# INTERNATIONAL HUMAN RIGHTS LAW AND "CRIMINALIZATION"

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Introduction
I. Background to the Relationship of International Human Rights Law and International Criminal Law
II. Analysis of the Implementation of International Human Rights Law via Domestic Criminal Law
  1. The Positive Obligations Doctrine
  2. The International Covenant on Civil and Political Rights
  3. General Comment 35
  4. The Human Rights Committee, State Reports and Concluding Observations
  5. The International Convention on the Elimination of all Forms of Racial Discrimination
  6. The Committee on the Elimination of All Forms of Racial Discrimination, State Reports and Concluding Observations
III. The European Convention of Human Rights
Conclusion

## Introduction

International human rights law imposes obligations on States to protect the rights of the individuals within their jurisdiction. The Universal Declaration of Human Rights (UDHR) states that it is "a common standard of achievement for all peoples and all nations," and places an obligation on every individual and every organ of society "to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their individual and effective recognition and observance."[1] It has become clear since the UDHR was adopted that the responsibility of States for breaches of human rights law "ought to be complemented by perpetrators' individual responsibility under criminal and civil law."[2] Human rights monitoring bodies are increasingly placing positive obli-

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[1] *Universal Declaration of Human Rights*, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, U.N. Doc. A/RES/217 A (III) (1948), Preamble.

[2] Ilias Bantekas, "Individual Responsibility and the Evolving Status of the Physical Person in International Human Rights Law," in Mashood A. Baderin and Manisuli Ssenyonjo eds., *International Human Rights Law: Six Decades after the Universal Declaration of Human*

gations on States to ensure compliance with human rights instruments by utilising domestic criminal law to criminalize certain types of behaviour, to investigate criminal behaviour and to prosecute and punish private individuals' conduct which is not in line with the rights set out in human rights instruments. Bantekas states that "[c]riminalization (and punishment) is not an aim within itself, but is a necessary ingredient for the primary aim, which is the protection of human beings."[3] This article analyses how human rights treaties and human rights monitoring bodies have increasingly embraced a criminal law approach with regard to ensuring the protection of human rights. After a brief discussion of the historic relationship of international human rights law and international criminal law, we focus on how certain United Nations' (UN) human rights treaties include provisions which require States to criminalize certain activities within their jurisdiction in order to ensure the protection of the human rights of individuals therein. This section also addresses how UN human rights monitoring bodies have interpreted these provisions and how UN treaty bodies have encouraged States to adopt criminal sanctions. Finally, we then turn to developments within the Council of Europe system, examining the provisions of the European Convention of Human Rights (ECHR)[4] which require States Parties to prohibit certain types of behaviour in order to protect human rights as well as the expansive approach to a criminalization requirement taken by the European Court of Human Rights (ECtHR).

## I. Background to the Relationship of International Human Rights Law and International Criminal Law

International law has "clearly moved towards much greater criminalization"[5] of the wrongs of individuals. Since the Nuremberg and Tokyo Trials,[6] the criminalization of violations of certain human rights has taken centre stage in the field of international law and the idea of criminal law as an enforcement avenue for human rights law has been re-enforced with the creation of the *ad hoc* tribunals

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*Rights and Beyond* (2010), p. 431. See also Ineke Boerefijn, "Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties," *Netherlands International Law Review*, Vol. 56, No. 2 (2009), p. 168.

[3] Bantekas, *supra* note 2, p. 438.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series*, Vol. 213, p. 222 (No. 2889).

[5] Theodor Meron, "Is International Law Moving towards Criminalization?," *European Journal of International Law*, Vol. 9, No. 1 (1998), p. 30.

[6] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945; International Military Tribunal for the Far East Charter, Tokyo, 19 January 1946.

for the Former Yugoslavia and for Rwanda[7] along with hybrid tribunals such as the Special Court for Sierra Leone.[8] The place of international criminal law as an important component of human rights protection was confirmed with the creation of the International Criminal Court,[9] and "international criminal law" has now emerged as a discipline resulting from "the combination of human rights law, international humanitarian law and national criminal law."[10] Indeed, this is not surprising given that the "goods" protected under the umbrella of international criminal law are protected likewise by those other older bodies of law,[11] and International Criminal Law has, at times, been guided by international human rights standards,[12] and international criminal tribunals have regularly referred to human rights treaties in their judgments.[13] Soares comments that "[w]ith the emergence of international criminal law, the distinction between human rights and criminal law became blurred."[14] "International criminal law has thus far offered an avenue for holding individuals responsible for those gross human rights violations

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[7] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 1993 and Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted 1994.

[8] Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

[9] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

[10] Patricia Pinto Soares, "Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism," *Criminal Law Forum*, Vol. 23, Nos. 1-3 (2012), p. 161.

[11] *Ibid.*, p. 162.

[12] The willingness of international criminal tribunals to accept human rights standards has been criticized for a lack of methodology and stringency. Soares states that "international criminal law has undergone controversial developments due to resorting to human rights law in a somewhat erratic manner which overlooks the differences, and sometimes the opposition, between the *telos* of both legal areas, often imperilling the principles of legality and individual culpability as unique foundational rationales of international criminal law." *Ibid.*, p. 161.

[13] See Guénaël Mettraux, "Using Human Rights Law for the Purpose of Defining International Criminal Offences — The Practice of the International Criminal Tribunal for the Former Yugoslavia," in Marc Henzelin and Robert Roth eds., *Le Droit pénal à l'epreuve de l'internationalisation* (2002), p. 193.

[14] Soares, *supra* note 10, p. 171. See also William A. Schabas, "Criminal Responsibility for Violations of Human Rights," in Janusz Symonides ed., *Human Rights: International Protection, Monitoring, Enforcement* (2003), p. 281.

that qualify as international crimes."[15]

The development of individual criminal responsibility from Nuremberg onwards has placed the focus on the individual in the international legal order. The Nuremberg Principles were embraced by the UN[16] and the Geneva Conventions of 1949 included specific references to individual criminal responsibility in the grave breaches provisions.[17] Subsequently, the UN adopted the Genocide Convention[18] and the Convention on Apartheid,[19] which criminalize acts of genocide and apartheid and require States Parties to punish perpetrators. However, when the UN turned its attention to human rights in general, rather than to breaches of those human rights laws which constitute international crimes, it chose an approach different from that of criminalization. The UDHR and the nine associated UN human rights treaties[20] have very few references to criminal law obligations and sanctions.

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[15] Danwood Mzikenge Chirwa, "State Responsibility for Human Rights," in Baderin and Ssenyonjo eds., *supra* note 2, p. 409.

