

A human rights and substantive criminal law approach to the criminalization of sexuality, reproduction, drug use and HIV

Project Partner: **International Commission of Jurists**

Background and rationale

There are well-documented patterns of human rights violations resulting from the enforcement of criminal law. This includes human rights violations arising from the misuse and abuse of criminal law in relation to the following issues: sexual and reproductive healthcare services, including abortion; consensual sexual conduct; adult consensual sex work; drug use, or possession of drugs for personal use; and the overly broad criminalization of HIV non-disclosure, exposure or transmission (hereinafter “the select areas”). This has prompted UNAIDS, the UN Office of the High Commissioner for Human Rights (OHCHR), the International Commission of Jurists and others to examine more closely the conditions and the permissible grounds, under applicable human rights law and standards, for the resort to and application of the criminal law in the first place.

In the context of the select areas, human rights bodies as well as national courts are increasingly finding criminal law provisions and their enforcement to be contrary to human rights law and standards, including the principle of non-discrimination; the right to equality before the law and equal protection of the law without discrimination; the right to be free from cruel, inhuman or degrading treatment or punishment; and the rights to privacy and to health, to name but a few. While progress is being made in this area, there is a long way to go, as most countries still criminalize and punish conduct to the detriment of the individual and society, particularly in respect of health and human rights. There is a need for further strategies and renewed mobilization to address the unjust application and the detrimental effects of the criminal law, particularly in the context of the select areas.

In recent years, national courts, international human rights mechanisms, independent bodies such as the Global Commission on HIV and the Law, civil society organizations and UN entities have increasingly addressed the challenges posed by the misuse of criminal laws in specific contexts, as well as against specific populations. Such efforts are particularly important in the current global context of increased challenges to the international human rights framework and its application to specific at-risk populations.

In this context, in February 2017, UNAIDS and OHCHR convened an expert meeting to examine the human rights impact of criminal laws within the select areas. One of the main findings of the meeting was the need for greater guidance on the application of the criminal law in these areas. In the aftermath of this meeting, UNAIDS and WHO led a joint UN statement on ending discrimination in health care settings, which was signed by 12 UN entities. One of the key recommendations in that statement calls for *‘Reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established*

public health evidence.' In addition, the UN Secretary General, in his report to the 2016 High-Level Meeting on HIV and AIDS, recognized the negative health and human rights impact of the criminal law in the following terms:

Misuse of criminal law often negatively impacts health and violates human rights. Overly broad criminalization of HIV exposure, non-disclosure and transmission is contrary to internationally accepted public health recommendations and human rights principles. Criminalization of adult consensual sexual relations is a human rights violation, and legalization can reduce vulnerability to HIV infection and improve treatment access. Decriminalizing possession and use of injecting drugs and developing laws and policies that allow comprehensive harm reduction services have been shown to reduce HIV transmission. Similarly, decriminalization of sex work can reduce violence, harassment and HIV risk. Sex workers should enjoy human rights protections guaranteed to all individuals, including the rights to non-discrimination, health, security and safety.

In light of this recognition, the U.N. Secretary General called on States to:

Leave no one behind and ensure access to services by removing punitive laws, policies and practices that violate human rights, including the criminalization of same-sex sexual relations, gender and sexual orientation diversity, drug use and sex work, the broad criminalization of HIV non-disclosure, exposure and transmission, HIV-related travel restrictions and mandatory testing, age of consent laws that restrict adolescents' right to health care and all forms violence against key populations.

Thus, there is both a momentum and recognition of the need for a set of principles in this context aimed at addressing the misuse of the criminal law in the abovementioned areas. Other sets of principles, addressing other areas of the law from a human rights perspective, indicate the potential beneficial impact this work could have. For example, principles developed by prior colloquia and expert groups related to the application of international human rights law in other contexts, such as the [Siracusa Principles](#), the [Maastricht Principles](#), and the [Yogyakarta Principles](#), in the elaboration of each of which the ICJ played a prominent role (see below), have had a significant impact on the development of national and international jurisprudence.

Against the above background, the ICJ is currently working with a group of eminent jurists to elaborate a set of principles to help legislatures, the courts, administrative and prosecutorial authorities, and advocates address the detrimental impact on health, equality, and human rights of criminalization, including, in particular, in the context of the select areas. The principles to be eventually elaborated should help both in the development of new criminal legislation, and in reviewing existing criminal provisions.

The project and its scope

In light of the above, the purpose of this project is to assist the ICJ in identifying the human rights and substantive criminal law framework for the elaboration of a set of principles to help legislatures, the courts, administrative and prosecutorial authorities, and advocates address the detrimental impact on health, equality, and human rights of criminalization, particularly in the context of the select areas.

