiliation or organised destruction, and that HIV transmission is used as a weapon of war or as a tool of targeted persecution against a population.

As early as 2000, during a debate in the Security Council, Peter Piot, former Executive Director of UNAIDS, described war in Africa as an instrument of AIDS and rape as an instrument of war⁹⁴.

In these exceptional circumstances of rape being used as a weapon of war and endemic sexual violence, where deliberate intent is demonstrated, the seriousness and strategic intent of the acts could justify separate criminalisation.

Clarifying these distinctions in normative instruments and judicial practices is essential to ensuring the effective protection of victims, the credibility of the judicial system, and respect for the fundamental rights of the accused in a state governed by the rule of law.

b) Criteria for recognising evidence of effective transmission of HIV to the victim

Prosecutions involving sexual activity are often fraught with prejudice and assumptions about gender. Moreover, in an area as sensitive as alleged HIV transmission, where social stigma and moral representations can alter

⁹³ Article 45 of Law No. 08/011 of 14 July 2008, which provided for the punishment of deliberate transmission of HIV in the Democratic Republic of Congo, was repealed by Law No. 18/012 of 9 July 2018, due to its incompatibility with the growing requirements for respect for the human rights of people living with HIV.

⁹⁴ United Nations, "Security Council Holds Debate on Impact of AIDS on Peace and Security in Africa," Press Release SC/6781, 10 January 2000. Available at: <https://www.un.org/press/en/2000/20000110.sc6781.doc.html>, accessed on 20 June 2025.

judicial objectivity, greater care is required to avoid unjust prosecutions⁹⁵. It must be clearly and indisputably demonstrated that HIV was actually transmitted to the victim.

It therefore seems essential to identify objective criteria that can reliably demonstrate the existence of actual HIV transmission.

1. Establishing the HIV status of the alleged perpetrator at the time of the alleged events

The first criterion requires proof that the alleged perpetrator was HIV-positive at the time of the alleged acts⁹⁶. This condition requires the presentation of reliable medical evidence, generally in the form of medical records or a previous test confirming a formal positive diagnosis.

This evidentiary requirement is found in several African court rulings. In Botswana, for example, in *the 1999 case of Makuto v. the State*, the Court of Appeal ruled that section 142 of the Penal Code could only apply to persons who were HIV-positive at the time of the rape. It specified that extending it to persons whose HIV status was discovered after the offence would have the effect of introducing a discriminatory increase in the penalty⁹⁷.

This position was confirmed in a subsequent decision. *In State v. David Motlhokomedi Ntshwarisang*, decided in 2017, the court held that since the accused's medical records indicated that he was aware of his HIV status prior to the rape, he had "*acted intentionally to spread the disease*".

There is also a convergence of case law in the region. The Supreme Court of Eswatini has also affirmed that it must be proven that the perpetrator was living with HIV at the time of the offence⁹⁹, thus confirming the decisive importance of the timing of HIV status in assessing criminal responsibility.

2. Proving the victim's seroconversion within a compatible time frame

It must also be demonstrated that the victim was HIV-negative prior to the alleged contact and that their seroconversion occurred within a timeframe consistent with the HIV incubation period, generally between two weeks and three months after exposure.

This requires the production of prior medical records attesting to the victim's HIV-negative status prior to the presumed date of transmission and confirmation, through subsequent testing, of

⁹⁵ American Bar Association, *Standards for the Prosecution Function*, 4th edition (2017).

⁹⁶ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op.cit., p. 13.

⁹⁷ Available at: <https://www.globalhealthrights.org/wp-content/uploads/2014/09/Botswana-Makuto-v-State.pdf>, accessed on 28 June 2025.

⁹⁸ *State v. David Motlhokomedi Ntshwarisang* (unpublished), as detailed in The Botswana Guardian, "The big HIV debate," Boitshupo Balozwi, Tuesday, 26 February 2019. Available at: <http://www.botswanaguardian.co.bw/news/item/4025-the-big-hiv-debate.html>, accessed 28 June 2025.

