



## Decriminalization and the U.N. Human Rights Bodies

Emily Nagisa Keehn

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Emily Nagisa Keehn<sup>1</sup>

## Abstract

*Concern about the penal turn in criminal law has sparked a proliferation of scholarship examining criminalization and decriminalization. In the human rights arena, most scholarship has concerned itself with specific categories of criminal offences and whether they are appropriately criminalized, what the consequences of this criminalization are, and the arguments for curtailing criminal regulation. This research tends to be issue specific and is relatively siloed. The current literature is missing analysis on the general interplay of criminalization or decriminalization and human rights law and systems. International and transnational human rights bodies are a significant source of new criminal norms, as national legislatures often pass or repeal laws to fulfill their State’s international obligations. This paper examines the developing jurisprudence on decriminalization at the U.N. human rights bodies, which collectively provide guidance for the development of international human rights norms. It aims to elucidate current patterns and practice in interpreting and applying international human rights norms to the issue of decriminalization writ large, to offer a systematic account of the subject. Further understanding of the scope and content of jurisprudence that supports decriminalization may help inform efforts to reconsider the inappropriate criminalization of a wide array of conduct.*

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<sup>1</sup> Associate Director, Academic Program, Human Rights Program, Harvard Law School. Please direct comments to [ekcehn@law.harvard.edu](mailto:ekcehn@law.harvard.edu). Research conducted with funding from the Wellspring Philanthropic Fund. I am grateful to Divya Srinivasan, Alyssa Oravec, and Dana Walters for assistance, and to Gerald L. Neuman and Douglas Husak for helpful discussion and comments.

## Introduction

Concern about the penal turn in criminal law and the “untrammled expansion of criminal law” has sparked a proliferation of scholarship examining criminalization and decriminalization.<sup>2</sup> The penal turn describes the expanding reach and increasing numbers of criminal laws with more severe punishments, for what may be the inappropriate use of criminal law to address a wide range of social problems.<sup>3</sup> International and transnational human rights bodies are a significant source of new criminal norms, as national legislatures often pass or repeal laws to fulfill their State’s international obligations.<sup>4</sup> As such, these bodies are an important subject for analysis. Likewise, focusing analysis on decriminalization can help demarcate where efforts exist to halt inappropriate regulation through the criminal law. This paper examines the developing jurisprudence on decriminalization at the U.N. human rights bodies, which collectively provide guidance for the development of international human rights norms. It presents a mapping of the criminal acts that U.N. human rights bodies recommend to be decriminalized and the arguments on which these recommendations rest. It aims to elucidate current patterns and practice in interpreting and applying international human rights norms to the issue of decriminalization writ large, as an overall and systemic account of the subject does not currently exist. Further understanding of the scope and content of jurisprudence that supports decriminalization may help inform efforts to reconsider the inappropriate criminalization of a wide array of conduct.

In part I of this article, I provide a brief overview of the current literature on decriminalization and human rights. Part II of this article examines the definitional and conceptual meaning of decriminalization within the literature and as it is utilized in the analysis of the U.N. human rights bodies. Part III presents a mapping of the criminal acts which the U.N. human rights bodies recommend for decriminalization, and describes the content of the jurisprudence. The actual impact of the jurisprudence on the domestic criminal law of State parties is beyond the scope this paper, but where identified, State party rationales for accepting or rejecting the decriminalization are woven into the analysis. Part IV contains a discussion of notable patterns, points of departure for future research, and a brief conclusion. Part V contains a table categorizing offences and recommendations.

### I. The Literature on Decriminalization and Human Rights

Most of the scholarship concerning criminalization and decriminalization comes from criminal law and socio-legal scholars who do not ground their theoretical, conceptual, or normative analysis in human rights.<sup>5</sup> That said there is a significant and growing set of scholarship on human rights

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<sup>2</sup> Nicola Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MOD. LAW REV. 936–960 (2009).

<sup>3</sup> VICTOR TADROS, *WRONGS AND CRIMES* (2016).

<sup>4</sup> RA Duff et al., *Towards a Theory of Criminalization?*, in *CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW* 1–53 (RA Duff et al. eds., 2014); ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* (2009).

<sup>5</sup> Roger A. Shiner, *Theorizing Criminal Law Reform*, 3 CRIM. LAW PHILOS. 167–186 (2009); DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008); Nicola Lacey, *Criminalisation: Conceptual and Empirical Issues*, 72 MOD. LAW REV. 936–960 (2009); *CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW*, (RA Duff et al. eds., 2014); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. LAW REV. 223–275 (2007); Alexandra

that examines these issues. Most work has concerned itself with specific categories of criminal offences and whether they are appropriately criminalized, what the consequences of this criminalization are, and the arguments for curtailing criminal regulation.<sup>6</sup> As this research tends to be issue specific it is relatively siloed—it does not tend to consider the general interplay of criminalization or decriminalization and human rights law and systems. In addition to issue specific legal scholarship, consideration of criminalization and human rights also cuts across multiple disciplines, leveraging social science and public health analyses to understand the social, economic, health and other impacts of criminalization on specific groups, and their ability to access a full array of human rights.<sup>7</sup>

Other scholarship critiques the relationship between human rights and criminal law, and considers the appropriate balance for human rights law to strike between acting as a “sword” versus a “shield.”<sup>8</sup> This area of work describes the historical shift of human rights law from primarily serving as a defensive tool against oppressive state power that is often wielded through the criminal law, to reaching offensively for the criminal law to vindicate individual rights violations.<sup>9</sup> Some scholarship examines how this pendulum shift has influenced the reach and content of laws, and the philosophies underlying penal laws and systems.<sup>10</sup> Increasing thought is being given to untangling the paradox of attempting to implement human rights within largely punishment-oriented and frequently rights infringing criminal justice systems. There is some concern that the alignment of human rights advocates with the “carceral state” undercuts the ability of the human rights movement to challenge systems of mass incarceration and the biases and discrimination that are present in many penal systems in the world.<sup>11</sup>

Some critiques of the penal turn in human rights highlight the negative externalities of the sword function, whereby defining a social problem as a crime control matter leads to people being

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Natapoff, *Misdemeanor Criminalization*, 155 VANDERBILT LAW REV. 1055–1116 (2015); TADROS, *supra* note 4; DENNIS J. BAKER, *THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW’S AUTHORITY* (2011).

<sup>6</sup> See for example, Decker, Crago et al, “Human rights violations against sex workers: burden and effect on HIV” in *The Lancet* Vol 385 Issue 9963 January 2015, pages 186-199, and O’Flaherty and Fisher, “Sexual Orientation, Gender Identity and Human Rights Law: Contextualising the Yogyakarta Principles,” in *Human Rights Law Review*, Volume 8 Issue 2, January 2008, p 207-248.

<sup>7</sup> Health and Human Rights scholars and advocates, i.e. those who examine the intersection of public health goals and human rights norms, write about the impact of criminalization on the right to health for marginalized groups like sex workers, the LGBTI population, drug users, and people in conflict with the law more generally, like prisoners. JONATHAN M. MANN, LARRY GOSTIN & SOFIA GRUSKIN, *HEALTH AND HUMAN RIGHTS: A READER* (1999). For some examples of helpful accounts, see Aziza Ahmed et al., *Criminalising consensual sexual behaviour in the context of HIV: Consequences, evidence, and leadership*, 6 GLOB. PUBLIC HEALTH S357–S369 (2011); Daisy Nakato et al., “*We are despised in the hospitals*”: sex workers’ experiences of accessing health care in four African countries, 15 CULT. HEALTH SEX. 450–465 (2013).

<sup>8</sup> Françoise Tulkens, *Paradoxical Relationship between Criminal Law and Human Rights*, 9 J. INT. CRIM. JUSTICE 577–595 (2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* which looks at European practice.

<sup>11</sup> Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL LAW REV. 1069–1128 (2015); Kristin Bumiller, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* (2008); Kristin Bumiller, *Explaining the Volte-Face: Turning Away from Criminal Law and Returning to the Quest for Gender Equality*, in *THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME* 118–136 (Rosemary Gartner & Bill McCarthy eds., 2014).

considered potentially deviant and risky as a result of their social circumstances or background.<sup>12</sup> Other considerations are the negative consequences of social, economic, and health inequalities becoming criminalized while the socio-economic foundations of crime remain unaddressed.<sup>13</sup> Scholars critiquing the ideological imbalance lament additional forms of unintended consequences such as when the very victims that the criminal law was meant to protect become caught in the wide net of criminalization.<sup>14</sup> Similarly, scholars who examine the growth of crime prevention policies tied to national security concerns caution against the inherent threats to human rights when such policies permit a dangerously wide range of State interventions and sanctions based on uncertain criteria.<sup>15</sup>

Scholarship is also developing in relation to International Criminal Law and accountability for individuals who have committed gross violations of International Human Rights Law or International Humanitarian Law.<sup>16</sup> There is some concern that the preference for international criminal accountability in the push for anti-impunity reinforces an individualized and decontextualized understanding of harms, and results in the alignment, participation, and sometimes encouragement by human rights advocates in state investigations, prosecutions and punishments, even where there is overreach.<sup>17</sup> Among scholars' concerns is that the penal turn in this context may contribute to the increasing conception of broader human rights issues as criminal issues attributable to culpable individuals, which allows for the punishment of "a few bad actors" to relieve pressure on the State to address entrenched socio-economic injustices.<sup>18</sup>

Evidently, there are some complicated anxieties about the current relationship between human rights law and criminal law. While the literature presents varying forms of analyses on specific categories of acts to be decriminalized, the consequences of criminalization, and critiques of the reach for criminal law for rights vindication above other alternatives, we do not at present have sufficient contextualizing scholarship, such as a systematic account of the frontiers of decriminalization within International Human Rights Law. The aim of this paper is to serve as one useful point of departure for the development of this literature.

## II. The Meaning of Decriminalization

The meaning of decriminalization may seem self-evident, but it can be defined and conceived of in scholarly works and policy documents in various ways that are sometimes vague or

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<sup>12</sup> Much has been written on this, owing to the intellectual legacy of Stanley Cohen, for example, see Michael Welch, *Moral Panic, Denial, and Human Rights: Scanning the Spectrum from Overreaction to Underreaction*, in *CRIME, SOCIAL CONTROL, AND HUMAN RIGHTS: FROM MORAL PANICS TO STATES OF DENIAL, ESSAYS IN HONOR OF STANLEY COHEN* 92–104 (David Downes et al. eds., 2007).

<sup>13</sup> *Id.*

<sup>14</sup> One example is mandatory arrest laws that result in the arrest of domestic violence victims who call the police.

<sup>15</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED DEMOCRACY AND CREATED A CULTURE OF FEAR*.

<sup>16</sup> Engle, *supra* note 12.

<sup>17</sup> Diane Otto, *Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility*, in *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 291–328 (Karen Engle, Zinaida Miller, & D.M. Davis eds.), at 317; Engle, *supra* note 12.

<sup>18</sup> Engle, *supra* note 12; Samuel Moyne, *Anti-Impunity as Deflection of Argument*, in *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 68–94 (Karen Engle, Zinaida Miller, & D.M. Davis eds., 2016).

inconsistent.<sup>19</sup> Many of these complexities have been helpfully parsed by Douglas Husak in his examinations of drug decriminalization and in Nicola Lacey's socio-legal examinations of criminalization.<sup>20</sup> The myriad usages of decriminalization in the literature are tied to the "hugely encompassing" nature of it, which is aptly described by Lacey in relation to its counterpart concept, criminalization:

[It] could swallow up almost every theoretically interesting question about criminal law, criminal responsibility, criminal justice and punishment. The assumptions, ideologies, ambitions and interests underlying criminal legislation, or the political promises of such legislation; those which inform citizens' decision-making, along with patterns of policing, prosecution and plea-bargaining; the contours of criminal law doctrine and of criminal legislation; the practices of judges and magistrates both in applying criminal law to particular offenders and sentencing them: the practices of officials in the penal system; even the impact of social attitudes and the inevitable economic costs, the personal ruptures and the knock-on social effects which accompany punishment: all of these, and more, contribute to our understanding of the social and political phenomena of 'criminalization'.<sup>21</sup>

It is therefore not surprising that criminalization and decriminalization are used to describe a myriad of legal and social situations in ways that sometimes lack cohesion.

Inconsistent references to decriminalization certainly occur within the U.N. human rights bodies, which leverage its technical legal definitions, as well as the broader social conceptualizations of decriminalization. The U.N. human rights bodies comprises several dozen mechanisms working across all human rights issues, and often through the lens of multiple disciplines.<sup>22</sup> The treaty bodies, as quasi-judicial mechanisms, consider questions of inappropriate criminal regulation from a more legalistic point of view as they adjudicate individual communications, develop general comments, and issue concluding observations on State party compliance with human rights treaties.<sup>23</sup> The independent experts and working groups that operate under the Special Procedures of the Human Rights Council consider the question of decriminalization from a perspective that contains, but goes beyond the law, when they give thematic attention to human rights issues.<sup>24</sup>

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<sup>19</sup> In a concise think piece, Richard Lempert used the pithy and broadly encompassing definition "the process by which once forbidden behavior loses the label 'illegal'," Richard Lempert, *Toward a Theory of Decriminalization*, No. 209 UNIV. MICH. PUBLIC LAW WORK. PAP. SER. (2010).

<sup>20</sup> For a helpful accounting of some of these complexities, see Chapter 1, "The Meaning of Drug Decriminalization" in DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS* (2005).; Lacey *supra* note 3.

<sup>21</sup> Lacey, *supra* note 3.

<sup>22</sup> For this paper, data on decriminalization were collected from the U.N. treaty bodies, the Special Procedures of the Human Rights Council (at last count there were 56 independent experts appointed), the Universal Periodic Review, and resolutions adopted by the Human Rights Council and the U.N. General Assembly.

<sup>23</sup> K.L. McCall-Smith, *Interpreting International Human Rights Standards*, in TRACING THE ROLES OF SOFT LAW IN HUMAN RIGHTS 27–46 (Stephanie Lagoutte, Thomas Gammeltoft-Hansen, & John Cerone eds., 2016).

<sup>24</sup> The special procedures: undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations; and contribute to the development of international human rights standards by engaging in advocacy, raising public awareness, and providing advice for technical cooperation, see United Nations Office of the High Commissioner for Human Rights, SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL: INTRODUCTION UNITED NATIONS OFFICE OF THE HIGH

This means they often examine social accounts of how criminalization is practiced, by whom, against whom, and with what consequences. Then with the Universal Periodic Review, states engage in a process of peer review for compliance with all human rights obligations.<sup>25</sup> This is a cooperative system that seeks to ensure equal scrutiny of all member states, so discussions on decriminalization are informed by the political nature of this exercise.<sup>26</sup> With such complexities in approach to the question of decriminalization, it is important to unpack the terminology and conceptions that the collective U.N. human rights bodies utilize.

#### *a. Legal Conceptions and Definitions*

Decriminalization can be defined formally in terms of *de jure* decriminalization, where legislatures repeal or narrow criminal statutes, to remove all or portions of a conduct from the purview of the criminal law.<sup>27</sup> This is often a codification of *de facto* practices of decriminalization, where a criminal offence remains in the criminal code but is no longer enforced.<sup>28</sup> *De facto* decriminalization is often due to obsolescence, and the resulting legal anachronisms may sometimes reflect a less politically divisive option where it is easier to cease enforcement of a criminal law than it is to remove it from the criminal code.<sup>29</sup> For certain conduct that may still be in contention, full *de jure* decriminalization would help avoid the risk of future enforcement.<sup>30</sup>

There is sometimes reference to partial decriminalization as the removal of all punishments, while retaining the formal prohibition of conduct within the criminal code.<sup>31</sup> This is slightly distinct from *de facto* decriminalization in that it may reflect a policy of continued state disapproval and official prohibition, with accompanying efforts to curtail the conduct using the criminal, civil or other forms of law and the implementation of programming targeted to reduce the conduct.

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COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (last visited Jun 22, 2017).

<sup>25</sup> The Universal Periodic Review was established by a U.N. General Assembly resolution in 2006. It operates under the auspices of the Human Rights Council, and operates as a state-driven review of the human rights records of all U.N. member states. Reviews take place every five years to examine the human rights record of states under review and the extent to which the state has respected all of its human rights obligations, including voluntary pledges and commitments it has made. Reviewing member states make recommendations to the State under review, to which it must respond to in writing, either accepting or noting recommendations. States do not explicitly reject recommendations they do not like, but diplomatically label their non-acceptance as ‘noting’. The UPR is considered a “soft power” mechanism, as it involves a combination of diplomatic coercion, voluntary engagement, collective peer oversight, and the state “giving an account of itself.” See United Nations Office of the High Commissioner for Human Rights, UNIVERSAL PERIODIC REVIEW UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Jun 22, 2017); Jane K. Cowan, *Universal Periodic Review as a public audit ritual*, in HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM (Hilary Charlesworth & Emma Larking eds., 2014).

<sup>26</sup> United Nations Office of the High Commissioner for Human Rights, *supra* note 26.

<sup>27</sup> Maggy Lee, *Decriminalization*, in THE SAGE DICTIONARY OF CRIMINOLOGY 118 (Eugene McLaughlin & John Muncie eds., 3rd ed. 2012).

<sup>28</sup> *Id.*

<sup>29</sup> Lempert, *supra* note 20. HUSAK AND DE MARNEFFE, *supra* note 21.

<sup>30</sup> See part IV for examples of this in relation to consensual same-sex sexual conduct. It may be useful to note that the impact of full the removal of a criminal offence may not be a significantly impactful intervention where there is already long-term non-enforcement, Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, 40 LAW SOC. INQ. 746–781 (2015).

<sup>31</sup> Natapoff, *supra* note 6 at 1057.

Relatedly, the term de-penalization is sometimes mistakenly used interchangeably with decriminalization, but this is a much narrower concept which describes the removal of custodial sentences as a punitive measure, while the conduct itself remains a criminal offence.<sup>32</sup> In this situation other forms of criminal punishment may be imposed instead, for example probation or mandatory rehabilitative programming.<sup>33</sup>

Conceptions of decriminalization may also extend beyond criminal laws, and refer to other areas of law and regulation that are used to punish behavior that can steer those who have been caught back into the criminal justice system, for example, the use of administrative fines, the non-payment of which can result in incarceration.<sup>34</sup> These administrative and regulatory measures may not necessarily be less burdensome than the criminal law.<sup>35</sup>

Lastly on legal descriptions, decriminalization must be made distinct from legalization, which is a term that is used in two senses. In the first sense, it means being freed by law to act in ways that were formerly forbidden.<sup>36</sup> The second sense signifies transferring control of an action or behavior to the legal system, that is, it is the policy of regulating conduct that has been decriminalized, for example, through zoning, licensing, and public health regulations.<sup>37</sup>

It is not always entirely clear in the U.N. human rights bodies' jurisprudence whether they are arguing for *de jure* or *de facto* decriminalization, de-penalization, the removal of all penal sanctions while retaining the criminal prohibition in question, or legalization. Where possible, I attempt to distinguish usages in part IV.

### ***b. Socio-legal Conceptions and Definitions***

Other conceptions of decriminalization are socio-legal.<sup>38</sup> These examine decriminalization across the entire criminal justice system and examine the wider social and political processes in which criminal justice systems are embedded, internally within states and internationally.<sup>39</sup> They are helpful for understanding how legal categories are applied to whom, in what circumstances, and with what consequences. They enable the examination of “the relations of class, race, and gender, the cultural assumptions and prejudices, and the political considerations that inform and influence the practice of law,” and the “partial, targeted, and often discriminatory ways” in which criminal laws are applied.<sup>40</sup>

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<sup>32</sup> WILLIAM L. SELKE, *PRISONS IN CRISIS* (1993).

<sup>33</sup> HUSAK AND DE MARNEFFE, *supra* note 21. at 6. For this paper, de-penalization is relevant mostly to the U.N. human rights bodies' discussion on the criminal regulation of drugs.

<sup>34</sup> Natapoff, *supra* note 6. See also Alexes Harris, *A Pound of Flesh: Monetary sanctions as punishment for the poor*, which describes the practice of jailing “willful” non-payers of administrative fines, page 129.

<sup>35</sup> *Id.*; Nicola Lacey & Lucia Zedner, *Criminalization: historical, legal and criminological perspectives*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY* 57–76 (S Maruna, A Liebling, & L McAra eds., 6th ed.).

<sup>36</sup> J.K. Lieberman, *Legalization in the International Encyclopedia of the Social & Behavioral Sciences*, at 8693.

<sup>37</sup> *Id.* and HUSAK AND DE MARNEFFE, *supra* note 21.21 at 6. For this paper, de-penalization is relevant mostly to the U.N. human rights bodies' discussion on the criminal regulation of drugs, as well as for discussion on defamation, where recommendations are to consider decriminalizing, but regardless to remove imprisonment as a punishment.

<sup>38</sup> By this I mean they are concerned with the interface with the social and political context in which criminal laws exist, and are being considered to address the concerns of the legal inquiries.

<sup>39</sup> Shiner, *supra* note 6; Lacey and Zedner, *supra* note 36.

<sup>40</sup> Lacey and Zedner, *supra* note 36.6.



Lacey’s conceptual framework of criminalization is helpful in considering the U.N. human rights bodies’ socio-legal approaches to the question of decriminalization.<sup>41</sup> She makes distinctions between criminalization as an outcome, and criminalization as a practice, both of which have a substantive and formal component.<sup>42</sup> Criminalization as an outcome describes what has been or should be criminalized, formally through legislative, judicial, or prosecutorial decisions, or substantively through actual implementation of the formal norms.<sup>43</sup> Criminalization as a practice describes who does the formal or substantive criminalizing, on what assumptions and according to what processes and principles.<sup>44</sup>

The U.N. human rights bodies consider the question of decriminalization beyond the normative and legal aspects of the issue. They review the content and scope of criminal law for its consistency with international human rights norms, but also engage with the practical, structural, and policy considerations of decriminalization. In doing so, they look at how the criminal law affects individuals, groups, and the wider society in which the criminal justice system is embedded. The U.N. human rights bodies also examine the substantive application of criminal laws, which may intensify or diminish depending on “ancillary factors such as the process by which [they come] into being and [are] disseminated, operationalized, and implemented,” which can also depend on factors such as the availability of resources, penal politics, media coverage, and other incentives that inform the ways in which criminal justice officials exercise their discretion.<sup>45</sup> This reflects the manner in which human rights bodies’ document their concerns with the broader social dynamics that shape criminalization as an outcome and practice.

