Criminal Theory and International Human Rights Law

The development of an international human rights jurisprudence on criminalization is in its relative infancy. Nonetheless, systematic examination of international decisions on acts engaging the criminal law reveals an emerging human rights approach to the acceptability, or not, of criminalization. This book provides an in-depth characterization of the reasoning and principles that underpin those decisions.

The work builds upon and adds value to existing literature by bringing together two fields of study – international human rights law and criminal theory – that usually receive separate treatment. It provides an in-depth analysis of human rights criminalization jurisprudence and presents a systematic identification of underlying reasoning and concepts that influence international human rights decisions on criminalization. The work thus advances both fields independently, as well as providing an example of inter-(sub)disciplinary analysis.

The book will be a valuable resource for academics and students working in the areas of International Human Rights Law, Criminal Law, and Moral Philosophy.

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First published 2020
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
52 Vanderbilt Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

A catalog record has been requested for this book

ISBN: 978-0-367-18227-4 (hbk)

ISBN: 978-0-429-06021-2 (ebk)

Typeset in Galliard
by Integra Software Services Pvt. Ltd.

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Preface

The aim of this book is to provide a bridge between two legal fields, both of which address the human situation in a fundamental way but have not thus far been examined together. Criminal theory seeks to deliver a critical moral account of when and why the state may use punitive measures with the express stigma of a criminal conviction to deter and punish certain conduct. International human rights law proclaims civil, political, economic, social, and cultural rights for each individual, in pursuit of freedom from fear and want for all. Each field has become a legal specialism in its own right, with its own immense literature, terminology, concepts, and dedicated academics and practitioners. Yet careful analysis of international human rights treaties and case law in particular shows a deep principled concern with, what amounts to, a subject of criminal theory: the rights-based reasons why a state should, can, or should not criminalize certain conduct. This book undertakes a detailed study of this part of international human rights law, with reference to the case law of international human rights courts and tribunals. It asks whether and how such jurisprudence can have value for the development of criminal theory. In order to answer this question, it also contains a discussion of existing approaches to the use of rights within Anglo-American and continental legal theory. In doing so, the book adopts a cross-disciplinary approach that should appeal both to criminal theorists and to international human rights law lawyers.

Each chapter may be read in its own right, but the chapters are intended to build on each other, linking the two fields and developing directions for further research. The book draws, in particular, from analysis of a group of almost 80 cases from the European Court of Human Rights that address matters of criminalization. The underlying reasoning in this group of cases was subject to classification and semi-quantitative analysis. A table at the very end of the book details the cases and their judgment reasoning. References are provided as footnotes to the text in abridged form. A full reference list, including United Nations documents, treaties and legislation, and cases, is provided. Within the book, the terms “criminal theory,” “criminal law theory,” and “criminalization theory” are used largely interchangeably. The author expresses his sincere thanks to those who provided the professional and personal inspiration for this book, as well as invaluable suggestions and critical review. Thanks are due in particular to

Ms Eva Ignatuschtschenko, Mr and Mrs J. Malby, Mr Reg Pritchard, Dr Anna Alvazzi del Frate, and the author's doctoral supervisors, Prof Kai Ambos and Prof Jörg-Martin Jehle of the Georg-August University of Göttingen. The author also wishes to thank the two anonymous reviewers from Routledge, as well as Ms Alison Kirk and Ms Emily Summers of Routledge for their professional and timely guidance at all stages in the publication process. The views expressed are those of the author only and do not represent the views or endorsement of the Commonwealth Secretariat or any other organization. As ever, any errors that remain are my sole responsibility.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICCS	International Classification of Crimes for Statistical Purposes
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
UDHR	Universal Declaration of Human Rights

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1 Introduction

If criminal theory and international human rights law were ever considered the sole domain of philosophers, lawyers, and legislators, the critical questions with which they deal have undoubtedly been pushed into the mainstream. The terms “criminalization” and “human rights” are now common parlance. Debates on the criminalization, and perhaps more frequently *decriminalization*, of conduct emerge in the media on a regular basis. Such debates include whether conduct as diverse as forced marriage, squatting, polygamy, possession of narcotic drugs for personal use, and prostitution should or should not be a criminal offence. The criminal law makes headlines around the world when individuals are convicted and incarcerated, or even sentenced to death, for acts such as adultery, blasphemy, and apostasy. At the same time, human rights are often portrayed as at a global juncture, openly questioned by some and lamented as in demise by others, in the context of polarized societies and moves away from global dialogue and multilateralism.

