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Beyond sword and shield: the UN human rights system and criminal law

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ABSTRACT

Growth in the scope and mandate of the United Nations human rights system sees it increasingly wrestle with questions of national criminal law. The UN human rights system today forms part of a wider transnational socio-legal process that shapes decisions on whether to criminalise conduct or not. Issues such as sexual orientation, defamation, hate speech, and homelessness have emerged as key human rights (de)criminalisation debates. The notion of the human rights sword and shield continues to describe the activation or restraint of the criminal law, but human rights is not always able to provide simple criminalisation conclusions and its exact application to the criminal law often remains contested. Meeting future criminalisation challenges will likely require a more nuanced approach, such as human rights guidelines for the criminal law, informed by frameworks and inspiration from fields including criminal theory.

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Introduction

Almost thirty years after the phrase was first coined, the idea of human rights as a sword and a shield for criminal law – activating and restraining criminalisation respectively – continues to influence human rights scholarship widely.[1] Much of the literature starts from one perspective or the other, focusing either on the risks of an overly coercive human rights doctrine, or concentrating on human rights approaches to decriminalisation.[2] Critics of the sword highlight that positive obligations to criminalise certain human rights violations present risks of coercive overreach that might demand penalisation of acts which do not necessarily warrant penal sanction; may result in conflation of state liability and individual criminal liability; and even serve to cover authoritarian tendencies with a human rights veil (Lavrysen & Mavronicola, 2020, pp. 3–4). Advocates for the shield and decriminalisation highlight the negative human rights impact of criminal laws across a wide range of conduct, including gender identity, HIV non-disclosure, drug use and homelessness (Keehn, 2018). Whereas recent literature has begun to explore ambiguities between the sword and shield positions,[3] the visual of the paradigm

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nonetheless risks, perhaps inadvertently, characterising human rights as producing a binary end-state of criminalisation or decriminalisation, with an assumption that human rights most usually can produce a clear conclusion, often alongside the argument that human rights are heavily oriented one way or the other.

Whilst the analogy remains powerful, this paper aims to show the additional nuance that international human rights in fact brings to questions of criminalisation. It does so by presenting a snapshot of prevailing human rights and criminalisation patterns in the United Nations (UN) human rights system. It explores situations where human rights offers guidelines or broad parameters for criminalisation rather than set conclusions, and highlights the context dependency of some human rights criminalisation positions. A better understanding of the dynamic at UN level is especially important due to the increasing influence of international human rights on national criminal laws (Pinto, 2018), as well as the fact that is often the touchpoint for different socio-cultural interpretations of human rights at the international level – including delicate balances between freedoms of expression and religion.[4] Whereas human rights also has much to say about the wider penal sphere, including issues of criminal justice and punishment, the article limits itself to the relationship between human rights and the direct content of the substantive criminal law. Discussion in the literature on the sword and shield paradigm often concentrates, understandably, on decisions of international human rights courts, tribunals or quasi-judicial bodies (Ashworth, 2013; Bengoetxea & Jung, 1991; O'Flaherty & Higgins, 2015). This article however takes a view across the whole UN human rights system and beyond, including human rights treaty bodies, special procedures, and the work of the UN Human Rights Council (UNHRC). This has the advantage of placing the sword and shield fully in context, revealing additional nuance to an otherwise binary concept, as well as the extent to which states themselves accept or contest the application of international human rights law and standards to their own national criminal law. This more complete grasp of the relationship between human rights and criminalisation, including its limitations, political dimension and links with related fields, in turn, aids in critiquing and ultimately strengthening the contribution that human rights can make to the criminal law.

The article starts with a short background and historical context to human rights and criminalisation, followed by a high-level review and examples of how different parts of the UN human rights system have addressed the criminal law. The analysis then applies a range of theoretical lenses, including sociological and criminal theory notions, as a starting point for conceptualising the dynamic. This draws out possible lessons for both states and civil society on what can drive or influence human rights criminalisation norms, and consequently national criminal laws. The article does not aim to express a view on the correctness or not of individual criminalisation conclusions, but rather to illustrate and provide an analytical frame for the way in which the UN human rights system influences the criminal law. It concludes that the international human rights framework, with its focus on the individual as a rights holder, offers an important principled perspective for criminalisation decisions. Independent mechanisms of the UN human rights system in particular have prioritised autonomy and non-interference in the private sphere when assessing the compatibility of criminal laws with international human rights. Although states do not always agree with such conclusions, the ability of human rights mechanisms such as UN treaty bodies and special procedures to opine on the application of international human rights law to questions of criminalisation is essential to advancing human rights

criminalisation standards. The independent UN mechanisms are at least partly responsible for the wide acknowledgement by states of the applicability of human rights to questions of criminal law, and are seen to influence state views and negotiations on criminalisation within the UN human rights system. At the same time, the human rights frame alone cannot resolve all disagreement concerning the criminal law, and there is a risk that criminalisation questions that strike at the heart of societal and cultural differences become highly politicised or entrenched in contested cycles within UNHRC. The article suggests that looking beyond the binary sword and shield to human rights guidelines that draw also from wider criminal theory and socio-cultural perspectives on criminal law could strengthen the contribution of human rights to a rational, fairer and more just criminal law.

Background and historical context

Human rights and (de)criminalisation

The sword and shield function in respect of the criminal law derives from the fact that international human rights law creates legal obligations that are both negative and positive in nature.[5] Before international human rights courts and tribunals, consideration of the criminal law arises not only where the existence or absence of criminalisation is argued to violate individual rights directly (either positive or negative), but also indirectly within broader legal challenges concerning crime and security, crime investigatory and prosecutorial obligations, and the rights of victims of crime (Malby, 2020). In practice, across both the UN and regional human rights systems, criminalisation obligations in international human rights law arise in respect of particularly serious human rights violations, that generally concern acts involving threat to life and limb, including violent threats to life, serious assault, torture, disappearances, kidnap, rape, trafficking and slavery (Seibert-Fohr, 2009). Such acts are found to require criminal prohibition by virtue of positive obligations to establish an appropriate legislative and policy framework to protect against abuse by third parties – in particular for the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment, and the right not to be held in slavery or servitude (Ashworth, 2013, pp. 196–209).

Prohibitions on criminalisation on the other hand are derived by human rights courts and tribunals from the parameters of rights such as the right not to be subjected to arbitrary or unlawful interference with privacy, the right to freedom of thought, conscience and religion, and to freedom of association. Whilst every criminal law of course represents a restriction on individual autonomy in some way, such specific rights function to restrain the criminal law only where it infringes on their exercise and is neither necessary or proportionate to a legitimate aim (Malby, 2020, pp. 85–110). Perhaps self-evidently, a human rights treatment of criminal law is therefore limited by the range of rights in applicable international human rights law. Not all possible criminal acts may necessarily engage rights and therefore be subject to the sword and shield. It is not necessarily clear, for example, that complex criminal law governing acts such as breach of trade regulations, or market manipulation and insider trading would be amenable to an international human rights critique unless an adverse impact on human rights could be clearly identified.[6]

Notably, international human rights courts that have developed extensive criminalisation jurisprudence, such as the European Court of Human Rights (ECtHR), in fact strictly require or prohibit criminalisation comparatively infrequently. Rather, the ECtHR at least, tends to show a broad permissiveness towards criminalisation, defining comparatively few circumstances in which a particular act *should* or *should not* be an offence, but frequently finding no violation in respect of an impugned offence, with the result that the act *may* (but need not) be an offence (Malby, 2020, pp. 101–110). This is not so often the case within parts of the UN human rights system, that vary in their definitiveness and detail of criminalisation conclusions, depending upon the procedural context, mandate, standing, degree of discursiveness, and framing of criminal law issues within the particular mandate or process.[7]

Criminalisation in the UN human rights treaties

For the UN human rights system, the structure of the UN core human rights treaties sets the context and parameters for the way in which today's UN human rights machinery considers questions of criminalisation. Very few provisions of the nine core UN international human rights treaties address criminalisation directly. This is not to say that criminalisation does not feature in treaty law in general. Instruments sometimes referred to as the 'suppression' conventions, such as the United Nations Convention against Transnational Organized Crime (UNTOC), the United Nations Convention against Corruption (UNCAC), and the Single Convention on Narcotic Drugs, for instance, oblige states parties to enact a range of criminal offences in national law.[8] Treaties such as the 1926 Slavery Convention and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide also contain criminal law provisions. In addition, international humanitarian law and international criminal law treaties define a range of crimes in the context of armed conflict or as part of a widespread or systematic attack directed against a civil population, including many serious human rights violations (Seibert-Fohr, 2009, pp. 1–10).