[16] *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, General Assembly Resolution 95(I), U.N. Doc. A/236 (1946).

[17] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No. 1), *United Nations Treaty Series*, Vol. 75, p. 31 (No. 970), Art. 50; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (No. II), *United Nations Treaty Series*, Vol. 75, p. 85 (No. 971), Art. 51; Convention Relative to the Prisoners of War (No. III), *United Nations Treaty Series*, Vol. 75, p. 135 (No. 972), Art. 130; Convention Relative to the Protection of Civilian Persons in Time of War (No. IV), *United Nations Treaty Series*, Vol. 75, p. 287 (No. 973), Art. 147.

[18] Convention on the Prevention and Punishment of the Crime of Genocide, *United Nations Treaty Series*, Vol. 78, p. 277 (No. 1021). The Genocide Convention states that genocide is "a crime under international law" and that States Parties "undertake to prevent and to punish" through both domestic courts and international tribunals that have jurisdiction.

[19] International Convention on the Suppression and Punishment of the Crime of Apartheid, *United Nations Treaty Series*, Vol. 1015, p. 243 (No. 14861). Under Article 3 of the Convention, international criminal responsibility is to apply to individuals, members of organizations and representatives of the State who commit, incite or conspire to commit the crime of apartheid. Article 4 requires States Parties to adopt legislation to suppress and prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.

[20] International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly Resolution 2106 (XX) of 21 December 1965; International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966; International Covenant on Social, Economic and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966; Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly Resolution 34/180 of 18 December 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of 10 December 1984, entry into force 26 June 1987; Convention

Rather than emphasize individual criminal responsibility, international human rights law focused almost solely on State responsibility. The same approach was taken by regional human rights organizations and treaties, which also, for the most part, place a responsibility on States to protect the rights of the individuals within their jurisdictions, rather than on the individual through criminal responsibility. A handful of provisions in international and regional human rights treaties do, however, oblige States to implement a criminal law framework and/or impose criminal sanctions in respect of certain types of behaviour. In addition, human rights monitoring bodies have in some instances taken such ideas further than might be suggested by the texts of the relevant treaties, especially within the Council of Europe system.

While it is clear that human rights treaties do not provide for individual criminal responsibility, rather requiring States to criminalize certain behaviors under domestic criminal law, the treaties have contributed significantly to the work of domestic and international judicial bodies in this regard. The requirement to criminalize certain types of behaviour incumbent on States Parties of human rights treaties paved the way first for the *ad hoc* tribunals, and now the international criminal court, to identify numerous general principles of law,[21] for example the principle that a trial must be established by law,[22] and the principle of proportionality between a penalty and the gravity of the crime.[23] In addition, "[i]t would be hard to imagine the unprecedented emergence of individual criminal responsibility in the post-Cold-War era without the increased international legal personality granted to individuals through the human rights treaties."[24]

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on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158 of 18 December 1990; International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006; Convention on the Rights of Persons with Disabilities, adopted 13 December 2006.

[21] See Bantekas, *supra* note 2, p. 439.

[22] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 42.

[23] *Prosecutor v. Blaskić, Judgment, Trial Chamber*, 3 March 2000, IT-95-14-T, para. 796. See Mohamed ELewa and Noelle Higgins, "General Principles of Law in the Early Jurisprudence of the ICC," in Triestino Mariniello ed., *The International Criminal Court Search of Its Purpose and Identity* (2015), pp. 263-282.

[24] See Bantekas, *supra* note 2, p. 439.

## II. Analysis of the Implementation of International Human Rights Law via Domestic Criminal Law

This section provides an analysis of how UN human rights treaties and General Comments of the treaty bodies call for the criminalization of certain acts in the domestic law of States Parties. The discussion focuses on a number of principal provisions which require State prohibition of certain behavior, *i.e.* Article 20 of the International Covenant on Civil and Political Rights (ICCPR), in addition to Article 9 regarding detention and the related General Comment No. 35 of the Human Rights Committee (HRC), as well as Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). We begin with a general discussion of the positive obligations doctrine.

### 1. The Positive Obligations Doctrine

Typically, human rights instruments require States to not only refrain from interfering in individuals' rights but also to take action to ensure that individuals' rights are not breached by non-State actors. The doctrine of positive obligations "acknowledges that constraints on individuals' freedom, autonomy and capabilities may not be the result of the exercise of state power alone but do in fact also follow from social forces and the conduct of private individuals, groups and organisations."[25] The idea that States had positive obligations to ensure the enjoyment of rights enshrined in international and regional human rights treaties for people within their jurisdiction was considered by Henry Shue, who argued in 1980 that every basic right has three corollary duties: to avoid depriving, to protect from deprivation and to aid the deprived.[26] This thinking was further developed and refined by Asbjørn Eide, the Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, as the duties to respect, to protect and fulfil.[27] This tripartite categorisation has now been accepted widely by human rights bodies and domestic law regimes and the positive obligations principle is echoed in regional human rights treaties.[28] This doctrine, in some in-

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[25] Piet Hein van Kempen, "Four Concepts of Security — A Human Rights Perspective," *Human Rights Law Review*, Vol. 13, No. 1 (2013), p. 17.

[26] Henry Shue, *Subsistence, Affluence, and US Foreign Policy* (1980), p. 52.

[27] See Asbjørn Eide, "Final Report on the Right to Adequate Food as a Human Right," U.N. Doc. E/CN.4/Sub.2/1987/23 (1987) and Martin Scheinin, "Economic, Social and Cultural Rights as Legal Rights," in Asbjørn Eide *et al.* eds., *Economic, Social, Cultural Rights: A Textbook* (1995), pp. 41-62.

[28] ECHR, *supra* note 4, Art. 1(1); American Convention on Human Rights, *United Nations Treaty Series*, Vol. 1144, p. 143 (No. 17955), Art. 1(1). See also *Commission Nationale des*

stances, requires States to prohibit and indeed to criminalize certain behaviours within their jurisdiction in order to respect, protect and fulfil human rights.

2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights requires States Parties "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant."[29] The use of this phrasing indicates that States must take positive measures to ensure the protection of the respective rights in addition to refraining from interfering itself with those rights. In General Comment 31 the HRC states that the obligations envisaged in Article 2(1) are "both negative and positive in nature."[30] At paragraph 8 of the General Comment, the Committee indicates that while the ICCPR does not have horizontal effect nevertheless States Parties are required to protect individuals from "acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."[31] Article 2 of the ICCPR divides the duty to protect into two, *i.e.* firstly States are under a duty to take measures to prevent human rights violations by non-State actors and secondly, they are required to take corrective measures once a violation has occurred.