⁹⁹ *Mamba v. R.* (15/11) [2011] SZSC 38 (30 November 2011). See also *Fanafana Nkosinathi Maliba v. the King* (31 May 2011). Available at: <https://eswatiniilii.org/judgments/SZSC/2011>, accessed 22 June 2025.

seroconversion. In the absence of this documented medical timeline, any claim of transmission remains speculative.

Furthermore, it should be remembered that the reliability of the establishment of the facts depends on evidence prior to or concurrent with the alleged offence. In this regard, an HIV test carried out after the alleged events, including as part of the investigation, cannot constitute sufficient evidence to initiate proceedings¹⁰⁰.

Where available and legally obtained, medical records may be useful in determining the date of the last negative and first positive HIV tests for the victim and the alleged perpetrator¹⁰¹.

Taking into account the serological latency period associated with each test, this information can be used to identify the period during which the victim contracted HIV and to determine whether the alleged perpetrator was HIV-positive at that time¹⁰².

3. Limited but useful contribution of phylogenetic analysis

Phylogenetic analysis of viral strains makes it possible to establish a correspondence between two human DNA samples¹⁰³ and to assess the genetic proximity between the HIV present in the alleged perpetrator and in the victim. It can establish that the HIV strains in two individuals are closely related, but these strains are not necessarily unique to these two individuals¹⁰⁴. In the absence of significant similarity between viral strains, the probability of direct transmission becomes extremely low, if not non-existent.

However, increased caution is required when interpreting phylogenetic analyses comparing two HIV strains. The limitations of this evidence must be carefully understood. It cannot establish a definitive "*match*" between two samples¹⁰⁵. HIV strains, even if closely related, will not be unique to two individuals, but could extend to other people in the same transmission network¹⁰⁶.

Furthermore, even when strains are closely related, phylogenetic analysis cannot establish direct transmission, i.e. who transmitted HIV to whom and when. This means that it cannot, on its own, prove beyond reasonable doubt that an alleged perpetrator transmitted HIV to the victim. This method provides no information about the direction of transmission¹⁰⁷. It simply establishes how closely related their respective HIV strains are¹⁰⁸.

¹⁰⁰UNDP, *Guidance for Prosecutors on Criminal Cases Related to HIV*, Op. cit., p. 13.

¹⁰¹ Françoise Barré-Sinoussi et al., *Expert consensus statement on scientific knowledge regarding HIV in the context of criminal law*, Op. cit., pp. 20 and 21.

¹⁰² Ibid.

¹⁰³ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 20.

¹⁰⁴ Ibid.

¹⁰⁵ UNDP, *A Training Resource for Judicial Officers*, Op. cit., p. 61.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 20.

This analysis is only conclusive if it is correlated with other circumstantial evidence, such as exclusivity of sexual contact, absence of other potential partners, and the timing of events¹⁰⁹.

Circumstances related to the nature of the sexual relationship, the time at which it took place, and information about other potential sources of infection are fundamental elements that must be taken into consideration in all cases where sexual transmission of HIV is alleged¹¹⁰.

In the same vein, it should be emphasised that, while phylogenetic analysis cannot establish with certainty the exact origin of transmission, it can nevertheless play an important role in judicial assessment. It is not limited to strengthening or weakening a presumption of transmission. In some cases, it can also play an exonerating role. Indeed, it could exclude a defendant as the source of the victim's infection if the results reveal that the viral strains are dissimilar¹¹¹.

Furthermore, given the scientific uncertainties surrounding the determination of the exact chain of transmission, it is important to remember that phylogenetic analysis, which is complex and subject to interpretation, requires strict supervision and can only be carried out with the support of qualified experts¹¹².

4. Exclude all other plausible sources of infection

Proof of transmission also requires the rigorous exclusion of alternative causes of contamination¹¹³, such as the existence of other sexual partners, the sharing of syringes or injection equipment, or the receipt of biological products such as contaminated blood, tissues or organs, etc.

Such exclusion requires a thorough investigation based not only on consistent statements and credible testimony, but also, as far as possible, on the production of medical documents or clinical records to corroborate the evidence gathered.

The fact that the victim took a test first, or filed a complaint first, is not sufficient to determine whether the victim or the alleged perpetrator was the first to be HIV-positive¹¹⁴.