For the nine core UN human rights treaties, in fact just five contain explicit requirements for criminalisation within treaty wording alone, two of which are contained in Optional Protocols.[9] The three clear criminalisation requirements in core treaties are found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 4 (incitement to racial discrimination and related acts); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 4 (acts of torture); and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), Articles 4 and 25 (acts of and related to enforced disappearance). In addition, in some instances, use of the term 'prohibit', such as Article 20 (Propaganda for war and advocacy of national, racial, or religious hatred) of the International Covenant on Civil and Political Rights (ICCPR) has subsequently been interpreted as requiring criminalisation in some cases. In no case do international human rights treaties specifically prohibit an act from being a criminal offence under national law, meaning that the shield function must be derived from interpretation of rights, rather than direct treaty text.[10]

Why, amongst the multiplicity of prohibitions in international human rights law were five made subject to criminal measures? In particular when many human rights prohibitions can be perpetrated by third parties, such as arbitrary deprivation of life; slavery;

servitude; and forced or compulsory labour. For the UN human rights machinery in general, regulation of the substantive content of national criminal law was not considered as a primary aim at the time of its formulation.[11] Early work on the formulation of the Universal Declaration of Human Rights (UDHR) rather tended to assume that the proper content of the criminal law could already be broadly identified and agreed, and the UDHR itself did not include any criminalisation requirements or prohibitions.[12] This set the tone for the subsequent binding UN human rights treaties, with issues including 'minorities, statelessness, rights of options, property and discrimination' being considered as 'human rights' matters, as distinct from any broader theory of governance, use of law, and rights.[13] As such, the answer likely lies in the individual circumstances of each treaty negotiation, in particular the extent to which the act was already covered by national criminal laws, as well as the sociopolitical realist interests of influential states (Malby, 2020, pp. 78–84). For ICERD Article 4 for example, at the time of drafting, racial discrimination was clearly identified as a human rights issue,[14] but whilst some states had a criminal offence or aggravating circumstances for racially-motivated violence or incitement to such violence, the dissemination of ideas based on racial superiority and incitement to racial discrimination were not commonly criminalised.[15] In the absence of a common approach at the national level, the history of criminalisation within ICERD is thus one of debate over the appropriate use of the criminal law to protect against the Convention condemnation of racial discrimination.[16] Whereas ICERD demonstrates the translation of a human rights situation into a criminalisation requirement, CAT and CPED represent situations where the acts of torture and enforced disappearance were largely already recognised *both* as crimes and human rights abuses around the time of the drafting process. In each case, the act was widely criminalised at the national level but states agreed that there was a need to provide also for a criminalisation obligation at the international level (Malby, 2020, pp. 74–76).

States and experts: criminalisation debates in the UN human rights system

The small number of criminalisation requirements in the core UN human rights treaties has not prevented the UN human rights system from developing extensive criminalisation recommendations and standards. UN treaty body concluding observations on State Party reports, general comments, and views on individual communications, as well as the UNHRC Universal Periodic Review (UPR) process and UNHRC resolutions, all contain criminalisation views and conclusions. The different nature of these processes – being either expert-led or state-led – results in some differences in their criminalisation findings. Independent and inter-governmental parts of the UN human rights system however bring different but complementary value to an overall contribution of international human rights to the criminal field.

Human rights treaty bodies

Statements of the UN human rights treaty bodies on criminalisation in concluding observations are not usually accompanied by significant depth of reasoning nor always link clearly to treaty articles. Treaty bodies often for example, simply recommend

'decriminalisation' of a particular act,[17] express 'concern' that a specific act is included in or excluded from the criminal law,[18] or urge a state party to ensure the criminalisation of an act.[19] As might be expected, many criminalisation references made by treaty bodies in concluding observations concern the five specific treaty-based prohibitions.[20] In addition, treaty bodies sometimes refer to criminalisation obligations in wider international treaty law, such as criminal law obligations in respect of trafficking in persons in accordance with UNTOC and its Protocols.[21] Beyond these clear criminalisation obligations in international law, treaty body application of rights result in conclusions on a rather wide range of possible criminal conduct.[22] Being limited to the specific rights of the treaties, acts that are the subject of concluding observations cluster around a number of offence types, such as acts leading to harm to the person, injurious acts of a sexual nature, and a wide category of acts against public order; by virtue of their engaging ICCPR Articles 6 (life), 7 (torture and cruel, inhuman degrading treatment), 17 (privacy), and 18 (thought, conscience and religion). The range and volume of concluding observations is significant. Across all treaty bodies, concluding observations referred to criminalisation or decriminalisation over 700 times between 2006 and 2023, with 250 references in 2022 alone.[23] Treaty bodies have, for example, amongst others, recommended that all forms of rape, including marital rape, should be a criminal offence,[24] that acts of domestic violence should be criminalised,[25] as well as female genital mutilation (FGM),[26] making accusations against children of witchcraft,[27] incest,[28] and sexual harassment in the workplace.[29] Conversely, treaty bodies have recommended that sexual relations between consenting adults of the same sex be decriminalised,[30] expressed concern about the existence of crimes such as injuring the honour and dignity of the President,[31] and called for the decriminalisation of abortion[32] and proselytism,[33] blasphemy,[34] vagrancy,[35] incest,[36] trespass,[37] adultery,[38] and crimes that can only be committed by children (child status offences).[39] In addition to concluding observations, notable views on individual communications that directly concern the criminal law include UN Human Rights Committee decisions on the criminalisation of same-sex sexual activity,[40] abortion,[41] conscientious objection to military service,[42] and concealing the face in public[43] – all of which the Committee held should not be a criminal offence in the circumstances. In other cases, such as defamation, the Committee is generally not in favour of criminalisation, but stops short of an outright condemnation of criminal sanctions.[44]

The nature of treaty body concluding observations means that such recommendations largely follow a classical sword and shield approach of recommending criminalisation or decriminalisation. Unlike in cases brought before a human rights court such as the ECtHR, criminal provisions that are neither required or prohibited by international human rights law have no particular need to be raised and discussed with a State Party in the reporting process. With a few exceptions, found in views on individual communications, treaty bodies have not therefore developed as wide a jurisprudence as the ECtHR on acts that *may* (rather than *should* or *should not*) be an offence from an international human rights law perspective. The relative freedom of treaty monitoring bodies to make recommendations on criminalisation within the broad terms of treaty rights stands in contrast to the state-led dynamic of UNHRC resolution negotiations. This results, on the one hand, in a sharper conception of a human rights approach to criminalisation by treaty bodies than for UNHRC processes that, as discussed further below,

are often the product of delicate state compromises. Treaty body conclusions on criminalisation are seen in particular to emphasise the importance of the protection of bodily integrity (requiring criminalisation for acts that infringe, in particular where societal customs may tend towards impunity or leniency), and of autonomy (requiring *de*criminalisation where criminal laws unduly impinge). In this way, treaty bodies aim to provide accountability for serious harms to the individual, whilst also setting important boundaries on state use of criminal law in the private sphere. As discussed later in this article, the UN Human Rights Committee's views on the unacceptability of criminalisation of concealing the face is one clear example of a treaty body according primacy to individual freedoms. On the other hand, a criticism of strong human rights criminalisation requirements, even in the case of serious harms such as violence against women, is that, in isolation, such calls for use of the criminal law may not recognise the complexities of embedded abuse, social realities, and issues of extreme carceral violence, through a removed notion of general criminal accountability, prevention and deterrence (Tapia Tapia, 2023). In other words, a criminal response, in some contexts, risks compounding underlying issues and itself perpetuating further violence. For violence against women in particular, treaty bodies do pay attention to associated issues such as cultural barriers to reporting and risks of reprisals, stigmatisation or revictimisation.[45] However, perhaps especially for treaty body concluding observations that cannot contain the same depth of analysis as individual complaints or human rights cases, the point does highlight the importance of context in the implementation of human rights criminalisation recommendations, as well as the need for promotion of wider structural preventative, restorative, and victim and community-centred approaches.