In order to address the first part of this duty States *may* be under an obligation to utilize domestic law to prohibit and deter human rights violations. The HRC has stated that States are required to put in place a legislative framework which prohibits acts constituting arbitrary and unlawful interference with privacy, family, home or correspondence by natural and legal persons.[32] In addition, with regard to the right to life, the Committee has stated that the State should "establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons."[33] General Comment 31 observes that there may be circumstances

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*Droits de l'Homme et des Libertés v. Chad*, Communication No. 74/92 (1995), (2000) AHRLR 66 (ACHPR 1995).

[29] International Covenant on Civil and Political Rights, *United Nations Treaty Series*, Vol. 999, p. 171 (No. 14668), Art. 2.

[30] *General Comment No. 31, The Nature of Legal Obligations Imposed on State Parties to the Covenant*, 29 March 2004, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 6.

[31] *Ibid.*, para. 8.

[32] See *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, U.N. Doc. A/43/40 (1988), paras. 1, 2 and 9-10; *General Comment No. 10: Article 19 (Freedom of Opinion)*, 29 June 1983, U.N. Doc. A/38/40 (1983), paras. 2-3.

[33] *General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, U.N. Doc. 30/04/82

where a State may breach the ICCPR if it fails "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[34]

Article 20 of the ICCPR *explicitly* requires States to prohibit certain types of behaviour. This provision states:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The non-governmental organization, whose name is *Article 19*, observes that "[t]his provision employs a double-barrelled formulation, whereby what is to be prohibited is advocacy of hatred that 'constitutes' incitement rather than simply incitement."[35] Article 19 points out, however, that States have been reluctant to incorporate the language of Article 20 in domestic legislation regarding "incitement." The organization states that "[t]he absence of reference to 'incitement' in domestic legislation suggests that States are either unwilling to take on the language of the ICCPR's Article 20 or are simply ignorant of it. The lack of reference to Article 20 of the ICCPR by state authorities (including by the judiciary) of States parties to the ICCPR, or their ignorance of these provisions, does provide potentially a significant hurdle to the effective implementation of a consistent threshold in relation to 'incitement' in the first instance."[36]

There has been concern expressed with regard to the impact of the prohibition obligation found in Article 20 ICCPR on the enjoyment of the right to freedom of expression which is enshrined in Article 19.[37] One of the present authors (O'Flaherty) has observed elsewhere that Article 20 is a "curiosity, imposing an obligation but not creating a right"[38] and also observed that it engendered much discussion during the treaty negotiation. The original proposal included an obli-

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(1982), para. 4.

[34] *General Comment No. 31*, *supra* note 30, para. 8.

[35] Article 19, *Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred Work in Progress*, A study prepared for the regional expert meeting on Article 20, Organized by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010, p. 2.

[36] *Ibid.*

[37] *Ibid.* See also Michael O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34," *Human Rights Law Review*, Vol. 12, No. 4 (2012), pp. 627-654.

[38] O'Flaherty, *ibid.*, p. 635.

gation to criminalize certain types of expression rather than merely prohibit them but this came to be discarded.[39] Proponents for inclusion of the criminalization language had insisted that the type of extreme expression addressed in Article 20 was so dangerous that prohibition was required, while opponents were concerned that its inclusion would encourage censorship.[40]

3. General Comment 35

In 2014, the HRC adopted General Comment 35[41] with regard to Article 9 of the ICCPR on the topic of the liberty and security of the person.[42] Article 9 states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The General Comment goes beyond the textual limits of the ICCPR with regard to the measures States Parties must undertake to fully implement Article 9.

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[39] Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p. 403.

[40] See O'Flaherty, *supra* note 37, p. 635.

[41] *General Comment No. 35, Article 9 (Liberty and Security of Person)*, 16 December 2014, U.N. Doc. CCPR/C/GC/35 (2014).

[42] See, *available at* <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>.

Paragraph 9 of the General Comment indicates that States Parties should take "both measures to prevent future injury and retrospective measures such as enforcement of criminal laws, in response to past injury,"[43] thus including a criminalization element. The General Comment goes on to give examples of such measures and states that States Parties "must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities. They should also prevent and redress unjustifiable use of force in law enforcement, and protect their populations against abuses by private security forces, and against the risks posed by excessive availability of firearms."[44]

Paragraph 9 of General Comment 35 clearly draws from long-standing practice of the HRC in communications before them. In *Chongwe v. Zambia*,[45] the author stated that the police fired on the vehicle in which he was travelling, slightly wounding former President Kaunda of Zambia and inflicting a life-threatening wound on the author. The police force subsequently promised to undertake its own investigation. The HRC observed that:[46]

> The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Zambian police forces shot at the author, wounded him, and barely missed killing him. The State party has refused to carry out independent investigations, and the investigations initiated by the Zambian police have still not been concluded and made public, more than three years after the incident. No criminal proceedings have been initiated and the author's claim for compensation appears to have been rejected. In the circumstances, the Committee concludes that the author's right to security of person, under article 9, paragraph 1 of the Covenant, has been violated.

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[43] *General Comment No. 35, supra* note 41, para. 9.

[44] *Ibid.*

[45] *Chongwe v. Zambia*, Communication No. 821/1998, 25 October 2000.

[46] *Ibid.*, para. 5.

In *Lalith Rajapakse v. Sri Lanka*,[47] and *Bautista de Arellana v. Colombia*[48] the HRC reiterated that while the ICCPR does not provide a right for individuals to require that States Parties criminally prosecute any person,[49] States Parties are nevertheless under a duty to thoroughly investigate alleged human rights violations and to prosecute those responsible for them.

4. The Human Rights Committee, State Reports and Concluding Observations

Within the context of the review by the HRC of State party reports, it frequently identifies a requirement to uphold human rights by means of the establishment and implementation of criminal law regimes. Notably, such requirements range beyond those very limited contexts wherein the ICCPR specifically requires the State to prohibit an action. In order to illustrate this practice, the Concluding Observations on State reports to the HRC Committee in 2014 are examined below.