Contemporary phenomena such as the misuse of global information and communications technologies, violent extremism, and terrorism increasingly present complex challenges to safe and peaceful societies. As governments develop new criminal law responses, an expanding reach of criminalization risks threatening the rule of law and a proportionately restrained criminal law. New criminal laws such as encouraging or preparing for acts of terrorism may come up against specific human rights law objections. The need for a principled criminal law, guided by external values and standards, is as great as ever.

Whilst the proper extent and nature of the criminal law have been a topic of intense academic debate from the time of John Locke, Jean-Jacque Rousseau, and Immanuel Kant, recent waves of development of criminal law theory have both reflected and ignited societal concern over the correctness of the scope of criminal liability. The influential 2007 text by Douglas Husak on overcriminalization, for instance, encapsulates an argument that the United States suffers from too much criminal law and too much punishment,¹ a theme subsequently emphasized at the political level by the Over-Criminalization Task Force of the Committee on the Judiciary of the United States House of Representatives.

1 Husak, D., 2007.

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Criminal theorists assert that the heart of the problem lies in the absence of a viable account of criminalization. A gap that Husak suggests is perhaps the single most glaring failure of penal theory. The criticism is that theorists, legislators, and judges have had too little to say about the proper scope of criminal law. As noted by Anthony Duff, if not directly about what kinds of conduct should or should not be criminalized, then at least about the considerations that should bear on questions of criminalization, and about the procedures through which such questions should be settled. This includes justification not only as to which acts should count as criminal offences but also as to when and why we should prefer criminalization to other possible ways of responding (or not responding) to such acts. As Duff notes, in a nutshell, we need to be clear about why rape, tax evasion, and driving when uninsured are properly criminal, as well as about why sexual infidelity and rudeness are not.²

Recent years have seen a renewed focus on outlining, if not a theoretical framework for criminalization, then at least guiding moral and legal principles for use of the criminal law.³ Nonetheless, the literature is still far from a settled account of acceptable criminalization. Criminalization theory typically invokes an abundance of terms and concepts, including harm, offence, wrongfulness, morality and moralism, paternalism, culpability, public concern, legal goods, *ultimo ratio* (last resort), deterrence, and retribution. Such concepts may be found in a range of combinations, relationships, and interactions. A number of contemporary commentators have begun to coalesce around the idea that there is no unified, grand theory for criminalization but rather that basic elements may interact to make or deny a case for criminalization. Nonetheless, views on the exact content, place, and interrelationship of individual criminalization concepts remain incredibly diverse.

This perceived lack of clarity in the philosophical account of criminalization is not unrelated to an equivalent criticism made by Dennis Baker: that even the legal boundaries of criminal offences – and specifically their relationship with moral limits – are equally undefined.⁴ In practice, such legal limits are often expressed through constitutional limits on the criminal law. Constitutional constraints on the substantive criminal law are found, for example, in the US and German constitutions.⁵ Such constraints include the human rights and fundamental freedoms enshrined in most national constitutions. The existence of constitutional rights-based challenges to the criminal law has long been recognized by criminal theorists, who variously have either tried to rationalize criminalization findings of constitutional courts with reference to criminal theory or argued that constitutional rights are unsuitable as the cornerstone of a general theory of criminalization.⁶ Whether from

2 Duff, R.A., 2010, pp.16–19.

3 See, for example, Simester, A.P., and von Hirsch, A., 2011; Ashworth, A., and Horder, J., 2013; Matravers, M., 2016.

4 Baker, D.J., 2011, p.1.

5 Bendor, A.L., and Dancig-Rosenberg, H., 2016; Lagodny, O., 1999.

6 Baker, D.J., 2011, pp.245–254; Simester, A.P., and von Hirsch, A., 2011, pp.134–137.

a legal or philosophical perspective, however, a clear area for enquiry emerges: the need for a viable account of criminalization and the potential role of human rights in determining such an account. As López-Rey asserted from the legal-political perspective, over 40 years ago, crime is what is defined by law as such. On the other hand, the definition must take into account the existence of, and respect for, human rights and not merely be the expression of arbitrary power.⁷

This book is concerned with exactly that issue. Whilst human rights take many forms in both the domains of legal positivism and legal theory, the focus here is specifically on human rights as contained in international human rights law. From a global perspective, international human rights law stands as the only common international legal framework that can be applied across a range of modern dilemmas and that aims to clearly delineate state responsibilities and individual entitlements. The rights contained in international human rights law are often the same, or similar, to those protected by national constitutions. International human rights law, as a field in its own right, however, has its own jurisprudence, its own dedicated international mechanisms, and, as this book examines, its own approach to questions of criminalization.