### **III. Mapping the Jurisprudence**

This section maps the jurisprudence of the offenses and conduct that the U.N. human rights bodies recommend to be decriminalized. The offences identified through this research can be broken down into the following nine categories: 1) sexuality, gender and reproduction; 2) thought, religion, and conscience; 3) migration and trafficking; 4) land and property; 5) opinion and expression; 6) assembly and association; 7) poverty; 8) child and adolescent behavior; and 9) drugs. The jurisprudence for each category is described with separate attention given to their treatment by the treaty bodies, special procedures, and UPR. For reference, a table of offences and recommendations is contained in part V.

#### ***a. Sexuality, Gender, and Reproduction***

This category of criminalization includes offences that regulate behavior related to sexual orientation and gender identity, sexual and reproductive health, and gender.

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<sup>41</sup> Lacey, *supra* note 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> WORKING GROUP ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE, REPORT OF THE WORKING GROUP ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE (2017); Lacey and Zedner, *supra* note 36.

i. Sexual Orientation and Gender Identity

The U.N. human rights bodies recommend the decriminalization of a variety of discriminatory laws and practices that punish individuals and groups because of their sexual orientation or gender identity. Recommendations pertain to *de jure* offences that specifically prohibit specific sexual activities, and *de facto* criminalization of broader identities through laws that punish individuals based on their real or perceived sexual orientation or gender diversity.<sup>46</sup> These include laws that criminalize consensual same-sex sexual activity, with some recommendations specific to adult sexual behavior while others encompass adolescent sexuality. Vaguely-worded offences such as “crimes against the order of nature,” “debauchery,” “indecent acts,” “grave scandal,” or “social dissention” are also at issue, as they are used to harass and arbitrarily arrest and detain LGBTI persons.<sup>47</sup>

Several countries have adopted laws that criminalize individuals who promote homosexuality or facilitate, condone, or witness same-sex relationships.<sup>48</sup> States adopting these laws sometimes justify them on the basis of preserving public morals, and some of them are framed in terms of protecting children from non-traditional sexual orientations and expressly forbid the promotion of homosexuality among minors.<sup>49</sup> Recent attention in this area pertains to Russian laws which are colloquially referred to as the “gay propaganda law,” and equates same-sex relations with pedophilia.<sup>50</sup>

The extent of punishment that flows from criminalization is also a concern for the U.N. human rights bodies. Some states order flogging and other forms of corporal punishment that are absolutely forbidden under International Human Rights Law. Others apply the death penalty, which in International Human Rights Law is a form of punishment that is restricted to the “most serious crimes,” a category under which offences relating to consensual adult same-sex intimate relations do not fall.<sup>51</sup> The Committee also encourages States to take steps to address

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<sup>46</sup> For example, Human Rights Committee *Toonen v Australia*, Concluding Observations for Kuwait 2011, Burundi 2014, CEDAW Concluding Observations for Guyana 2012, Sri Lanka 2011, CRC Concluding Observations Iran 2011, Eritrea 2014, CESCR General Comment 22 (2016) E/C.12/GC/22.

<sup>47</sup> See a helpful review in U.N. High Commissioner for Human Rights Report on discrimination and violence against individuals based on their sexual orientation and gender identity, 2015, A/HRC/29/23.

<sup>48</sup> Special Rapporteur on Rights to Freedom of Peaceful Assembly and of Association Report to the Human Rights Council, 2014, A/HRC/26/29, para 30.

<sup>49</sup> Special Rapporteur on Human Rights Defenders Report to U.N. General Assembly, 2013, A/HRC/25/55, para 65.

<sup>50</sup> Special Rapporteur on Rights to Freedom of Peaceful Assembly and of Association Report to the Human Rights Council, 2014, A/HRC/26/29, para 30. In the Russian federal anti-LGBT propaganda law, propaganda is defined as: “distribution of information that is aimed at the formation among minors of nontraditional sexual attitudes, attractiveness of non-traditional sexual relations, misperceptions of the social equivalence of traditional and non-traditional sexual relations, or enforcing information about non-traditional sexual relations that evokes interest to such relations...” translation of the provision is from The Council for Global Equality, The Facts on LGBT Rights in Russia, <http://www.globalequality.org/newsroom/latest-news/1-in-the-news/186-the-facts-on-lgbt-rights-in-russia>.

<sup>51</sup> Committee on Rights of the Child Concluding Observations on Iran 2016, CRC/C/IRN/CO/3-4, on page 4; ICCPR section 6(2) states “in countries which have not abolished the death penalty, sentence may be imposed only for the most serious crimes”; the Human Rights Council in 2017 adopted resolution 36 which expressly condemns the imposition of the death penalty as a sanction for consensual same-sex relations, A/HRC/36/L.6 in the preamble.

discrimination and societal stigma against LGBT persons to ensure their enjoyment of socio-economic rights.<sup>52</sup>

Although the U.N. human rights bodies widely recommend the decriminalization of same-sex conduct and LGBTI persons, deep divides remain in terms of state party recognition of the universal application of human rights norms based on sexual orientation and gender identity. In 2015, the Human Rights Council passed a resolution to appoint a new independent expert, the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (Independent Expert on SOGI).<sup>53</sup> These current tensions are also reflected in the fact that a number of states abstained from voting, or voted against the establishment of this new independent expert.<sup>54</sup> Currently, around 70 countries criminalize same-sex relations between men, and 40 criminalize conduct between women.<sup>55</sup>

### *Treaty Bodies*

While the text of the U.N. human rights conventions do not explicitly address the content of human rights law pertaining to sexuality, they express general human rights norms of personal and familial privacy, and the principle of nondiscrimination, which underlay protections based on sexual orientation.<sup>56</sup> Here, the right to privacy is intended to protect individual freedoms for intimate conduct without arbitrary intrusion. The principle of nondiscrimination obligates states to respect and ensure to individuals the enjoyment of rights without distinction based on prohibited grounds—which include gender and as developed by the jurisprudence, sexual orientation.<sup>57</sup>

The treaty bodies began articulating the content of international human rights norms in this area, with the landmark decision of *Toonen v Australia*. Delivered in 1994, the Human Rights Committee held that criminalization of adult consensual sexual activity violated the right to privacy, even where such offences are not enforced.<sup>58</sup> It determined that the very existence of the criminal prohibition constituted arbitrary interference with the right to privacy as there are no guarantees against future prosecution.<sup>59</sup> The criminal prohibition also failed to meet the test for reasonableness, which requires interferences with the right to privacy to be in accordance with the provisions, aims, and objectives of the International Covenant on Civil and Political Rights

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<sup>52</sup> That, is on employment, healthcare, education, and housing. See, CESCR Concluding Observations Iran 2013 para 7, E/C.12/IRN/CO/2 -- The Committee is concerned that consensual same-sex sexual activity is criminalized and that convicted persons may even receive the death penalty. It is also concerned that members of the lesbian, gay, bisexual, and transgender community face discrimination with respect to access to employment, housing, education and health care, as well as social stigma and marginalization (art. 2).

<sup>53</sup> Human Rights Council Resolution 32/2 of 2016, A/HRC/RES/32/2, “Protection against violence and discrimination based on sexual orientation and gender identity,” was adopted with a recorded vote of 23 to 18 with 6 abstentions.

<sup>54</sup> *Id.*

<sup>55</sup> Independent expert on protection against violence and discrimination based on sexual orientation and gender identity, Report to the Human Rights Council, 2017, A/HRC35/36, para 52.

<sup>56</sup> ICCPR Article 2(1) and 2(2); Article 26; the major conventions protect against unlawful discrimination based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>57</sup> Human Rights Committee, *Toonen v Australia*, CCPR/C/50/D/488/1992, (1994); CEDAW General Recommendation 27 (2010), paragraph 13; CEDAW General Recommendation 28 (2010) at para 18, CESCR General Comment 20 (2009).

<sup>58</sup> *Toonen v Australia supra* note 58 para 10.

<sup>59</sup> *Id.* at 8.2.

(ICCPR), and to be proportional and necessary in the circumstances.<sup>60</sup> The Committee rejected the justification for interference based on public health grounds for the prevention of the spread of HIV, arguing that criminalization is antithetical to this purpose as it drives underground individuals who are vulnerable to transmission.<sup>61</sup> The justification based on protection of morals also failed to meet reasonableness as the lack of prosecutions indicated that criminalization was not essential for this purpose. The Committee also made explicit that sexual orientation is one of the grounds under which discrimination is prohibited under Articles 2(1) and 26 of the Covenant.

The Human Rights Committee has not been allayed by assurances of non-enforcement of criminal laws and has rejected state party arguments that it is necessary to first change negative public opinions about homosexuality before laws are reformed.<sup>62</sup> The Committee has argued that criminalization has the effect of stigmatizing and marginalizing homosexuals, and the Committee highlights the link between criminalization and homophobic harassment and violence, which can amount to violations of the rights to freedom from cruel, inhuman, and degrading treatment, arbitrary arrest and detention, as well as freedoms of expression, association, and assembly.<sup>63</sup>

The criminalization of LGBT “propaganda” is a topic of some limited consideration by the U.N. human rights bodies. In the 1982 case of *Hertzberg v Finland*, the Human Rights Committee examined state censorship of radio and television programs related to homosexuality in Finland.<sup>64</sup> On the State’s use of the public morals justification, the Committee ruled that a “certain margin of discretion must be accorded to the responsible national authorities” given that public morals are a culturally relative concept without a universal standard.<sup>65</sup> The Committee deferred to the State broadcasting corporation and its decision to judge television and radio as inappropriate forums for the discussion of homosexuality “as far as a program could be judged as encouraging homosexual behavior” and in consideration of potential harmful effects on minors.<sup>66</sup> *Hertzberg* therefore recognized the State party’s interest in protecting children, and recognized that this trumped the rights of adults to freedom of expression about their sexuality.<sup>67</sup> In the post-*Toonen* era, the Committee considered the case of *Fedotova v Russian Federation*, which considered a fine imposed against an LGBT activist who displayed posters near a school with statements expressing the activist’s pride in their homosexuality.<sup>68</sup> The Committee held that the law restricting homosexual propaganda but not restricting expressions about heterosexuality or sexuality in general failed to meet its test for reasonable and objective limitations on the right to freedom of expression because it did not demonstrate the necessity of this distinction.<sup>69</sup> The Committee gave credence to the fact that the complainant was not undertaking actions aimed at involving minors

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<sup>60</sup> Human Rights Committee General Comment 22 (1993) CCPR/GC/22, at para 8, “The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations...for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”

<sup>61</sup> *Toonen v Australia supra* note 58 para 8.5.

<sup>62</sup> Human Rights Committee Concluding Observations Togo, 2011, CCPR/C/TGO/CO/4, para 14; Human Rights Committee Concluding Observations on Ethiopia, 2011, CCPR/C/ETH/CO/1, para 12.

<sup>63</sup> For example, Human Rights Committee Concluding Observation on Kuwait, 2011, CCPR/C/KWT/CO/2, para 30; Concluding Observations on Maldives, 2012, CCPR/C/MDV/CO/1, para 8.

<sup>64</sup> Human Rights Committee, *Hertzberg v. Finland*, Comm. No. R.14/61/1979, CCPR/C/OP/1 (1985).

<sup>65</sup> *Id.* at 10.3

<sup>66</sup> *Id.* at 10.4

<sup>67</sup> Ryan Thoreson, *From Child Protection to Children’s Rights: Rethinking Homosexual Propaganda Bans in Human Rights Law*, 124 YALE LAW J. 882–1345 (2015).

<sup>68</sup> Human Rights Committee, *Fedotova v Russian Federation*, CCPR/C/106/D/1932/2010, (2010).

<sup>69</sup> *Id.* at 10.5.

in particular sexual activity or specifically advocating any particular sexual orientation—she was “giving expression to her sexual identity and seeking understanding for it.”<sup>70</sup> The Committee found that the State party’s interest in protecting minors in this particular instance could not trump the complainant’s freedom of expression with regard to her own sexuality.<sup>71</sup>

The Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Committee on the Rights of the Child (CRC Committee) and the Committee on Economic, Social and Cultural Rights (CESCR Committee) have rested their recommendations for decriminalization of consensual same-sex relations on non-discrimination and equal protection arguments. As a treaty body concerned with the rights of women, the CEDAW Committee’s recommendations have in some instances been circumscribed to the decriminalization of consensual same-sex relations between women only, although it also situates sexual orientation and gender identity concerns within its mandate.<sup>72</sup> The CEDAW Committee recognizes homophobic violence against women and transgender persons as a form of prohibited discrimination.<sup>73</sup> This interpretation is based on the Committee’s definition of gender-based violence which it frames as discriminatory conduct that inhibits women’s ability to enjoy and exercise their human rights and fundamental freedoms equally with men.<sup>74</sup> The CEDAW Committee has also commented on the proliferation of “anti-propaganda” laws which restrict the rights to freedom of expression and assembly for LGBT persons, such as the introduction of criminal sanctions for the “formation of positive attitudes to non-traditional sexual relations.”<sup>75</sup>

The CRC Committee argues that criminalization encourages the stigmatization of and discrimination against LGBTI children or those perceived to be LGBTI, and to children of LGBTI persons, and argues that penalties from flogging to the death penalty for LGBTI children must be removed.<sup>76</sup> The Committee has also found that the laws that allow a lower age of legal consent for heterosexual relationships versus homosexual relationships are discriminatory.<sup>77</sup>

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<sup>70</sup> *Id.* at 10.7.

<sup>71</sup> *Id.* at 10.8.

<sup>72</sup> Human Rights Committee General Recommendation 27, para 13; Human Rights Committee General Recommendation 28, para 18.

<sup>73</sup> CEDAW General Recommendation 27 para 13 and General Recommendation 28 para 18 note that the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. CEDAW General Recommendation 19 paras 1 and 4 note that gender-based violence is discrimination and inhibits women’s ability to enjoy rights equally, and that there is a close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.

<sup>74</sup> CEDAW General Recommendation 19 para 6 defines gender-based violence to include acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs.

<sup>75</sup> CEDAW Concluding Observations on Kyrgyzstan, 2015, CEDAW/C/KGZ/CO/4, para 9.

<sup>76</sup> For example, CRC Concluding Observations on Iran, 2011, CRC/C/IRN/CO/3-4, at page 4; CRC Concluding Observations on Eritrea, 2014, CRC/C/ERI/CO/4, para 24(c).

<sup>77</sup> CRC Concluding Observations United Kingdom of Great Britain and Northern Ireland: Isle of Man, 2000, CRC/C/15/Add.134, para 22. While the Committee did not provide reasoning for this particular recommendation, where such laws exist, research indicates that they are enacted based on homophobic assumptions, such as anxieties about the ability of homosexual experiences in teen years to “convert” an otherwise heterosexual into a homosexual or bisexual person, and expose partners in consensual same-sex relations to criminal sanction under statutory rape

The CESCR Committee specifically includes sexual orientation and gender identity as a prohibited ground for discrimination, and asserts that criminalization is a violation of non-discrimination in the context of sexual health as it fails to respect individuals for their sexual orientation, gender identity, and intersex status.<sup>78</sup> It also recognizes that criminalization is one of the social determinants of poor sexual health outcomes, as systemic discrimination and marginalization can limit the choices that individuals can exercise with respect to their sexual health, including by impeding their access to health services and related information.<sup>79</sup> Under the CESCR Committee's analysis, criminalization as a source of discrimination extends beyond the topic of sexual health, hindering LGBTI persons' enjoyment of their full range of economic, social, and cultural rights, as state-sanctioned discrimination affects their access to employment, housing, education, and health care.<sup>80</sup>

### *Special Procedures*

A number of independent experts appointed under the Special Procedures of the Human Rights Council have recommended the decriminalization of diverse sexual orientations as well as gender identities, for example where cross-gender dressing is criminalized. Mandate holders have explored and emphasized the negative social consequences of criminalization in greater detail, such as in prompting homophobic or transphobic violence, police abuse, torture, family and community violence, constraints on LGBTI rights defenders, as well as poor health outcomes and difficulty accessing housing, education, employment.<sup>81</sup>

In the first report of the recently appointed Independent Expert on SOGI, decriminalization of consensual same-sex relations is "singled out for specific attention to help prevent and overcome negative elements fueling violence and discrimination," and noted as a topic for detailed future exploration.<sup>82</sup> The Independent Expert underscores the uneven and context-specific nature of criminalization, noting that in one country same-sex relationships can be criminalized under the threat of capital punishment, while transgender persons are recognized and assisted with undergoing gender-reassignment surgery.<sup>83</sup> The Independent Expert situates homophobic violence as owing to the criminalization of same-sex activity, as it creates an environment enabling of violence and discrimination.<sup>84</sup>

The Special Rapporteur on extrajudicial, summary or arbitrary executions (Special Rapporteur on Extrajudicial Executions) has recommended decriminalization on a number of occasions, most recently in a thematic report in a gender-sensitive approach to extrajudicial killings. The current mandate holder has emphasized that LGBTI persons are particularly vulnerable to arbitrary

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laws where their heterosexual counterparts would not, see Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WILLIAM MARY LAW REV. 797–936 (2008).

<sup>78</sup> CESCR General Comment 20, para 32.

<sup>79</sup> CESCR General Comment 22 *supra* note 47 at para 57.

<sup>80</sup> For example, CESCR Concluding Observations on Iran, 2013, E/C.12/IRN/CO/2, para 7; CESCR Concluding Observations on Kenya, 2016, E/C.12/KEN/CO/2-5, para 21.

<sup>81</sup> U.N. High Commissioner for Human Rights Report on Discrimination and Violence against Individuals based on their Sexual Orientation or Gender Identity, 2015, A/HRC/29/23, and 2011, A/HRC/19/41.

<sup>82</sup> Independent expert on protection against violence and discrimination based on sexual orientation and gender identity, Report to the Human Rights Council, 2017, A/HRC/35/36, para 65.

<sup>83</sup> *Id.* at para 18.

<sup>84</sup> *Id.* at para 52.

killings by state and non-state actors, here defined as arbitrary due to their discriminatory nature.<sup>85</sup> She and prior mandate holders have argued that criminalization increases stigmatization and condones hate-fueled violence, which in turn contributes to the impunity with which human rights violations against LGBTI persons take place.<sup>86</sup> The Special Rapporteur on freedom of religion or belief (Special Rapporteur on Freedom Religion) has also noted that practices that criminalize “dissident practices” under religious laws may give “pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence” against LGBTI persons.<sup>87</sup>

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on the Right to Health) has addressed criminalization of same-sex conduct as a significant impediment to the right to health.<sup>88</sup> Mandate holders have noted that “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality at affected individuals.”<sup>89</sup> Concerning the criminalization of adolescent consensual same-sex conduct, the Special Rapporteur argued that it results in stigmatization, demonization, and discrimination against youth and “affects [LGBTI youths’] socially perceived roles, self-esteem, well-being, and sense of empowerment,” and as such, forms part of the social determinants of adolescent health.<sup>90</sup> Various mandate holders have emphasized the link between criminalization and HIV on a number of occasions and noted that decriminalization is an essential part of structural prevention of HIV as it encourages health seeking behavior and improves the quality of care given for all—not just LGBT communities. For example, with HIV being associated with gay communities, criminalization of same-sex conduct can deter even heterosexual people from accessing testing or treatment for fear of criminal sanction or violence.<sup>91</sup> The impact of criminalization on the mental health of LGBTI persons who are branded as socially “abnormal,” also contributes to the higher rates of attempted suicide for adults and youth who engage in same-sex conduct.<sup>92</sup>

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<sup>85</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, A Gender Sensitive Approach to Extrajudicial Killings, Report to the Human Rights Council, 2017 A/HRC/35/23, notes that a gender-sensitive approach to the mandate reveals that arbitrary deprivation of life may result from systemic discrimination that must be remedied for all people to enjoy equal rights to life. At para 110, the Special Rapporteur notes that on the basis of their gender identity, gender expression or sexual orientation, lesbian, gay, bisexual, transgender, questioning and intersex persons are particularly exposed to violence and killings by both State and non-State actors, and States should therefore repeal all laws that criminalize same-sex relationships and/or forms of gender expression, and address impunity for murders of lesbian, gay, bisexual, transgender, questioning and intersex persons.

<sup>86</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the Human Rights Commission, E/CN.4/2000/3; A/HRC/35/23

<sup>87</sup> Special Rapporteur on freedom of religion or belief, Report to the Human Rights Council, 2014, A/HRC/28/66, para 42.

<sup>88</sup> Special Rapporteur on the right to health, Report to the Human Rights Council, 2016, A/HRC/32/32, which focuses on the right to health of adolescents, and Report to the Human Rights Council, 2010, A/HRC/14/20, which focuses on right to health and criminalization of same-sex conduct and sexual orientation, sex-work and HIV transmission.

<sup>89</sup> Special Rapporteur on the right to health *supra* note 89 para 20. See also Human Rights Committee Concluding Observation on Togo, 2011, CCPR/C/TGO/CO/4, para 14; and E/CN.4/2000/3 *supra* note 87, para 116.

<sup>90</sup> Special Rapporteur on the right to health A/HRC/32/32 *supra* note 89, para 15.

<sup>91</sup> *Id.* para 19.

<sup>92</sup> *Id.* para 17.