Human Rights Council – Universal Periodic Review

Whilst the views of individual experts of treaty bodies are authoritative and an important mechanism for identifying likely points of (in)compatibility of criminal law with human rights obligations, they do not capture the position of states themselves as international actors on the criminalisation requirements and parameters of international human rights law.[46] Follow-up procedures of the Human Rights Committee show that not all states do take action on recommendations concerning criminal law in concluding observations, at least at the point of follow-up.[47] The influence of the UN human rights framework on national criminal law – including the extent to which it genuinely succeeds as a sword and shield – must be measured, in part, by the nature of state engagement, their acceptance of human rights implications for criminalisation, and use of the UN human rights framework to promulgate global change in criminal laws (Mutua, 2007). Through its mechanism of state-led recommendations, the Universal Period Review (UPR) process of the HRC offers one opportunity for understanding the extent to which states themselves value a human rights approach to the criminal law, at least as regards their recommendations to other states.

The UPR and treaty bodies have fundamental differences in scope, approach, purpose and method, but are intended to be complementary (Ramcharan, 2019). The UPR is universal, state driven, and inherently political, producing numerous human rights recommendations as between states, which those under review are free to accept or to note. Of over 100,000 individual recommendations made by states since the inception

of the mechanism in 2006, at least 1600 refer to criminalisation or decriminalisation of particular conduct.[48] In terms of raw numbers, around two-thirds of these are recommendations for decriminalisation, and one-third for criminalisation. At least fifty distinct acts are mentioned by states as requiring criminalisation, and at least thirty different acts that should not be criminalised.[49] The very fact that states include recommendations on the criminal law in the UPR – often in quite direct terms – shows a clear acceptance of human rights as a framework that is relevant to and sets parameters for national criminal law. As discussed later in this article, this constitutes a two-way dynamic of states bringing national perspectives to the international sphere, whilst accepting requirements of international human rights (to varying degrees) for their own national criminal law; resulting in a transnational form of lawmaking that shapes criminalisation laws and norms at multiple levels. In so far as this introduces an additional dimension to (otherwise) national, and sometimes sub-national, criminal law making, UN human rights mechanisms do have the potential in practice to promote a move towards common global criminalisation approaches, based on the principled, albeit also political, universal human rights framework.

Acceptance of a human rights framework in matters of criminalisation is also shown by the UPR to not be limited to specific regions. At least some recommendations on criminalisation and decriminalisation are made by countries from all UN regional groups. Although the UPR does show that significant regional differences remain in approaches to criminalisation. Accounting for the numbers of countries in each regional group, it is clear that countries in the Western Europe and Others Group (WEOG) make significantly more criminal law-related recommendations in the UPR process than other regional groups, with the smallest number of criminal law recommendations made by the Africa and Asia-Pacific Groups.[50] In terms of absolute numbers of recommendations, WEOG countries make around three times as many recommendations for *de*criminalisation of conduct, as they do for criminalisation. This picture is reversed for the Africa and Asia-Pacific Groups, who have numerically recommended criminalisation more often than decriminalisation. Countries in Eastern European (EEG), and Latin America and Caribbean (GRULAC) groups appear to make roughly equal numbers of criminalisation and decriminalisation recommendations.[51]

Of the almost 1,000 decriminalisation recommendations, around 700 relate to decriminalisation of same-sex relations. More than 90 per cent of all decriminalisation recommendations relate to the three acts of same-sex relations, abortion, and defamation.[52] Criminalisation recommendations show more variation in acts, although more than 90 per cent are comprised of recommendations on criminalisation of marital rape, domestic violence or violence against women, torture, female genital mutilation, trafficking in persons, child sexual exploitation or child soldiers.[53] UPR recommendations show that states generally do raise similar criminalisation concerns to treaty bodies. In particular, criminal laws that touch on matters of bodily integrity, forms of expression, and innermost aspects of private life such as sexual conduct are particularly likely to attract recommendations from states. There are no glaring acts that states see as human rights and criminalisation issues in the UPR that have not been raised by treaty bodies in concluding observations or views. Conversely, there are comparatively few criminalisation issues referred to by treaty bodies that do not feature in UPR recommendations.[54] This is likely due in no small part to the fact that the UPR

process is informed by a compilation of information prepared by the Office of the UN High Commissioner for Human Rights (OHCHR) that includes concluding observations made by treaty bodies.

Nonetheless, the UPR reveals critical differences between states, and sometimes between states and treaty bodies, in the way in which they view international human rights standards as applying to the criminal law. Countries in the African and Asia-Pacific groups almost never, for example, make UPR recommendations in respect of the decriminalisation of same-sex relations. Recommendations made on decriminalisation of same-sex relations (mostly by the WEOG, Latin American and Caribbean, and Eastern European groups) are supported by the country under review in less than 5 per cent of cases. Taken together, for the top three acts recommended for decriminalisation – same sex-relations, abortion and defamation – the recommendation is supported in less than 10 per cent of cases.[55] This picture aligns with research that suggests more than 60 countries criminalise consensual same-sex sexual acts, predominantly in Africa and Asia-Pacific regions;[56] some 65 countries permit abortion only when the pregnant person's life is at risk or do not permit abortion under any circumstances;[57] and 160 countries criminalise defamation (UNESCO, 2022). When it comes to criminalisation, recommendations tend to be more widely supported, with common recommendations such as criminalisation of domestic violence, violence against women, torture, trafficking in persons, or sexual exploitation of children being supported on average in nearly in 80 per cent of cases. In contrast, recommendations on issues such as marital rape and FGM are supported in only 50 per cent of cases.[58] Almost directly opposing recommendations can also be identified, such as suggestions to criminalise defamation of religious prophets and symbols, or to criminalise acts that distort history; versus recommendations to decriminalise blasphemy and attacks on the sanctity of religion, and to amend legislation that effectively criminalises discourse that should be considered normal in any society.[59]

Whilst the UPR shows a general acceptance of the sword and shield function of human rights, at the same time, it reveals deeply embedded differences in the way in which states accept human rights as applying to the criminal law. In particular as regards the (de)criminalisation of same-sex relations, and of defamation of religion and hate speech. In many ways, these differences are not so much about criminal law itself, as about differences in underlying values and socio-cultural perspectives on the limits of bodily autonomy and freedoms of speech and religion. Whereas treaty bodies have tended to determine such debates with a general lean towards the protection of autonomy, states continue to contest how criminalisation might apply in such instances through UNHRC processes.

Human Rights Council – resolutions

In addition to the UPR, dialogue on such issues takes place in the UNHRC also through resolution negotiations, as well as wider state-driven processes, often mandated by resolution. Whereas treaty bodies and the UPR mechanism are seen to be very active on criminalisation issues, in fact relatively few UNHRC resolutions refer directly to criminal law. The primary criminal law issues addressed by resolution include violence against women, offences against children, offences related to poverty, and laws criminalising expression and association, in particular in the context of human rights defenders, journalists, and as

relates to race and religion. In line with the approach of treaty bodies and states in the UPR, resolutions, for example: 'stress the need to treat all forms of violence against women and girls as a criminal offence',[60] call upon states to 'ensure that any conduct not considered a criminal offence if committed by an adult is not considered a criminal offence if committed by a child',[61] to 'criminalise all relevant conduct related to the sexual exploitation of children online and offline',[62] and to 'eliminate legislation that criminalises homelessness'.[63] The UNHRC has also welcomed steps taken towards the 'decriminalisation of defamation that serve to protect human rights defenders',[64] as well as expressed deep concern over legislation 'that can be used to criminalise journalism and by the misuse of overbroad or vague laws to repress legitimate expression, including defamation and libel laws'.[65] All of those resolutions were adopted by consensus, indicating that each (de)criminalisation principle – although not legally binding as a matter of international law – is, in principle, accepted by all members of the UNHRC.[66] In so far as the UNHRC is concerned with the promotion and protection of human rights overall, rather than the criminal law itself, the relatively small selection of offences in resolutions is largely a function of those human rights themes that states bring to the Council. As states tend to seek consensus resolutions where possible, resolution criminalisation language is seen – with a few exceptions discussed below – to mostly reflect existing areas of broad agreement between states on the criminal law. This nonetheless still takes time to develop, with multiple steps within the UN human rights system, including through its independent mechanisms, eventually leading to recognition in resolution language.