International human rights law cannot be viewed as a substitute for domestic criminal or civil law. However, the positive international obligations of states to ensure realization of human rights will only be fully discharged if individuals are protected by the state, not just against violations of rights by its agent but also against acts committed by private persons or entities that would impair the enjoyment of human rights. This includes in the exercise of due diligence to prevent, punish, investigate, or redress harm caused by private persons or entities. At the same time, however, criminal law and penalties must always themselves avoid violating the rights of individuals. It seems almost self-evident that international human rights law would have something to say about the proper exercise of national criminal law. This book explores the differences between criminal theory and an international human rights law approach to criminalization, and considers whether gains may be achieved at the intersection of the two.

Bringing the two fields together

Whilst international human rights law jurisprudence on matters of substantive criminal law exists, the relationship between international human rights law and criminal theory has not been extensively or systematically explored. Rather, the literature tends to either reflect a broad discussion of a possible place for rights within criminal theory or be limited to examples of the human rights implications of criminalization of limited specific conduct, such as the criminalization of homelessness or HIV transmission.⁸ Where legal theorists have attempted to integrate

⁷ López-Rey, M., 1978, p.11.

⁸ See, for example, Hörnle, T., 2016; Langley, E.E., and Nardi, Jr., D.J., 2010; Baker D.J., 2009.

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a human rights discourse into criminalization theory, they have often not engaged seriously with the framework and lessons of international human rights law. Rather, many criminalization works are completed in isolation from developments in the jurisprudence of international human rights law, preferring instead theories based in welfare rights and deontological moral rights. One major recent initiative aimed at developing a normative theory of criminalization, for example, largely limited its discussion on the place of human rights in criminal theory to that of international criminal responsibility.⁹ It is perhaps not surprising that the non-governmental International Council on Human Rights Policy concluded in 2010 that there remains an urgent need for a human rights-based narrative of crime and criminality and responses to crime.¹⁰ In so far as any account of the criminal law must grapple seriously with the concept of wrongdoing, it appears that such a project could benefit significantly from a body of law and thought, such as international human rights law, that proclaims itself to be a foundation of freedom, justice, and peace in the world, as a common standard of achievement for all peoples and all nations.

The limited examination of criminal theory together with international human rights law to date is perhaps all the more surprising in light of the fact that the two fields share a number of common features. From the perspective of underlying legal theory, both the notions of criminalization and human rights concern the idea of constraint on action. The subjects of this constraint are, of course, different: primarily states or public authorities in the case of international human rights law and individuals or groups of individuals in the case of criminal law. Nonetheless, both fields purport to guide their subjects, to a greater or lesser degree through the threat of sanctions for violation, as to an acceptable range of actions. In this respect, both fields share something of a common philosophical heritage from Enlightenment thinkers. The work and philosophy of Immanuel Kant, for instance, are habitually invoked in (separate) academic commentary on human rights and on criminalization.¹¹ Notwithstanding such elements of common heritage, however, legal philosophical work related to criminalization and human rights tends to remain compartmentalized. The elaboration of capability theory by Sen and Nussbaum, for example, occurred primarily within the language and context of human rights discourse. The theory is rarely discussed in the context of criminalization, despite the importance of criminalization as a constraint on permissible human action.¹² Conversely, well-known concepts that are inherent to many criminalization theories, such as harm theory, find little place within academic discourse on human rights. Indeed, academic commentators who systematically apply legal reasoning or moral and critical

9 Renzo, M., 2013.

10 International Council on Human Rights Policy, 2010, p.v.

11 In the field of human rights, see, for example, Demenchonok, E., 2009. In the field of criminalization, see Richards, D.A.J., 1979b.

12 A number of commentators have recently started to acknowledge the notion of Sen's capabilities in the context of resources to be protected by the harm principle in criminalization theory. See, for example, von Hirsch, A., 2014, p.249.

philosophy in such areas appear for the most part to identify themselves with the field of either human rights or criminalization, but rarely both.