The Special Rapporteur on the rights to freedom of peaceful assembly and association (Special Rapporteur on Freedom of Assembly) has noted that sexual orientation and gender identity are used as the basis for discrimination in assembly rights, for example, through laws that ban propaganda relating to homosexuality, or that criminalize associations and assemblies aimed at promoting equal marriage.<sup>93</sup> These laws are passed ostensibly to “protect minors” on the basis of protecting traditional sexual relations.<sup>94</sup>

### *Universal Periodic Review*

The decriminalization of consensual same-sex relations is a topic which has received significant attention under the UPR. State recommendations on this topic rest largely on the same reasoning that the treaty bodies and special procedures articulate, resting on the right to privacy, non-discrimination, equal protection, and health.<sup>95</sup> The detrimental consequences of criminalization are highlighted, including unnecessary suffering, violence, stigmatization and intolerance, arbitrary arrests and detention, and impediments to HIV prevention and treatment.<sup>96</sup> While most recommendations are for decriminalization, in an outlier instance, a reviewing State made a statement against States recommending such reform, claiming that the UPR is not intended to impose values of one society onto another, in particular where they extend beyond universally accepted human rights norms, a category of offences in which certain States assert that consensual same-sex relations do not fall.<sup>97</sup>

In the vast majority of cases, States under review who were the subject of the recommendations refused to accept the recommendation. Several states offered justifications based on moral, traditional cultural, religious, or public opinion grounds, some rejected the universality of sexual orientation as a human right, several gave justifications based on the non-enforcement of the criminal laws, a few states rejected the recommendations while agreeing to promote national consultations, and then a number of States gave no explanation.<sup>98</sup> Some States argued that decriminalization would be counterproductive for LGBTI rights because it would cause backlash,

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<sup>93</sup> Special Rapporteur on the right to peaceful assembly report to the Human Rights Council, 2014, A/HRC/26/29, para 27;

<sup>94</sup> HUMAN RIGHTS FIRST, THE SPREAD OF RUSSIAN-STYLE PROPAGANDA LAWS (2016), notes that laws akin to the Russian federal law banning “propaganda of nontraditional sexual relations to minors” have proliferated in Eastern Europe and Central Asia.

<sup>95</sup> See, e.g. Canada recommendation in Report of the UPR Working Group (2009) for Cameroon para 22; Brazil recommendations for Cameroon para 32, and UPR Working Group Report (2013) on Uzbekistan: 136.50.

<sup>96</sup> See, e.g. Czech Republic recommendations para 98(6) in UPR Working Group 2009 on Senegal, UPR Working Group Cameroon 2013 Mexico recommendation 131.38, Report of the UPR Working Group on Senegal (2013): 126.7.

<sup>97</sup> UPR Working Group Report on Tonga, 2008, A/HRC/8/48, para 58, Bangladesh made this statement in relation to Togo’s review, asserting that there are no treaty obligations to decriminalize consensual same-sex relations.

<sup>98</sup> Several States have declined to accept recommendations based on moral, traditional cultural, religious or public opinion grounds, for example: Cameroon (2009 and 2013); Senegal (2009 and 2013), Uzbekistan (2009 and 2013), Bhutan (2014), Gambia (2010), Bangladesh (2009); Several States argued against the universality of protection of sexual orientation as a human right, for example, The Gambia 2010; examples of States that argued that they do not enforce the criminal laws are Cameroon (2013), Singapore (2011) and (2016), Swaziland (2011 and 2016), Kenya (2015), Bhutan (2010 and 2014); and several States argued that they would first promote national consultations on the topic such as Tunisia (2012), Saint Kitts and Nevis (2011), Tonga (2008); while other States gave no explanation such as Comoros (2015), Democratic Republic of Congo (2010), Zambia (2008), Gambia (2014), Ghana (2012), Uganda (2011), Qatar (2010), and Afghanistan (2014).



or argued there was a need to first increase public tolerance before attempting legal reform.<sup>99</sup> Another State implied that it respected LGBTI rights as homosexual sexual orientation is not itself criminalized—only consensual same-sex acts are prohibited.<sup>100</sup> Lastly, that Western countries only recently decriminalized consensual same-sex relations has been pointed to as a justification for sanctions.<sup>101</sup> More agnostic states have agreed to consider the question of decriminalization further, in one instance noting the emerging global trend toward decriminalization, and another conceding that criminalization contained an element of discrimination.<sup>102</sup> A small minority of states fully accepted the recommendations, either to repeal criminal laws or to refrain from adopting draft legislation that would criminalize consensual same-sex relations.<sup>103</sup>

## ii. Abortion

While the criminal regulation of abortion remains contested at the domestic and international levels, the U.N. human rights bodies articulate a number of grounds for the decriminalization of abortion, and in certain circumstances, recognize abortion in itself as a human right.<sup>104</sup> Regardless, the absolute ban on abortions is treated as incompatible with international human rights norms. Debates on the decriminalization of abortion pertain to conduct ranging from decriminalization in all circumstances, or under limited circumstances including fatal fetal abnormality, rape, incest, or risk to the life and health of the pregnant woman or girl. Human rights bodies are also concerned with practices that predicate the provision of confidential and adequate post-abortion care to women on their admissions that can subsequently be used to prosecute them for undergoing abortions illegally.<sup>105</sup> Beyond these questions, the jurisprudence is increasingly reflecting a progression from carving out narrow exceptions to legally permissible abortions, to calling on States to ensure access to safe abortion services—regardless of its status under criminal law—as part of their obligation to provide comprehensive reproductive health services.<sup>106</sup>

### *Treaty Bodies*

In *Karen Noelia Llantoy Huaman v Peru*, and *VDA (on behalf of LMR) v Argentina* the Human Rights Committee held that in cases where abortions are legal, they must be available in practice, and the arbitrary denial or interference with this can amount to violations of the right to privacy and freedom from cruel, inhuman, and degrading treatment.<sup>107</sup> Moving beyond requiring States to provide accessible abortions where they are legally permitted, in *Mellet v Ireland*, the Committee held that Ireland's criminalization of abortion in nearly all circumstances amounts to violations of

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<sup>99</sup> States that argued it would cause backlash and be counterproductive include Singapore (2016) and Senegal (2013). States that argued they needed to first increase public tolerance before attempting legal reform include Grenada (2015), Malawi (2015), and Papua New Guinea (2011 and 2016).

<sup>100</sup> Jamaica (2011)

<sup>101</sup> Iran (2014)

<sup>102</sup> One State noted the emerging global trend toward decriminalization, Nauru (2015). One State conceded that criminalization contained an element of discrimination, Dominica (2010).

<sup>103</sup> Seychelles (2016), Nauru (2011), Palau (2011), Lithuania (2011), Sao Tome and Principe (2015).

<sup>104</sup> Human Rights Committee *Mellet v Ireland*, CCPR/C/116/D/2324/2013.

<sup>105</sup> CEDAW *TPF v Peru*, CEDAW/C/50/D/22/2009, para 8.17.

<sup>106</sup> Johanna B. Fine, Katherine Mayall & Lilian Sepulveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, 19 HEALTH HUM. RIGHTS J. 69–79.

<sup>107</sup> Human Rights Committee *Karen Noelia Llantoy Huaman v Peru*, Human Rights Committee, CCPR/C/85/D/1153/2003 and *L.M.R. v Argentina*, CCPR/C/101/D/1608/2007.

the rights to privacy, equality before the law, and freedom from cruel, inhuman, and degrading treatment.<sup>108</sup> The Committee directed the State to amend its law, including the Constitution if necessary, to ensure effective, timely, and accessible abortion and to enable healthcare providers to share information on safe abortion without fear of criminal sanction.<sup>109</sup> The *Mellet* case is the first in which a treaty body has clearly held that criminalizing abortion can violate International Human Rights Law.<sup>110</sup> The Human Rights Committee has also argued that the criminalization of abortion can infringe on the right to information, which includes the negative obligation of States to refrain from interfering with access to health information by private parties, and a positive obligation to provide complete and accurate health information, including concerning safe abortion, in circumstances where it is legal.<sup>111</sup>

In *TPF (on behalf of LC) v Peru*, the CEDAW Committee held that where therapeutic abortions are legally permitted, the State must establish legal frameworks to allow women to exercise this right in a manner that guarantees the legal security of the woman obtaining the abortion, and the medical professionals who perform it, and instructed the State party to review its legislation to decriminalize abortion for pregnancies resulting from rape or sexual abuse.<sup>112</sup> The Committee frames the criminalization of abortion as discriminatory, as it punishes behavior in which only women can engage.<sup>113</sup> Further, it infringes on the ability of women to decide on the number and spacing of their children under Article 16(1)(e) of CEDAW, as the responsibilities of child rearing affects women's rights to education, employment, and their personal development.<sup>114</sup> The CEDAW and CRC Committees also recommend that punitive measures be withdrawn for women and girls who undergo abortions illegally.<sup>115</sup> They also argue for procedural barriers to legal abortions to be removed, with third party consent requirements to be removed, together with requirements to meet the burden of proof to prove the pregnancy as the result of rape or incest.<sup>116</sup> The CEDAW Committee has stated its concerns about the criminalization of women who are pressured into undergoing sex-selective abortions, as it exposes women to criminal punishment even where they were coerced into undergoing abortions.<sup>117</sup>

The CRC Committee also frames its arguments in terms of the best interests of the child, and the need to protect the ability for girls to make autonomous and informed decisions about their reproductive health.<sup>118</sup> The increased vulnerability of adolescents underpins the Committee's reasoning, as they consider young mothers to be more prone to mental health struggles, and to

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<sup>108</sup> *Mellet v Ireland supra* note 105 at para 7.6

<sup>109</sup> *Id* at para 9.

<sup>110</sup> Fine et al *supra* note 107 at 76.

<sup>111</sup> HRC Concluding Observations on Sri Lanka, 2014, CCPR/C/LKA/CO/5, para 10; CESCR General Comment 14, E/C.12/2000/4 (2000), paras. 12(b), 18, and 19.

<sup>112</sup> *TPF v Peru supra* note 106, para 9.2 and 9.3.

<sup>113</sup> CEDAW General Recommendation 33 (2015), para 51(l).

<sup>114</sup> CEDAW General Recommendation 21 (1994), para 21.

<sup>115</sup> CEDAW General Recommendation 24 (1999), para 31(c); and CRC Concluding Observations on Nicaragua, 2016, CRC/C/NIC/CO/4, para 59(b).

<sup>116</sup> CEDAW Concluding Observations on Democratic Republic of Congo, 2013, CEDAW/C/COD/CO/6-7, para 32(d).

<sup>117</sup> CEDAW Concluding Observations on India, 2007, CEDAW/C/IND/CO/3, para 38 and 39.

<sup>118</sup> CRC General Comment 15 (2013), CRC/C/GC/15, para 56, and CRC General Comment 4 (2003), CRC/GC/2003/4 paras 28, 29, and 35(b).

experience higher rates of morbidity and mortality related to their pregnancies.<sup>119</sup> For these reasons the CRC Committee calls for the full decriminalization of abortions under all circumstances for adolescents.<sup>120</sup>

In its General Comment 22, the CESCR Committee argues that criminalization, partial or full, undermines the right to autonomy, gender equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health.<sup>121</sup> The Committee states that the obligation to respect the right to sexual and reproductive health requires states to refrain from interfering with the exercise of this right, including through the criminalization of abortion, and that the obligation of States to fulfill this right requires that they take steps to the maximum of their available resources to progressively achieve the full realization of the right to sexual and reproductive health.<sup>122</sup> The obligation to protect individuals seeking to exercise their right to sexual and reproductive health is violated when States fail to prevent violence and coercion committed against women seeking abortions, or women forced to undergo pregnancies.<sup>123</sup>

Criminalization, which leads to maternal mortality and morbidity where women must undergo high-risk clandestine abortions, is recognized by the various treaty bodies as a potential violation of the right to life, and can constitute cruel, inhuman, or degrading treatment.<sup>124</sup> Several treaty bodies that comment on abortion recommend that States carve out exceptions to criminalization for rape, incest, fatal or severe fetal abnormality, or when there is a danger to the health or life of the woman.<sup>125</sup>

### *Special Procedures*

The Special Rapporteur on the Right to Health expands on the policy rationales for decriminalizing abortion, and argues that criminalization is a “paradigmatic example of an impermissible barrier to the realization of women’s right to health.”<sup>126</sup> The Special Rapporteur argues that criminalization perpetuates conditions in which unsafe abortion occur—where there is limited access to information on how legal abortions may be obtained; where there is an unskilled provider in unhygienic conditions or outside of appropriate facilities; when induced by the woman

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<sup>119</sup> CRC General Comment 4 *supra* note 119 at para 27.

<sup>120</sup> CRC General Comment 15 *supra* note 119 at para 70, the CRC recommends that States ensure girls access to safe abortion services, irrespective of whether abortion itself is legal; however in several concluding observations, the CRC recommends State parties to decriminalize abortion in all circumstances and review legislation with a view to ensuring adolescents’ access to safe abortion and post-abortion care services, *see* for example, CRC Concluding Observations on Brunei, 2016, CRC/C/BRN/CO/2-3, at para 54.

<sup>121</sup> CESCR General Comment 22 *supra* note 47 at para 34.

<sup>122</sup> *Id.* at para 33.

<sup>123</sup> *Id.* at para 49(d).

<sup>124</sup> *Karen Noelia Llantoy Huaman v Peru supra* note 108, at para 6.6.

<sup>125</sup> Committee Against Torture Concluding Observations on Sierra Leone 2014 -- Clandestine and unsafe abortions, which may account for over 10 per cent of maternal deaths (arts. 2 and 16), take place because of restrictions which criminalize abortion in all circumstances. Need to make exceptions for therapeutic abortion and rape and incest cases. Human Rights Committee Concluding Observations on the United Kingdom (2015) recommends the State party to amend its legislation on abortion in Northern Ireland with a view to providing for additional exceptions to the legal ban on abortion, including in cases of rape, incest and fatal foetal abnormality; the CEDAW Committee Concluding Observations on Solomon Islands (2014) recommending the State party to decriminalize abortion in cases of rape, incest, risk to the health of the mother or severe foetal impairment.

<sup>126</sup> Special Rapporteur on the right to health, Report to the U.N. General Assembly, 2011, A/66/254, para 21.

herself.<sup>127</sup> In a 2011 report, the mandate holder leveraged World Health Organization data that directly correlates the ratio of unsafe to safe abortions to the degree to which abortion laws are restrictive and/or punitive, and noting that unsafe abortions account for 13% of maternal deaths globally, and millions of additional short- and long-term injuries for women and girls.<sup>128</sup> The Special Rapporteur emphasizes the stigmatizing force of criminalization as a reason for reform, arguing that it hinders access to information on legal abortions, is a source of psychological anguish, and perpetuates the notion that it is an immoral practice.<sup>129</sup> The Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur on Violence against Women) has recommended that States explicitly decriminalize abortion in cases of pregnancy due to rape.<sup>130</sup>

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Recommendations for decriminalization of abortion within the UPR system are limited to carving out exceptions for rape, incest, fatal or severe fetal abnormality, and for the health and life of the pregnant woman.<sup>131</sup> Almost all of the States under review did not accept these recommendations, citing constitutional protections of the right to life for the fetus or from the moment of conception, or other societal standards that require fetal life to be protected.<sup>132</sup> Other States under review argued that there was no international consensus on abortion, that they had made a reservation to Article 16 of CEDAW, which recognizes women's rights to decide freely and responsibly on the number and spacing of their children, or that a national consensus on abortion would first have to be built before decriminalization could be considered.<sup>133</sup> Further recommendations have called for the immediate release of women and girls who were in prison for undergoing abortions illegally.<sup>134</sup> States that did not fully reject the recommendations agreed that they would not preclude medical interventions to save the life of the pregnant woman, that they would need to amend their right to life provision under their constitution, or that they were attempting to implement the decriminalization of abortion under limited circumstances.<sup>135</sup>

#### iii. Non-Marital Consensual Sex

Several States criminalize consensual sex outside of marriage through laws that prohibit adultery, pregnancy out of wedlock, or through the application of vaguely worded "moral" offences, and laws that prohibit "debauchery" or that seek to protect "public decency."<sup>136</sup> In some contexts, adultery is criminalized when committed by a woman, but not a man, or offences are drafted in

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<sup>127</sup> *Id.* at para 17 and 26.

<sup>128</sup> *Id.* at para 25.

<sup>129</sup> Special Rapporteur on the right to health, Mission to Algeria, 2017, A/HRC/35/21/Add.1, para 65; Special Rapporteur on the right to health *supra* note 127 at para 36.

<sup>130</sup> Special Rapporteur on violence against women, Mission to Algeria, 2008, A/HRC/7/6/Add.2, para 41.

<sup>131</sup> See, e.g. Nicaragua UPR Working Group Report, Malta (2013), Chile (2014).

<sup>132</sup> UPR Working Group Costa Rica (2014), response para 17, Chile (2014), Andorra (2011).

<sup>133</sup> Chile (2014).

<sup>134</sup> El Salvador (2014).

<sup>135</sup> In 2013, Malta asserted that it would not preclude medical interventions to save the life of the pregnant woman. Andorra asserted that it would need to amend the right to life provision under their constitution. Also in 2013, Colombia asserted that it was attempting to implement the decriminalization of abortion under limited circumstances.

<sup>136</sup> Human Rights Committee Concluding Observation Cote D'Ivoire, 2015, CCPR/C/CIV/CO/1, para 8; Concluding Observations Egypt, 2002, CCPR/CO/76/EGY, at para 19.

gender neutral terms but applied in disproportionately against women.<sup>137</sup> Several mechanisms within the U.N. human rights bodies recommend that consensual sex outside of marriage be decriminalized. They also express concern at the types of punishments imposed for this category of offences, which can include corporal punishment, as well as at the impunity with which retaliatory violence is perpetrated against women who engage in non-marital consensual sex, and the societal effects of criminalization.<sup>138</sup>

### *Treaty Bodies*

The Human Rights Committee has argued that the regulation of private and consensual sexual activity between people who are legally able to consent constitutes arbitrary interference with the right to privacy.<sup>139</sup> Where the law is applied or defined discriminatorily or disproportionately against women, the CEDAW Committee recommends decriminalization in order to guarantee equality between men and women.<sup>140</sup> The Committee has addressed this topic in its General Recommendation 33, calling for the abolishment of discriminatory criminalization that covers forms of conduct that are not punished or punished as harshly if performed by men, and failing to criminalize or act with due diligence to respond to crimes that disproportionately or solely affect women.<sup>141</sup> The Committee recognizes equal protection concerns arising from these laws' effect of deterring from reporting women and girls who are victims of sexual violence, and the consequence of criminalizing women who are exploited through coerced prostitution or trafficking.<sup>142</sup> The impunity which certain laws provide to men and male relatives who commit honor killings against women who have committed adultery is discriminatory against women and therefore constitutes an arbitrary deprivation of life.<sup>143</sup> The CRC Committee has focused its arguments on the discriminatory effect on children born out of wedlock, describing how it may lead to the abandonment or killing of such children, cause the social rejection and stigmatization of single mothers and their children, and result in the statelessness of such children.<sup>144</sup>

### *Special Procedures*

The Special Rapporteur on Extra-Judicial Executions has expressed concern at the severity of punishments for criminalized non-marital sexual relations, such as flogging or stoning which are violations of the right to be free from cruel, inhuman, or degrading treatment, including torture,

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<sup>137</sup> CEDAW Concluding Observation Yemen, 2008, CEDAW/C/YEM/CO/6, at paras 367 ad 368; Special Rapporteur on Freedom of Religion Report to the Economic and Social Council, 2002, E/CN.4/2002/73Add.2, at para 123; CEDAW General Recommendation 33, 2015, CEDAW/C/GC/33, at para 49.

<sup>138</sup> CEDAW Concluding Observation Maldives, 2015, CEDAW/C/MDV/CO/4-5, at para 44; Concluding Observation Yemen *supra* note 138.

<sup>139</sup> Human Rights Committee Concluding Observations Egypt *supra* note 137.

<sup>140</sup> CEDAW Concluding Observations Libya 2009, CEDAW/C/LBY/CO/5, CEDAW Concluding Observations Maldives *supra* note 139; Human Rights Committee Concluding Observations Cote D'Ivoire 2015

<sup>141</sup> CEDAW General Recommendation 33, at paras 47(a)-(c).

<sup>142</sup> On the deterrence of victims from reporting CEDAW Concluding Observations Maldives *supra* note 139; Special Rapporteur on right to health, Mission to Algeria *supra* note 130; On the consequence of criminalizing women who are coerced into prostitution or are trafficked CEDAW Concluding Observations United Arab Emirates, 2015, CEDAW/C/ARE/CO/2-3, at para 29.

<sup>143</sup> CEDAW Concluding Observation Yemen *supra* note 138.

<sup>144</sup> CRC Concluding Observation United Arab Emirates, 2015, CRC/C/ARE/CO/2, at paras 34, 35, and 36; CRC Concluding Observations Morocco, 2014, CRC/C/MAR/CO/3-4, at paras 30, 32, 33; CRC Concluding Observations Iraq, 2015, CRC/C/IRQ/CO/2-4, at 31.

and where the death penalty is imposed, a violation of the right to life.<sup>145</sup> The Special Rapporteur on Violence Against Women has reported on the collateral consequences of criminalizing non-marital consensual sex for victims of rape, as women in most cases are unable to meet the evidentiary burden for rape and consequently convicted.<sup>146</sup> This has an obvious chilling effect on reporting rape. Where women are convicted for non-marital sex under morality offences, prosecutions are combined with offences such as running away from home without permission, or theft.<sup>147</sup>

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This topic has only been dealt with in limited exchanges within the UPR system. Recommendations included repealing laws that criminalize non-marital consensual sex, or to otherwise remove and cease application of corporal punishment and death penalty provisions in such cases.<sup>148</sup> States under review did not accept these recommendations.<sup>149</sup>

#### iv. Sex Work

Various entities within the U.N. human rights mechanisms recommend the decriminalization of sex work to some degree.<sup>150</sup> Uneven approaches reflect the nature of ongoing debates within the human rights community, as well as divergent positions held by prostitution abolitionists and sex work decriminalization advocates.<sup>151</sup> Briefly, abolitionists argue that sex work is inextricably linked to trafficking in persons fueled by the demand for prostitution, necessitating the criminalization of solicitation and procurement, or at least procurement alone.<sup>152</sup> Decriminalization advocates make a categorical distinction between individuals who enter the sex work industry by choice and those who are forced into prostitution as victims of trafficking. They also argue for sex worker access to labor rights and protections.<sup>153</sup> Others may view the jury to still be out on the question of sex work decriminalization and instead seek to shift attention to the prevention of sex work and sex trafficking by addressing their “structural root causes.”<sup>154</sup>

U.N. human rights bodies’ recommendations to decriminalize sex work are sometimes vague, referencing simply “sex work” without describing in detail what aspects should be decriminalized, i.e. solicitation, procurement, operating brothels, or otherwise facilitating transactions for sex

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<sup>145</sup> Special Rapporteur on extrajudicial executions, Report to Human Rights Council, 2017, A/HRC/35/23 at para 42.