In 2014, the HRC adopted Concluding Observations on the reports of 17 States and made a number of comments in relation to States' criminalization obligations. In Concluding Observations on the initial report of Haiti the HRC recalled the State party's "obligation to bring criminal proceedings for any serious violation of human rights."[50] In Concluding Observations on a report by Sri Lanka, the HRC stated that the State should "publish all official places of detention on a regular basis and explicitly forbid and criminalize the use of unofficial places for detention."[51] In Concluding Observations on Japan, the HRC recommended that the State "take the necessary legislative measures to criminalize sexual harassment and to prohibit and sanction, with appropriate penalties, unfair treatment based on pregnancy and childbirth."[52] In its comments to Ireland, the HRC welcomed the adoption of the

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[47] *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, Communication No. 1250/2004, 4 September 2006, para. 9.7.

[48] *Bautista de Arellana v. Colombia*, Communication No. 563/1993, 11 October 1994, para. 8.6

[49] The HRC referred to previous communications to support this, *e.g.*, *Arhuaco v. Colombia*, Communication No. 612/1995, 29 July 1997; *H.C.M.A. v. the Netherlands*, Case No. 213/1986, adopted 30 March 1989; *S.E. v. Argentina*, Case No. 275/1988, adopted 26 March 1990; *R.A., V.N. et al. v. Argentina*, Case Nos. 343-345/1988, adopted 26 March 1990.

[50] HRC, *Concluding Observations on the Initial Report of Haiti*, 21 November 2014, U.N. Doc. CCPR/C/HTI/CO/1 (2014), para. 7.

[51] HRC, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, 21 November 2014, U.N. Doc. CCPR/C/LKA/CO/5 (2014), para. 17.

[52] HRC, *Concluding Observations on the Sixth Periodic Report of Japan*, 20 August 2014, U.N. Doc. CCPR/C/JPN/CO/6 (2014), para. 9.

Criminal Justice (Female Genital Mutilation) Act two years previously.[53] The issue of female genital mutilation also arose in the case of Malawi's report when the HRC recommended that the State explicitly criminalize the practice of female genital mutilation in addition to "'sexual cleansing' rituals and 'widow inheritance.'"[54] It also recommended that the State criminalize spousal rape,[55] expedite the adoption of legislation criminalizing all forms of trafficking,[56] amend the Penal Code to criminalize all forms of sexual abuse of children regardless of their gender,[57] and "expedite the adoption of the Marriage, Divorce and Family Relations Bill and ensure that it explicitly criminalizes forced and child marriages and sets the minimum age of marriage in accordance with international standards."[58]

In Concluding Observations on Sudan, the HRC recommended that the State ensure protection of the rights of women by amending its Criminal Code by criminalizing domestic violence and marital rape,[59] and adopt legislation that criminalizes torture and defines it in accordance with international standards.[60] In response to Chile's report, the HRC recommended that "[t]he State party should repeal article 373 of the Criminal Code and ensure that all acts of violence that are committed because of the sexual orientation or gender identity of the victim are investigated, prosecuted and punished."[61] In its Concluding Observations on Kyrgyzstan's report, the HRC recommended that States initiate criminal proceedings against perpetrators of torture.[62] Responding to the report of the United States, the HRC recommended that the State incorporate the principle of "command responsibility" in its domestic law.[63] It also recommended that "[t]he State party should enact legislation to explicitly prohibit torture, including mental torture, wherever

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[53] HRC, *Concluding Observations on the Fourth Periodic Report of Ireland*, 19 August 2014, U.N. Doc. CCPR/C/IRL/CO/4 (2014).

[54] HRC, *Concluding Observations on the Initial Periodic Report of Malawi*, 19 August 2014, U.N. Doc. CCPR/C/MWI/CO/1/Add.1 (2014), para. 8.

[55] *Ibid.*, para. 14.

[56] *Ibid.*, para. 17.

[57] *Ibid.*, para. 24.

[58] *Ibid.*, para. 25.

[59] HRC, *Concluding Observations on the Fourth Periodic Report on the Sudan*, 19 August 2014, U.N. Doc. CCPR/C/SDN/CO/4 (2014), para. 12.

[60] *Ibid.*, para. 15.

[61] HRC, *Concluding Observations on the Sixth Periodic Report of Chile*, 13 August 2014, U.N. Doc. CCPR/C/CHL/CO/6 (2014), para. 14.

[62] HRC, *Concluding Observations on the Second Periodic Report on Kyrgyzstan*, 23 April 2014, U.N. Doc. CCPR/C/KGZ/CO/2 (2014), para. 15.

[63] HRC, *Concluding Observations on the Fourth Periodic Report on the United States of America*, 23 April 2014, U.N. Doc. CCPR/C/USA/CO/4 (2014), para. 5.

committed, and ensure that the law provides for penalties commensurate with the gravity of such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. The State party should ensure the availability of compensation to victims of torture."[64]

Responding to the initial report of Sierra Leone, the HRC recommended that the State adopt into its legislation a definition of torture in line with international standards and that it investigate allegations of torture and prosecute perpetrators.[65] With regard to Nepal, the HRC recommended that the State "[e]nsure that all gross violations of international human rights law, including torture and enforced disappearances, are explicitly prohibited as criminal offences under domestic law."[66] It also recommended that the State enact legislation prohibiting torture in line with international standards.[67] Finally, in response to Latvia's report, the HRC recommended that the State Party establish domestic violence and rape[68] as well as torture[69] as specific crimes in its domestic law, and it also recommended that the State "[i]mplement criminal law provisions aimed at combating racially motivated crimes, punish perpetrators with appropriate penalties and facilitate the reporting procedure for hate crimes."[70]

### 5. The International Convention on the Elimination of All Forms of Racial Discrimination

Article 4 of CERD[71] requires States parties to, "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof." This formulation is much broader than Article 20(2) of the ICCPR and goes beyond reference to prohibition. It requires States to criminalize the dissemination of ideas as well as incitement in the absence of intent. The provision requires States Parties

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[64] *Ibid.*, para. 12.

[65] HRC, *Concluding Observations on the Initial Report of Sierra Leone*, 17 April 2014, U.N. Doc. CCPR/C/SLE/CO/1 (2014), para. 16.

[66] HRC, *Concluding Observations on the Second Periodic Report of Nepal*, 15 April 2014, U.N. Doc. CCPR/C/NPL/CO/2 (2014), para. 5.

[67] *Ibid.*, para. 10.

[68] HRC, *Concluding Observations on the Third Periodic Report of Latvia*, 11 April 2014, U.N. Doc. CCPR/C/LVA/CO/3 (2014), para. 9.

[69] *Ibid.*, para. 11.

[70] *Ibid.*, para. 19.