In the positivist legal world, the two bodies of law frequently occupy different positions in the national legal order. Human rights usually benefit from protection at the constitutional level. Criminal offences, on the other hand, can be found in all of primary legislation, in secondary legislation, and at common law. At the international level, both human rights and specific criminal offences are also contained within binding regional and international legal instruments. However, the sociopolitical processes which give rise to such instruments are frequently conducted separately and with little reference to the other field. It is an oft-cited point, for example, that within the United Nations system, international human rights instruments are developed in Geneva, whereas instruments concerning human security are developed in Vienna, frequently with little discussion between the two bodies.¹³ Nonetheless, in the positivist legal world, human rights law and criminal law do intersect in a number of circumstances. The criminalization of particular conduct may be tested against a state constitution, where national criminal laws are subject to constitutional protections that include human rights. Some national legislatures conduct specific human rights assessments of proposed criminal legislation. At the regional and international levels, complaints to human rights tribunals can directly concern the compatibility of national criminal law with the international human rights obligations of the state in question.¹⁴ International human rights law includes an implicit duty to punish serious human rights violations through prosecution.¹⁵ A detailed body of law has also arisen around criminal culpability for a limited subset of human rights as a component of international criminal law. Nonetheless, when compared, for example, to the sheer number and depth of judicial decisions on human rights and criminal procedure, jurisprudence on human rights and criminalization is seen, at least at the regional and international levels, to be decidedly limited. It is therefore perhaps unsurprising that few academic commentators have tackled the legal intersections of human rights and criminalization head-on. Of those who do, some take extreme positions, such as the suggestion that the violation of human rights of any kind should be a criminal act.¹⁶ More considered work examines a subset of the criminalization jurisprudence of certain international human rights systems, including the European and the United Nations system.¹⁷ To date, however, the literature lacks detailed analysis of the outcomes and reasoning of such international human rights law criminalization jurisprudence that does exist.

13 Barrett, D., and Nowak, M., 2009.

14 See, for example, *Prince v. South Africa*, UNHRC, concerning the compatibility with the ICCPR of the offence of possessing or using cannabis, and *Kokkinakis v. Greece*, ECHR, concerning the compatibility with the ECHR of the offence of acts of proselytism.

15 Seibert-Fohr, A., 2009.

16 See, for example, Blau, J., and Moncada, A., 2007.

17 See, for example, Bengoetxea, J., and Jung, H., 1991; Ashworth, A., 2013; O'Flaherty, M., and Higgins, N., 2015; Du Hert, P. et al., 2007; Keehn, E.N., 2018.

As a result, bringing the fields of criminal theory and international human rights law together is no easy task. One key reason for this is the fact that international human rights law sits predominantly within the plane of positivist law and *ex post facto* case law. International human rights law consists of treaties and the decisions of international human rights courts and tribunals. Human rights treaties are negotiated positivist text, and the decisions of human rights courts and tribunals are highly context-specific. Where such decisions address the compatibility of a particular criminal offence with international human rights law, they do so from the vantage point of looking back at the offence in law and its application to the facts in practice. By contrast, criminal theory is most usually conducted as a theoretical *a priori* exercise. That is, criminal theory is concerned with an ideal, critical moral approach to what should or should not be a criminal offence, ideally well before any offence is enacted.

In order to analyse whether international human rights law might have any value for criminal theory, it is necessary to distil international human rights law and jurisprudence down to the conceptual level. Fundamental international human rights law principles and concepts can then be compared with the critical moral reasoning of criminal theory. This requires scrutiny of the place of criminalization within international human rights law treaty text, as well as detailed examination of the underlying reasoning of the decisions of international human rights courts and tribunals that address criminalization.

Such an undertaking relies, in particular, on the notion that law has a *dual* nature. Under this approach, the law comprises both a real or factual dimension and an ideal or critical one. The factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness.¹⁸ As applied to international human rights law, dual nature of law theory highlights the connection between human rights as both moral rights and positive rights. In the field of criminal law, as with other national laws, dual nature of law theory, under the Radbruch formula, suggests a threshold of extreme injustice for determining the outermost border of law, beyond which laws are, in some sense, valid but defective.¹⁹ Kai Ambos expresses this as the idea that the positive law ultimately operates with a “legitimacy reservation” that also requires a plausible claim of moral validity.²⁰

At the international level, this theoretical approach fits well with the conception of the rule of law. The United Nations definition of the rule of law includes the requirement that laws must be consistent with international human rights norms and standards, fairness, legal certainty, and the avoidance of arbitrariness.²¹ Under this approach, law is supreme (in the classically positivist

18 Alexy, R., 2010.

19 Radbruch, G., 1946.

20 Ambos, K., 2013, p.302.

21 United Nations, Security Council, 2004. UN Doc. S/2004/616, para 6.

sense) but – or perhaps *and* – only fully legitimate when it fulfils the substantive requirements of fairness and meets human rights norms and standards. The human rights compatibility requirement in the United Nations rule of law definition plays a role analogous to that of the extreme injustice test. As such, justice is conceived as an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims, and for the well-being of society at large.