¹⁰⁹ Françoise Barré-Sinoussi et al., *Expert consensus statement on scientific knowledge regarding HIV in the context of criminal law*, Op.cit., p. 7.

¹¹⁰ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., p. 20. See also Françoise Barré-Sinoussi et al., *Expert Consensus Statement on Scientific Knowledge of HIV in the Context of Criminal Law*, Op. cit., pp. 20 and 21.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Françoise Barré-Sinoussi et al., *Expert consensus statement on scientific knowledge regarding HIV in the context of criminal law*, Op. cit., p. 21.

5. Assessing the viral load of the alleged perpetrator

Finally, even if the facts reveal risky behaviour, such as unprotected sexual intercourse, sexual assault, etc., it must be proven that the alleged perpetrator had a detectable viral load at the time of the events¹¹⁵.

Current scientific data, in particular the "*U=U*" (*Undetectable = Untransmittable*) principle, establishes that a person with an "*undetectable*" or "*suppressed*" viral load cannot transmit HIV to a sexual partner¹¹⁶.

The most recent recommendations from the World Health Organisation, published in 2023, go even further. They indicate that the risk of transmission is negligible, or even virtually zero, when a person has a suppressed viral load, i.e. less than or equal to 1,000 copies per mL¹¹⁷.

This scientific recognition has major legal implications. It should be presumed, as a matter of principle, that a person living with HIV and receiving effective antiretroviral treatment does not pose a risk of transmission that would justify criminal prosecution.

c) Criteria for attributing deliberate intent to transmit HIV

In order to avoid abusive prosecutions and to make appropriate use of the resources of the judicial system, it is essential to establish that the perpetrator was aware of their HIV-positive status at the time of the events¹¹⁸. This knowledge is a prerequisite for assessing intent. Without clear evidence of this knowledge, no criminal liability for intentional transmission can be established.

Deliberate intent, a requirement for legal precision, plays a decisive role in the legal classification of acts resulting in HIV transmission, particularly when it comes to distinguishing between an aggravating circumstance of an existing offence, such as rape, and a separate offence based on a deliberate intention to transmit HIV. It implies a clear intent to cause harm, which cannot be based on stereotypes, mere assumptions or the HIV status of the person being prosecuted.

On the contrary, it requires the establishment of objective and verifiable criteria, based in particular on actual knowledge of one's HIV status, awareness of the risk of transmission, demonstration of a clear intent to cause harm, and the absence of any reasonable precautions to prevent infection.

¹¹⁵ UNDP, *A Training Resource for Judicial Officers*, Op.cit., p. 60.

¹¹⁶ Ibid. See also UNAIDS, *Undetectable = Untransmittable — Public health and HIV viral load suppression*, fact sheet, updated version 2024. Available at: https://www.unaids.org/sites/default/files/media_asset/undetectable-untransmittable_fr.pdf, accessed on 24 March 2025. See also UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations*, Op.cit.

¹¹⁷ WHO, New WHO guidance on HIV viral suppression and scientific updates released at IAS 2023. Available at: <https://www.who.int/news/item/23-07-2023-new-who-guidance-on-hiv-viral-suppression-and-scientific-updates-released-at-ias-2023>, consulté on 25 April 2025.

¹¹⁸ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., pp. 14 and 15.

In order for criminal liability to be validly established for deliberate transmission of HIV, three strict, rigorous and inseparable cumulative conditions must be met. First, it must be established, by means of precise and individualised scientific evidence, that the person being prosecuted was fully aware of their HIV status. Second, it is incumbent upon the prosecution to demonstrate that the person concerned was aware of the real risk of transmission inherent in the sexual act in question. Finally, it must be proven, clearly, certainly and unambiguously, that there was a deliberate intention to transmit HIV. If these conditions are not met simultaneously, any criminal prosecution based on HIV transmission is likely to lead to arbitrariness.

1. Awareness by the perpetrator of their HIV-positive status

The first determining criterion is the perpetrator's full and complete awareness of their HIV-positive status¹¹⁹. Knowledge of the status must be proven by medical evidence or specific statements (formal serological diagnosis issued by a health professional, followed by explicit notification to the patient, resulting in the opening of a medical file).