<sup>146</sup> Special Rapporteur on violence against women, Report to the Human Rights Commission, 2013, AHRC/23/49, at para 53; Special Rapporteur on violence against women, Report to U.N. General Assembly on pathways to, conditions and consequences of incarceration for women, A/68/340, at para 16.

<sup>147</sup> *Id.* at paras 19 and 20.

<sup>148</sup> UPR Pakistan (2008, 2012), Maldives (2015).

<sup>149</sup> *Id.*

<sup>150</sup> See, e.g. CEDAW and the Special Rapporteur on the Right to Health clearly call for the decriminalization of prostitution in 2007, unaccompanied by regulatory measures, and the existence of illegal “strip clubs,” may increase trafficking and exploitation of prostitution.”

<sup>151</sup> Special Rapporteur on trafficking in persons, especially women and children, Report to U.N. General Assembly, 2010, A/65/288, at paras 34-38.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

work.<sup>155</sup> Some recommendations specifically call for the decriminalization of solicitation while maintaining criminalization of procurement.<sup>156</sup> This approach is also known as demand side criminalization or “the Swedish Model,” named such as this model is applied domestically in Sweden.<sup>157</sup> The majority of recommendations within the U.N. human rights bodies have been issued through the CEDAW Committee and the Special Rapporteur on the Right to Health.<sup>158</sup>

### *Treaty Bodies*

The CEDAW Committee appears to be the only treaty body directly commenting on the topic of decriminalizing sex work, although several treaty bodies make recommendations with regard to the protection and decriminalization of victims of sex trafficking.<sup>159</sup> While sex work is absent from treaty texts, the Committee has emphasized sex workers’ vulnerability to violence and police harassment and ill-treatment due to the marginalization and criminalization of sex workers and has urged States to provide sex workers with equal protection against human rights abuses.<sup>160</sup> Its approach to the issue varies across the States under its consideration and has evolved over time. In 2001 it expressed concern about Sweden’s criminalization of the purchase of sexual services, due to its anxieties that it might increase clandestine sex work and thereby make individuals engaged in sex work more vulnerable to abuse, or result in Sweden becoming a destination for trafficked women.<sup>161</sup> In 2003, after New Zealand decriminalized sex work, the Committee expressed concern that sex workers continued to face risks of exploitation and violence, and urged the provision of training and education to allow individuals to exit the sex industry.<sup>162</sup> So too in 2008, it expressed concern about decriminalization of sex work unaccompanied by regulatory measures as potentially fueling trafficking and exploitation of sex workers.<sup>163</sup> From 2010 the Committee began to explicitly recommend decriminalization of sex work, linking violence and vulnerability to torture and ill-treatment to criminal prohibition. The Committee also urges a “comprehensive approach” which includes decriminalization coupled with exit programs for women who want to leave sex work, as well as measures to reduce demand for sex work and to address the root causes fueling

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<sup>155</sup> Special Rapporteur on right to health *supra* note 89, at para 76, The Special Rapporteur called upon States to repeal all laws criminalizing sex work and practices around it, and to establish appropriate regulatory frameworks within which sex workers can enjoy the safe working conditions to which they are entitled.

<sup>156</sup> Special Rapporteur on trafficking in persons *supra* note 152 at para 35.

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g. CEDAW Concluding Observations for Qatar, 2014, CEDAW/C/QAT/CO/1, at paras 25 and 26; CEDAW Concluding Observations for Brunei, 2014, CEDAW/C/BRN/CO/1-2, at paras 24 and 25; CEDAW Concluding Observations for Mauritania, 2014, CEDAW/C/MRT/CO/2-3, at paras 28; Special Rapporteur on right to health *supra* note 89, at para 76.

<sup>159</sup> Other treaty bodies do, however, discuss and make recommendation pertaining to human rights abuses stemming from sex work, forced prostitution, or victims of sex trafficking. These will be dealt with in later sections. That CEDAW stands alone in this regard is noted by MR Decker et al., *Human rights violations against sex workers: burdens and effect on HIV*, 385 THE LANCET 186–199 (2015), at p2.

<sup>160</sup> CEDAW Concluding Observations Tajikistan 2013, CEDAW/C/TJK/CO/4-5 at paras 19-20; CEDAW Concluding Observations Fiji 2010, CEDAW/C/FJI/CO/4, at paras 24-25.

<sup>161</sup> CEDAW Concluding Observations Sweden 2001, CEDAW/C/SR.510 and 511, at paras 354-355.

<sup>162</sup> CEDAW Concluding Observations New Zealand 2003, in CEDAW Report to the U.N. General Assembly 2003 A/58/38; paras 413-414.

<sup>163</sup> CEDAW Concluding Observations Iceland 2008, CEDAW/C/ICE/CO/6, at paras 224-225.

the industry.<sup>164</sup> In its General Recommendation 33, the CEDAW Committee also notes criminalization of sex work as a factor hindering women's access to justice.<sup>165</sup>

In response to the criminalization of children involved in sex work, the CRC Committee has recommended that safe harbor laws be passed to protect children in prostitution from prosecution.<sup>166</sup> Likewise, the CESCR Committee has recommended that legislation on child sexual exploitation be reviewed to avoid criminalizing children in prostitution.<sup>167</sup>

### *Special Procedures*

The Special Rapporteur on the Right to Health has explicitly recommended that sex work be decriminalized.<sup>168</sup> His arguments rest on the rights to health and non-discrimination. He argues that criminalization perpetuates discrimination, stigma, and violence against sex workers and is a barrier to the access and delivery of health care services, contributing to poor health outcomes, particularly for HIV/AIDS.<sup>169</sup> Punitive measures against sex workers undermine health promoting activities, as it drives populations underground or to unsafe areas and diminishes the bargaining power of sex workers to negotiate safer sex practices.<sup>170</sup> He asserts that laws that criminalize or onerously regulate sex work have adverse health outcomes due to the compounding stigma, and are enacted "without justification on the grounds of public health."<sup>171</sup> He also argues that criminalization excludes sex work from the purview of occupational health and safety regulations, which leave sex workers without access to protection.<sup>172</sup>

While avoiding the specific question of decriminalization, different mandate holders of the Special Rapporteur on Violence Against Women have commented on human rights concerns surrounding sex work. In a 2000 report, the mandate holder argued that anti-trafficking frameworks do not prohibit sex work per se, but seek to target and punish third party involvement without also prohibiting States from prosecuting sex workers.<sup>173</sup> She argued for governments to address trafficking in a manner that does not further marginalize, criminalize, or stigmatize women.<sup>174</sup> In 2014, responding to reports about physical attacks, harassment, forced detention and rehabilitation, and lack of legal protection for sex workers, the mandate holder recommended that a State party's anti-trafficking laws be reviewed to protect the human rights of sex workers.<sup>175</sup>

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<sup>164</sup> CEDAW Concluding Observations Fiji *supra* note 161; CEDAW Concluding Observations Italy 2011, CEDAW/C/ITA/CO/6, at paras 28-31; CEDAW Concluding Observations Tajikistan *supra* note 161; CEDAW Concluding Observations Qatar 2014, CEDAW/C/QAT/CO/1, at paras 25-26; CEDAW Concluding Observations Brunei *supra* note 159; CEDAW Concluding Observations Mauritania *supra* note 159; CEDAW Concluding Observations Iraq 2014, CEDAW/C/IRQ/CO/4-6 at paras 31-32; CEDAW Concluding Observations Cameroon 2014, CEDAW/C/CMR/CO/4-5, at paras 20-21.

<sup>165</sup> CEDAW General Comment 33 (2015), CEDAW/C/GC/33, para 9.

<sup>166</sup> CRC Concluding Observations, United States, 2013, CRC/C/OPSC/USA/CO/2, at para 34(b) and (c).

<sup>167</sup> CESCR Concluding Observations Sri Lanka, 2010, E/C.12/LKA/CO/2-4, at para 27.

<sup>168</sup> Special Rapporteur on right to health *supra* note 89, para 76.

<sup>169</sup> Special Rapporteur right to health Mission to Ghana 2012, A/HRC/20/15/Add.1, at para 21.

<sup>170</sup> Special Rapporteur right to health *supra* note 89, para 51.

<sup>171</sup> *Id.* at para 39.

<sup>172</sup> *Id.* at para 27.

<sup>173</sup> Special Rapporteur on violence against women, Report to Commission on Human Rights 2000, E/CN.4/2000/68, para 24.

<sup>174</sup> *Id.*

<sup>175</sup> Special Rapporteur on violence against women Mission to India 2014, A/HRC/26/38/Add.1, para 78(e).



The approach of the Special Rapporteur on trafficking in persons, especially women and children (Special Rapporteur on Trafficking) on this topic has evolved over the past decade. In 2006, the mandate holder encouraged criminalization of sex work to give “expressive condemnation” and discourage prostitution as harmful conduct, while emphasizing that criminal sanctions should not penalize trafficked women and children.<sup>176</sup> Four years later in 2010, the new mandate holder adopted a more agnostic stance toward decriminalization.<sup>177</sup> She noted that the evidence from Sweden’s experience was not persuasive on the impact of criminalizing purchase on reducing trafficking, and that there was no conclusive link between the legalization or criminalization of sex work and the existence of trafficking for sexual exploitation.<sup>178</sup> She did find persuasive evidence that the absence of labor rights protections enables the exploitation of sex workers.<sup>179</sup> She urged interventions aimed at tackling the root causes of trafficking, such as increasing opportunities for safe migration, while respecting the rights of trafficked persons.<sup>180</sup>

The Special Rapporteur on the Sale of Children has argued that the criminalization of sex work makes it difficult for social and health services to reach children who are being sexually exploited, as they fear criminal sanctions.<sup>181</sup> Even where they are not prosecuted, children may be placed in “protective custody” to keep them available for prosecution of the clients or their traffickers, where they may remain for long periods of time, or be deported to their countries of origin.<sup>182</sup> The Special Rapporteur has also argued that age of consent laws need to be clarified, and that they should not be used to prosecute children who are sexually exploited.<sup>183</sup>

### *Universal Periodic Review*

The States making recommendations under the UPR process have not explicitly recommended the decriminalization of sex work, although some States have noted sex workers’ vulnerabilities to human rights abuses.<sup>184</sup>

#### v. HIV Transmission, Exposure, and Non-Disclosure

This section describes recommendations to decriminalize exposing individuals to HIV, non-disclosure of ones’ HIV status, and the transmission of HIV. Prosecutions under HIV-specific criminal statutes have formed part of State responses to the HIV epidemic since the late 1980s.<sup>185</sup> While these laws primarily focus on sexual transmission, they are applied to other situations, such as peri- and post-natal transmission from mother to child, biting, spitting and other “body fluid

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<sup>176</sup> Special Rapporteur on the human rights aspects of the victims of trafficking, Report to the Commission on Human Rights 2006, E/CN.4/2006/62, para 25.

<sup>177</sup> Special Rapporteur on trafficking in persons *supra* note 152, para 36

<sup>178</sup> *Id.* at para 35.

<sup>179</sup> *Id.* at para 36 and 38.

<sup>180</sup> *Id.* at para 38 and 39.

<sup>181</sup> *Id.*

<sup>182</sup> Special Rapporteur on the sale of children Mission to United States, 2011, A/HRC/16/57/Add.5 at para 102; Special Rapporteur on the sale of children Report to Commission on Human Rights 2003, E/CN.4/2003/79, at para 14.

<sup>183</sup> Special Rapporteur on the sale of children *supra* note 183, the age of consent and age of criminality are considered throughout the report across States.

<sup>184</sup> UPR review U.S. recommendation 86 from Uruguay.

<sup>185</sup> UNAIDS, CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: BACKGROUND AND CURRENT LANDSCAPE (2012), at p5.

assault,” consensual sharing of drug-injecting equipment, and blood donation.<sup>186</sup> As of 2014, such laws were present in approximately 42 countries.<sup>187</sup> The World Health Organization (WHO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), and the Office of the U.N. High Commissioner on Human Rights (OHCHR) have issued guidance, calling for the elimination of criminal statutes defining HIV-specific offences, but there has been relatively limited consideration of the topic by the U.N. human rights bodies.<sup>188</sup> The recommendations that do exist urge the decriminalization of HIV offences where the *mens rea* requirement is less than intentional or malicious, as well as the decriminalization of peri- and post-natal transmission of HIV.<sup>189</sup> Other recommendations are to remove HIV-specific offences from the criminal law entirely, and to instead use pre-existing criminal laws, such as those that prohibit assault and the deliberate spread of disease.<sup>190</sup>

### *Treaty Bodies*

Treaty body engagement with the topic of decriminalization of HIV offences have only appeared since 2016. In its Concluding Observations, the CEDAW Committee denounced the application of criminal sanctions to women who failed to disclose their HIV status to sexual partners where the transmission was not intentional, where there was no transmission, or where the risk of transmission was minimal.<sup>191</sup> It recommended that prosecutions be limited to cases of intentional transmission only.<sup>192</sup> In its General Comment 22 on sexual and reproductive health, the CESCR Committee has explicitly urged the reform of laws that impede the exercise of sexual and reproductive health, including laws that criminalize non-disclosure of HIV status, and the exposure to and transmission of HIV.<sup>193</sup>

### *Special Procedures*

This research identified the Special Rapporteur on the Right to Health as the only independent expert within the U.N. human rights bodies to recommend the decriminalization of HIV offences. This recommendation is based on the rights to non-discrimination and health.<sup>194</sup> He argues that there is evidence of disproportionate severity in sentencing of people convicted of “HIV crimes,” which are often highly publicized. The increased stigma that criminalization causes, he argues, contributes to discrimination, and increases the risk of violence directed to HIV-positive people. The few cases that are prosecuted mostly involve defendants in vulnerable social and economic positions.<sup>195</sup> Women are particularly impacted, as they are more likely to access health services and know their HIV status, and as a result, they’re blamed for introducing HIV into relationships

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<sup>186</sup> *Id.* at 14-15

<sup>187</sup> UNAIDS, THE GAP REPORT (2014), at p.13.

<sup>188</sup> WHO, UNAIDS & UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS (2006); UNAIDS, *supra* note 186.; UNAIDS, UNDP, CRIMINALIZATION OF HIV TRANSMISSION (2008).

<sup>189</sup> Special Rapporteur on right to health *supra* note 89 at para 74; Report of Special Rapporteur on right to health *supra* note 127 at paras 40-43.

<sup>190</sup> Special Rapporteur on right to health *supra* note 89 at para 75; Special Rapporteur on right to health *supra* note 127, at para 43.

<sup>191</sup> CEDAW Concluding Observations Canada, 2016, CEDAW/C/CAN/CO/8-9 at paras 42 and 43.

<sup>192</sup> *Id.*

<sup>193</sup> CESCR General Comment 22 *supra* note 47 at para 40.

<sup>194</sup> Special Rapporteur on right to health *supra* note 89, at paras 67-69.

<sup>195</sup> *Id.* at 64.

and communities.<sup>196</sup> Concerning non-disclosure offences, women have more difficulty negotiating safer sex or disclosing for fear of violence, abandonment, or other consequences, making them more vulnerable to prosecution.<sup>197</sup> Peri-natal or post-natal transmission of HIV is criminalized in one State where the woman knows her HIV status and fails to take all reasonable measures and precautions to prevent transmission.<sup>198</sup> However, not all women are able to access prevention services in high prevalence areas such as sub-Saharan Africa, which potentially exposes them to criminal liability.<sup>199</sup> Further, the Special Rapporteur argues that the evidence indicates that criminalization is ineffective in moderating HIV risk behaviors, as most people living with HIV are unaware of their status, and criminalization further discourages testing.<sup>200</sup> It also undermines trust with health professionals and researchers, as people with HIV fear that information regarding their status will be used against them.<sup>201</sup>

### *Universal Periodic Review*

This research identified no UPR recommendations pertaining to the decriminalization of HIV non-disclosure, transmission, or exposure.

#### ***b. Religion, Thought, and Conscience***

This category includes criminal prohibitions that restrict the freedom of religion, thought, and conscience. This includes religious offences, such as criminalization of conduct or beliefs that do not conform with majority or official State religions, claims of religious superiority, and conscientious objection to military service. This section also covers criminal prohibitions of witchcraft.

##### ***i. Proselytism, Blasphemy, and Apostasy***

This section examines the criminalization of proselytism, missionary activities, unethical conversions, blasphemy or insult of religion, apostasy, heresy, as well as laws that prohibit the “disruption of public order” or require people to “protect and safeguard religious unity and harmony.”<sup>202</sup> While dozens of States in all regions of the world have criminal restrictions on the free practice of religion, blasphemy laws are the most common form of restriction across regions.<sup>203</sup> Proselytism is also criminalized under the auspices of many religions, whereas apostasy laws exist primarily in certain Muslim-majority countries in the Middle East and North Africa.<sup>204</sup>

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<sup>196</sup> *Id.* at 89-95.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 67.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 86.

<sup>201</sup> *Id.*

<sup>202</sup> Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, *BYU LAW REV.*, at p255 notes that proselytism is “...expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another.”; see also Anh Nga Longya, *The Apostasy Law in the Age of Universal Human Rights and Citizenship: Some legal and political implications*, in *THE MIDDLE EAST IN A GLOBALIZING WORLD* (1998).

<sup>203</sup> ANGELINA E. THEODOROUR, WHICH COUNTRIES STILL OUTLAW APOSTASY AND BLASPHEMY? (2016).

<sup>204</sup> *Id.* Special Rapporteur on Freedom of Religion Report to HRC 2016 A/71/269

The freedom of religion, thought, and conscience is recognized in the Universal Declaration of Human Rights, and the ICCPR and has been reaffirmed by the U.N. General Assembly in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>205</sup> Every year since 2011, the U.N. Human Rights Council has adopted a resolution on “combating intolerance, negative stereotyping and stigmatization of and discrimination, incitement to violence, and violence against persons based on religion or belief,” which calls on states to promote the ability of members of all religious communities to manifest their religion.<sup>206</sup> These texts recognize the freedom to have or adopt religion or beliefs and the freedom to manifest religion or belief in worship, observance, practice, and teaching.<sup>207</sup> They protect individuals from coercion to have or adopt beliefs or religion, and permit limitations on these freedoms only by law to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>208</sup> They further prohibit discrimination based on religion or belief.<sup>209</sup> Often, criminal restrictions on religion exist where there is a State religion or where the majority of a population adheres to one religion—for these reasons the freedom of religion overlaps with human rights concerns for minority groups.

### *Treaty Bodies*

The Human Rights Committee has articulated the clear incompatibility of criminalizing proselytism, blasphemy, and apostasy with the freedom of religion, thought, and conscience. In its General Comments 11 and 34, it has argued that prohibitions of lack of respect for a religion or belief system are impermissible, except where they constitute advocacy of religious hatred as incitement to discrimination, hostility, or violence.<sup>210</sup> Laws on religious practice, opinion, or expression are required to adhere to protections for the freedom of expression, the right to privacy, and the right to equality and non-discrimination, which make it impermissible for them to “discriminate in favor of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers.”<sup>211</sup> Where there is a state religion or majority religion, laws also cannot infringe on the rights of religious and other minorities to profess and practice their own religion or belief systems.<sup>212</sup> The Committee argues that criminalization is a source of coercion that impairs the right to replace or retain one’s religion or belief, or to adopt atheistic views.<sup>213</sup> It has clarified that where limitations are imposed, they are required to be directly related and proportional to the specific need on which they’re predicated, and cannot be

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<sup>205</sup> U.N. General Assembly Resolution on Declaration on the Elimination of All Forms of Intolerance or Discrimination Based on Religion or Belief, A/RES/36/55, (1981).

<sup>206</sup> Resolution adopted by the Human Rights Council 16/18 Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, A/HRC/RES/16/18.

<sup>207</sup> ICCPR Article 18(1).

<sup>208</sup> *Id.* Article 18(2) and (3).

<sup>209</sup> *Id.* Article 2, 26.

<sup>210</sup> Human Rights Committee General Comment 34, 2011, CCPR/C/GC/34, at para 48; see also General Comment 11, CCPR/C/GC/11, at para 2.

<sup>211</sup> Human Rights Committee General Comment 34 *supra* note 211 at para 48, notes that it is also impermissible to use these laws to “prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”

<sup>212</sup> Human Rights Committee General Comment 22 *supra* note 61 at para 9.

<sup>213</sup> *Id.* at para 5, noting that criminalization and the use of threat of physical force are coercive where they compel conversion or adherence to a religion or belief, or the recantation of religion or belief.

imposed or practiced in a discriminatory manner.<sup>214</sup> It has also clarified that national security is not a justifiable reason to limit the freedom to manifest one's religion or beliefs.<sup>215</sup> And while morality is recognized as a permissible ground on which to limit freedom of religion, such restrictions cannot rely solely upon a single tradition.<sup>216</sup> The Committee has affirmed these interpretations in a number of its Concluding Observations in which it has recommended the decriminalization of proselytism and blasphemy.<sup>217</sup> Criticisms of States also extend to their imposition of rules and conditions for the practice of religions through registered structures, which are vaguely worded and enforced through the criminal law.<sup>218</sup>

### *Special Procedures*

Special Rapporteurs on the freedom of religion, in the field of cultural rights, and the freedom of assembly have addressed criminal restrictions on religion and belief in their country mission and thematic reports. On proselytism, the Special Rapporteur has argued that missionary activity is inherent in, and a legitimate expression of religion, so long as the parties are adults able to reason on their own, and there is no relation of dependency or hierarchy between the missionaries and the objects of their activities.<sup>219</sup> The Special Rapporteur on Freedom of Religion or Belief has considered the teaching of religion or belief to be integral to the basic affairs of religious groups, such as the establishment of seminaries and the production and distribution of religious texts.<sup>220</sup> As such, the mandate holder has recommended against the criminalization *in abstracto* of “unethical conversions” —conversions made by promising material benefit or taking advantage of a person in a vulnerable situation—and urged the consideration of criminality of such conversions on a case-by-case basis and only at the behest of a victim.<sup>221</sup>

The Special Rapporteur on Freedom of Religion has raised the close nexus between criminal restrictions on religion and infringements on freedom of expression, as “the possibility of becoming an object of communication... constitutes an indispensable part of freedom of religion or belief.”<sup>222</sup> States may inappropriately apply vaguely worded hate speech laws to speech that may be deemed offensive by some believers of dominant religions, and the Special Rapporteur recommends that States craft and interpret their criminal laws to make a careful distinction between expression that incites religious hatred and expressions of opinion that are protected under Article 19.<sup>223</sup> Threats of punishment where criminal restrictions exist also have a “chilling effect on communicative outreach activities,” or result in censorship, bans, and the confiscation and

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<sup>214</sup> *Id.* at para 8.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Human Rights Committee Concluding Observation on Algeria 2007, Concluding Observation on Uzbekistan 2010 and 2015, Concluding Observations on Armenia 2012.