The project will explore and outline the principles/notions arising from substantive criminal law and human rights that inform and underpin the answer to the following fundamental question: what acts or omissions should be criminalized and why? The project will focus, in particular, albeit not exclusively, on the select areas with a view to promoting decriminalization efforts as critical to mitigating the detrimental impact of criminalization on health, equality and human rights in these contexts and beyond.

There is some overlap between procedural propositions derived from IHRL and those arising from substantive criminal law, for example, with respect to the principle of legality and due process rights. However, the focus of the project is on substantive criminal law and IHRL notions that have a bearing on it, as opposed to the procedural aspects of the criminal law.

The International Commission of Jurists (ICJ, www.icj.org)

Established in 1952, and active on five continents, the International Commission of Jurists (ICJ) is an international non-governmental organization headquartered in Geneva, Switzerland. The Commission is composed of 60 distinguished judges and lawyers from all regions of the world, representing different justice systems worldwide. The ICJ promotes understanding and observance of the rule of law and the legal protection of human rights throughout the world. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. It endeavours to promote States' compliance with their international human rights legal obligations; to support efforts to combat impunity; to ensure legal accountability for human rights violations and access to effective remedies and reparations for victims.

Historically, the ICJ has played a major role in the elaboration and adoption of a number of principles by distinguished jurists, including senior judges, legal practitioners, law academics and civil society members. Among those are: the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (see Commission on Human Rights, E/CN.4/1985/4); the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by 40 international law experts from all regions of the world, including current and former members of international human rights treaty bodies, regional human rights bodies, as well as former and current Special Rapporteurs of the United Nations Human Rights

Council; and the 2006 Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity - a universal guide to human rights which affirm binding international legal standards with which all States must comply.

Project Output:

A survey of relevant domestic legislation from up to eight countries in Europe, Africa, the Americas and possibly the Asia Pacific region (to be agreed based on among other things language skills), and comparative jurisprudence that would assist in answering the fundamental question: what acts or omissions should be criminalized and why, with particular reference to -- albeit not exclusively -- the select areas (i.e. consensual sexuality; adult consensual sex work; sexual and reproductive healthcare services, particularly abortion; drug use; and criminalization of HIV non-disclosure, exposure and transmission). In common law jurisdictions this will entail a survey of legislation and jurisprudence to identify what conduct, falling within the select areas, is currently criminalised; how the law has developed in this regard; and the reasons for the current state of the law. In civil law systems inspired by German's substantive criminal law theory, the relevant notions are the "system for the analysis of criminal liability, or "criminal offense system" (Straftatsystem)" and the notions of "Tatbestandsmäßigkeit", wrongfulness (Rechtswidrigkeit) and culpability (Schuld)". The research would entail a focus on the select areas in the first place, surveying legislation and jurisprudence that addresses them, with a view to ascertaining on what grounds the relevant conduct is considered criminal or not.

Project Outline:

- Phase 1: (November-December)
 - Familiarisation with the human rights impacts of the criminalisation of consensual sexuality, adult consensual sex work; sexual and reproductive health services, particularly abortion, and HIV transmission
 - Preliminary identification and agreement on the main sources to be surveyed, and of the focus countries; bibliography and literature review on principles/notions of substantive criminal law and human rights law that inform the answer to the fundamental question set out above on up to 2 focus countries per team member.
 - Development of a research methodology
 - Apply for ethical consent to conduct interviews with experts on criminal law and human rights in the focus countries.
 - By the end of term, submit bibliography, literature review and research methodology to the ICJ. This document should be in the region of 12-15 pages.
- Phase 2: (January-March)
 - Research undertaken on each focus country; analysis and review of findings on each; write up of individual briefings on focus countries; findings to be collected together as a compilation of relevant legislation

and jurisprudential statements (as annexes to the main report). Review and global analysis identifying tentative overarching, common principles/traits/features (if any are found) produced as a full first draft of the final report by the end of March. The suggested length of the report is 25-30 pages, plus any relevant annexes.

- Phase 3: (April-June)
 - Revision of report
 - Any further tasks

Project Bibliography:

- Background paper No. 2 “Human rights and criminal law principles - Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”.
- Amnesty, Body Politics, the criminalization of sexuality and reproduction, <https://www.amnesty.org/download/Documents/POL4077642018ENGLISH.PDF>
- Amnesty, A Primer on Criminalization of Sexuality and Reproduction, <https://www.amnesty.org/download/Documents/POL4077632018ENGLISH.PDF>
See in particular the Learn More sections in each annex and the endnotes.