In the absence of a direct admission, this knowledge cannot be based on mere assumptions or stereotypes. It must be based on a rigorous analysis of objectively verifiable facts, taken in context. This analysis must be deduced with caution from clear, consistent and converging evidence, reasonably ruling out the possibility of legitimate ignorance of serological status.

The most direct and decisive factor is adherence, even partial, to antiretroviral treatment, which is an almost irrefutable indication of knowledge of one's own HIV status. Participation in a medical monitoring programme, regular viral load tests and specialist consultations further reinforce the presumption that the person concerned was aware of their condition.

Similarly, verbal or written statements in which the alleged perpetrator acknowledges their HIV status, whether addressed to relatives, healthcare professionals or a partner, as well as messages (text messages, social media posts, letters) explicitly referring to their status, also constitute direct evidence of this awareness.

2. Awareness by the perpetrator of the risk of transmission associated with the sexual act of which they are accused

It must also be demonstrated that the alleged perpetrator was aware of the risk of transmission associated with the sexual act of which they are accused¹²⁰. Awareness of the risk of transmission can be inferred from a set of objective indicators, which must be analysed rigorously to avoid any stigmatisation or presumption of guilt based on prejudice.

This particularly refers to the deliberate refusal, or voluntary and unjustified interruption, of antiretroviral treatment that is available. In certain exceptional situations, if the alleged perpetrator had real, sustained and unhindered access to treatment, had received clear explanations about the importance of treatment for their health and for the prevention of transmission, and knew that treatment can achieve an undetectable viral load and

¹¹⁹ Ibid.

¹²⁰ Ibid.

If the virus is not transmissible, then persistent refusal to start or continue treatment, contrary to the expected precautions, may be interpreted as indicative of conscious and avoidable risk-taking, thereby increasing criminal liability.

However, caution should be exercised. Refusal or discontinuation of antiretroviral treatment does not necessarily reflect a desire to harm or transmit HIV. It may be explained by intolerance to the treatment or intolerable side effects, the shock of the diagnosis or denial of it, fear of stigmatisation or social rejection, psychological disorders, lack of information, and concerns about confidentiality or fear that their HIV status will be disclosed.

The circumstances specific to each alleged perpetrator must be taken into account, regardless of material barriers to accessing care.

3. Explicit intent of the perpetrator to transmit HIV

The core of deliberate intent lies in the explicit desire to transmit HIV. This desire is manifested through objective indicators that are observable and interpretable by the judge. Various types of evidence may constitute indicators revealing such deliberate intent.

It must be evident and inferred from objective evidence, such as explicit or threatening statements made by the perpetrator, indicating an intention to infect the victim. These statements, whether reported by credible witnesses, by the victim themselves or extracted from written correspondence, may be considered as evidence of a clear intention to transmit HIV.

Similarly, malicious acts or behaviour deliberately aimed at transmitting HIV, as well as attitudes revealing a harmful motive, revenge, hatred or a desire to harm a specific person, may be taken into account. The same applies to a history of or statements suggesting an ideological or punitive motive linked to the transmission of HIV.

Some cases may highlight situations where the perpetrator presents himself as a "*vigilante*" seeking to "*punish society*" because of his own circumstances. This cannot be considered simple carelessness or negligence, but rather deliberate and intentionally malicious behaviour. The demonstration of this intent must be based on concrete and converging facts and established with all the necessary rigour and objectivity.

When HIV transmission occurs in the context of a sexual encounter, it is essential that these three elements be established independently and separately from the circumstances surrounding the main offence, particularly in cases of sexual violence. The aim is to avoid any confusion or legal over-classification and to prevent double jeopardy for the same acts.

That said, it is important to remember that establishing deliberate intent to transmit HIV must be subject to rigorous and nuanced assessment. The mere fact that a person living with HIV did not disclose their HIV status or had sexual intercourse

Unprotected sexual intercourse is not, in itself, sufficient to prove criminal intent¹²¹ to transmit HIV. Such a hasty conclusion could unfairly penalise behaviour which, although potentially risky, does not necessarily reflect malicious intent. Taking into account the state of mind of the alleged perpetrator should not be conclusive¹²².