An appeal to dual nature of law theory places emphasis on the fact that whilst international human rights law derives, in positivist terms, from international negotiations and judicial interpretation, it is, at the same time, a product of a historical tradition that owes a great deal to intellectual and philosophical concepts such as natural law, natural rights, autonomy of the person, and human dignity.²² As expressed by James Griffin:

The international law of human rights aims, or should aim, at least in part, to incorporate some extra-legal ethical standards. The creators of international law do not, and cannot plausibly say that what they deem to be a human right *is* a human right, that on this subject they are infallible ... It is not that over the last fifty years or so the body of treaties and decisions of international courts has grown large enough for those courts now to be able to tell us definitively whether a certain human right exists and what, fairly precisely, its content is. [Rather] ... an international court willing to heed expert opinion or considerations of humanity or *jus cogens* is driven to take seriously basic considerations of justice, the meaning of “the dignity of the person”, and how justice and rights are related.²³

It is this approach which facilitates the bringing together of the fields of international human rights law and criminal theory. International human rights jurisprudence does not and cannot examine all acts that may be subject to criminal prohibition. Within some international human rights systems, however, there is now sufficient, consistent case law to undertake analysis of underlying human rights concepts and reasoning that are applied to questions of criminalization. That said, the notion that ideal concepts may underpin international human rights law is one thing to assert, but quite another to identify in practice.

22 Perhaps most clearly argued is the proposition that the Universal Declaration of Human Rights has solid roots in the French Declaration of the Rights of Man and of the Citizen (26 August 1789 and 24 June 1793) through the natural law concept that the individual has rights against the state, through the rule of law requirement that legal rules actually dictate behaviour of all within the state’s jurisdiction, and through the social contract that orders society for the common good. See Marks, S.P., 1998, p.511.

23 Griffin, J., 2008, p.54 and 204–205. Reproduced with permission of the Licensor through PLSclear.

Distilling a conceptual framework from the diverse, fact-driven jurisprudence of an international human rights court or tribunal is far from straightforward. Whilst international human rights judges at least aim for consistency of decisions and reasoning, their decisions do not often consciously make reference to conceptual moral frameworks. In addition to its contribution to criminal theory, this book also therefore demonstrates an analytical approach to international human rights law jurisprudence. By classifying and conducting a semi-quantitative analysis of a group of international human rights judicial decisions on criminalization, it demonstrates a technique for identification and analysis of underlying legal concepts and reasoning. To the extent that a conceptual framework is identifiable, the technique offers a route to bringing order and analytical rigour to an otherwise largely unstructured body of case law. This enables new insights and understanding of factors that guide a human rights-based position on criminalization. The differences between this framework and criminal theory are then used to discuss whether international human rights law can either itself provide guiding principles for criminalization or otherwise make a significant contribution to existing criminal theory.

Defining the criminal offence

Whilst some countries benefit from a single, largely definitive penal code, criminalization in other countries can arise from multiple statutes that deal with multiple subject matters and at multiple geographical levels, such as federal and state. Criminal offences may also be contained in secondary legislation, at common law, and from discretionary, or *ta'azir*, crimes in some Islamic legal systems.²⁴ In Western legal systems, the large spectrum of terminology associated with legal measures of varying types, including words such as crime, offence, legal, indictable, summary and administrative offence, felony, misdemeanour, administrative sanction, and penalty, in particular serves to introduce confusion as to those measures that may be included within the ambit of criminalization. A number of commentators have recognized the significance of this challenge. Susan Klein, for instance, suggests that it is simply impossible, at present, to separate all proceedings into criminal and civil actions, as so many now have a combination of features from both.²⁵ Nevertheless, some definitions of crime do rely on a focus on the type of proceedings as the determining factor of a crime in law. Under this approach, a crime is defined by reference to the legal consequences of the act. As such, the criminal offence is distinguished, primarily, not as a crime or civil wrong but by virtue of the difference between criminal and civil proceedings. A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome known to follow these proceedings.²⁶