The issue of criminalisation of homelessness, for example, shows how the different elements of the UN human rights system can be mutually reinforcing in developing a human rights criminalisation standard, with a range of UN mechanisms drawing from, citing, and approving the arguments of others through time. From references in the late 90s in discussions of the (then) Sub-Commission on Prevention on Discrimination and Protection of Minorities,[67] to recognition of the issue by the Special Rapporteur on the Right to Adequate Housing ten years later,[68] the issue came to be included in draft guiding principles prepared by the (then) Independent Expert on Human Rights and Extreme Poverty.[69] These were adopted by the Council in 2012,[70] with recommendations of treaty bodies and the UPR on decriminalisation of homelessness following in the mid-2010s, and the explicit UNHRC resolution wording cited above in 2016.[71] The Special Rapporteur subsequently included the issue in guidelines for the implementation of the right to adequate housing in 2019.[72] Following a key judgment of the ECtHR in 2021 that a criminal penalty imposed in Switzerland for begging was incompatible with ECHR Article 8 (private life), the norm looks set to continue to be developed at the UN level through a joint Special Rapporteur report on the decriminalisation of offences frequently associated with homelessness and poverty.[73] For the act of defamation also, a clear trend across treaty bodies, UPR recommendations and special procedures towards decriminalisation has supported UNHRC resolution language. However, with many countries still maintaining criminal defamation laws, the position of the Human Rights Committee remains somewhat caveated (Jaspar et al., 2023), and UNHRC resolution language is less direct than for other acts.

For those criminalisation issues where views are more divergent, as might be expected, UNHRC resolutions that speak to the criminal law are few and far between. It is

comparatively rare for voted UNHRC resolutions not to pass, but states are still cognisant of risks of failure or division over criminalisation language that can be expected to be highly contentious. In respect of same-sex relations, for example, whereas the Human Rights Committee found in the case of *Toonen* in 1994 that a criminal law outlawing private same-sex sexual activity constituted a violation of ICCPR Article 17 (private life), attempts in both 2003 and 2006 failed to secure a resolution of the (then) Human Rights Commission and of UNHRC on human rights and sexual orientation and gender identity (SOGI) (Jane Roseman & Miller, 2011). It was not until 2011 that the UNHRC first passed a resolution on SOGI,[74] and in 2016 the UNHRC adopted a resolution creating the mandate of an Independent Expert on SOGI.[75] In its latest renewal of that mandate in 2022, the Council, almost twenty years after *Toonen*, made its first pronouncement on criminalisation of same-sex conduct, expressed strong concern 'at existing laws, policies and practices criminalising consensual same-sex conduct and relations and expressions of gender identity'.[76] The resolution went to vote, passing by a narrow margin.[77]

It is clear that the use of criminal law is but one part of a wider set of issues on SOGI, contested largely between WEOG, GRULAC, EEG and some Asia-Pacific countries in favour of SOGI rights, and Organisation of Islamic Cooperation (OIC) and many African countries in opposition (Jordaan, 2016). Notwithstanding the finding of *Toonen* that moral issues cannot be 'exclusively a matter of domestic concern',[78] at the heart of that lies disagreement over the understanding of universality of human rights and its relationship to belief, culture and national systems (Voss, 2018). Joel Voss characterises this as an issue of norm dynamics and contestation whereby both SOGI advocates and SOGI opponents claim that their position is universalist and adherent to existing international human rights standards, whilst the other is relativist and consequentially revisionist in respect of existing human rights (Voss, 2018, pp. 4–5). Under norm theory, challenge to advancement of a norm such as the human rights requirement for decriminalisation of same-sex relations may over time either result in its decay or strengthening where its proponents are able to successfully defend the norm (Deitelhoff & Zimmermann, 2020). Such a norm is certainly far from realised universally for decriminalisation of same-sex relations, and continues to be actively contested.[79] However, its inclusion for the first time in a UNHRC resolution in 2022, as well as increasing nuance around its narrative suggests that it is at least holding ground. The most recent report of the Independent Expert on SOGI, for example, highlights that there has been a global trend towards decriminalisation of same-sex intimacy (around 40 jurisdictions have decriminalised consensual same-sex sexual acts since *Toonen*)[80] and reasserts that under international human rights law there can be no justification for the continued criminalisation of same-sex intimacy or gender diversity.[81]

Similar levels of contestation are seen in the Council regarding criminal restrictions on expression relating to racial and religious hatred. Since at least the events of 9/11, compounded by the Danish cartoon crisis in 2005, disagreement has existed as to the treatment of defamation of religion (or blasphemy or religious insult) within international human rights law (Elbahtimy, 2021). OIC states argued that defamation of religion, including the negative stereotyping of religions, religious adherents, symbols and sacred persons, led to incitement to religious hatred and violence – with clear reference to ICCPR Article 20 that obliges States Parties to prohibit racial or religious hatred

constituting incitement to discrimination, hostility or violence.[82] A series of defamation of religion resolutions of the Human Rights Commission and UNHRC between 1999 and 2010 stopped short of calling directly for criminalisation of religious insult, but did urge states to provide 'adequate protection' within their respective legal systems against such acts.[83] Western countries voted against the resolutions, emphasised that international human rights law should not grant protection to religions, entities or ideologies, and did not view defamation of religion as meeting the threshold for incitement under ICCPR Article 20.[84] The Human Rights Committee, which has expressed concern in concluding observations over blasphemy laws since the 1990s, positioned itself somewhere in between in its General Comment 34 on freedom of expression, leaving it open in principle that a prohibition on displays of lack of respect for a religion could fall within Article 20, but stating that it would not be permissible for such prohibitions to 'prevent or punish commentary on religious doctrine and tenets of faith'.[85]

A pair of compromise resolutions between OIC and Western states – one on combating intolerance, and one on freedom of religion and belief – began in 2011, both adopted by consensus.[86] The OIC resolution on intolerance had a discernible change in emphasis and focused on the rights of individuals rather than religions. It made no reference to defamation of religions and called on states to 'criminalise incitement to imminent violence based on religion or belief' – a narrow formulation consistent with ICCPR Article 20 and repeated in the most recent 2023 iteration of the resolution.[87] The most recent intolerance and freedom of religion and belief resolutions *both* now reference a set of principles known as The Rabat Plan of Action, developed through a series of OHCHR expert workshops with the participation of states, civil society, academia, treaty bodies and Special Rapporteurs.[88] The Plan proposes a six-part threshold test for expressions considered as criminal offences under ICCPR Article 20, to be applied on a case-by-case basis by national judicial systems.[89] As Mona Elbahtimy notes, in contrast to the creation of substantive international standards outlining the content of expressions and harms that may or may not be prohibited pursuant to protection from incitement to hatred, the procedural approach of the Plan, outlining basic guarantees and guidelines, could offer a partial substitute for the development of a universal normative consensus (Elbahtimy, 2021, p. 188).