<sup>218</sup> Human Rights Committee Concluding Observation on Algeria 2007, Concluding Observation on Uzbekistan 2015

<sup>219</sup> Special Rapporteur on Religion, A/51/542/Add.1 Country Mission to Greece 1996.

<sup>220</sup> Special Rapporteur on Religion, E/CN.4/2006/5/Add.3 Country Mission to Sri Lanka 2005, and A/HRC/6/5 Report to Human Rights Council 2007.

<sup>221</sup> Special Rapporteur on Religion, E/CN.4/2006/5/Add.3 Country Mission to Sri Lanka 2005.

<sup>222</sup> Special Rapporteur on Religion Report to HRC 2015.

<sup>223</sup> Special Rapporteur on Religion A/HRC/13/40/Add.2 Macedonia 2009 at para 60, and A/HRC/10/31/Add.3, at para 24.

destruction of religious literature.<sup>224</sup> A distinction is also drawn between laws that criminalize claims of racial or ethnic superiority and claims of religious superiority. Where criminalization of the former is called for under the Convention on the Elimination of All Forms of Racial Discrimination, the latter would amount to “the end of any free communication concerning religious and belief-related issues” as it would restrict theological analysis, academic studies of religion, and missionary and da’wah activities.<sup>225</sup> Furthermore, the criminalization of apostasy and expressions of an atheistic nature also create an unsafe environment for people in the arts and their audience.<sup>226</sup> And the freedom of religion and belief is also argued to be a precondition for exercise of the rights of peaceful assembly and association, which allows like-minded people to express themselves collectively.<sup>227</sup>

The Special Rapporteur on Freedom of Religion has also argued for decriminalization based on the discriminatory intent and application of criminal restrictions.<sup>228</sup> Some States afford a specific religion a ‘foremost’ place under the law, which can lead to rights abuses where laws obligate people to safeguard religious unity, or limit the manner in which religious minorities manifest their religions.<sup>229</sup> Religious minorities are exposed to social pressure, public contempt, and systematic discrimination, and the threat of imprisonment or capital punishment, which can create insurmountable obstacles to living in conformity with their convictions.<sup>230</sup> Criminal restrictions can also ‘cast a shadow’ on converted people as objects of manipulation, and as such are also a source of stigmatization.<sup>231</sup> Under apostasy laws, humanists and atheists are at particular risk of persecution and are often killed with impunity.<sup>232</sup>

### *Universal Periodic Review*

To date, there are limited instances where States have recommended the decriminalization of religious offences. Where made, recommendations to decriminalize proselytism, blasphemy, apostasy, or to restrict the practice of non-registered religious groups have not been accepted.<sup>233</sup> In one instance, the recommendation to decriminalize apostasy was countered with the explanation that it is a norm that is governed by uncodified Shariah Law, not under existing criminal law.<sup>234</sup>

#### ii. Witchcraft

Criminal restrictions on religious and spiritual practice also bear on the practice of “witchcraft” — a concept which is difficult to define across cultures, but can include an array of traditional or faith healing practices, or occult or mystical practices.<sup>235</sup> Practicing witchcraft is a criminal offence in

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<sup>224</sup> Special Rapporteur on Religion A/67/303 Report to Human Rights Council 2012; Special Rapporteur on Religion A/62/280 Report to UNGA 2007.

<sup>225</sup> CERD Article 4; Special Rapporteur on Religion Report to Human Rights Council 2015.

<sup>226</sup> Special Rapporteur on Field of Cultural Rights A/HRC/34/56 Report to HRC 2017.

<sup>227</sup> Special Rapporteur on Freedom of Peaceful Assembly A/HRC/32/36 Report to Human Rights Council 2016.

<sup>228</sup> Special Rapporteur Religion A/HRC/34/50 Report to Human Rights Council 2017 para 39.

<sup>229</sup> Special Rapporteur on the Freedom of Religion Mission to Maldives at para 36.

<sup>230</sup> Special Rapporteur Religion A/67/303 Report to Human Rights Council 2012.

<sup>231</sup> Special Rapporteur Religion A/71/269 Report to Human Rights Council 2016.

<sup>232</sup> Special Rapporteur Religion A/HRC/34/50 Report to Human Rights Council 2017.

<sup>233</sup> UPR Working Group Uzbekistan 2013, Greece 2016, Sudan 2011, Comoros.

<sup>234</sup> Maldives 2011, 100.100

<sup>235</sup> Special Rapporteur Extrajudicial Killing Report to Human Rights Council 2009 A/HRC/11/2, at para 43.

many African countries, while violence against women and children accused of witchcraft is also reported in India and Nepal.<sup>236</sup> Some countries ban only the practice of witchcraft while others criminalize falsely representing oneself as a witch, or engaging in witch-finding.<sup>237</sup> Other laws criminalize “groundless” accusations of witchcraft, or only criminalize witchcraft that causes harm to others—an approach which recognizes witchcraft as a practice and belief system that can be used with either harmful or beneficent intentions.<sup>238</sup>

The Human Rights Committee has considered rights abuses stemming from accusations of witchcraft.<sup>239</sup> The CEDAW Committee has noted that popular justice against women accused of witchcraft results in violence and the violation of the right to life, and they have urged the repeal of any provisions criminalizing witchcraft that are discriminatory to women.<sup>240</sup> The Committee has considered the practice of witch-hunting, which it characterized as an extreme form of violence against women.<sup>241</sup> The Special Rapporteur on Violence against Women considered this topic in a country mission report, and urged the State to criminalize acts of undue accusations of persons of causing harm through the use of supernatural powers.<sup>242</sup> The Special Rapporteur on Extrajudicial Executions has discussed how laws proscribing witchcraft tend to be vaguely defined, lending themselves to abuse, for example, by individuals who might make accusations against persons who are the objects of their enmity.<sup>243</sup> The Special Rapporteur has also noted that vigilante justice against accused witches, who are often persecuted or killed through mob violence, is a practice which disproportionately affects women and children.<sup>244</sup> In cases where accused witches are killed, the Special Rapporteur notes that some laws permit defendants to invoke witchcraft as an extenuating circumstance that warrants a lesser sentence.<sup>245</sup>

### iii. Conscientious Objection to Military Service

Conscientious objection to military service refers to the refusal to perform military service on the

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<sup>236</sup> *Id.* at para 49(c).

<sup>237</sup> ALEKSANDRA CIMPRIC, CHILDREN ACCUSED OF WITCHCRAFT: AN ANTHROPOLOGICAL STUDY OF CONTEMPORARY PRACTICES IN AFRICA (2010), at 39, as cited in CA Mgbako & K Glenn, *Witchcraft Accusations and Human Rights: Case Studies from Malawi*, 43 GEORGE WASH. INT. LAW REV. 389–417 (2011), at p396. The practice of witchcraft is banned in the former French colonies of Benin, Cameroon, Chad Cote d’Ivoire, Gabon, Mali, Mauritania have such laws. Falsely representing oneself as a witch, or engaging in witch-finding are prohibited in former British colonies in Kenya, South Africa, Uganda, Tanzania, and Zimbabwe; Witchcraft Suppression Act 3 of 1957, s.1(iii) defines witch-finding is employing or soliciting someone with occult powers to name or identify a witch or a wizard.

<sup>238</sup> As occurs in Zimbabwe, see Criminal Law (Codification and Reform) Act 9:23 of 2004 sections 97-102 (Zim), as cited in Mgbako and Glenn, *supra* note 238 at p396.

<sup>239</sup> Human Rights Committee Concluding Observations Ghana 2016 CCPR/C/GHA/CO/1, at para 17, “The Committee is concerned about the persistence of certain harmful practices, notwithstanding their prohibition by law, such as female genital mutilation, trokosi (ritual servitude), forced early marriage and witchcraft accusations leading to confinement in witch camps.”

<sup>240</sup> CEDAW Concluding Observations on the Central African Republic, 2014. Paras 25 and 26(d). CEDAW/C/CAF/CO/1-5.

<sup>241</sup> CEDAW Concluding Observations on India, CEDAW/C/IND/CO/3

<sup>242</sup> Special Rapporteur on violence against women, Mission to Ghana A/HRC/7/6/Add.3, para. 93.

<sup>243</sup> Special Rapporteur on Extrajudicial Killings Report to HRC 2009 A/HRC/11/2, at para 55.

<sup>244</sup> *Id.* at 43.

<sup>245</sup> *Id.* at 56.

grounds of freedom of thought, conscience, or religion.<sup>246</sup> It is primarily criminalized in States where there is mandatory military service or a conflict-triggered policy of conscription into the military.<sup>247</sup>

### *Treaty Bodies*

In its General Comment 22, the Human Rights Committee stated that compelling someone to use lethal force, where it would seriously conflict with the requirements of their conscience or religious belief, would violate Article 18's requirement to provide freedom of religion, thought, and conscience.<sup>248</sup> The Committee has developed its jurisprudence on this topic in numerous individual communications and Concluding Observations. In the 2004 case *Yoon v Republic of Korea*, the Committee observed that the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with Article 18 paragraph 3 against being forced to act against genuinely-held religious belief.<sup>249</sup> Article 18 also requires restrictions to be prescribed by law and be necessary to protect public safety, order, health, morals, or the fundamental freedom of others. The Committee in *Yoon* rejected the State party's argument that criminalizing refusal of military service was necessary for public safety to maintain the State party's national defensive capacities, and to preserve social cohesion, by noting the increasing number of State parties that retain compulsory military service while offering alternative forms of service.<sup>250</sup> It also argued that respect for conscientious beliefs and manifestations thereof are important for ensuring cohesive and stable pluralism in society, and therefore do not erode social cohesion.<sup>251</sup> *Yoon* also recognized that alternatives to compulsory military service can render equivalent social good and make comparable demands on the individual, eliminating unfair disparities between those undertaking military and alternative services.<sup>252</sup>

In the 2011 communication *Jeong et al v the Republic of Korea*, the Committee attributed the right of conscientious objectors to refuse military service as deriving from the right to freedom of conscience—as opposed to the freedom to manifest religion or belief—and did not examine arguments based on necessity, as occurred in *Yoon*.<sup>253</sup> The Committee also set out the requirements for compulsory civilian service under the ICCPR.<sup>254</sup> It stated that alternative service cannot be of a punitive nature and must be a real service to the community and in compliance with respect for human rights.<sup>255</sup> The Committee later reaffirmed the reasoning in *Jeong* in *Atastoy v Turkey*.<sup>256</sup>

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<sup>246</sup> U.N. High Commissioner for Human Rights, *Conscientious Objection to Military Service*, A/HRC/35/4 2017, para 1.

<sup>247</sup> U.N. High Commissioner for Human Rights, *Conscientious Objection to Military Service*, HR/PUB/12/1, 2012, at para 2.

<sup>248</sup> Human Rights Committee General Comment 22 *supra* note 61.

<sup>249</sup> Human Rights Committee, *Yoon v Republic of Korea*, CCPR/C/88/D/1321-1322/2004, para 8.3.

<sup>250</sup> ICCPR Article 18(3); *Yoon v Republic of Korea supra* note 250 at para 8.4.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> In a concurring opinion, Committee members argued that the reasoning should not have derived from the right to freedom of conscience, but rather the freedom to manifest religion or belief. *Id.* at 7.2.

<sup>254</sup> *Id.* para. 7.3, and again in *Atastoy v Turkey* para 10.4.

<sup>255</sup> *Yoon v Republic of Korea supra* note 250 at para 8.3.

<sup>256</sup> Human Rights Committee, *Atastoy v Turkey*, CCPR/C/104/D/1853-1854/2008 para 10.4, in a concurring opinion once more Committee members asserted once more that the holding should have derived from the restriction on



The Committee has also argued that laws are discriminatory where they differentiate among conscientious objectors on the basis of the nature of their particular beliefs, or where there is discrimination against conscientious objectors for having refused to perform military service.<sup>257</sup> The Committee has recommended that the criminal records of those convicted for refusal of military service be expunged, and that their personal information not be publicly disclosed.<sup>258</sup> Lastly, the Committee has recognized that laws criminalizing conscientious objection to military service may be incompatible with the right to freedom of expression where individuals who express their support for conscientious objectors are also abused by the State.<sup>259</sup>

### *Special Procedures*

The Special Rapporteur on Freedom of Religion has recognized that criminal laws that are *prima facie* neutral, such as laws that criminalize alleged acts of eroding national security, may threaten punishments against conscientious objectors to military service.<sup>260</sup> The Special Rapporteur raised concerns with the stigmatizing impact of a criminal record which brands conscientious objectors as “traitors,” and results in collateral social consequences, including ostracization from families, difficulties for marriage, and trouble finding employment.<sup>261</sup>

### *Universal Periodic Review*

Under the UPR, the criminalization of conscientious objection to military service has been raised in relation to its use as a ground for prohibiting employment in government or public organizations.<sup>262</sup> The State under review accepted the recommendation and noted its plans to establish a civilian alternative to military service.<sup>263</sup>

### *c. Trafficking and Irregular Migration*

This section describes criminal restrictions on migration and trafficking, including immigration, refugee and asylum, and human trafficking laws. Certain U.N. human rights bodies have expressed concern with the increasing use of criminal law instead of administrative regulations to restrict

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their ability to manifest their religion or belief and that, in those cases, the State party had not demonstrated that the restriction in question was necessary. Committee members argued that the majority did not provide “convincing reason for treating conscientious objection to military service as if it were an instance of the absolutely protected right to hold a belief. Nor does the majority clarify how conscientious objection to military service can be distinguished in this respect from other claims to exemption on religious grounds from legal obligations.” See *Id* at Appendix I. A second concurring opinion argued that what distinguishes conscientious objection to military service from objection to other claims to exemption is that it is within a context in which it may be necessary to take human life, *Id* at Appendix II. A third concurring opinion gives credence to the progressive development of human rights norms on conscientious objection to military service, and asserts that conscientious objection to military service is now inherent in the freedom of religion, thought, and conscience, and is therefore exempt from limitations under article 18 paragraph 3, and is non-derogable right under article 4 paragraph 2, *Id.* at Appendix III at para 15 and 16.

<sup>257</sup> Human Rights Committee General Comment 22 *supra* note 61 at para 11.

<sup>258</sup> Human Rights Committee Concluding Observations on Republic of Korea, 2015, CCPR/C/KOR/CO/4, paras 45(a)(b)(c).

<sup>259</sup> Human Rights Committee Concluding Observations on Turkey 2012, CCPR/C/SR.2929, at paras. 4, 6 and 27.

<sup>260</sup> Special Rapporteur on Freedom of Religion U.N. General Assembly Report 2016, A/71/269.

<sup>261</sup> Special Rapporteur on Freedom of Religion Report to Human Rights Council 2015, A/HRC/32/53.

<sup>262</sup> UPR Working Group on Republic of Korea 2008.

<sup>263</sup> Republic of Korea response to Report of the UPR Working Group on the Republic of Korea (2008) recommendations from Slovenia and United Kingdom.

migratory flows.<sup>264</sup> These concerns span the criminalization of labor migration, of minors who undertake irregular border crossings, and of asylum seekers.<sup>265</sup> They also give attention to attendant forms of criminalization such as punishing landlords who accommodate irregular migrants, or fishermen who rescue or inadvertently transport irregular migrants.<sup>266</sup> Human rights abuses that are inherent to criminal justice systems, such as inhumane conditions of detention, imprisonment of children, and police harassment and violence, are also a concern as criminalized migration exposes migrants and asylum seekers to these forms of collateral consequences.<sup>267</sup> This section also examines the practice of enforcing anti-trafficking laws against the victims they are meant to protect, as several human rights bodies have urged States to decriminalize victims of labor, migration, organ, and other forms of trafficking.<sup>268</sup>

### *Treaty bodies*

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW Committee) has commented on the rights of migrant workers in irregular situations, and noted that States increasingly resort to measures that repress labor migration using the criminal law.<sup>269</sup> The Committee has argued that criminalization exceeds the legitimate interest of State parties to control and regulate irregular migration because it does not constitute crimes per se against persons, property, or national security, and also because it results in arbitrary arrest and detention.<sup>270</sup> The Committee argues that criminalization results in migrants being labeled as “illegal,” which fuels discrimination and xenophobia.<sup>271</sup> As migrants and their families fear being reported to immigration authorities, criminalization also hinders migrants’ access to justice and other public services.<sup>272</sup> This makes them vulnerable to labor and other forms of exploitation and abuse.<sup>273</sup>

The CRC Committee has argued that the criminalization of irregular migration fails to protect the best interests of the child as required under the Convention on the Rights of the Child—a protection that children are entitled to regardless of their migration status.<sup>274</sup> Children in irregular migration situations are detained along with their parents in identification and expulsion centers which are not properly regulated for the presence of children.<sup>275</sup> Where they have not been apprehended by

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<sup>264</sup> For example, Special Rapporteur on Racism Mission to Italy (2007), at para 62; CMW Concluding Observations on Belize (2014), at para 26; Special Rapporteur on the Human Rights of Migrants to the Human Rights Council (2011) at para 22.

<sup>265</sup> *Id.*

<sup>266</sup> Special Rapporteur on Migration, Report to Human Rights Council 2008 A/HRC/7/12, and Report to Human Rights Council 2010 A/HRC/14/30.

<sup>267</sup> CMW Committee Concluding Observations Mali, 2014, CMW/C/MLI/CO/2, at para 20.

<sup>268</sup> Report of Special Rapporteur on Trafficking in Persons to the Human Rights Council (2012), paras 23-31.

<sup>269</sup> The CMW Committee monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, see

<http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx>; CMW Committee General Comment 2, 2013

<sup>270</sup> CMW Committee General Comment 2, CMW/C/GC/2, at para 23-25. Under Article 16(4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, controls of migrant workers must comply with procedures established by law, be in pursuance of a legitimate aim under the Convention, and necessary and proportionate to the legitimate aim pursued.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at para 2 and 55.

<sup>273</sup> *Id.* at para 2.

<sup>274</sup> CRC Concluding Observations Italy 2011, CRC/C/ITA/CO/3-4, at para 68.

<sup>275</sup> *Id.* at para 63 and 64.

the authorities, children in irregular migration situations may not be able to access social services due to their immigration status, hindering the enjoyment of their economic and social rights.<sup>276</sup>

The Human Rights Committee, the Committee Against Torture, and the CEDAW and CESCR Committees have examined how victims of trafficking are sometimes punished for their migration status alone, or inappropriately prosecuted under anti-trafficking laws or other criminal laws, even when they were compelled to engage in unlawful activities.<sup>277</sup>

### *Special Procedures*

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (Special Rapporteur on Racism) has considered the criminalization of migration as linked to policies governing national security, with States using security concerns to justify migration crackdowns.<sup>278</sup> This includes practices such as the invocation of a state of emergency to trigger expedited border procedures with limited judicial review of asylum decisions, and the amendment of criminal laws to allow prison sentences or mandatory expulsion of migrants and refugees.<sup>279</sup>

The Special Rapporteur on Migrant Workers has argued that overly restrictive labor migration policies increase trafficking, as workers attempt to circumvent migration controls through traffickers.<sup>280</sup> The mandate holder has argued that laws that criminalize undocumented migrants are also applied to victims of trafficking, resulting in a form of “double victimization.”<sup>281</sup> The Special Rapporteur on Trafficking in Persons has recommended that States adopt *vacatur* laws to vacate convictions of victims of trafficking and pass safe harbor laws to prevent the prosecution of victims of sex trafficking.<sup>282</sup>

The social impact of criminalization is a significant concern for various independent experts, who argue that labeling migrants, refugees, and trafficking victims as “illegal” is dehumanizing and fuels the general public perception that they are criminal and undesirable, and increases the likelihood that people in irregular migration situations, and all migrants, will experience xenophobia, discrimination, and violence.<sup>283</sup>

#### ***d. Land and Property***

This section examines the criminalization of the occupation of land by landless people, and the criminalization of nomadism.

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<sup>276</sup> *Id.*

<sup>277</sup> CAT Concluding Observations on Macao SAR 2016, CAT/C/CHN-HKG/CO/5 at para 9; CEDAW Committee Concluding Observations on Syrian Arab Republic 2007, CEDAW/C/SYR/CO/1, at para 24; Human Rights Committee Concluding Observations on U.S.A. 2014, para 14.

<sup>278</sup> Special Rapporteur on Racism Report to Human Rights Council 2017.

<sup>279</sup> Special Rapporteur on Racism Report to Human Rights Council 2017.

<sup>280</sup> Special Rapporteur on Trafficking, UNGA, 2016, A/HRC/32/41.

<sup>281</sup> Special Rapporteur on Trafficking Mission to Belize, 2014, A/HRC/26/27/Add.6.

<sup>282</sup> Special Rapporteur on Trafficking Report to HRC 2017.