Legitimate fears of being a victim of physical or psychological violence, particularly in the context of unbalanced or coercive relationships, are a major obstacle to the adoption of protective measures. Added to this is the fear of being stigmatised, discriminated against or rejected, whether by one's partner, family or community, as well as the fear of losing control over one's private life or having one's HIV status disclosed against one's will.

Furthermore, condom use can sometimes be mistakenly perceived as an admission of mistrust, suspicion of infidelity or a sign of illness, which can discourage some people from using them, especially in contexts marked by strong gender norms or cultural expectations.

Finally, it should be noted that some people living with HIV who are on effective antiretroviral treatment know that they have achieved an undetectable viral load, which means that they can no longer transmit HIV through sexual contact. This awareness of the absence of biological risk of transmission may also explain, in some cases, a reduced emphasis on condom use, without this necessarily reflecting negligence or a desire to cause harm.

These contextual factors must be taken into account when analysing the intentional element of the offence. Guilt cannot be assessed without considering the social, psychological and medical realities that shape the behaviour of the person being prosecuted.

With regard specifically to women living with HIV, it is essential to take into account the often unequal power relations between the sexes, as well as situations of economic, social or emotional dependence.

In this context, disclosing their HIV status can be dangerous, exposing women to risks of rejection, domestic violence, stigmatisation or loss of material support. Similarly, their ability to negotiate, or even impose, condom use in relationships often marked by male dominance can be considerably hampered, particularly in traditional marital or family settings¹²³.

It follows that any legal assessment of their behaviour must therefore be made with particular sensitivity to these factors of vulnerability¹²⁴.

¹²¹ UNDP, *A training resource for bailiffs*, Op.cit., p. 62.

¹²² Ibid.

¹²³ UNAIDS, *Technical argument for the adoption of a new law on HIV and AIDS in the Central African Republic*, 2022, p. 19. Available via the following https://hivpreventioncoalition.unaids.org/sites/default/files/attachments/national_strategy_plan_for_the_fight_against_hiv_and_aids_in_the_central_african_republic_2023-2027.pdf, accessed on 30 June 2025.

¹²⁴ Ibid.

Section 3 – Strengthening the skills of judicial actors by integrating scientific knowledge into the interpretation and application of the law

The judicial approach to HIV must evolve to reflect scientific advances and respect fundamental rights. This section first examines the issue of strengthening the skills of legal professionals through continuing education (**paragraph 1**), then highlights the importance of a justice system aligned with public health principles and respect for human rights (**paragraph 2**).

Paragraph 1 – Strengthening the capacities of judicial actors through continuing education and scientific awareness

Legal cases involving HIV are particularly complex, especially when they concern sexual violence. However, in many contexts, magistrates have to cope with heavy workloads, limited resources¹²⁵ and restricted access to specialised training. This situation leads, in the Democratic Republic of Congo as elsewhere, to unjustified or misguided prosecutions against people living with HIV¹²⁶. *The S. M. case*, analysed in detail in this study, is a striking illustration of this.

To remedy this situation, the judicial response must be modernised, based on a profound transformation of professional practices. This requires ongoing training and increased awareness among magistrates, solicitors, police officers and other stakeholders in the judicial system. A good understanding of current scientific knowledge, particularly regarding modes of transmission, the effectiveness of antiretroviral treatments, and the "*U=U*" (*Undetectable = Untransmittable*) formula, is now essential to limit arbitrary decisions and ensure a more equitable application of the law.

With this in mind, it is essential to organise regular training and awareness-raising workshops for judicial actors. These sessions should aim to integrate scientific data into decision-making processes, while supporting HIV prevention and care efforts. It is also crucial to develop specific modules on medical advances related to HIV and their legal implications, in order to ensure informed decisions that respect human rights.