24 For an introduction to Islamic law, see Bassiouni, M.C., and Badr, G.M., 2002.

25 Klein, S.R., 1999, p.722.

26 Williams, G., 1955, p.123.

Although such definitions on the one hand introduce at least some basis for distinguishing a criminal offence, on the other they arguably simply defer the problem of identification from the level of legal definitions to the level of type of proceedings and sanctions. Further tests have nonetheless been proposed to attach to this definition, including related to the type of procedural rules that govern the legal proceedings, as well as to the distinguishing feature of the sanction. Andreas von Hirsch, in particular, advocates that it is the “censure” that attaches to a criminal penalty which most clearly distinguishes criminal wrongs from other wrongs.²⁷ International human rights law itself is also able to make a contribution to the point, with jurisprudence under the European Convention on Human Rights (ECHR) Article 6 (Right to a fair trial), for example, providing some guidance as to whether a particular set of proceedings amounts to criminal proceedings for the purposes of fair trial protection. In this respect, European Court of Human Rights (ECtHR) case law tends towards a broadening of the criminal head to all sanctions whose main objective is to deter from future violations of a norm generally perceived as inherently bad or contrary to the common values shared in a democratic society.²⁸ For the purposes of analysing international human rights jurisprudence on criminalization, and its comparison with criminal theory, however, the focus in this book is on those proceedings that clearly carry the stigma and expressive function of a criminal conviction, rather than coercive sanctions in general.²⁹

A conscious exclusion is also made in relation to the general part of the criminal law. Criminal law theorists often refer to the distinction between the general part of the criminal law and the special part of the criminal law.³⁰ The general part is comprised of rules and principles of the criminal law whose importance and application can be analysed and debated without necessarily referring to a specific crime. By contrast, the special part of the criminal law refers to the particular conduct, situations, and states of mind that are used to define specific offences, such as murder, theft, rape, robbery, and blackmail. Doctrines sometimes argued to reside in the general part of the criminal law, and thus to apply across a range of offences, include the requirement of voluntary action; the principle of causation and interventions between conduct and result; the requirement of a culpable state mind; the operation of defences such as self-defence and duress; and principles related to inchoate offences and accessory liability.

Analysis of the general part of the criminal law is to be found in the European continental perspective, including, in particular Austrian, German, Italian, Portuguese, Spanish, and Swiss legal thinking, in both a classical and, more recently,

27 Von Hirsch, A., 1993, pp.9–12.

28 See, for example, the ECHR cases of *Engel and Others v. The Netherlands*; *Garyfallou Aebe v. Greece*; and *Jussila v. Finland*. For a general review, see Guinchard, A., 2005.

29 On the expressive function of law in general, see Sunstein, C.R., 1996.

30 Gardner, J., 1998.

post-finalist, structure of the criminal law. Under a post-finalist structure, a crime is considered to consist of the objective and subjective elements of the offence (*Tatbestandsmäßigkeit*) together with a requirement for wrongfulness (*Rechtswidrigkeit*) and culpability (*Schuld*) in a normative sense.³¹ Such models suggest that the interaction between the general part and the special part of the criminal law is complex. In particular, depending upon the model applied, mental aspects, such as specific intentions or motives, beliefs concerning the act and situation, and consciousness of the wrong, can be distributed between the special and general parts of the criminal law. As Simester and Shute note, the general part of the criminal law is not simply the set of generalized, directly justiciable doctrines known to criminal law. General part doctrines need not be mandatory, they may be advisory or, for that matter, permissive. Nor is the relationship between the general and special parts uniform or straightforward.³²

There is no reason, in principle, why a human rights analysis of the general part of the criminal law may not be undertaken. David Richards, for example, examines defences of justification and excuse, as well as other elements of the general part of the criminal law, with reference to a rights-based scheme of autonomous choice and deliberation.³³ The ECtHR, in the context of challenges to criminal convictions, has had occasion to consider the human rights compatibility of strict liability offences.³⁴ The close interaction between the general part and special part of the criminal law means that it can sometimes be difficult to focus on one part to the exclusion of the other. A human rights analysis of the specific offence of rape, for instance, engages not only issues that are particular to the definition of the specific act but also issues that can be described as belonging to the general part of the criminal law, including the ability of the victim to consent to the act or not, the subjective belief of the perpetrator, as well as strict liability variants of the offence.³⁵

That said, the focus of this book is on an analysis of the special part of the criminal law – that is, the range of acts or conduct which may legitimately be made criminal. The rationale for this lies in the particular public, and practical, interest in specific controversial laws, such as the criminalization of homelessness or membership of proscribed organizations. Indeed, international human rights law jurisprudence most usually arises from challenges to specific criminalization and criminal convictions. Similarly, whilst criminal law theorists do not ignore the general part of criminal law, they usually reserve the greater part of their analysis for the acceptability, or not, of specific conduct.