<sup>283</sup> SR Migrants Report to HRC 2017 A/HRC/35/25

Landless people may be poor tenant farmers, or poorly paid agricultural laborers who migrate from one insecure, informal job to another.<sup>284</sup> Where movements of landless people resort to the non-violent occupation of land, the Special Rapporteur on the Right to Food has urged States to refrain from criminalization such occupation.<sup>285</sup> In order to protect the right to food, the Special Rapporteur has argued that such occupation should not be criminalized where deep land inequalities remain and insufficient progress has been made on the implementation of international commitments for agrarian reform and rural development.<sup>286</sup>

Nomadic peoples are often viewed with suspicion and as a danger to society by States, who seek to restrict their ways of life or otherwise endeavor to achieve assimilation and integration into settled society.<sup>287</sup> Across States, laws are largely “sedentarist,” that is, they are designed to govern non-nomadic peoples, and offences such as trespassing can criminalize nomadic people who travel to their traditional territories.<sup>288</sup> While human rights treaties specifically mention vulnerable groups such as indigenous peoples, minorities, and refugees, there is no body of human rights law that is dedicated to nomadic peoples.<sup>289</sup> To date the U.N. human rights bodies have given little consideration to this topic—only the CRC Committee has issued a recommendation in regard to the criminalization of nomadism.<sup>290</sup> The Committee expressed concern about structural discrimination against Traveler and Roma children in Ireland, and recommended the decriminalization of nomadism and for the State to provide adequate transient halting sites, as well as safeguards against forced evictions, and access to timely recourse and reparation for victims of forced evictions.<sup>291</sup>

#### *e. Opinion and Expression*

Criminal restrictions on the rights to freedom of expression and opinion are a long-standing concern of the U.N. human rights bodies. Various mechanisms recommend the *de jure* decriminalization of specific offences, such as criminal defamation or the prohibition of protest-based self-mutilation as a form of protected speech.<sup>292</sup> Other recommendations are to stop the *de facto* criminalization of expression through the application of vaguely defined national security and counter-terrorism laws or laws that prohibit disinformation and the dissemination of false information, to repress the activities of journalists, academics, and human rights defenders.<sup>293</sup> On the freedom of opinion, recommendations are to decriminalize or reconsider certain memory laws, such as those that prohibit expressions of erroneous opinions or incorrect interpretations of historical events.<sup>294</sup>

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<sup>284</sup> Drafting Group of the Right to Food, Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas, 2012, A/HRC/AC/8/6, at para 14.

<sup>285</sup> Special Rapporteur on the Right to Food Report to HRC 2014; Report to UNGA 2016.

<sup>286</sup> *Id.*

<sup>287</sup> JEREMIE GILBERT, NOMADIC PEOPLE AND HUMAN RIGHTS (2014), p13.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> CRC Committee Concluding Observation on Ireland 2016

<sup>291</sup> *Id.*

<sup>292</sup> Committee Against Torture Concluding Observations Kazakhstan 2014, recognized that self-mutilation was a form of protected speech when prisoners engaged in this conduct as a form of protest.

<sup>293</sup> See, e.g. Special Rapporteur on Human Rights Defenders Report to HRC 2009 at 32.

<sup>294</sup> Human Rights Committee General Comment 34 *supra* note 211 at para. 49.

Under Article 19 of the ICCPR, the right to freedom of opinion cannot be limited, while the right to freedom of expression can be subjected to certain restrictions provided by law that are necessary to protect the rights or reputations of others, or for the protection of national security, public order, public health, or morals.<sup>295</sup> The jurisprudence on the decriminalization of expression and opinion offences examines the parameters of these limits, and whether certain criminal restrictions are justifiable under International Human Rights Law.

i. Defamation

Defamation laws seek to protect individuals from public communication that injures their reputation.<sup>296</sup> However, criminal defamation laws are frequently abused, and are often enforced to insulate public officials or state institutions from criticism.<sup>297</sup> U.N. human rights bodies' jurisprudence on defamation has increasingly developed to support the principle that criminal defamation is in itself a breach of the right to freedom of expression.<sup>298</sup> This approach is in line with the high value placed by the ICCPR on uninhibited expression.<sup>299</sup>

The Human Rights Committee has addressed the topic of criminal defamation in its General Comment 34 on the freedom of opinion and expression, and in a number of Concluding Observations. It has cautioned that defamation laws must be carefully crafted to ensure compliance with the narrow restrictions permitted under the ICCPR, and so that they do not in practice stifle freedom of expression.<sup>300</sup> The Committee has clarified that with regard to comments about public figures, States should consider refraining from “penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.”<sup>301</sup> It has also stated that all public figures are legitimately subject to criticism and political opposition, and the mere fact that an expression is considered insulting to a public figure is not sufficient to justify the imposition of penalties.<sup>302</sup> The Committee has recommended that *lese majesty*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of head of state, and protection of the honor of public officials laws be repealed to protect freedom of expression.<sup>303</sup>

A key argument against criminal defamation is that the sanctions that flow from these laws are too harsh and have a chilling effect on free expression and access to information, and can discourage the media from publishing critical information on matters of public interest.<sup>304</sup> The Human Rights Committee has argued that the criminal law should only be countenanced in the most serious of cases and that imprisonment is never a legitimate sanction for defamation.<sup>305</sup> It has also argued that where they exist, penal defamation laws should not be applied to expression that are not in their nature subject to verification, and should also contain defenses for the truth and public interest

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<sup>295</sup> ICCPR Article 19(3)(a)-(b).

<sup>296</sup> Peter M. Tiersma, *The Language of Defamation*, 66 TEX. LAW REV. 303–350 (1987), at p305.

<sup>297</sup> ARTICLE 19, BRIEFING NOTE ON INTERNATIONAL AND COMPARATIVE DEFAMATION STANDARDS (2004), p3 and 4.

<sup>298</sup> U.N. Human Rights Commission, Resolution 2005/38, 19 April 2005, para 3(a), noting its concern at the “abuse of legal provisions on defamation and criminal libel.”

<sup>299</sup> Human Rights Committee General Comment 34, para 38.

<sup>300</sup> Human Rights Committee General Comment 34 *supra* note 211 at para 47.

<sup>301</sup> *Id.* at para 38 and 47.

<sup>302</sup> *Id.* at para 38 and 47.

<sup>303</sup> *Id.* at para 38, Special Rapporteur on Freedom of Expression Report to UNGA, 2015, A/71/373.

<sup>304</sup> Human Rights Committee Concluding Observations Paraguay 2013

<sup>305</sup> Human Rights Committee General Comment 34 *supra* note 211, at para 47.

in the subject matter.<sup>306</sup> The Committee has also extended its concerns about the chilling effect of punishments for defamation extending to civil cases, has disagreed with excessive financial damages awarded, and has urged the institution of reasonable limits on the requirement for defendants to reimburse the expenses of the successful party as they may amount to a form of censure.<sup>307</sup>

There is some unevenness in recommendations produced through treaty bodies. Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination requires State parties to adopt measures designed to eradicate all incitement to, or acts of, racial hatred and discrimination, and to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred.”<sup>308</sup> The CERD Committee has found State parties to be in compliance with this obligation when they have laws on criminal defamation that can be applied to racist ideas and statements.<sup>309</sup>

### *Special Procedures*

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on Freedom of Expression) has expressed concern that criminal defamation creates a constant threat of arrest, detention, being subjected to expensive criminal trials, fines and imprisonment, and the stigma of a criminal record.<sup>310</sup> The Special Rapporteur has that as defamation is intended to protect the rights and reputations of others, it should not be used to protect abstract or subjective notions or concepts such as the state, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines.<sup>311</sup> In numerous country mission reports, the Special Rapporteur has noted that criminal and civil defamation is used to dissuade individuals from criticizing officials or government policies, and has urged States to at least decriminalize defamation in favor of civil laws, and for public figures to accept a greater degree of criticism.<sup>312</sup> That said, the Special Rapporteur has underscored that civil sanctions also threaten free expression, and can bankrupt small and independent media and paralyze journalistic investigation under an atmosphere of intimidation.<sup>313</sup>

The Special Rapporteur on Freedom of Expression has also argued for decriminalization of defamation based on the availability of alternative mechanisms at least with regard to defamation claims against journalists, which could instead be addressed by independent authorities like press

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> International Convention on the Elimination of All Forms of Racial Discrimination Article 4(a).

<sup>309</sup> CERD Committee Individual Communication *Ahmand Najaati Sadic v Denmark* 2003 – the Committee found the communication to be inadmissible based on the ground that the author of the communication had effective remedy for being subjected to racially discriminatory expression, as the general provision criminalizing defamatory statements was applicable to racist statements. The CERD Committee mission report to Japan, 2014, CERD/C/JPN/CO/7-9, para 10.

<sup>310</sup> Special Rapporteur on Freedom of Expression Report to HRC 2010 A/HRC/14/23 at para 83, and Report to HRC 2012 A/HRC/20/17 para 84.

<sup>311</sup> Special Rapporteur on the Promotion and Protection of Freedom of Expression Report to Human Rights Council 2010 A/HRC/14/23 at para 84.

<sup>312</sup> Special Rapporteur on the Promotion and Protection of Freedom of Expression Report to Human Rights Council 2012 A/HRC/20/17 para 88.

<sup>313</sup> Special Rapporteur on the Promotion and Protection of Freedom of Expression Report to Human Rights Council 2012 A/HRC/20/17 para 85.

councils and ombudspersons.<sup>314</sup> Such authorities could impartially evaluate the seriousness of violations and take decisions that would not put at risk the core values of freedom of expression.<sup>315</sup>

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Under the UPR, numerous States have been the subject of recommendations to repeal criminal defamation laws.<sup>316</sup> Responding State parties have sought to justify criminal defamation as necessary to protect the reputational rights of individuals, and have asserted that defamation offences are best suited to protect individuals' right to dignity or right to privacy.<sup>317</sup> Some States have argued that it is easier to obtain evidence using prosecutorial investigative powers available under criminalizing regimes.<sup>318</sup> Other States have argued for criminalization based on predominant State practice, asserting that only a small minority of European nations do not criminalize defamation.<sup>319</sup> One State has argued that criminal defamation protects against injurious behavior that may be racist or homophobic in nature, and therefore protects individuals against defamation on account of their membership of particular groups.<sup>320</sup>

#### ii. Anti-Terrorism and National Security

This section examines the use of anti-terrorism and national security laws to stifle freedom of opinion and expression. Anti-terrorism and national security laws are often vaguely worded and are used to charge journalists, writers, and activists in an attempt to limit their non-violent expression of critical opinions.<sup>321</sup> Laws within this category include offenses such as treason, subversion and acting against national interests, as well as offenses such as the “glorification of terrorism,” “public provocation,” and “apology of terrorism.”<sup>322</sup> The Special Rapporteur on Racism has noted the proliferation of “right-wing populist initiatives in direct response to the fear of Muslim radicalization,” and has noted that far reaching laws with ambiguous definitions have also sprung up in several African countries.<sup>323</sup> The Special Rapporteur has also expressed concern that one Western European country has removed the statutory requirement of incitement posing an actual risk of a terrorism-related offence being committed.<sup>324</sup> Given the threat of allegations of terrorism against journalists who report “inconvenient information,” the effect of these laws are similar to criminal defamation, in that they have a chilling effect on journalistic reporting on issues of public interest.<sup>325</sup>

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<sup>314</sup> Special Rapporteur on the Promotion and Protection of Freedom of Expression Report to Human Rights Council A/HRC/4/27 para 47.

<sup>315</sup> *Id.*

<sup>316</sup> Kazakhstan, San Marino, Belgium, Turkey, Montenegro, Mozambique, Monaco, Brunei, Laos, Russia, Singapore, Tajikistan, Poland, Libya.

<sup>317</sup> San Marino 2014, Kazakhstan 2010, Poland 2012.

<sup>318</sup> Belgium 2016, Kazakhstan 2010

<sup>319</sup> Turkey, Montenegro 2009, Russia 2013

<sup>320</sup> Monaco 2014.

<sup>321</sup> Special Rapporteur on Extrajudicial Executions report to Commission on Human Rights 1996

<sup>322</sup> Special Rapporteur on Racism, Xenophobia, Report to HRC 2017, para 69.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> Special Rapporteur on the Promotion and Protection of Freedom of Expression Report to Human Rights Council 2012 para 53.

This topic has been the subject of minimal scrutiny under the UPR. In one instance, the State under review asserted that it would not use its anti-terrorism proclamation to silence political opposition.<sup>326</sup> In another, the State under review accepted the recommendation to repeal its laws that criminalize media freedoms under its laws prohibiting sedition and subversive activities, and suppression of terrorism.<sup>327</sup>

### iii. Memory Laws

The U.N. human rights bodies have expressed some concern about the regulation of collective memories using the criminal law, such as those that prohibit the expression of erroneous opinions and revisionist interpretations of past events.<sup>328</sup> Some examples are laws that prohibit the denial of the Holocaust or the denial of other genocides and mass atrocities, and laws that attempt to regulate colonial historiography such as those that proscribe the teaching of the “positive role” of colonialism.<sup>329</sup>

In its General Comment 34, the Human Rights Committee stated that laws that penalize the expression of opinions about historical facts may in some circumstances be incompatible with Article 19 on freedom of opinion and expression. In a Concluding Observation, the Committee has cautioned against prescriptive memory laws, which risk criminalizing a wide range of views on the understanding of the post-World War II history.<sup>330</sup> Likewise, the Special Rapporteur on Cultural Rights has argued that academic freedom in the study and teaching of history necessitates the repeal of laws that criminalize expressions of opinions about historical facts, in particular in the study of history which requires historians to take into account various and conflicting data and to analyze events in the widest possible context.<sup>331</sup>

Recommendations on memory laws are not consistent across entities within the U.N. human rights bodies. This is due in part to State party obligations under CERD and the ICCPR to prohibit acts that advocate national, racial, or religious forms of hatred, discrimination, and violence, or that disseminate ideas based on racial superiority, or incitement against any race or group of persons of another color or ethnic origin.<sup>332</sup> The Special Rapporteur on Racism has argued that these obligations require State parties to “criminalize acts of belittlement or denial, such as acts that create a favorable environment for the dissemination and rehabilitation of Nazism and other extremist ideologies, and constitute hate speech.”<sup>333</sup>

### *f. Assembly and Association*

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<sup>326</sup> UPR Ethiopia

<sup>327</sup> UPR Swaziland 2011

<sup>328</sup> Dan Stone, *Memory Wars in the “New Europe”* in OXFORD HANDBOOK ON POSTWAR EUROPEAN HISTORY (2012).

<sup>329</sup> Vivian Grosswald Curran, *History, Memory, and Law*, 16 ROGER WILLIAMS UNIV. LAW REV., page 102.

<sup>330</sup> Human Rights Committee General Comment 34 *supra* note 211 at para 49; Human Rights Committee Concluding Observations Hungary 2010 CCPR/C/HUN/CO/5 para 19 and 20. This recommendation stemmed from the increasing policy of the Hungarian state to revise its World War II history, by absolve it of an active role in deporting Jews to Nazi death camps, and ignoring its history of anti-Semitism prior to the Nazi invasion.

<sup>331</sup> Special Rapporteur on Cultural Rights Report to UNGA, 2013, A/68/296, para 35.

<sup>332</sup> ICCPR article 20(2). SR Racism, Xenophobia Report to HRC in re Neo-Nazism 2017.

<sup>333</sup> Special Rapporteur on Racism, Xenophobia Report to HRC in re Neo-Nazism 2017.



A number of criminal restrictions on the rights to association and peaceful assembly are under consideration by the U.N. human rights bodies. The *de facto* criminalization of the right to association and assembly is a frequent concern with regard to the repression of social protest and collective rights claims, often through the application of common criminal laws or anti-terrorist and national security laws.<sup>334</sup> Laws that restrict the registration of civil society associations and then criminalize the activities of non-registered entities are also a concern.<sup>335</sup> Other criminal laws may prohibit organizations from accessing foreign funding in an attempt to stifle civil society activity.<sup>336</sup> The *de jure* criminalization of associations of specific marginalized groups is also a concern, for example where several countries have adopted legislation to curb the activities of associations defending LGBT rights.<sup>337</sup>

i. Demonstrations and Protest

Various Special Rapporteurs have reported on the criminalization of participation in and organization of peaceful protests, for example during election time, when protesting against natural resource exploitation, for indigenous rights to self-determination or access to ancestral lands, or to advance other human rights concerns.<sup>338</sup> The Special Rapporteur on the rights of indigenous peoples (Special Rapporteur on Indigenous Peoples) and the Special Rapporteur on Racism and Xenophobia have expressed their concern about the inappropriate drafting and application of counter-terrorism laws for the suppression of demonstrations and protests.<sup>339</sup> They report that such laws are drafted too broadly and lack provisions that limit their applicability to appropriate use under Article 21 of the ICCPR—that is, to limitations imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals, or the protections of the rights and freedoms of others.<sup>340</sup> They also express concern at the discriminatory and stigmatizing effect of criminalizing protest and demonstrations. For example, ethnic minorities and indigenous groups are stigmatized where anti-terrorist legislation is applied against them, and when their rights to peaceful assembly and freedom of association are discriminatorily suppressed.<sup>341</sup> The Special Rapporteur on Indigenous Peoples notes that the penal response to deep social problems contributes to the criminalization of the social demand for rights, and the dismantling of rights movements.<sup>342</sup>

ii. Restrictions on Public Associations and NGOs

The criminalization of public associations and non-governmental organizations is considered by several human rights mechanisms. One issue is where governments criminalize the operation of

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<sup>334</sup> Special Rapporteur on Right to Freedom of Peaceful Assembly Report to UNGA 2013, para 19-20, Report to HRC 2015 A/HRC/29/25, para 44.

<sup>335</sup> Special Rapporteur on Human Rights Defenders Report to UNGA 2009, para 59-74.

<sup>336</sup> Special Rapporteur on Right to Freedom of Peaceful Assembly Report to HRC 2013, para 69 A/HRC/25/55

<sup>337</sup> Special Rapporteur on Human Rights Defenders Report to UNGA 2013, para 65 and 104 A/HRC/25/55.

<sup>338</sup> Special Rapporteur on Indigenous Peoples Report to HRC 2007 para 53 A/HRC/4/32

<sup>339</sup> Special Rapporteur on Racism Report to HRC 2017 para 71 A/HRC/35/41, Mission to Argentina 2017 para 27 and 41 A/HRC/35/41/Add.1

<sup>340</sup> ICCPR Article 21.

<sup>341</sup> Special Rapporteur on Racism Report to HRC 2017.

<sup>342</sup> Special Rapporteur on Indigenous Peoples Report to Commission on Human Rights 2004, Report to Human Rights Council 2007.

public associations that are not registered with the State, and then refuse to register or make registration extremely onerous for certain types of organizations.<sup>343</sup> Another issue is where governments place undue restrictions on organizations for receiving or utilizing foreign funding to conduct human rights activities.<sup>344</sup>

In *Natalya Pinchuk v Belarus*, the Human Rights Committee held that imprisoning activists for conducting activities on behalf of an unregistered organization which the government refused to register, violated the right to freedom of association.<sup>345</sup> Under Article 22 of the ICCPR, restrictions on the right to freedom of association must be prescribed by law, and imposed for purposes in concordance with the Covenant—that is, for national security, public safety, public order, the protection of public health or morals, and the protection of the rights and freedoms of others—and must be necessary in a democratic society for achieving one of these purposes.<sup>346</sup> In this regard, the Committee has explained that the existence and operation of associations, including those that peacefully promote ideas not favorably viewed by the Government or the majority of the population, are cornerstones of any democratic society.<sup>347</sup> The CEDAW and CRC Committees have both expressed concern that this practice hampers the work and reduces the number of children and women’s organizations.<sup>348</sup> They both recommend that States decriminalize membership in unregistered organizations in order to facilitate the registration and operation of non-governmental organizations.<sup>349</sup>

### *Special Procedures*

The Special Rapporteur on Freedom of Assembly has also affirmed that the right to freedom of association equally protects associations that are not registered, as criminalization of unregistered groups in the context where registration is subject to abusive administrative discretion, can be used as a means to quell dissenting views or beliefs.<sup>350</sup> And where domestic funding is scarce or unduly restricted, the Special Rapporteur has stated that it is critical for associations to be free to rely on foreign assistance in order to carry out their activities.<sup>351</sup> The Special Rapporteur on Human Rights Defenders has also remarked on the practice of States resorting to legal actions that violate the human rights of human rights defenders by systematically invoking national security and public safety justifications to restrict the scope of activists’ activities.<sup>352</sup>

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<sup>343</sup> Special Rapporteur on Human Rights Defenders Report to U.N. General Assembly 2009, para 59-74.

<sup>344</sup> Special Rapporteur on Right to Freedom of Peaceful Assembly Report to Human Rights Council 2013, para 69 A/HRC/25/55

<sup>345</sup> Human Rights Committee, *Natalya Pinchuk v Belarus*, CCPR/C/112/D/2165/2012.

<sup>346</sup> ICCPR Article 22

<sup>347</sup> CCPR/C/112/D/2165/2012 at 8.4

<sup>348</sup> CEDAW CO on Belarus 2011, CRC CO Belarus 2011.

<sup>349</sup> *Id.*

<sup>350</sup> Special Rapporteur on Freedom of Assembly Report to Human Rights Council 2012.

<sup>351</sup> Special Rapporteur on Freedom of Assembly Report to Human Rights Council 2014.

<sup>352</sup> Special Rapporteur on Human Rights Defenders, Report to Commission on Human Rights 2002, 2004, Report to UNGA 2009, Report to HRC 2010, Report to UNGA 2012, Report to HRC 2013.

States have expressed some concern at the criminalization of civil society associations under the UPR, but responses from States under review largely deny these practices take place or argue that they are permitted under the law.<sup>353</sup>

### *g. Poverty*

The U.N. human rights bodies' consideration of the criminalization of poverty includes laws that prohibit or place heavy burdens on homeless and people living in poverty. States may criminalize life sustaining activities conducted in public spaces such as eating, sleeping, sitting, performing personal hygiene, and public urination or defecation. They may also criminally prohibit efforts to earn a livelihood, such as street vending and panhandling. The impact of these laws on children is an area of concern, as are laws that punish parents or caregivers who may be unable to provide for their children. Criminal laws that target people providing assistance to people living in poverty, for example, by criminalizing outdoor charity food services is also an area of consideration. That people living in poverty are more vulnerable to contact with the criminal justice system is also a concern, and is the result of spending more time in public on the street, in markets, or public transport, and being more easily scrutinized by law enforcement.<sup>354</sup> The over-representation of people living in poverty in incarcerated populations is a further concern.