Through a cycle of norm advancement and contestation, it is tempting to think that criminalisation of religious insult or defamation of religion may now be prohibited by international human rights standards – being largely excluded from the criminalisation permitted under ICCPR Article 20. Still, however, some 95 states retain criminal laws on blasphemy, and Qur'an burning acts in Western states have provided fresh impetus for norm contestation.[90] In 2023, OIC states brought a UNHRC resolution that was adopted by vote on countering religious hatred constituting incitement to discrimination, hostility or violence.[91] The resolution did not contain direct language on criminalisation, although noted that 'rising incidents of desecration of sacred books and places of worship as well as religious symbols' could constitute incitement to discrimination, hostility or violence. It then proceeded to call upon states to adopt frameworks that 'prosecute' acts and advocacy of religious hatred that constitutes incitement.[92] WEOG countries voted against the resolution, emphasising that international human rights law provides us with narrowly defined parameters in which freedom of expression can be limited and that, by definition, attacks on religion, including on religious texts or

symbols do not constitute advocacy for hatred.[93] Notwithstanding broad agreement to the Rabat threshold and the 2011 compromise, it is clear that full consensus on criminal law approaches to religious incitement remains some way off.

Patterns of influence: the international human rights and criminal law dynamic

In today's interconnected world, developments in the criminal law of any one individual country are no longer the concern of merely that country. International law, from the suppression conventions, to international humanitarian law, and international human rights law, places requirements on states to enact certain criminal laws. Discussion of national criminal laws regularly takes place in a wide range of international fora, including mechanisms established for the review of international obligations, and the decisions of international human rights courts, tribunals and bodies (which may or may not be legally binding) that can require, permit, or prohibit criminalisation. Although not intended at the time of its conception as a system for regulation of the criminal law, the UN human rights system plays a key role in this transnational discussion, both through its accountability mechanisms for direct human rights treaty-based criminalisation requirements, as well as interpretation of the application of wider UN human rights obligations to the criminal law. Review of the UN human rights system shows extensive pronouncements on matters of criminalisation, covering conduct as diverse as abortion, blasphemy, conscientious objection, child abuse and exploitation, defamation, discrimination, homelessness, enforced disappearance, forced labour, hate speech, same-sex relations, torture, trafficking in persons, and violence against women. Some of these criminalisation positions have reached a high level of consensus amongst states. Others remain strongly contested. Where broad acceptance of (de)criminalisation of a particular act is demonstrated through consistent UPR recommendations or consensus UNHRC resolution, the influence of criminalisation positions of the independent functions of the UN human rights system, such as treaty bodies and special procedures, can in some cases be identified. Where consensus does not yet exist, the UN human rights system is nonetheless seen to provide an important organising frame and link to wider international fora, facilitating ongoing dialogue, albeit still strongly polarised in the case of some criminalisation questions.

UN human rights and transnational law making

In some ways it is striking that the Human Rights Council has come to be a forum for discussion of the substantive content of the criminal law, as opposed, for instance, to the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) in Vienna; established as the principal policy-making body of the UN in that field.[94] Whilst today's CCPCJ mandate places a focus on transnational crime that requires cross-border cooperation, historically the UN crime programme has covered consideration of a criminological and social approach to national criminal law, including questions of criminalisation of domestic offences.[95] A number of explanations for this may exist, including the success of sustained awareness raising and lobbying by human rights civil society on specific laws and issues, usually for decriminalisation (Mutua,

2023); a perceived move of human rights in general towards mobilisation of the criminal law as a means of protection from, and redress for, human rights violations (Lavrysen & Mavronicola, 2020); the impact of regional human rights systems, including their extensive court decisions on (de)criminalisation (Malby, 2020, pp. 103–106); as well as a reduced criminological focus within the work of today's UN Office on Drugs and Crime and the policy bodies it services.[96] Notably, however, the criminal law work of the UN human rights system is increasingly coordinated with Vienna, with clear recognition by UNODC that 'international human rights law provides an agreed normative framework, against which criminalisation and penalties are to be assessed'.[97] As such, the work of the UN human rights system on criminalisation cannot be viewed in isolation, but rather as part of the wider set of international institutions and mechanisms that touch on national criminal law. This relationship goes both ways, with UNHRC resolutions also covering human rights aspects of the suppression conventions, such as trafficking in persons, firearms, corruption, and narcotic drugs.[98]

The web of international and national mechanisms concerned with criminal law has led Aaronson and Shaffer to argue that the development of criminalisation requirements at the international level should be modelled as a 'transnational legal order' (Aaronson & Shaffer, 2021). In the context of the suppression conventions they assert that the development of prohibitions at the international level is not simply top-down and linear. It rather constitutes an ongoing process that integrates top-down, bottom-up and horizontal forms of lawmaking and practice that involve recursive interactions between actors wielding lawmaking power at different levels of social organisation, from the transnational to the local.[99] In this scheme, not only is the process of producing an international prohibition closely linked with domestic pressures, social meaning and arguments for the internationalisation of a criminal prohibition, but, once created, varying domestic implementation of international norms may itself reshape the norm at international level.[100] In particular, where international prohibitions contain room for interpretation, different national approaches by legislatures and criminal justice actors may inform state approaches to international guidance or clarifications of treaty text. The notion of a transnational legal order certainly has resonance when it comes to the norm development and contestation on criminal law that occurs in the UNHRC, involving multiple actors, including states, civil society, and UN special procedures. Indeed, research examining the interaction of the global and the local in criminalisation processes highlights how a country's international standing and approach can impact local contestation of an international criminalisation norm where there is conflict with local values, which in turn may influence the position of that country in international negotiations on the norm.[101] The dynamic was identified in the context of international discourse and national genital cutting laws, but contains elements with strong relevance to a number of contested human rights criminalisation topics. As criminologists increasingly draw attention to the importance of political processes beyond the single geopolitical unit in lawmaking (Jenness, 2004), theories that highlight the transnational legal dynamics that affect criminalisation can help civil society make more effective use of international mechanisms in holding states to account for the compatibility of criminal law with human rights standards, as well as promote the importance of international norms in criminalisation to states themselves.

Universal and local values

Whilst discussion on some criminal law issues may begin to approach a transnational law-making dynamic, it is clear that, in practice, debates on criminalisation within the UN human rights system must still grapple with a predominant paradigm of *national* (and sometimes sub-national) criminal law. Criminal theorists have long attempted to present criminal law as subject to universal values, either as a means of responding to moral wrongdoing or a means of efficiently deterring harm (Simester & von Hirsch, 2011). It is increasingly argued, however, that the criminal law cannot be properly understood through the frame of moral wrongdoing or utility alone (Liss, 2022). It instead is best understood as defining and enforcing the central norms of the practice of 'living together' as members of a political community.[102] Such theories, of which Antony Duff is one leading proponent, are designed to account for the fact that different political communities will differ, sometimes radically, in how they define their civil orders and therefore in national approaches to criminalisation (Duff, 2018). In short, so the argument goes, criminal law scholarship misses the point if it evaluates criminalisation according to abstract standards of justice, without considering what is really at stake in many criminalisation conflicts: framing *meaning*. It must, in other words, take into account the underlying expressive frame whereby criminal law can also represent differing values, social structure, and power configuration, including as related to its historic development (Wilenmann, 2019, p. 5). When discussion of such national law is elevated to the international UN level and compared against the broad frame of international human rights standards, it is not unsurprising that different perspectives arise – not least where human rights attention turns to highly contested domains such as societal, moral, and religious beliefs and structures. The scope for different interpretation here is heightened by the fact that the UN human rights treaties contain only the five distinct criminalisation requirements, with a relatively high degree of abstraction for treaty rights and obligations that are then applied by states, treaty bodies and special procedures to argue that criminal law should, may, or should not, exist.

The challenge is well illustrated by the reaction of the international human rights system to the French criminal law prohibiting concealing the face in public, which is justified by France, in exactly the terms of Antony Duff's theory, on the basis of its necessity for 'living together' in the particular socio-cultural context.[103] The UN Human Rights Committee found a violation of ICCPR Article 18 (freedom of thought, conscience and religion), in contrast to the ECtHR which, when considering the impact of the same law, found no violation of ECHR Articles 8 (private life), 9 (thought, conscience and religion) or 10 (expression).[104] Sarah Cleveland, a member of the Human Rights Committee, points to differences between the ECtHR overseeing a European community of shared social, cultural and political values giving rise to a distinct margin of appreciation and principle of subsidiarity, as compared with the Human Rights Committee being required to oversee a human rights treaty with more than 170 States Parties, spanning all legal, political, social and cultural traditions (Cleveland, 2021). She notes, in particular, that had the Human Rights Committee accepted France's contention that revealing the face in public was necessary to promoting the ability of people to live together in society, in a global context the same claim could be advanced to justify precisely the opposite result – that women were required to conceal their faces, hair, or other

part of their bodies as necessary to promoting the goal of living together in that society (Cleveland, 2021, p. 226). Effectively, the UN Human Rights Committee deployed its shield (possibly with wider considerations in mind), whereas the ECtHR declined to use either shield or sword.