Paragraph 2 – Promoting justice that respects human rights and public health issues

Training and awareness-raising for judicial actors should not be limited to medical aspects alone. It should also include an ethical and social dimension, focused on combating stigma and protecting human rights. Modules dedicated to combating discrimination, the effects of stigma, and the impact of criminalisation on access to care are essential for developing a truly equitable justice system.

The implementation of rights-based justice also requires cross-sectoral collaboration, encouraging partnerships between the judicial sector and professionals

¹²⁵ UNDP, *Guidance for Prosecutors on HIV-Related Criminal Cases*, Op. cit., pp. 1 and 3.

¹²⁶ Alison Symington, Edwin J. Bernard, et al., *Advancing HIV Justice 4: Understanding Convergences, Seizing Opportunities*, HIV Justice Network, Amsterdam, July 2022. Available at: <https://www.hivjustice.net/publication/advancing4/>, accessed on 18 August 2025.

health for concerted action. Training judicial actors in the latest scientific data on HIV and raising their awareness of issues related to stigma, discrimination and human rights are therefore essential for the informed and balanced application of criminal law.

The Expert Consensus Statement is a useful reference tool in this regard. It contains accessible and reliable information on HIV that can be used to combat the stigma, discrimination and widespread misinformation that contribute to the criminalisation of HIV¹²⁷.

These proposals aim to bring about a more balanced Congolese justice system, based on science, respectful of fundamental rights and compatible with public health objectives. The aim is not to relax vigilance in the face of sexual violence, but to ensure that the judicial response is informed, consistent and respectful of human rights.

By training those working in the field, the DR Congo could become an example in Central Africa of an integrated, modern and humane legal and health approach.

Conclusion

Analysis of the current regime of criminalisation of HIV transmission in DR Congo, particularly when applied in the context of sexual violence prosecutions, highlights a profound gap between the scientific progress made in recent decades and judicial practices that remain rooted in outdated and stigmatising attitudes.

The S. M. case, analysed in detail in this study, strikingly illustrates the persistent weight of negative social representations of HIV in the criminal justice system. The judgement handed down in this case illustrates a worrying persistence of social stereotypes and collective fears inherited from the early years of the HIV epidemic, which continue to influence judicial decisions to the detriment of an approach based on biomedical evidence and current scientific knowledge. This gap between scientific advances and traditional judicial reflexes often leads to disproportionately harsh decisions.

In this case, an individual was sentenced to life imprisonment without any reliable medical evidence establishing his HIV status or demonstrating a causal link between the offence and possible HIV transmission. The severity of the sentence thus appears to be based more on a presumption of infection following the rape of a child than on rigorously established facts.

In light of these abuses, it is imperative to reorient the application of criminal law in relation to HIV towards an approach that is science-based, respectful of human rights and consistent with public health objectives. Such a change requires a thorough reform of the Congolese legal and judicial framework, based on three fundamental principles.

Firstly, it is essential to develop and implement precise, scientifically informed and legally rigorous guidelines for magistrates.

¹²⁷Alison Symington, *Expert Consensus Statement on Scientific Knowledge of HIV in the Context of Criminal Law: Five-Year Impact Study: Science in the Service of Justice*, Op. cit., p. 13.

These guidelines should define the situations in which criminal responsibility may be incurred, while avoiding automatic punitive measures based on unfounded assumptions.

Secondly, it is crucial to strengthen the capacities of actors in the judicial system, particularly judges, prosecutors and lawyers, through ongoing training on biomedical developments relating to HIV, public health principles and international human rights standards. This training should also cover combating stigma, differentiated approaches to cases, and assessing the real risks of transmission.

Thirdly, there must be greater coordination between policies to combat sexual violence, protect the rights of people living with HIV, and public health strategies. This synergy is essential to ensure a consistent, proportionate judicial response that respects human dignity and is in line with the DR Congo's social justice objectives and international commitments.

By making such adjustments, the DRC would be able to lay the foundations for a judicial system that is better adapted to contemporary realities, more equitable in its treatment of people living with HIV, and more effective in combating sexual violence.

This legal reform would not only help restore confidence in the justice system, but also combat stigma and strengthen the national response to HIV and AIDS, in line with the country's commitments to human rights and public health.

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