#### *i. Homelessness and Poverty*

##### *Treaty Bodies*

Commenting on the criminalization of homeless people in the United States, the Human Rights Committee has raised concerns of discrimination under Articles 2 and 26, and cruel, inhuman or degrading treatment under Article 7, the right to liberty and security of the person under Article 9, and the right to privacy under Article 17 of the ICCPR.<sup>355</sup> It recommended that the State party abolish laws and policies criminalizing homelessness at state and local levels, intensify efforts to find solutions for the homeless in accordance with human rights standards, and offer incentives for decriminalization and the implementation of non-criminal solutions by providing continued financial support to local authorities that implement alternatives to criminalization, and withdrawing funding from authorities that cling to criminalizing approaches.<sup>356</sup>

The CERD Committee has noted the disproportionate impact of homelessness on racial and ethnic minorities in the United States, and African American and Hispanic/Latino and Native American populations in particular. The Committee argued for the decriminalization of homelessness based on Article 2 of CERD, which obligates State parties to take “concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”<sup>357</sup> It also argues for decriminalization based on Article 5(e), which contains the right

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<sup>353</sup> Niger, Sri Lanka, Ecuador, Belarus

<sup>354</sup> U.N. High Commissioner for Human Rights on Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding, Report to Human Rights Council A/HRC/36/28 para 14.

<sup>355</sup> UNHRC CO USA 2014 para 19.

<sup>356</sup> *Id.*

<sup>357</sup> CERD Article 2

to equal enjoyment of economic, social, and cultural rights, most relevantly the “right of access to any place or service intended for use by the general public.”<sup>358</sup> The CERD Committee made the same recommendation as the Human Rights Committee—to incentivize decriminalization at the State and local levels through federal funding.<sup>359</sup>

The CRC Committee has expressed concern at the criminalization of children and adolescents living in poverty.<sup>360</sup> In its Concluding Observations it has noted that endemic poverty results in children being sent to the street to hawk or beg to support family income, and has recommended that States decriminalize begging by children, while taking steps to prevent their exploitation by adults who may use children to beg.<sup>361</sup> The Committee has also expressed concern that the criminalization of child abandonment has unintended consequences on parents and families living in poverty, and can impede future efforts to trace parents or guardians for family reunification purposes.<sup>362</sup> The Committee also argues that alternative approaches that address the root causes of child abandonment be used, namely direct services to families impacted by poverty, domestic abuse, homelessness, and substance abuse.<sup>363</sup>

### *Special Procedures*

The Special Rapporteur on extreme poverty and human rights (Special Rapporteur on Poverty) has noted the increasingly common nature of criminal or regulatory prohibition of begging, through laws that often have broad application, extending to the performance of any activity which might elicit money, such as dancing, or exposing a wound or a deformity.<sup>364</sup> The Special Rapporteur has also raised concerns about vaguely worded offences that afford law enforcement authorities excessive discretion, for example, offences that criminalize being in a public place and having “no visible means of subsistence.”<sup>365</sup> The Special Rapporteur has disagreed with States’ justifications, including the argument that the prohibited behaviors are dangerous, conflict with the demands of public safety or order, or are “contrary to the images and preconceptions that authorities want to associate with public spaces,” and asserts that such justifications are illegitimate for being discriminatory.<sup>366</sup>

The Special Rapporteur argues for the decriminalization of homelessness and begging based on the right to equality and non-discrimination, noting that prohibitions are either discriminatory in their intent or in their application, and are disproportionately punitive as homeless and impoverished people have no other means of survival.<sup>367</sup> The Special Rapporteur has also argued that criminalization of life sustaining activities can constitute cruel, inhuman, and degrading treatment under Article 7 of the ICCPR because it may result in “serious adverse physical and psychological effects on persons living in poverty, undermining their right to an adequate standard

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<sup>358</sup> CERD Article 5(e)(f).

<sup>359</sup> CERD CO USA 2014 para 12.

<sup>360</sup> CRC General Comment 4, 2003.

<sup>361</sup> CRC Cos Greece 2002, 2012, Nigeria 2010, Lebanon 2006.

<sup>362</sup> CRC CO Rwanda 2013.

<sup>363</sup> *Id.*

<sup>364</sup> Special Rapporteur on Extreme Poverty, Report to UNGA 2011, para 30 A/66/265

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at para 29.

<sup>367</sup> Special Rapporteur on Extreme Poverty UNGA 2011.

of physical and mental health.”<sup>368</sup> This position is supported by the Special Rapporteur on the right to safe drinking water and sanitation (Special Rapporteur on Right to Water) who argued that to deny persons the ability to exercise a necessary biological function in a lawful and dignified manner can both compromise human dignity and cause suffering. The Special Rapporteur has argued that where offences limit access to water, toilets and showers, they violate the right to water and sanitation.<sup>369</sup> And in cases where there is deliberate action or clear neglect by the State, this can amount to cruel, inhumane, or degrading treatment.<sup>370</sup> The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (Special Rapporteur on Housing) has supported this position, citing the example of laws that are used to continuously displace people who occupy and live in public spaces, or make it illegal for such persons to fall asleep in a public space between sunset and sunrise.<sup>371</sup>

On criminal clampdowns on homeless and impoverished people in the time periods leading up to mega events such as the Olympics or the FIFA World Cup, the Special Rapporteur on the Right to Adequate Housing has remarked that States tend to exercise a “rationale of exception,” where they consider it necessary to leverage the criminal law to clear the streets of undesirable persons.<sup>372</sup> States deploy a similar justification for using the criminal law to remove homeless or impoverished people in order to promote tourism and business or to increase property values.<sup>373</sup> The Special Rapporteur has expressed concern at the resulting increased marginalization of homeless persons, who already experience shortened life spans and ill-health, their increased exposure to violence and harassment, corruption, and extortion by both private individuals and law enforcement officials.<sup>374</sup>

The U.N. Human Rights Council adopted the U.N. Guiding Principles on Extreme Poverty and Human Rights in 2012, which recommends States address the disproportionate effect of criminal sanctions and incarceration proceedings on persons living in poverty, and to ensure the greatest extent possible that bail procedures take into account the socio-economic circumstances of persons

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<sup>368</sup> Special Rapporteur on Extreme Poverty Report to HRC 2011, A/66/265 (2011), para 36.

<sup>369</sup> Special Rapporteur on Water and Sanitation, report to HRC 2012 para 22.

<sup>370</sup> Special Rapporteur on Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, Addendum: Mission to the US, para 58, A/HRC/18/33/Add.4(2011).

<sup>371</sup> SR Right to Adequate Housing Mission to Australia 2007.

<sup>372</sup> SR Adequate Housing, HRC 2009

<sup>373</sup> As the Special Rapporteur on Adequate Housing noted, “Examples are countless: in Zimbabwe, an operation to “sweep out the rubbish” through demolitions of shanty towns in 2005 left up to 1.5 million people homeless in the middle of the winter. In June 2014, the Mayor of Honolulu introduced new measures to crack down on homelessness because tourists want to see “their paradise, not homeless people sleeping.” In Medellín, Colombia, during the World Urban Forum, the homeless population was transported outside of the city. In Australia, “move on” laws permit authorities to “disperse” homeless people “where a person’s mere presence could cause anxiety to another person or interfere with another’s ‘reasonable enjoyment’ of the space.” Special Rapporteur on Adequate Housing Report to the Human Rights Council 2015 A/HRC/31/54 at para 24; The recommendations under the previous section of this paper are also relevant, as they seek to reduce criminalization of homeless and people living in poverty for non-violent life sustaining activities, and seek to reduce the disproportionate impact of their contact with the criminal justice systems, inter alia through increased access to legal representation, stopping the application of disproportionate fines, and ensuring that bail procedures take into account the socio-economic circumstances of impoverished people.

<sup>374</sup> Special Rapporteur on Adequate Housing Report to the Human Rights Council 2015 A/HRC/31/54 at paras 21 and 88.

living in poverty.<sup>375</sup> It also recommends that States repeal laws that criminalize life-sustaining activities in public spaces as well as sanitation activities in public spaces where no adequate sanitation services are available.<sup>376</sup> The Guidelines also urge States to review sanctions that require the payment of disproportionate fines by people living in poverty, especially related to begging, use of public space, welfare fraud, and consider abolishing prison sentences for non-payment of fines for those unable to pay.<sup>377</sup>

ii. Petty Offences

Human rights bodies have recommended the decriminalization or de-penalization of petty offences in relation to concerns about the discriminatory and criminalizing impact on people living in poverty, on ethnic and racial minorities, and on other marginalized groups.<sup>378</sup> The Committee Against Torture has raised concerns that petty offences contribute to over-incarceration and prison overcrowding.<sup>379</sup> The CEDAW Committee has observed in its concluding observation that “women are more likely than men to be incarcerated for non-violent offences” and that criminalization of petty offences has a discriminatory impact on women.<sup>380</sup> The Special Rapporteur on Torture has also recommended that States use incarceration as a last resort, and reserve it for persons sentenced for committing “grave crimes and who constitute a real danger to society,” instead of detaining large numbers of people in pretrial detention.<sup>381</sup>

*h. Status Offences, and Child and Adolescent Behavior*

This section describes offences that criminalize child and adolescent behavior, including status offences, disciplinary issues in schools, and self-harming behavior.

i. Status Offences

Status offences refer to acts that are only considered criminal when they are committed by minors.<sup>382</sup> They often relate to vagrancy, truancy, running away, or disorderly conduct.<sup>383</sup> It can also include laws that allow police to remove children and young people who assemble peacefully in public spaces or that establish curfews that are enforced with fines or detention where fines cannot be paid.<sup>384</sup> Article 56 of the U.N. Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) calls for States to decriminalize status offences and to stop penalizing behavior of young people that would not be considered punishable if committed by adults.<sup>385</sup> The

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<sup>375</sup> U.N. Guiding Principles on Extreme Poverty and Human Rights A/HRC/21/39 at 66(b).

<sup>376</sup> *Id.* at 66(c) and 78(c)

<sup>377</sup> *Id.* at 66(d)

<sup>378</sup> U.N. High Commissioner for Human Rights Report on Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of over-incarceration and overcrowding A/HRC/36/28 at para 12.

<sup>379</sup> Committee Against Torture, Concluding Observation on Costa Rica 2008, CAT/C/CRI/CO2 at para 6. Stated that the increase in prison population was linked to the limited use of alternative measures, longer prison terms, the criminalization of certain behavior and use of pre-trial detention as preventive measures.

<sup>380</sup> CEDAW/C/GBR/CO/7, para. 54.

<sup>381</sup> Special Rapporteur on Torture Mission to Togo 2008, para 69.

<sup>382</sup> CRC General Comment 10, para 8 CRC/C/GC/10

<sup>383</sup> *Id.*

<sup>384</sup> CRC Concluding Observations Australia 2012, Concluding Observations Panama 2011

<sup>385</sup> A/RES/45/112, Article 56.

CRC Committee affirmed this recommendation in its General Comment 10, which urges States to leverage child protective measures and to use measures that address the psychological and socio-economic root causes of behavioral problems instead.<sup>386</sup> The Committee has re-stated this position in several Concluding Observations, also arguing for decriminalization of status offences to prevent stigmatization and victimization of young persons.<sup>387</sup> It has also noted that status offences have a discriminatory impact and disproportionately impacts young people who are from low income and ethnic or racial minority neighborhoods, or are assumed to be criminal or affiliated with gangs based on their appearance.<sup>388</sup> The Committee has also expressed concern that “girls and street children are often victims of this criminalization.”<sup>389</sup>

ii. Disciplinary Issues in Schools

The criminalization of disciplinary issues in schools has been the subject of scrutiny in reports on the United States.<sup>390</sup> The Human Rights Committee has argued that where it disproportionately impacts racial or ethnic minorities, the criminalization of disciplinary matters in schools can constitute discrimination. The Committee also argues that it can violate students’ rights to measures of protection based on their status as minors under Article 24 of the ICCPR.<sup>391</sup> And where school officials inflict corporal punishment on students, the Committee has raised concerns about cruel, inhuman, and degrading treatment under Article 7.<sup>392</sup> Referring to the U.S., the Special Rapporteur on Racism described the “school to prison pipeline” which refers to “the failure of the U.S. school system to educate pupils adequately, serving rather as a conduit to juvenile and criminal justice,” often due to the widespread application of zero tolerance policies which call for severe punishments for minor infractions.<sup>393</sup> The Special Rapporteur cites examples including police issuing fines to students for inappropriate behavior, conducting regular searches of students, using excessive force against students, or referring students with non-violent behavioral problems to juvenile courts.<sup>394</sup> The Special Rapporteur has noted that this occurs particularly in neighborhoods where minorities are overrepresented, and that there are racial disparities in the application of criminalizing measures, with African-American students being more likely than White students to be suspended, expelled, or arrested for the same kind of school conduct.<sup>395</sup> The Special Rapporteur has stated specifically that racist acts and racially-motivated behavioral problems amongst students should not be dealt with through the criminal justice system except for in the most serious cases and only as a last resort.<sup>396</sup>

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<sup>386</sup> CRC General Comment 10, para 9 CRC/C/GC/10.

<sup>387</sup> CRC Concluding Observations on Kazakhstan 2003, Tunisia 2010, Egypt 2001 Australia 2012, Honduras 2007, Panama 2011.

<sup>388</sup> CRC Concluding Observations on Panama 2011, Concluding Observations on Honduras 2007.

<sup>389</sup> CRC General Comment 10, para 8

<sup>390</sup> Human Rights Council Concluding Observations on USA 2014 at para 17.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> Special Rapporteur on Racism mission to USA 2009, para 60 A/HRC/11/36/Add.3

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> SR Racism, Report to HRC 2013, A/HRC/23/56, para 50.

### iii. Self-Harm

The CRC Committee has raised the topic of self-harm by children in its General Comment 13, and recommended that States decriminalize self-harm and offer supportive interventions for children instead.<sup>397</sup> In addition, the Committee has discussed suicide, but only as it relates to assisted suicide for children 12-18 years of age in the Netherlands, and in terms of its concerns about the lack of sufficient oversight and monitoring of decision-making.<sup>398</sup>

#### *i. Drugs*

Despite the fact that drug control and enforcement activities are “prime areas for human rights abuses,” the international drug control bodies have historically operated separately with little reference to or interaction with International Human Rights Law or the U.N. human rights bodies.<sup>399</sup> While the drug control treaties obligate States to deter or punish drug use and trafficking, including through criminal laws, they provide relatively little guidance on what constitutes appropriate penal responses.<sup>400</sup> Increasingly, the U.N. human rights bodies are providing normative guidance in this regard.<sup>401</sup> The Human Rights Council staged a thematic session on the topic of human rights and drug control in 2015, and the U.N. General Assembly Special Session on the World Drug Problem in 2016 included called for rights-based reform of international drug policy.<sup>402</sup> Various entities within the U.N. human rights bodies have also commented on the impact of drug control laws on a broad spectrum of human rights areas, including health, arbitrary detention, capital punishment, due process, consent to treatment, prisons and policing, indigenous rights, women’s rights, and children’s rights.<sup>403</sup> There is a growing trend for certain entities within the U.N. human rights bodies to urge States to decriminalize the personal possession and use of drugs, as well as loosen laws to ensure access to essential medicines for certain medical conditions and situations.<sup>404</sup>

#### *Treaty Bodies*

The Human Rights Committee considered the matter of drug decriminalization in its individual communication published in 2007, *Gareth Anver Prince v South Africa*, in which it upheld the total prohibition of cannabis sativa use, without an exemption for practicing Rastafarians.<sup>405</sup> The Committee rejected the complainant’s claim that the prohibition was discriminatory, violated his right to practice his religion as a member of a religious minority, and constituted an unjustified

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<sup>397</sup> CRC Committee General Comment 13, 2011.

<sup>398</sup> CRC Committee Concluding Observations on The Netherlands 2009.

<sup>399</sup> Rick Lines et al., *The Case for International Guidelines on Human Rights and Drug Control*, 19 HEALTH HUM. RIGHTS J. at p232.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 234.

<sup>403</sup> Julie Hannah, et al, *Human Rights, Drug Control, and the U.N. Special Procedures: Preventing arbitrary detention through the promotion of human rights in drug control*, INT. CENT. HUM. RIGHTS DRUG POLICY (2015), at p 20.

<sup>404</sup> Special Rapporteur on Right to Health Report to UNGA 2016 – On 2030 Agenda for SDGs and Health and Human Rights of those Furthest Behind para 46 A/71/304; Special Rapporteur on Right to Health Report to UNGA 2010 para 42 A/65/255.

<sup>405</sup> Human Rights Committee *Gareth Anver Prince v South Africa*, CCPR/C/91/D/1474/2006



limitation on his freedom of religion.<sup>406</sup> The Committee found that the limitation on the practice of Rastafarian religion was proportional and necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others, under Article 18(3).<sup>407</sup> The Committee argued that cannabis has harmful effects, and that creating a religious exemption may allow the substance to enter into general circulation.<sup>408</sup> As the prohibition impacted all people equally, including members of other religious movements who may also believe in the beneficial nature of drugs, and did not target Rastafarians for differential treatment, the Committee found that the prohibition was not discriminatory.<sup>409</sup> Since *Gareth*, the Committee has not commented on whether drugs should be criminally prohibited, but has recommended a State party to re-focus its efforts on health, support, and rehabilitation, including opioid substitution, instead of leveraging its zero tolerance drug policy for plea bargaining with drug users.<sup>410</sup>

The CEDAW and CRC Committees have also recommended State parties to implement harm reduction programs, including drug substitution therapy for women and children.<sup>411</sup> The CRC Committee further recommended that State parties refrain from subjecting children who use drugs to criminal proceedings, and to decriminalize the possession of drugs by children.<sup>412</sup>

Commenting on laws that limit prescriptions of opioid medication, the CESCR Committee has clarified that access to essential drugs, including opioids, is an essential element of the right to health, and that States must comply with this obligation regardless of resource constraints.<sup>413</sup> This position is supported by both the World Health Organization and the International Narcotics Control Board which recognize that unnecessarily restrictive drug control regulations are a barrier to accessing essential controlled medicines.<sup>414</sup>

### *Special Procedures*

The Special Rapporteur on the independence of judges, lawyers, and court officials has expressed concern that the criminalization of drug consumption is unsuccessful in curtailing drug use, leads to high rates of recidivism by drug users, their failure to reintegrate into society, and produces particularly harsh outcomes for young offenders who are subject to long sentences.<sup>415</sup> The Special Rapporteur on Extrajudicial Executions has expressed concern at the application of death sentences for people convicted for drug possession, as drug offences are not sufficiently serious for the consideration of capital punishment, and where possession is criminalized, it is often based on threshold quantities that are arbitrary.<sup>416</sup> The Special Rapporteur on Torture and Other Cruel,

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<sup>406</sup> *Id.* para 8.

<sup>407</sup> *Id.* para 7.3

<sup>408</sup> *Id.* para 7.5

<sup>409</sup> *Id.*

<sup>410</sup> Human Rights Committee Concluding Observations, Georgia 2014.

<sup>411</sup> CEDAW/C/RUS/CO/8, para 35(d), and CEDAW/C/CAN/CO/8-9 para 45(a). General Comment No. 3 on HIV/AIDS and the rights of the child, General Comment 15 (2014) on right of the child to the highest attainable standard of health, and CRC Concluding Observations on Ukraine, Austria, Albania.

<sup>412</sup> CRC Concluding Observations on Mexico and Ukraine.

<sup>413</sup> General Comment 14 (2000), Right to Highest Attainable standard of Health.

<sup>414</sup> OHCHR Study on the impact of the world drug problem on the enjoyment of human rights, para 34 A/HRC/30/65; Special Rapporteur on Right to Health Report to UNGA 2016 – On 2030 Agenda for SDGs and Health and Human Rights of those Furthest Behind para 46 A/71/304

<sup>415</sup> Special Rapporteur on the independence of judges and lawyers, Mission to Maldives 2007.

<sup>416</sup> Special Rapporteur on extrajudicial executions, Report to UNGA 2012, para 36 A/67/275

Inhuman or Degrading Treatment or Punishment has described some experiences of drug users in compulsory treatment centers as meeting the definition of torture or ill-treatment, and has recommended that State parties replace punitive approaches to drug treatment.<sup>417</sup> The Special Rapporteur has also recommended that States adopt “a human rights-based approach to drug control as a matter of priority to prevent the continuing violations of rights stemming from the current approaches to curtailing supply and demand.”<sup>418</sup>

The Special Rapporteur on the Right to Health has strongly recommended that States consider decriminalizing or legally regulating and controlling drug use and possession, and to seek other alternatives to punitive or repressive drug control policies.<sup>419</sup> The past two mandate holders have argued that repressive and punitive responses to drugs are ineffective in reducing drug use or supply, and that criminalization of use and personal possession have a health-deterrent effect, driving drug users from health services, including substitution therapy.<sup>420</sup> Mandate holders have also argued that criminalizing approaches place drug users in prison, thereby fueling over-incarceration, overcrowding, and exposing people to unsafe and unhealthy conditions of detention.<sup>421</sup> They have also examined the specific rights abuses that adolescents who use drugs experience within criminal justice systems, and their challenges accessing drug treatment or HIV-related harm reduction services that envision them and are tailored to their needs.<sup>422</sup> In line with the CESCR Committee, the WHO, and the International Narcotics Control Board, the Special Rapporteur has noted that excessive restrictions to accessing opioids also affects the right to health by limiting substitution therapy, as well as access to medicines for palliative care, and access to medicines necessary for certain emergency obstetric situations and for the management of epilepsy.<sup>423</sup>

The Special Rapporteur on the Right to Health has also argued that the international drug control treaties “include space for a number of good faith interpretations that allow for domestic legislative reform, even in the absence of significant changes to the international drug control regime.”<sup>424</sup> Examining the case of Portugal, where the State decriminalized purchase, possession and use of all illicit drugs for personal use, making these administrative offences, the Special Rapporteur noted that the International Narcotics Board did not deem this sweeping policy reversal as inconsistent with the 1998 Convention.<sup>425</sup>

The UN General Assembly Special Session on Drugs considered the matter of drug decriminalization in its preparation for the development of the 2019 Political Declaration and Plan

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<sup>417</sup> Special Rapporteur on torture A/HRC/22/53 para 87(b)

<sup>418</sup> Special Rapporteur on torture A/HRC/22/52 para 86(a)

<sup>419</sup> Special Rapporteur on the right to health, Report to UNGA 2010 A/65/255. Arnand Grover, specifically recommended the consideration of decriminalization or de-penalization of drug use and possession, whereby legal prohibitions can remain in place but criminal punishments are reduced or eliminated, as opposed to legalization, with no criminal prohibitions on conduct.