Finding global common ground

The extent to which international human rights standards should or may come to acknowledge legitimate restrictions on rights through criminal law for societal coordination purposes, and how such purposes are themselves determined and defined, is likely to be a key question going forward. New complex criminal law in response to emerging challenges that impact at all individual, community, societal, and transnational levels, such as public health, artificial intelligence, and climate change, may increasingly have aims that either push the interpretation of, or do not easily fit within, existing grounds for restrictions in international human rights law. Although much criticised, the ECtHR accepted that 'living together' was linked to the legitimate aim of the 'protection of the rights and freedoms of others'.[105] The UN Human Rights Committee specifically took issue with this notion, holding that 'living together is a very vague and abstract term' and that the state had 'not identified any specific fundamental rights of freedoms of others that are affected by the fact that some people present in the public space have their face covered'.[106] The global viewpoint of the UN human rights system on human rights standards that should inform national criminal laws offers an especially valuable perspective in this regard. Drawing any universal bright lines for criminal law, such as in the case of same-sex conduct, defamation of religion, or covering the face in public, will inevitably however face contestation. For the UN human rights system, recognising the underlying drivers and values of criminalisation will be critical to informed debate and sensitive, respectful norm advancement. In respect of same-sex conduct, for instance, the most recent report of the Independent Expert on SOGI provides important recognition of the role of colonial projects in imposing systems of differentiation, hierarchisation and domination that included the imposition of a rigid gender binary on colonised persons and the criminalisation of gender and sexual nonconformity.[107] Such honest engagement with the underlying history, meaning and political context of criminal law is vital to promoting implementation in practice of UN human rights conclusions on its acceptability. Similarly, as noted in the context of treaty bodies, where human rights function to activate the criminal law, consideration of context, criminal justice and penal mistreatment risks, and the need to address underlying causes of criminality are equally important.

Finally, debate in the UN human rights system on criminalisation must be realistic about the structure and scope of the human rights framework itself. The universal and interdependent rights and obligations of international human rights law continue to remain relevant to contemporary challenges. However, consensus on their application to criminalisation in the face of polarised state positions can require connecting the human rights framework with wider constructs and reasoning. It is notable, for example, that the Rabat threshold test for the severity of hatred that may qualify as a criminal offence itself draws heavily from criminal law and theory concepts, such as intent, causation, and risk of harm.[108] Similarly, work supported by OHCHR and

UNAIDS to develop principles for a human rights-based approach to criminal law proscribing conduct associated with sex, reproduction, drug use, HIV, homelessness and poverty makes a point of integrating basic principles of criminal law. The principles specifically rely on the criminal theory harm principle, although handle it somewhat bluntly with a rather restrictive pronouncement that 'criminal law may *only* proscribe conduct that inflicts or threatens substantial harm to the fundamental rights and freedoms of others or to certain fundamental public interests'; a statement that risks excluding substantial parts of modern criminal laws.[109] Nonetheless, the approach of detailed cross-regional expert consultation that includes comparative criminal law discussion in a human rights frame may represent one important model for increasing the ability of the UN human rights system to reach universal agreement on a human rights compatible criminal law.

Conclusion

Whereas not all criminal laws will have human rights implications, the UN human rights system has risen to the challenge of responding to changes in criminalisation over the last years, including where triggering events have inserted new laws or proposals into the international arena. The distributed nature of standard setting within the UN human rights system, through states, treaty bodies, and special procedures, has the advantage of offering multiple but connected perspectives from a universally agreed human rights framework. Although differing national approaches often result in polarisation, the human rights frame, with its focus on protection of private life and freedom of expression has provided valuable guardrails at a global level and should be supported to continue to do so. As the response of the UN human rights system to criminalisation becomes integrated with wider international mechanisms of the suppression conventions and engages ever more closely with national approaches, an understanding of its sword and shield role may increasingly need to include the development of principles and parameters for compatibility of the criminal law with human rights, alongside existing requirements and prohibitions. The paradigm may need to shift to delineating the extent and parameters of the criminal law that may differ but still comply with underlying treaty-based rights, rather than seeking bright lines and uniformity of state responses. Reaching consensus may also sometimes require a turn back to wider criminal law concepts and practical harm thresholds, as well as a concerted effort to engage with sociocultural and expressive functions of criminal law. Further research on such options could prove valuable in supporting the response of the international human rights system to future evolution of criminal law.

Notes

1. The sword and shield analogy is commonly attributed to Christine Van den Wyngaert who, in 1995, referred to the dual function in a presentation on the European citizen and criminal justice in the European Union. See Tulkens (2011).
2. See, for example Lavrysen and Mavronicola (2020); and Pinto (2023a).
3. See for example, Pinto (2023b).
4. See, for example, van Noorloos (2014).

5. United Nations, Human Rights Committee, *General Comment No.31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (UN Doc. CCPR/C/21/Rev.1/Add.13, 2004).
6. Even broad autonomy-based rights such as ECHR Article 8 (right to private and family life) by no means protect all forms of conduct that may be subject to the criminal law. The European Court of Human Rights has found for example that a criminal offence of deliberately hunting wild mammals did not amount to an interference under Article 8. European Court of Human Rights, *Friend and Countryside Alliance and Others v. United Kingdom* (Application nos. 16072/06 and 27809/08, 2009).
7. For an introduction to the UN human rights treaty bodies and UN Human Rights Council, see Connors (2022).
8. See for example, Neil Boister (2002).
9. Within Optional Protocols, criminalisation requirements are found in the Optional Protocol to the Convention on the Rights of the Child (CRC) on the Involvement of Children in Armed Conflict Article 4; and the Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography, Article 3.
10. Although ICCPR Article 11 implies as such through its proscription on imprisonment on the grounds of inability to fulfil a contractual obligation.
11. That this should have been the case, however, in fact represented something of a departure from parts of the body of earlier declarations of rights from which the philosophy, reason and morality of contemporary international human rights law were derived. Texts such as the nineteenth century French Declaration of the Rights of Man and Citizen, and the eighteenth century Constitution of the United States with its eighteenth and nineteenth century Amendments include a greater concern for substantive criminal law than was ultimately reflected in the UDHR and the subsequent core human rights treaties. Article 5 of the French Declaration of the Rights of Man and Citizen of 1789 stated that law can only prohibit such actions as are hurtful to society – reflecting almost exactly a key tenet of criminalisation theory.
12. See, for example, United Nations, Commission on Human Rights, Drafting Committee *Documented Outline* (UN Doc. E/CN.4/AC.1/3/Add.1, 1947).
13. United Nations, Commission on Human Rights, Drafting Committee *Documented Outline* (UN Doc. E/CN.4/AC.1/3/Add.1, 1947), 168.
14. Including through the right to equality before the law and equal protection against discrimination entrenched in UDHR Article 7.
15. United Nations, General Assembly, *Report of Third Committee*, *Draft Declaration on the Elimination of All Forms of Racial Discrimination* (UN Doc. A/PV.1261, 1963), paras 47 and 87.
16. States that advocated for criminalisation held that it was essential in the fight against discrimination, creating effective practical measures and a real rule of conduct. Other delegations argued that such provisions were not suitable for inclusion in such an instrument and could be interpreted as an undue restriction of freedom of speech. Many states ultimately made declarations or reservations pertaining to ICERD Article 4 on becoming party to the Convention. These focused predominantly on either reaffirming the primacy of rights to freedom of opinion and expression as contained in UDHR Articles 19 and 20 or on reserving the requirement to enact such legislation only when the need arose.
17. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/ITA/CO/6, 2013), para 39; and (UN Doc. CCPR/C/UZB/CO/4, 2015), para 22.
18. United Nations, Committee against Torture, *Concluding observations* (UN Doc. CAT/C/JPN/CO/1, 2007), para 10.
19. United Nations, Committee on the Rights of the Child, *Concluding observations* (UN Doc. CRC/C/OPSC/COD/CO/1, 2017), para 27.
20. United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations* (UN Doc. CERD/C/POL/CO/19, 2009) para 9; and United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/RUS/CO/6, 2009), para 15.