31 Ambos, K., 2007.

32 Simester, A.P., and Shute, S., 2002, p.12.

33 Richards, D.A.J., 1979b, p.1431.

34 See, for example, *Salabiaku v. France*, ECHR, and *Hansen v. Denmark*, ECHR.

35 See, for example, *X and Y v. The Netherlands*, ECHR, and *G v. United Kingdom*, ECHR.

The scope of international human rights law

At its core, international human rights law consists of international customary law and those international treaties that contain human rights and fundamental freedoms concluded under the auspices of the United Nations and regional intergovernmental systems. Whereas the Universal Declaration on Human Rights (UDHR) adopted by the United Nations General Assembly on 10 December 1948 is considered as a foundational international human rights law document, its status as a General Assembly resolution means that it does not, on the face of it, impose binding obligations on states. That said, a number of the provisions of the UDHR arguably do reflect provisions of customary international law. These may include the right to life (UDHR Article 3), as well as prohibitions against slavery (Article 4), torture (Article 5), arbitrary detention (Article 9), and racial discrimination (Article 2).³⁶ By far the greater body of international human rights legal standards, though, are found in specific international human rights treaties.

Almost exactly 18 years after the UDHR, the International Covenant on Civil and Political Rights (ICCPR) was adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, containing 22 articles setting out civil and political rights for the individual. The Covenant additionally set out two rights of peoples. The same General Assembly resolution also adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR), containing 10 substantive articles with rights of an economic, social, and cultural nature. The 1966 Covenants are accompanied by a further seven core international human rights treaties negotiated under the auspices of the United Nations: the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT), the Convention on the Rights of the Child of 1989 (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance of 2006 (CPED), and the Convention on the Rights of Persons with Disabilities, also of 2006 (CRPD). In addition, Optional Protocols exist to ICESCR, ICCPR, CEDAW, CRC, CAT, and CRPD, creating competencies for communications from individuals claiming to be victims of violations of rights contained in the instruments and covering additional areas such as the abolition of the death penalty, the involvement of children in armed conflict, and the sale of children, child prostitution, and child pornography.

At the regional intergovernmental level, contemporaneously with the preparation of the UDHR, a charter of human rights was proposed in Europe by the Congress of Europe held in The Hague in May 1948. A first draft of what was to become the ECHR was prepared by a committee of the European Movement in 1949. The

36 Hannum, H., 1996.

resultant Convention was opened for signature on 4 November 1950 in Rome, and the ECHR came into effect on 3 September 1953 upon its tenth ratification. The ECHR has been amended and supplemented by a number of additional protocols, which both added additional rights to the original Convention and amended provisions relating to the institutional machinery of the ECHR.

In the Americas, the American Declaration of the Rights and Duties of Man represents the earliest contemporary human rights instrument, having been adopted by the Ninth International Conference of American States, held in Bogotá, Colombia, in 1948. This was followed by the adoption of the American Convention on Human Rights in 1969. Whereas the American Declaration of the Rights and Duties of Man does not hold the status of a treaty, the General Assembly of the Organization of American States has repeatedly recognized that the American Declaration is a source of international obligations for member states of the Organization. In addition, the Inter-American Commission on Human Rights is empowered to consider allegations of violation of rights guaranteed in the American Declaration.

In Africa, the African Charter on Human and Peoples' Rights was unanimously approved by the Organization of African Unity in 1981. A Protocol to the African Charter on the Establishment of an African Court on Human Peoples' Rights was adopted in 1998 and entered into force in 2004. At present, there is no Asia-wide or Oceania-wide intergovernmental human rights system. The Association of Southeast Asian Nations adopted the ASEAN Human Rights Declaration in 2012, however, and the League of Arab States adopted the Arab Charter on Human Rights in 2004. The relationship between the universal international human rights law system of the United Nations and the international human rights law deriving from regional intergovernmental systems is, in many senses, bidirectional. Regional human rights systems may both reflect and influence United Nations human rights instruments. Whilst it is undoubtedly the case, for example, that the European human rights system became influential in its region earlier, the American and African systems have also contributed to the making of the broader international human rights order.³⁷

In addition to the provisions of international human rights instruments and treaties themselves, international human rights law is shaped by the jurisprudence of international human rights courts and tribunals. It is the international common law, representing the collective decisions of international tribunals, which provides the soft law interpretative standards that delineate the meaning and application of treaty-based rights.³⁸ Judgments of international courts and tribunals, such as the ECtHR, do not strictly bind non-parties to the particular case. However, as noted by the European Court in *Pretty*, judgments issued in individual cases establish precedents, albeit to a greater or lesser extent, and

37 See, for example, Huneeus, A., and Madsen, M.R., 2018.

38 Guzman, A.T., and Meyer, T.L., 2010.

a decision in a case could not, in either theory or practice, be framed in such a way as to prevent application in later cases.³⁹