[71] CERD, *supra* note 20.

to prohibit and punish four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.[72] The criminalization requirement[73] is monitored closely in the practice of the Committee on the Elimination of Racial Discrimination (CERD Committee). The CERD Committee's General Recommendation 1 relates to Article 4. It states that when undertaking its review of State reports the Committee has found "that the legislation of a number of States parties did not include the provisions envisaged in article 4(a) and (b) of the Convention"[74] and accordingly recommended to States Parties whose legislation was deficient in this respect to duly amend it. In a similar vein, in General Recommendation 7,[75] the Committee reiterated that many States Parties had not fulfilled all of the requirements of Article 4 and once again recommended that they take the necessary steps to amend their legislation in line with the mandatory requirements of Article 4. The Committee called on States to highlight in their periodic reports how Article 4 is effectively implemented. In General Recommendation 15,[76] while again highlighting the importance of Article 4, it stated that the provision had grown further in importance due to the increase in organised violence based on ethnic origin and the political exploitation of ethnic difference. The CERD Committee stated that to satisfy Article 4 obligations "States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response."[77]

The CERD Committee has examined the implementation of Article 4 in its review of various communications. In *Gelle v. Denmark* it addressed the question of whether Danish authorities had fulfilled their "positive obligation to take effective action against reported incidents of racial discrimination."[78] It found that the mere criminalization of racial discrimination was insufficient, and stated that it is implicit

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[72] Art. 4(b) of CERD.

[73] See Wibbke Kristin Timmermann, "The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law towards Criminalization of Hate Propaganda," *Leiden Journal of International Law*, Vo. 18, No. 2 (2005), pp. 257-282.

[74] *General Recommendation 1, States' Parties Obligations (Art. 4)*, 25/02/72.

[75] *General Recommendation 7, Legislation to Eradicate Racial Discrimination (Art. 4)*, 23/08/85.

[76] *General Recommendation 15, Organized Violence Based on Ethnic Origin (Art. 4)*, 23/03/93.

[77] *Ibid.*, para. 6.

[78] CERD, *Gelle v. Denmark*, Communication No. 34/2004, Opinion of 6 March 2006, U.N. Doc. A/61/18 (2006), Annex IV, para. 7.2.

in Article 4 that "criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions."[79] It based this finding also on Denmark's obligations under Article 2(1)(d) which imposes a duty to prohibit racial discrimination and under Article 6 which imposes a duty to assure effective protection and remedies.

In *Dawas and Shava v. Denmark*[80] the CERD Committee dealt with a situation where the house of a refugee of Iraqi origin had been attacked by more than 35 people. The house was damaged and Mahali Dawas and another member of his family were beaten. The attackers told the refugees to "go home." The Committee stated that "the issue before the Committee is whether the state party fulfilled its positive obligation to properly investigate and prosecute the assault suffered by the petitioners [...] having regard to its duty, under article 2 of the Convention, to take effective action against reported incidents of racial discrimination."[81] The Committee considered that the attack warranted a thorough investigation by police into the possible racist nature of the attack but that the investigation which was in fact carried out was incomplete. Therefore the State had failed to effectively protect the petitioners from an alleged act of racial discrimination and had violated Article 6 and Article 2(1)(d) of CERD.

### 6. The Committee on the Elimination of All Forms of Racial Discrimination, State Reports and Concluding Observations

The CERD Committee raises Article 4-related issues with regard to its review of every periodic report. For instance, in 2014 it recommended to Cameroon that it "speed up the process of harmonizing the Criminal Code to ensure that acts of racial discrimination and incitement to racial hatred are defined and criminalized in the light of the Convention."[82] In its Concluding Observations on Peru's report, the CERD Committee referred to its General Recommendations 7 and 15 with regard to Article 4 of CERD and urged the government "to include in its criminal legislation the offence of racial discrimination and an offence that combines all the elements of article 4 of the Convention while also conforming with general recommendation No. 35 (2013) on combating racist hate speech."[83] Regarding the report of El Salvador, the CERD Committee aired concerns about the completeness of its

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[79] *Ibid.*

[80] CERD, *Dawas and Shava v. Denmark*, Communication No. 46/2009, 6 March 2012.

[81] *Ibid.*, para. 7.2.

[82] CERD, *Concluding Observations on the Nineteenth to Twenty-First Periodic Reports of Cameroon*, 26 September 2014, U.N. Doc. CERD/C/CMR/CO/19-21 (2014), para. 7.

[83] CERD, *Concluding Observations on the Eighteenth to Twenty-First Periodic Reports of Peru*, 25 September 2014, U.N. Doc. CERD/C/PER/CO/18-21 (2014), para. 10.

Criminal Code and encouraged the government to "bring its legal provisions relating to the offence of racial discrimination into line with article 4 of the Convention."[84] Similarly, in response to the report by Honduras, the CERD Committee recommended that the domestic Criminal Code be amended to bring it in line with Article 4 of the Convention. Commenting on Estonia's report, the CERD Committee noted the delegation's statements with regard to a new draft law on the criminalization of hate crimes but was concerned at the absence of amendments to the Penal Code prohibiting racist organizations and the dissemination of ideas based on racial superiority.[85] Responding to Iraq's report, the CERD Committee recommend that Iraq's Criminal Code be amended to include an explicit provision on the prohibition of racial discrimination in line with Article 1, paragraph 1 of the Convention and that its draft Anti-Discrimination law complied fully with Article 4.[86] In response to Poland's report the Committee recommended that "the State party amend its criminal code, specifically making racial motivation of a crime an aggravating circumstance and allowing for enhanced punishment to combat the occurrence of such acts."[87] Commenting on Uzbekistan's report, the CERD Committee highlighted its concern that domestic laws did not fully meet the requirements of Article 4 of the Convention and recommend that this be addressed.[88] In a similar vein, the CERD Committee noted with concern that Kazakhstan's Criminal Code may not be fully in line with Article 4 requirements and recommended that the government review its legislation.[89] Responding to Montenegro's report, the CERD Committee recommended that the government "amend the Criminal Code to include racial, national, ethnic or ethno-religious motivation as an aggravating circumstance when determining the punishment of crimes."[90] Similarly, the Committee recommended to Luxembourg that the government "in-

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[84] CERD, *Concluding Observations on the Combined Sixteenth and Seventeenth Periodic Reports of El Salvador*, 25 September 2014, U.N. Doc. CERD/C/SLV/CO/16-17 (2014), para. 12.

[85] CERD, *Concluding Observations on the Combined Tenth and Eleventh Periodic Reports of Estonia*, 22 September 2014, U.N. Doc. CERD/C/EST/CO/10-11 (2014), para. 7.