<sup>420</sup> *Id.* Special Rapporteur on the right to health UNGA Report 2015, para 75, Right to health of families is put at risk by criminalization, where parents who use drugs may have their custodial rights removed, which deters parents from seeking health and social services.

<sup>421</sup> Special Rapporteur on the right to health, Report to UNGA 2010 para 68, A/65/255

<sup>422</sup> Special Rapporteur on the right to health, Report to HRC 2016 para 98-104.

<sup>423</sup> Special Rapporteur on the right to health, Report to UNGA 2010 A/65/255, para. 42

<sup>424</sup> Special Rapporteur on the right to health, Report to UNGA 2010.

<sup>425</sup> Citing Portugal.

of Action on drugs.<sup>426</sup> In advance of the special session, the U.N. Working Group on Arbitrary Detention, the Special Rapporteurs on extrajudicial executions, torture and other cruel, inhuman or degrading treatment or punishment, the right to health, and the CRC Committee issued a joint open letter to the President of the U.N. General Assembly recommending that drug use and possession be decriminalized and de-penalized.<sup>427</sup> The open letter also argued that States increase their investment in treatment, education, and other interventions.<sup>428</sup> Their arguments hinged on the right to health, and the collateral human rights abuses that flow from increasing drug users' contact with the criminal law, including their subjection to over-incarceration, police harassment, and arbitrary detention in drug treatment centers.<sup>429</sup> They also cite the stigmatizing effects of the criminal law which result in discrimination that reduces drug users' chances for employment, education, and other pathways to social inclusion.<sup>430</sup>

Indigenous peoples have an interest in the decriminalization of drugs, as drug control laws are used to prosecute them for their traditional use of plant-based narcotics and hallucinogens.<sup>431</sup> They are also victims of drug producers who remove them from their traditional lands for illicit drug production, and because they are often targeted first by law enforcement resulting in their disproportionate criminalization and incarceration.<sup>432</sup> While the Special Rapporteur on Indigenous Peoples has not commented on the decriminalization of drugs, the Permanent Forum on Indigenous Issues has called for the amendment or repeal of the 1961 Convention regarding coca leaf chewing, where they are inconsistent with the right of indigenous peoples to maintain their traditional health and cultural practices, as protected within the U.N. Declaration on the Rights of Indigenous Peoples.<sup>433</sup>

#### IV. Discussion and Conclusion

This research identified a wide and varied range of activities and behaviors that the U.N. human rights bodies argue should be decriminalized. Given this variation, it is difficult to identify a clear benchmark or general theory for decriminalization within the jurisprudence.<sup>434</sup> The jurisprudence does not articulate generally what kinds of harms are appropriately criminalized under International Human Rights Law. In addition to the diversity of offences, a unifying analysis in the jurisprudence is complicated by ambiguity in what precisely the human rights bodies are

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<sup>426</sup> UNITED NATIONS GENERAL ASSEMBLY, A/RES/S-30/1 JOINT COMMITMENT TO EFFECTIVELY ADDRESSING AND COUNTERING THE WORLD DRUG PROBLEM S-30/1 (2016).

<sup>427</sup> Christof Heyns et al., JOINT OPEN LETTER BY THE U.N. WORKING GROUP ON ARBITRARY DETENTION; SPECIAL RAPPORTEURS ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS; TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; THE RIGHT TO EVERYONE TO THE HIGHEST ATTAINABLE STANDARD OF MENTAL AND PHYSICAL HEALTH; AND THE COMMITTEE ON THE RIGHTS OF THE CHILD, ON THE OCCASION OF THE UNITED NATIONS GENERAL ASSEMBLY SPECIAL SESSION ON DRUGS, NEW YORK, 19-21 APRIL 2016 (2016).

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> Johan Burger & Mary Kapron, *Drug Policy and Indigenous Peoples*, 19 HEALTH HUM. RIGHTS J. 269–278 (2017).

<sup>432</sup> *Id.*

<sup>433</sup> United Nations Permanent Forum on Indigenous Issues, Report on the Eight Session (18-29 May 2009), Economic and Social Council, E/2009/43-E/C.19/2009/14, para. 89.

<sup>434</sup> ASHWORTH, *supra* note 5 at page 22, Commenting on the complexities of developing a general theory for criminalization.

recommending. This ambiguity stems in part from sometimes vague or inconsistent use of terminology and conceptualizations of decriminalization. The jurisprudence rarely specifies whether it is calling for *de jure* or *de facto* decriminalization, partial decriminalization, legalization, or de-penalization. Sometimes it is unclear whether recommendations to decriminalize stem from disagreement with the conduct itself being prohibited, or whether the inappropriate punishments that flow from prohibition are at the crux of the human rights bodies' concern. Often, it appears that the offences themselves are not the concern, but the leveraging of the offences for discriminatory and rights-repressing ends is at issue.

A cohesive thread may not neatly tie the jurisprudence together, but further analysis of the jurisprudence may be informed by the categorization of arguments that the human rights bodies make, which are described below.

The human rights bodies argue that crimes that specifically target and forbid the exercise of a human right should be decriminalized. This includes crimes that prohibit the exercise of a right altogether—such as apostasy—and crimes that disproportionately restrict the exercise of a right that is subject to proportionate limitation under International Human Rights Law—such as defamation.

Another argument is that certain crimes are defined in explicitly discriminatory ways or enforced in deliberately discriminatory ways. Together, these two reasons encompass a large majority of recommendations, from offences that limit rights and freedoms pertaining to sexual orientation and gender identity, to religious freedom restrictions enforced against religious minority groups, to the discriminatory application of moral offenses against women and girls, and the disproportionate application of petty offences against the poor, homeless, and marginalized minorities.

There are also crimes that directly affect the exercise of rights without specifically targeting them. A salient example includes the use of anti-terrorism laws to stifle free expression, assembly, and association. Relatedly, some crimes are overbroad in their definitions, and are subject to abuse for this and other reasons. These include offences that are used to criminalize the activities of human rights defenders, such as vaguely worded offences like sedition, incitement to revolt, forming criminal gangs, and creating civil disobedience. The application of debauchery, grave scandal, or social dissention offences to repress LGBTI people is another example.

There are also crimes that the human rights bodies argue should be reconsidered because they are defined in ways that result in *de facto* discrimination against protected status groups. This may include drug control laws that fail to include exemptions for the use of certain substances for the traditional spiritual practices of certain indigenous groups, or the application of trespassing laws against nomadic peoples. Other arguments include special arguments pertaining to vulnerable groups such as children, and argue for reduced culpability, or express concern about their greater vulnerability to the effects of imprisonment, or require greater protections. Some examples include the criminalization of children involved in irregular migration situations, and petty offenses and the criminalization of children living in poverty.

The human rights bodies express concern with crimes that have a variety of unintended indirect effects on rights that are disproportionate. This includes concerns about secondary effects such as the stigmatization and marginalization of individuals who are criminalized for one type of offence,

but then face difficulties accessing an array of rights related to health services, housing, and employment. Where offences are not explicitly discriminatory or inappropriate in themselves, but applied in a manner that produces a multitude of harmful secondary effects, concerns are tied to the harm that criminalization produces being disproportionately greater than the harm the criminalization seeks to protect against. Relatedly, although distinct, some arguments consider the harms that certain prohibitions seek to prevent as too insignificant to justify punishment, such as the possession and use of certain drugs for personal consumption.

Some offences are unobjectionable in themselves, but punishments that are impermissible under International Human Rights Law—for example drug trafficking offences that are subject to capital punishment. Other examples pertain to disproportionate punishments, such as offences that result in the disproportionate deprivation of liberty for people with increased vulnerabilities, such as non-violent criminal offences that are applied against people who cannot afford adequate legal representation or who cannot afford to pay bail or fines, or those applied against the young, women, or sexual, ethnic and racial minorities.

Certain crimes produce disproportionate effects on the rights of third parties, rather than the rights of the criminal defendant, and thus merit reconsideration. The criminalization of adultery and pregnancy out of wedlock and the harms of these prohibitions on any resulting children are examples.

Other crimes are counterproductive to their own purposes, for example, by punishing the victims they were enacted to protect. This category can refer to human and sexual trafficking laws that fail to include safe harbor or *vacatur* laws for victims of trafficking, and that are applied against victims of trafficking for participating in their own trafficking. It can also include the application of related laws, for example, punishing trafficked persons for working without work visas.

There are also concerns about the inefficaciousness of criminalization, for example, where criminalizing conduct drives behavior underground. This category includes examples such as the criminalization of HIV transmission which deters health seeking behavior, or offences that create a black market for prohibited products or behavior, such as the criminalization of the personal use and possession of drugs or the criminalization of sex work in certain contexts.

There are arguments that rest on the availability of alternative approaches to address certain harms that do not require the use of the criminal law. The human rights bodies raise these arguments in relation to the criminalization of sex work, personal use and possession of drugs, witchcraft, defamation, HIV offences, and irregular migration, for example.

Some arguments hinge on the appropriateness of retaining criminal justice responses as a last resort. Various human rights bodies raise this argument in relation to behavioral challenges with children in school and other contexts, in addition to the criminalization of homeless people and people living in poverty. The jurisprudence does not, however, include more broadly applicable guidance about when it is appropriate to reach for the criminal law, and what factors might be considered in this calculation.

In addition to the categories of arguments for decriminalization, there are notable patterns to the question of decriminalization across the various human rights mechanisms. There is some unevenness in recommendations across mechanisms, which creates ambiguity for States. This

arises in relation to the question of sex work decriminalization, where there are unclear recommendations from various mechanisms, or conflicting recommendations between mechanisms. For example, there is sometimes disagreement or are differences in the forcefulness with which mechanisms argue for the decriminalization of sex workers. Some mechanisms state clearly that States should also decriminalize clients and other ancillary practices around sex work, while others side step this question. There are also conflicting recommendations relating to criminal defamation—the majority of mechanisms call for defamation to be decriminalized, while the CERD committee has found States compliant with obligations under the CERD treaty for having criminal defamation available to apply to the expression of racist ideas and statements.

Conversely, it is interesting to note some coordination amongst mechanisms to harmonize recommendations and pool political weight for specific policy reform. This can be seen in the approach of various mandate holders of special procedures and the CRC Committee in their joint letter to the President of the U.N. General Assembly containing their collective recommendation to decriminalize and de-penalize the personal possession and use of drugs.

The treaty bodies, special procedures, and UPR systems approach the question of decriminalization in some distinct ways that merit some general observations. As described in part III, the treaty bodies clarify norms and apply them to specific country contexts in their Concluding Observations, and to specific cases in their individual communications. They consider normative questions within the bounds of the specific treaties they are mandated to monitor, although they do draw on reasoning elaborated by other treaty bodies. The special procedures, tasked with monitoring thematic human rights topics, can at times exercise a more boundary expanding role, and their arguments push the collective U.N. human rights bodies to consider the decriminalization of offences that may not have been previously considered within the jurisprudence. The Special Rapporteur on the Right to Health's unequivocal recommendations to decriminalize sex work, as well as to decriminalize the personal use and possession of drugs are good examples of boundary expanding recommendations. With their thematic reports, the special procedures also play a role in building the evidentiary foundation for policy reform. Within the UPR mechanism we can see which issues States seek to advance in their recommendations to their peers, and how States under review respond to recommendations. In general, there are relatively limited recommendations across the jurisprudence, with recommendations more concentrated around one or two categories of offences, for example, on the decriminalization of same-sex relations or to carve out exceptions to the criminalization of abortion. The recommendations that States make are markedly more conservative than those emanating from treaty bodies or the special procedures. This is unsurprising given the political nature of State interactions within the UPR. Recommendations made to States as part of the UPR review are often not accepted by the State under review. This lack of acceptance might be based on an array of arguments spanning cultural relativistic justifications, or from a lack of consensus within or across States. Lastly, within the UPR system it is possible to see how normative arguments made at the international level dissipate into the prevailing political culture of each State.<sup>435</sup>

The current jurisprudence on decriminalization at the U.N. human rights bodies provides an array of normative arguments that can be used to curtail criminalization that may be ineffective, counterproductive, or cause more harm than it prevents. While the various mechanisms do not

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<sup>435</sup> *Id.* at page 39, positing that the main determinants of criminalization continue to be political opportunism and power, both linked to the prevailing political culture of the country.

consider generally or state in a clear and unified manner what constitutes appropriate forms of criminalization, the collective arguments this research identified may assist theorists and practitioners to develop additional inquiries into the role of International Human Rights Law in influencing the decriminalization of offences. The evidentiary foundation for decriminalization of certain offences within the jurisprudence may also help inform actors engaged in criminal law reform to make principled decisions within a human rights rubric that consider the human rights consequences of introducing new offences or maintaining certain offences under the criminal law.

## V. Table of Offences and Recommendations

Offences	Various Recommendations
<b>I. Sexuality, Gender, Reproduction</b>	
1. Sexual orientation and gender identity	<ul style="list-style-type: none"> <li>– Decriminalize homosexuality</li> <li>– Decriminalize consensual same-sex relationships</li> <li>– Decriminalize same-sex sexual conduct</li> <li>– Stop applying broad, vaguely defined offences to criminalize same-sex relations</li> <li>– Decriminalize cross-gender dressing or imitating the opposite sex</li> <li>– Decriminalize the operation of associations that promote homosexuality or condone or witness same-sex relationships</li> <li>– Decriminalize “promotion of homosexuality” among minors</li> </ul>
2. Abortion	<ul style="list-style-type: none"> <li>– Decriminalize abortion in all cases for adolescents</li> <li>– Decriminalize abortion in cases of severe and/or fatal abnormalities of the fetus</li> <li>– Decriminalize abortion in cases where there is a risk to life and health of the pregnant woman or girl</li> <li>– Remove all punishments for abortions for the woman or girl</li> <li>– Decriminalize the provision of abortion services</li> </ul>
3. Non-marital consensual sex	<ul style="list-style-type: none"> <li>– Decriminalize consensual sexual relations between adults</li> <li>– Decriminalize adultery for women</li> <li>– Decriminalize debauchery</li> <li>– Decriminalize “moral” crimes, applied disproportionately against women for non-marital consensual sex</li> <li>– Decriminalize pregnancy out of wedlock</li> <li>– Decriminalize non-marital consensual sex through the application of vague “public decency” laws</li> </ul>
4. Sex work	<ul style="list-style-type: none"> <li>– Decriminalize sex work</li> <li>– Decriminalize the demand side of sex work / purchasing of sex</li> <li>– Decriminalizes practices around sex work</li> </ul>
5. HIV transmission, exposure, non-disclosure	<ul style="list-style-type: none"> <li>– Decriminalize non-disclosure of HIV status</li> <li>– Decriminalize exposure to or transmission of HIV where the mens rea is less than intentional or malicious</li> <li>– Decriminalize peri-natal and post-natal (mother-to-child / vertical) transmission of HIV</li> </ul>
<b>II. Religion, Thought, and Conscience</b>	
6. Proselytism	<ul style="list-style-type: none"> <li>– Decriminalize proselytism</li> <li>– Decriminalize missionary activities</li> <li>– Decriminalize unethical conversions in abstracto</li> </ul>

	<ul style="list-style-type: none"> <li>– Decriminalize proselytism and non-coercive attempts to convert through the application of “public order” offences</li> </ul>
7. Blasphemy	<ul style="list-style-type: none"> <li>– Decriminalize blasphemy</li> <li>– Decriminalize the defamation of religion</li> <li>– Decriminalize claims of religious superiority</li> </ul>
8. Apostasy	<ul style="list-style-type: none"> <li>– Decriminalize apostasy</li> <li>– Decriminalize expressions of an atheistic nature</li> </ul>
9. Witchcraft	<ul style="list-style-type: none"> <li>– Repeal provisions criminalizing witchcraft that are discriminatory to women</li> </ul>
10. Refusal of military service	<ul style="list-style-type: none"> <li>– Decriminalize conscientious objection to military service</li> <li>– Allow conscientious objectors to expunge their criminal records</li> </ul>
<b>III. Trafficking and Irregular Migration</b>	
11. Irregular migration	<ul style="list-style-type: none"> <li>– Decriminalize irregular migration</li> <li>– Decriminalize minors involved in irregular border crossing</li> <li>– Decriminalize labor migration</li> <li>– Decriminalize homeowners who accommodate undocumented migrants</li> <li>– Decriminalize leaving the country without permission</li> </ul>
12. Victims of trafficking	<ul style="list-style-type: none"> <li>– Decriminalize victims of trafficking for participating in their own trafficking</li> <li>– Stop penalizing victims of trafficking for engaging in work without a visa</li> <li>– Decriminalize child and adult victims of sex trafficking</li> <li>– Pass safe harbor or <i>vacatur</i> laws for children and adult victims of trafficking for sexual exploitation</li> </ul>
<b>IV. Land and Property</b>	
13. Occupation of land	<ul style="list-style-type: none"> <li>– Decriminalize the occupation of land by landless peoples</li> <li>– Reform eviction laws to avoid criminalizing homeless people</li> </ul>
14. Nomadism	<ul style="list-style-type: none"> <li>– Ensure safeguards against forced eviction for nomadic communities</li> <li>– Decriminalize nomadism</li> </ul>
<b>V. Opinion and Expression</b>	
15. Defamation	<ul style="list-style-type: none"> <li>– Decriminalize defamation</li> <li>– De-penalize defamation in all cases</li> <li>– Only criminalize defamation in the most serious of cases including malicious intent</li> <li>– Refrain from <i>de facto</i> criminalization of defamation through the introduction of new norms with the same goals, e.g. through disinformation and dissemination of false information offences</li> </ul>
16. Self-mutilation	<ul style="list-style-type: none"> <li>– Decriminalize self-mutilation as a form of protest expression</li> </ul>
17. Memory laws	<ul style="list-style-type: none"> <li>– Do not penalize expressions of an erroneous opinion about or incorrect interpretation of past events where they fall short of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence</li> <li>– Decriminalize expressions of opinions about historical facts to enable the study of history</li> </ul>
18. Incitement of terrorism	<ul style="list-style-type: none"> <li>– Stop applying vaguely defined glorification, public provocation, and apology of terrorism offences that limit freedom of expression</li> <li>– Stop applying vague counter terrorism or national security laws to journalists and activists carrying out legitimate activities</li> </ul>
<b>VI. Assembly and Association</b>	
19. Demonstrations, protests	<ul style="list-style-type: none"> <li>– Decriminalize participation in and the organization of peaceful assemblies</li> <li>– Decriminalize peaceful assembly in the context of natural resource exploitation or during election time</li> </ul>



	<ul style="list-style-type: none"> <li>– Stop the <i>de facto</i> criminalization of social protest by indigenous organizations and movements by applying anti-terrorism laws and common criminal laws</li> <li>– Stop criminalizing human rights defenders by applying overly broad offences such as sedition, incitement to revolt, attempt to undermine institutions, forming criminal gangs, obstructing public roads, creating civil disobedience, or inciting crime.</li> </ul>
20. Public associations, NGOs	<ul style="list-style-type: none"> <li>– Decriminalize membership in unregistered NGOs</li> <li>– Remove prohibitions on NGOs accessing foreign funding</li> </ul>
<b>VII. Poverty</b>	
21. Homelessness, people living in poverty	<ul style="list-style-type: none"> <li>– Decriminalize life sustaining activities in public spaces, like eating, sleeping, sitting, performing personal hygiene, public urination and defecation, by people living in the street</li> <li>– Decriminalize loitering and panhandling</li> <li>– Reform eviction laws to avoid criminalizing homeless people</li> <li>– Decriminalize outdoor charity food services</li> <li>– Do not criminalize homelessness in advance of mega events</li> <li>– Do not criminalize children and adolescents affected by poverty</li> <li>– Review sanctions that require payment of disproportionate fines by persons living in poverty related to begging and the use of public spaces</li> <li>– Decriminalize poverty by reforming bail laws to take into account the socio-economic circumstances of persons living in poverty</li> <li>– Do not prosecute families and parents for child abandonment where they are unable to provide proper care for their children</li> </ul>
22. Petty offences	<ul style="list-style-type: none"> <li>– De-penalize minor/petty offences</li> <li>– De-penalize the non-payment of fines for those unable to pay</li> <li>– Identify alternative and restorative justice mechanisms for petty offences and retain imprisonment as a last resort and reserve it for persons sentenced for grave crimes and who constitute a real danger to society</li> </ul>
<b>VIII. Status Offences and Child and Adolescent Behavior</b>	
23. Status offences	<ul style="list-style-type: none"> <li>– Decriminalize status offences</li> <li>– Decriminalize vagrancy, truancy, running away, violating curfews, and other behavioral problems of children and adolescents</li> <li>– Do not criminalize children based on their appearance</li> <li>– Decriminalize “moral” offences by children, including running away from home, adultery or sodomy</li> </ul>
24. Disciplinary issues in schools	<ul style="list-style-type: none"> <li>– Do not apply criminal law to address disciplinary issues in schools</li> <li>– Decriminalize disruptive behavior, disorderly conduct, and other non-violent behavior of students</li> </ul>
25. Self-harm	<ul style="list-style-type: none"> <li>– Decriminalize self-harm by adolescents</li> </ul>
<b>IX. Drugs</b>	
26. Drugs	<ul style="list-style-type: none"> <li>– Decriminalize and de-penalize the personal use and possession of drugs</li> <li>– Decriminalize certain drug use for indigenous, traditional, and religious groups for traditional health and cultural practices</li> <li>– Seek alternatives to punitive or repressive drug control policies</li> <li>– Do not criminalize parents in situations of risk from drug use</li> <li>– Change legislation that criminalizes drug users based on non-consensual drug testing</li> <li>– Decriminalize minor offences related to drugs</li> </ul>