Within the United Nations system, treaty bodies are responsible for monitoring implementation of the United Nations international human rights treaties. They produce concluding observations on state party reports and may also receive and consider individual complaints. United Nations treaty body concluding observations differ from judgments of an international court or tribunal in that they are not legally binding on states parties and are developed following a periodic process of state party reporting and dialogue with the relevant treaty-monitoring Committee. Committee decisions in individual cases similarly contain non-legally binding recommendations to the state party. Nonetheless, concluding observations and decisions in individual communications are not without some special status, at least to the extent that they interpret the treaty or consider the treaty obligations of the state party.⁴⁰ The combined jurisprudence of an international human rights tribunal or treaty body on a particular issue can therefore be taken as an authoritative expression of the applicable international human rights standards within each international human rights system. Moreover, a certain cross-fertilization can occur between the jurisprudence of different international human rights systems. The African Court on Human and Peoples' Rights, for instance, frequently makes reference to the interpretation of equivalent standards within the United Nations, European, and American human rights systems.⁴¹

For the purposes of this book, the human rights contained in the nine core United Nations human rights treaties and their protocols, as well as the treaties of the three principal regional human rights mechanisms, together with the authoritative interpretation of their associated international courts and tribunals, are taken as the principal expression of international human rights law to be applied to the question of criminalization. This is not to say that other international law does not exist that may be classified as human rights law. Multilateral treaties agreed under the auspices of organizations such as the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization, including the 1960 Convention against Discrimination in Education, the 1948 Freedom of Association and Protection of the Right to Organize Convention, and the 1999 Worst Forms of Child Labour Convention, for example, also contain human rights protections. Such instruments generally either build on standards in the core United Nations human rights treaties or concern their application in particular circumstances or to specific groups.

This said, the question of what exactly comes within the remit of international human rights law is more than a semantic issue, not least because human rights treaties are often argued to have a special status within international law.⁴² The

39 *Pretty v. United Kingdom*, ECHR.

40 O'Flaherty, M., 2006.

41 See, for example, *Lobé Issa Konaté v. Burkina Faso*, African Court on Human and Peoples' Rights, paras 116–166.

42 Mégret, F., 2018.

category of human rights treaties may be larger or smaller depending upon the specific characteristics employed to define the category. These may include rights of petition for individuals, as well as independence of rights from nationality, or reciprocal protection by other states parties to the treaty.⁴³ Of special relevance to the issue of criminalization is the interface between instruments that contain protections of individual rights and those that prohibit specific acts under threat of penal sanction. International treaties such as the 1926 Slavery Convention and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for example, are often viewed as human rights treaties, but do not in fact specify rights of individuals. Rather, they define specific acts and commit states parties to undertake necessary measures to ensure that penalties are imposed in respect of infractions.⁴⁴ Whilst their structure is very different to that of the nine core United Nations human rights treaties, their characterization as human rights instruments can probably be traced to the fact that their subject matter strikes at the heart of human life and liberty.

Equally significant is the relationship between international human rights law, international humanitarian law, and international criminal law. Whereas international human rights law is primarily constructed in terms of *state* obligations, international criminal law is concerned with the criminal liability of *individuals*. This applies to the most serious crimes of concern to the international community as a whole, including the crime of genocide, war crimes, and the crime of aggression, but also, under the head of crimes against humanity, a number of acts that represent serious human rights violations, such as enslavement, deprivation of physical liberty, enforced disappearance, and torture.⁴⁵ The existence of a continuum between the core international human rights treaties and international instruments that provide for individual criminal liability confirms that the most serious human rights violations are to be subject to criminal sanctions. Indeed, in the 1980s, M. Cherif Bassiouni had already proposed a process of evolutionary development of human rights through enunciative, declarative, prescriptive, enforcement, and, finally, “criminalization” stages.⁴⁶ As Bassiouni recognized, however, not all rights will progress through these stages. As such, the focus of this book is *not* on the well-established criminalization of the most serious human rights violations, such as slavery, genocide, and crimes against humanity. Rather, by examining the range of rights and obligations prescribed by international human rights law across its universal and regional systems as a whole, it aims to understand how international human rights law views criminalization in all its aspects – in particular, where criminal law is to be required, tolerated, or constrained.

43 Craven, M., 2000.

44 See Slavery Convention, Article 6, and Genocide Convention, Article 5.

45 See United Nations, 1998. Rome Statute of the International Criminal Court.

46 Bassiouni, M.C., 1982.

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