[86] CERD, *Concluding Observations on the Combined Fifteenth to Twenty-First Periodic Reports of Iraq*, 22 September 2014, U.N. Doc. CERD/C/IRQ/CO/15-21 (2014), para. 12.

[87] CERD, *Concluding Observations on the Combined Twentieth and Twenty-First Periodic Reports of Poland*, 19 March 2014, U.N. Doc. CERD/C/POL/CO/20-21 (2014), para. 8.

[88] CERD, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Uzbekistan*, 14 March 2014, U.N. Doc. CERD/C/UZB/CO/8-9 (2014), para. 6.

[89] CERD, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Kazakhstan*, 14 March 2014, U.N. Doc. CERD/C/KAZ/CO/6-7 (2014), para. 12.

[90] CERD, *Concluding Observations on the Combined Second and Third Periodic Reports of Montenegro*, 13 March 2014, U.N. Doc. CERD/C/MNE/CO/2-3 (2014), para. 8.

troduce into its criminal legislation an aggravating circumstance for racially motivated crimes"[91] and to Switzerland that the government should "[i]ncorporate a provision in the Criminal Code to the effect that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for more severe punishment."[92]

## III. The European Convention of Human Rights

The ECHR was originally drafted with the aim of preventing negative interferences with persons by State authorities.[93] This is clear from, for example, Article 8 of the Convention. Article 8(1) protects the right to respect for private life and Article 8(2) provides that there shall be no interference with this right except insofar as that interference is necessary in a democratic society for one of a variety of reasons. Furthermore, Article 1 of the ECHR provides that States have an obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this European Convention," therefore placing a general obligation on States to act to protect the rights set out in the ECHR.[94] While the Convention is silent as to whether its provisions impose positive obligations on States, the European Court of Human Rights (ECtHR) has interpreted the treaty[95] as imposing inherent positive obligations on States to secure the rights which it contains.[96] The Court has stated that:[97]

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[91] CERD, *Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of Luxembourg*, 13 March 2014, U.N. Doc. CERD/C/LUX/CO/14-17 (2014), para. 11.

[92] CERD, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Switzerland*, 13 March 2014, U.N. Doc. CERD/C/CHE/CO/7-9 (2014), para. 6.

[93] See Pieter van Dijk, "'Positive Obligations' Implied in the European Convention on Human Rights: Are the States still the 'Masters' of the Convention?," in Monique Castermans-Holleman *et al.* eds., *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy — Essays in Honour of Peter Baehr* (1998), pp. 17-18.

[94] See Andrew Ashworth, *Positive Obligations in Criminal Law* (2013), p. 198.

[95] See *Airey v. Ireland*, Application No. 6289/73, Judgment, Series A, No. 32, 9 October 1979 and *McCann v. United Kingdom*, Application No. 18984/91, Judgment, Series A, No. 324, 27 September 1995.

[96] See Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights* (4th ed., 2006), p. 51 and Ashworth, *supra* note 94.

[97] *Sovtransavto Holding v. Ukraine*, Application No. 48553/99, Judgment, 25 July 2002, para. 96.

> The obligation to secure the effective exercise of the rights defined in that instrument may result in positive obligations for the State [...] In such circumstances, the State cannot simply remain passive and there is [...] no room to distinguish between acts and omissions.

The ECtHR has found that numerous provisions of the ECHR imply an obligation to criminalize behavior. In this regard its practice is considerably more expansive than that of the UN HRC.[98]

Despite the fact that Article 8 is a derogable right which can be interfered with if "necessary in a democratic society," it was one of the first articles discussed by the ECtHR in terms of positive obligations. In the case of *X and Y v. Netherlands* a 16 year old handicapped woman who was living in a residential home was raped by a man living nearby. Dutch law required that a formal complaint be submitted before a sex crime could be investigated. Parents could make a complaint on behalf of children under the age of 16 but people over the age of 16 were required to make the complaint themselves. The law made no provision for those who were unable to make a complaint on their own behaves. The victim's father was of the view that his daughter was too disturbed to make the complaint herself. The victim and her father alleged that the Dutch law therefore breached her Article 8 rights. The Court stated that[99]

> [A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

While the Court did not cite Article 1 or any other authority when concluding that there were positive obligations on the State, this case sets the scene for the discovery of various types of positive obligations on States to ensure the enjoyment of ECHR rights.[100] However, does the mere existence of a positive obligation create

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[98] van Kempen, *supra* note 25, p. 17.

[99] *X and Y v. Netherlands*, Application No. 8978/80, Judgment, 26 March 1985, para. 23. See also *Osman v. United Kingdom*, Application No. 23452/94, Judgment, 28 October 1998, para. 115, regarding Article 2 ECHR and *Siliadin v. France*, Application No. 73316/01, Judgment, 26 July 2005, para. 89, regarding Article 4.

[100] Ashworth, *supra* note 94, p. 199.

a requirement that States criminalize certain offences?[101] In the case of *X and Y*, the ECtHR assessed a number of options of State action which would have allowed for the respect of the victim's rights, including the option of applying for an injunction to prevent future violations and an action for damages with regard to violations which had already occurred. The Court, however, decided that only a criminal sanction would be an adequate response to the violation in the particular circumstances of the case, stating[102]

> [T]his is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed it is by such provisions that the matter is normally regulated.

In a similar vein, in *M.C. v. Bulgaria*,[103] the ECtHR stated[104]

> While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.

Ashworth thus concludes that the "nature of the positive obligation is that all states should have in place criminal laws that protect individuals against sexual violation by other individuals. It is not that the state is in any way responsible for the acts of those who violate the rights of others, but that the state is responsible for putting in place criminal laws that ensure appropriate protection for those rights."[105] He considers that the ECtHR jurisprudence supports three forms of positive obligation incumbent on the State in order to ensure the enjoyment of ECHR rights, one of which is implementation of effective criminal law provisions and machinery to deal with breaches of these provisions.[106] This approach is evident in the case of

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[101] *Ibid.*

[102] *X and Y v. Netherlands*, *supra* note 99, para. 27.

[103] *M.C. v. Bulgaria*, Application No. 39272/98, Judgment, 4 December 2003.

[104] *Ibid.*, para. 150.

[105] Ashworth, *supra* note 94, p. 200.

[106] The other two positive obligations are: "(i)The duty, in certain well-defined circumstances, to take preventive operational measures to protect an individual whose right is at risk from the criminal acts of another individual" and "The duty to have in place effective machinery for investigating complaints of violations of Convention rights, combined with the duty to

*Osman v. United Kingdom*[107] relating to the right to life,[108] where the ECtHR stated:[109]

> It is common ground that the State's obligation [...] extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.