21. United Nations, Committee against Torture, *Concluding observations* (UN Doc. CAT/C/MWI/CO/1, 2022), para 36.
22. For a general review see O'Flaherty and Higgins (2015).
23. Author's calculation from Universal Human Rights Index, https://uhri.ohchr.org/en/ (accessed 1 December 2023). Calculations made using search terms 'criminalize' and 'decriminalize' with manual review, sorting, and classification by offence type.
24. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/KOR/CO/4, 2015), para 19; and (UN Doc. CCPR/C/KWT/CO/4, 2023), para 21.
25. See United Nations, Committee on Economic, Social and Cultural Rights *Concluding observations* (UN Doc. E/C.12/DEU/CO/5, 2011), para 23; and United Nations, Committee against Torture, *Concluding observations* (UN Doc. CAT/C/KWT/CO/2, 2011), para 23.
26. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/CAF/CO/2, 2006), para 11.
27. United Nations, Committee on the Rights of the Child, *Concluding observations* (UN Doc. CRC/C/COD/CO/2, 2009), para 79.
28. United Nations, Committee on the Elimination of Discrimination against Women, *Concluding observations* (UN Doc. A/57/38 (SUPP), 2002), para 334.
29. United Nations, Committee on Economic, Social and Cultural Rights, *Concluding observations* (UN Doc. E/C.12/1/Add.107, 2009), para 110.
30. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/KWT/CO/2, 2011) para 30.
31. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/CO/84/TJK, 2005), para 22.
32. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/CO/79/LKA, 2003) para 12; and (UN Doc. CCPR/CO/82/MAR, 2004), para 29.
33. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/ARM/CO/2, 2012), para 24.
34. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/SOM/CO/1, 2024), para 42.
35. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/CO/79/PHL, 2003), para 14.
36. United Nations, Committee on the Elimination of Discrimination against Women, *Concluding observations* (UN Doc. CEDAW/C/TUV/CO/2, 2009), para 32.
37. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/IRL/CO/3, 2008), para 23.
38. United Nations, Committee against Torture, *Concluding observations* (UN Doc. CAT/C/TCD/CO/2, 2022), para 22.
39. United Nations, Committee on the Rights of the Child, *Concluding observations* (UN Doc. CRC/C/15/Add.213, 2003), para 69.
40. United Nations, Human Rights Committee, *Views on Communication 488/1992* (UN Doc. CCPR/C/50/D/488/1992, 1994).
41. United Nations, Human Rights Committee, *Views on Communication* 2324/2013 (UN Doc. CCPR/C/116/D/2324/2013, 2016).
42. United Nations, Human Rights Committee, *Views on Communication* 2846/2016 (UN Doc. CCPR/C/128/D/2846/2016, 2020).
43. United Nations, Human Rights Committee, *Views on Communication* 2807/2016 (UN Doc. CCPR/C/123/D/2807/2016, 2018).
44. United Nations, Human Rights Committee, *Views on Communication* 2716/2016 (UN Doc. CCPR/C/126/D/2716/2016, 2019). For a review of the Human Rights Committee's defamation jurisprudence see Jaspar et al. (2023).
45. United Nations, Committee on the Elimination of Discrimination against Women, *Concluding observations* (UN Doc. CEDAW/C/SGP/CO/6, 2024), para 34.

46. Concluding observations and views on individual communications of treaty bodies are not legally binding, albeit that as matter of treaty law, states should take treaty body views into consideration in good faith.
47. Some treaty bodies request States parties to report back to the Committee within one or two years on measures taken to give effect to 'follow-up recommendations' clearly identified at the end of concluding observations. The Committee then makes an assessment to be transmitted to the State party concerned. In respect of (de)criminalisation follow-up see for example, United Nations, Human Rights Committee, *Report on Follow-up* (UN Doc. CCPR/C/139/2/Add.3, 2023); and (UN Doc. CCPR/C/130/2/Add.3, 2021).
48. Author's calculation from Universal Human Rights Index. Data are derived only from direct use of the terms 'criminalize' and 'decriminalize' in recommendations, whereas a range of language with criminal law implications can be used, including terms such as penalise, prosecute, or criminal offence.
49. Top level categories for acts recommended for criminalisation include gender-based violence, discriminatory acts, acts against children, acts causing bodily harm, modern slavery, forms of hatred, racism, sexual acts, and other acts. Top level categories for acts recommended for decriminalisation include sexual acts, abortion, defamation, forms of expression, migration-related acts, religious acts, acts involving assembly and association, dissent against the states, and other acts.
50. Countries in the WEOG group made, on average across all criminalisation recommendations identified, nine times as many recommendations for decriminalisation of an act as countries in the African and Asia-Pacific groups. Author calculation from Universal Human Rights Index.
51. Author calculations from Universal Human Rights Index.
52. Recommendations for decriminalisation of same-sex relations constituted 70 per cent of all decriminalisation recommendations made; abortion, 12 per cent; and defamation, 10 per cent.
53. Recommendations for criminalisation of domestic violence or violence against women constituted 26 per cent of all criminalisation recommendations made; marital rape, 23 per cent; torture, 8 per cent; female genital mutilation, 7 per cent; trafficking in persons, 6 per cent; child sexual exploitation, 5 per cent; and child soldiers 5 per cent.
54. One example may be the criminalisation of trespass on land.
55. Author calculations from Universal Human Rights Index.
56. ILGA Database, Criminalisation of Consensual Same-Sex Sexual Acts, https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts (accessed 8 January 2024).
57. Center for Reproductive Rights, The World's Abortion Laws, https://reproductiverights.org/maps/worlds-abortion-laws/ (accessed 8 January 2024).
58. Author calculations from Universal Human Rights Index.
59. See, for example, United Nations, HRC, *Report of the Working Group on the Universal Periodic Review* (UN Doc. A/HRC/34/7, 2016), 117.29; and (UN Doc. A/HRC/39/9, 2018),155.106 verses (UN Doc. A/HRC/52/9, 2023), 138.93; (UN Doc. A/HRC/48/11, 2021), 132.146; and (UN Doc. A/HRC/39/13, 2018), 147.205.
60. United Nations, HRC, *Resolution, Violence against women* (UN Doc. A/HRC/RES/20/12, 2012), OP1.
61. United Nations, HRC, *Resolution, Rights of the child* (UN Doc. A/HRC/RES/25/6, 2014), OP8(h).
62. United Nations, HRC, *Resolution, Child sexual exploitation* (UN Doc. A/HRC/RES/31/7, 2016), OP4.
63. United Nations, HRC, *Resolution, Adequate housing* (UN Doc. A/HRC/RES/31/9, 2016), OP5; and (UN Doc. A/HRC/RES/43/14, 2020), OP1(j).
64. United Nations, HRC, *Resolution, Human rights defenders* (UN Doc. A/HRC/RES/22/6, 2013), PP16.
65. United Nations, HRC, *Resolution, Safety of journalists* (UN Doc. A/HRC/RES/51/9, 2022), PP23.