In addition to Article 2 and Article 8 cases, the ECtHR has found that positive criminalization obligations arise in respect of other articles of the ECHR. Article 3 of the ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment of punishment." In the case of *A v. United Kingdom*, a case concerning corporal punishment of a child, the ECtHR stated that[110] it

> considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to make measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

The ECtHR has placed special emphasis on the importance of the implementation of criminal law in situations of sexual crimes. In *M.C. v. Bulgaria*, concerning the rape of a 14 year old girl, the ECtHR held that[111]

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ensure that there is a thorough and effective investigation capable of leading to the identification and punishment of those responsible." Ashworth, *supra* note 94, p. 198.

[107] *Osman v. United Kingdom*, *supra* note 99.

[108] See also the case of *Van Colle v. United Kingdom*, Application No. 7678/09, Judgment, 13 November 2012, concerning the right to life.

[109] *Osman v. United Kingdom*, *supra* note 99, para. 115.

[110] *A v. United Kingdom*, Application No. 25599/94, Judgment, 23 September 1998, para. 22.

[111] *M.C. v. Bulgaria*, *supra* note 103, para. 166. See also Patricia Londono, "Positive Obligations, Criminal Procedure and Rape Cases," *European Human Rights Law Review*, Vol. 2 (2007), pp. 158-171 and Clare McGlynn, "Rape, Torture and the European Convention on Human Rights," *International and Comparative Law Quarterly*, Vol. 58, No. 3 (2009), pp. 565-595.

> Any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual act, including in the absence of physical resistance by the victim.

Positive obligations and a corollary obligation to criminalize have also been deemed to arise under Article 4 of the ECHR. Article 4 states that "no one shall be held in slavery or servitude" and "no one shall be required to perform forced or compulsory labour". In the case of *Siliadin v. France*, the ECtHR recognised a positive obligation under Article 4 of the Convention.[112] In this case, French law was found to be flawed as it provided only civil compensation as a remedy for a breach of Article 4 of the Convention. The case concerned a girl who was brought from Togo to France on a tourist visa. The woman who brought her to France promised that her immigration status would be regularized, that she could get an education in France and that she could earn her fare for a return journey. However, the woman kept her passport and lent her to another family, where she had to work for 15 hours a day with no payment and no education. Her "employers" were prosecuted but convictions for keeping the girl in conditions which affected her human dignity were quashed and the employers were only required to face a technical employment offence and a civil judgment for damages. She, therefore, claimed that her Article 4 rights were violated. The ECtHR stated that a number of international instruments placed positive obligations on States, in particular in relation to children and other vulnerable groups. Therefore, the ECtHR concluded that "governments have positive obligations [...] to adopt criminal law provisions which penalise the practices referred to in Article 4 and to apply them in practice."[113]

In the quite similar case of *Rantsev v. Cyprus and Russia*, the ECtHR said that[114] it

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[112] *Siliadin v. France*, *supra* note 99. In relation to the *Siliadin* case, see Holly Cullen, "Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights," *Human Rights Law Review*, Vol. 6, No. 3 (2006), pp. 585-592.

[113] *Siliadin v. France*, *supra* note 99, para. 89.

[114] *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment, 7 January 2010, para. 284. In relation to the positive obligations doctrine trafficking see, Ryszard Piorowicz, "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations," *International Journal of Refugee Law*, Vol. 24, No. 2 (2012), pp. 181-201 and Vladislava Stoyanova, "Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human

> considers that the spectrum of safeguards set out in national legislation must be adequate to ensure practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires Member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a state's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.

While States may be obliged to criminalize certain types of behaviour in order prevent the violation of human rights of non-State actors even in the absence of an obligation to criminalize, the ECtHR has also, at times, considered whether non-criminal remedies would be sufficient to ensure the enjoyment of ECHR rights, including free legal assistance.[115]

In recent cases such as *Nachova and Others v. Bulgaria*,[116] *Šečić v. Croatia*[117] and *Abdu v. Bulgaria*, the ECtHR has emphasized the importance of a criminal justice response to hate crimes.[118] In *Abdu*, the applicant was a Sudanese national living in Bulgaria. He and his friend were attacked by two Bulgarian skinheads, and he suffered a number of injuries. The victim alleged to police that, while he was being attacked, his attackers uttered a number of racial insults. Despite this, Bulgarian police did not question witnesses about the alleged remarks, nor did they investigate the possibility that the attack was racially motivated (which would have rendered it punishable by imprisonment). Though an investigation was launched, the prosecutor dismissed the case and a subsequent appeal was dismissed. The ECtHR noted that despite the increase in racially motivated acts in Bulgaria and despite having plausible evidence pointing to a possible racist motive on the part of Mr. Abdu's attackers, the authorities had failed in their duty to take all reasonable steps to establish the accuracy of that evidence by failing to question witnesses in relation to the allegations of racism. The Court found a violation of the procedural aspect of Article 3, taken alone and in conjunction with Article 14.

The ECtHR has held that the State has a duty to adopt criminal law provisions

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trafficking," *Cambridge Journal of International and Comparative Law*, Vol. 3, No. 2 (2014), pp. 407-443.

[115] However, the ECtHR has, at times, considered whether non-criminal remedies would be sufficient to ensure the enjoyment of ECHR rights. See *Rantsev v. Cyprus and Russia*, *supra* note 114.

[116] *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, Judgment by the Grand Chamber, 6 July 2005.

[117] *Šečić v. Croatia*, Application No. 40116/2002, Judgment, 31 May 2007.

[118] *Abdu v. Bulgaria*, Application No. 26827/08, Judgment, 11 March 2014.

to deter the commission of offences against the person. In addition, the State must investigate alleged breaches of rights and prosecute and punish those guilty of breaching such rights.[119] The ECtHR has also held that States are under a positive obligation to criminalize certain activities in order to ensure compliance with the Article 3 prohibition on torture and cruel, inhuman and degrading treatment and punishment, which covers rape and domestic violence.[120]

It is clear that the trend established by the ECtHR of implying a criminalization obligation into the provisions of the ECHR has placed additional obligations on States to reassess their domestic criminal law and indeed, as Ashworth states, the development of the positive obligations doctrine by the ECtHR "has brought some welcome minimum standards for the criminal law of Member States [of the Council of Europe]."[121]

## Conclusion

In recent years, public international law has increasingly focused on victims[122] and numerous attempts have been made to address the previously pervasive culture of impunity whereby there was a lack of accountability for violations of international law.[123] As Huneeus states "[t]he emphasis has [...] shifted away from a state's general duty to guarantee rights and toward the victim's individual right to have the government investigate and punish."[124] The establishment of the *ad hoc* criminal tribunals in the 1990s and the creation of the ICC have engendered the development of criminal law principles to address serious violations of international law. This emphasis on criminal law has now, as this article has illustrated, been furthered by human rights monitoring bodies and courts. While not established for the purpose of implementing criminal law, these bodies and courts, es-

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[119] *Osman v. United Kingdom*, *supra* note 99, paras. 115-116.