66. Although note that some resolutions were contested through hostile amendments. For example, Resolution 22/6 on human rights defenders was subject to five amendments, all of which were defeated.
67. United Nations, Sub-Commission, *Summary Record* (UN Doc. E/CN.4/Sub.2/1997/SR.13, 1997), para 3.
68. United Nations, Special Rapporteur, Adequate Housing, *Report* (UN Doc. A/HRC/13/20, 2009).
69. United Nations, Special Rapporteur, Human Rights and Extreme Poverty, *Report* (UN Doc. A/HRC/15/41, 2010).
70. United Nations, HRC, *Resolution, Guiding principles* (UN Doc. A/HRC/RES/21/11, 2012).
71. United Nations, Human Rights Committee, *Concluding observations* (UN Doc. CCPR/C/USA/CO/4, 2014); and HRC, *Report of the Working Group on the Universal Periodic Review* (UN Doc. A/HRC/30/12, 2015).
72. United Nations, Special Rapporteur, Adequate Housing (UN Doc. A/HRC/43/43, 2019), Guideline 5.
73. See https://www.ohchr.org/en/calls-for-input/2023/call-input-decriminalisation-homelessness-and-extreme-poverty
74. United Nations, HRC, *Resolution, Sexual orientation and gender identity* (UN Doc. A/HRC/RES/171/19, 2011).
75. United Nations, HRC, *Resolution, Sexual orientation and gender identity* (UN Doc. A/HRC/RES/32/2, 2016).
76. United Nations, HRC, *Resolution, Mandate of Independent Expert* (UN Doc. HRC/Res/50/10, 2022) PP 11.
77. 23 Yes votes to 17 No votes, with 7 abstentions. Cameroon, China, Côte d'Ivoire, Eritrea, Gabon, Gambia, Indonesia, Libya, Malawi, Malaysia, Mauritania, Pakistan, Qatar, Senegal, Somalia, Sudan and United Arab Emirates voted against the resolution.
78. United Nations, Human Rights Committee, *Views on Communication 488/1992*, para 8.6.
79. For example, at the adoption of the mandate of the Independent Expert on SOGI in 2022 (HRC/Res/50/10), the representative of OIC said: 'The text undermines the key human rights principles of universality, equality, impartiality, and objectivity … The concept of SOGI is not recognised by international human rights law as a ground for discrimination or violence. These concepts run contrary to social, cultural and religious particularities of many UN member states and undercut the shared values of respect for diversity and pluralism.' See https://webtv.un.org/en/asset/k1n/k1nvqxketj (accessed 4 January 2024).
80. See https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts (accessed 4 January 2024).
81. United Nations, Independent Expert, Sexual Orientation and Gender Identity, *Report* (UN Doc. A/78/227, 2023).
82. Elbahtimy (2021, p. 130). In respect of ICCPR Article 20, the UN Human Rights Committee referred to 'an appropriate sanction in case of violation' in its General Comment 11 of 1983, and uses a mix of 'prohibit' and 'criminalize' in concluding observations. See, for example, UN Docs. CCPR/C/TGO/CO/4 and CCPR/C/GRC/CO/2.
83. United Nations, HRC, *Resolution, Defamation of religions,* (UN Doc. A/HRC/RES 13/16, 2010), OP14.
84. See for example, https://geneva.usmission.gov/2010/03/25/combatting-defamation-of-religions-u-s-explanation-of-vote/ (accessed 4 January 2024).
85. United Nations, Human Rights Committee, *General Comment 34: Freedoms of Opinion and Expression* (UN Doc. CCPR/C/GC/34, 2011), para 48,
86. United Nations, HRC, *Resolution, Combatting intolerance* (UN Doc. A/HRC/RES/16/18, 2011) and *Resolution, Freedom of religion or belief* (UN Doc. A/HRC/RES/16/13, 2011). See also Elbahtimy (2021, p. 168).
87. United Nations, HRC, *Resolution, Combatting intolerance,* most recently UN Doc. A/HRC/RES/52/38, 2023.
88. United Nations, HRC, *Resolutions, Combatting intolerance* and *Freedom of religion or belief* (UN Doc. A/HRC/RES/52/38, 2023), OP5; and (UN Doc. A/HRC/RES/52/6, 2023), PP5.

89. United Nations, High Commissioner for Human Rights, *Report* (UN Doc. A/HRC/22/17/Add.4, 2013). The Rabat threshold test covers context; speaker; intent; content and form; extent of the speech act; and likelihood, including imminence.
90. International Bar Association, High Level Panel of Legal Experts on Media Freedom, *On Religious Freedom and Discontent: Report on International Standards and Blasphemy Laws* (2023).
91. United Nations, HRC, *Resolution, Countering religious hatred* (UN Doc. A/HRC/RES/53/1, 2023).
92. United Nations, HRC, *Resolution, Countering religious hatred* (UN Doc. A/HRC/RES/53/1, 2023), PP5 and OP2
93. See for example, https://www.gov.uk/government/speeches/un-hrc53-explanation-of-vote-on-countering-religious-hatred (accessed 4 January 2024).
94. United Nations, General Assembly, *Resolution* 1992/22. CCPCJ resolutions that refer to criminalisation predominantly concern offences required by the Conventions supported by UNODC, such as UNCAC and UNTOC, but also include illegal obtaining precious metals, trafficking in cultural property, and maritime piracy.
95. See, for example, United Nations, Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Criminal legislation, judicial procedures and other forms of social control in the prevention of crime. Working Paper prepared by the Secretariat* (UN Doc. A/CONF.56/4 57-63, 1975), 57-63.
96. See, for example, Rado (2012).
97. United Nations, Commission on Narcotic Drugs and Commission on Crime Prevention and Criminal Justice, *Drug control crime prevention and criminal justice: A human rights perspective* (UN Doc. E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1, 2010).
98. See for example, United Nations, HRC, *Resolution, Drug policy* (UN Doc. A/HRC/RES/52/24, 2023); *Resolution, Trafficking in persons* (UN Doc. A/HRC/RES/53/9, 2023); *Resolution, Firearms* (UN Doc. A/HRC/RES/50/12, 2022); and *Resolution, Corruption* (UN Doc. A/HRC/RES/47/7, 2021).
99. United Nations, HRC, *Resolution, Drug policy* (UN Doc. A/HRC/RES/52/24, 2023); *Resolution, Trafficking in persons* (UN Doc. A/HRC/RES/53/9, 2023); *Resolution, Firearms* (UN Doc. A/HRC/RES/50/12, 2022); and *Resolution, Corruption* (UN Doc. A/HRC/RES/47/7, 2021), 457.
100. United Nations, HRC, *Resolution, Drug policy* (UN Doc. A/HRC/RES/52/24, 2023); *Resolution, Trafficking in persons* (UN Doc. A/HRC/RES/53/9, 2023); *Resolution, Firearms* (UN Doc. A/HRC/RES/50/12, 2022); and *Resolution, Corruption* (UN Doc. A/HRC/RES/47/7, 2021), 462.
101. See, for example, Heger Boyle et al. (2001).
102. Under this approach, where conduct falls within the 'public realm' and is inconsistent with the values by which that realm is constructed, a reason, in principle, arises for criminalisation.
103. For a review, see Oxford Human Rights Hub, https://ohrh.law.ox.ac.uk/privacy-at-the-margins-frances-new-ban-on-the-hijab/ (accessed 4 January 2024). France argued that the systematic concealment of the face in public places, contrary to the ideal of fraternity, fell short of a minimum requirement of civility that it considered necessary for social interaction.
104. See United Nations, Human Rights Committee, *Views on Communication 2807/2016* (UN Doc. CCPR/C/123/D/2807/2016, 2022); and European Court of Human Rights, *Case of S.A.S. v. France* (Application no. 43835/11, 2014).
105. European Court of Human Rights, *Case of S.A.S. v. France*, 121-122. The Court did not specify which Convention rights might be in need of protection however, referring only to a 'right of others to live in a space of socialisation which makes living together easier.'
106. United Nations, Human Rights Committee, *Views on Communication 2807/2016,* para 7.10.
107. United Nations, Independent Expert, Sexual Orientation and Gender Identity, *Report* (UN Doc. A/78/227, 2023). para 63.

108. United Nations, High Commissioner for Human Rights, *Report* (UN Doc. A/HRC/22/17/Add.4, 2013), Rabat threshold, para 2.
109. International Committee of Jurists, *The 8 March principles*, principle 2.

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