[120] See *M.C. v. Bulgaria*, *supra* note 103, paras. 148-153, 185-186 with regard to rape and *Opuz v. Turkey*, Application No. 33401/02, Judgment, 9 June 2009, paras. 128-130 and 159 with regard to domestic violence.

[121] Ashworth, *supra* note 94, p. 209.

[122] The focus on the interests of victims can be attributed to the influence of human rights law, but also to the development of other disciplines, such as transitional justice and victimology. See Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012), pp. 117-122.

[123] Ramesh Thakur and Peter Malcontent eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (2004).

[124] Alexandra Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts," *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 8.

pecially the ECtHR, have carved out a significant criminal law mandate.[125] The European trend is also observable in other human rights regional systems. In the Americas, the Inter-American Court of Human Rights stated in *Velásquez Rodriguez v. Honduras*[126] that the obligations on States Parties under Article 1 of the Inter-American Convention to respect and ensure the rights enshrined therein "implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[127] The Court also observed that the duty to prevent human rights violations includes "all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages."[128] The African Commission on Human Rights has also made a number of recommendations with regard to the criminalization of certain acts in order to ensure the protection of economic, social and cultural rights.[129] In respect of Article 4 of the African Charter on Human and Peoples' Rights (the right to life),[130] it has been found that States had a number of obligations to ensure its implementation, including "the necessity to conduct effective official investigations when individuals have been killed as a result of the use of force by agents of the State, to secure the right to life by making effective provisions in criminal law to deter the commission of offences against the person, to establish law-enforcement machinery for the prevention, suppression, investigation and penalisation of breaches of criminal law."[131] The African Union has also announced that it is considering adding criminal jurisdiction to the proposed African Court of Justice and Human Rights.[132]

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[125] *Ibid.*, pp. 1-44.

[126] *Velásquez Rodriguez v. Honduras*, Inter-American Court of Human Rights, Series C, No. 4 (1988).

[127] *Ibid.*, para. 166.

[128] *Ibid.*, para. 175.

[129] African Commission on Human and People's Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, available at* <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf>.

[130] African Charter on Human and People's Rights, adopted 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (1981), 21 I.L.M. 58 (1982).

[131] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03-296/05 (2009), para. 147.

[132] See *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, First Meeting of the Specialized Technical Committee, 15-16

These developments in the regional human rights systems are a reflection of the growing emphasis on positive obligations in respect of human rights instruments. In this vein, Chirwa comments: "[t]he shift from a minimalist conception of human rights duties as negative edicts to an acceptance of positive obligations, especially the duty to protect, signifies the realization that state inaction or non-interference, far from being the guarantor of freedom, can leave individuals prone to human rights violations and, consequently, form a potential basis for state responsibility where the violations were preventable and 'redressible.'"[133] As this article has highlighted, one of the more important elements of the positive obligations doctrine is the duty to criminalize certain acts which constitute human rights violations. Albeit it is the ECtHR that has been in the vanguard, with other regions, and indeed the UN, slower to embrace a criminalization approach, we can observe a developing trend internationally that will serve to both strengthen domestic criminal law and improve human rights protection.

However, this development is not unproblematic in as much as it is propelling a movement from "human rights by persuasion" to "human rights by coercion."[134] The traditional approach taken in human rights treaties and by their monitoring bodies was to encourage States to build a framework which would protect human rights domestically. The criminalization approach demands that States change or adopt their domestic criminal law to standards set by the human rights monitoring bodies. Huneeus states that "[i]n pushing for accountability, the human rights bodies exert a jurisdiction quite different from that traditionally exercised by the international and hybrid criminal courts. Whereas those courts directly conduct the prosecutorial work, the rights bodies entrust local justice systems with the corrective actions, monitoring their work from afar but at times in detail, and exerting pressure by publishing compliance reports and holding hearings." She continues that "[t]he rights bodies' methods are thus more deferential to states and, inevitably, slower to reach prosecutorial outcomes." She does, however, identify merits, stating: "[b]ut they have important virtues. They foster local processes of justice, memory, and judicial reform. They are able to pair restorative justice and victim-centered remedies with retributive justice. And significantly, it is the state rather than the international community that shoulders the cost of prosecution."[135]

States and scholars have questioned the legitimacy of such self-extension of court's powers, particularly in the case of the Inter-American Court of Human

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May 2014, O.A.U. Doc. STC/Legal/Min/7(I) Rev. 1 (2014).

[133] Chirwa, *supra* note 15, p. 407.

[134] See John Tobin, "Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation," *Harvard Human Rights Journal*, Vol. 23, No. 1 (2010), pp. 1-50.

[135] Huneeus, *supra* note 124, p. 2.

Rights.[136] Indeed, Venezuela opted to remove itself from the Court's jurisdiction in 2012 when it denounced the American Convention on Human Rights.[137] The extension of human rights bodies' role in the sphere of criminal law may, therefore, be detrimental to the overall stability of the international human rights law regime inasmuch as States may be more reluctant to ratify human rights treaties if they fear that this will leave them open to burdensome criminal law obligations. Indeed, the extensive interpretation of human rights treaties by human rights bodies also calls the principle of legality into question.[138]

While the extension of the positive obligations doctrine has been observed clearly in some regional systems,[139] it has yet to be seriously tested at the UN level and its potential benefits and problems are yet to manifest themselves. We may thus conclude that the question of whether the criminalization approach is a successful development in the field of human rights is an open one.

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[136] See Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights," *International Criminal Law Review*, Vol. 12, No. 4 (2012), pp. 665-696.

[137] See the Press Release by the OAS Secretary General on Venezuela's decision, *available at* <http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-307/12>.

[138] Dan Meagher, "The Common Law Principle of Legality in the Age of Rights," *Melbourne Journal of International Law*, Vol. 35, No. 2 (2011), pp. 449-478.

[139] Françoise Tulkens, "The Paradoxical Relationship between Criminal Law and Human Rights," *Journal of International Criminal Justice*, Vol. 9, No. 3 (2011), pp. 577-595.