

The 8 March Principles for
a Human Rights-Based Approach to
**Criminal Law Proscribing Conduct
Associated with Sex, Reproduction,
Drug Use, HIV, Homelessness
and Poverty**



Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

© Copyright International Commission of Jurists
Published in March 2023

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgement is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists
Rue des Buis 3
P.O. Box 1740
1211 Geneva 1
Switzerland
T +41 (0)22 979 38 00
F +41 (0)22 979 38 01
www.icj.org

The 8 March Principles for
a Human Rights-Based Approach to
**Criminal Law Proscribing Conduct
Associated with Sex, Reproduction,
Drug Use, HIV, Homelessness
and Poverty**

March 2023

Foreword

From long years in the law, and as a proudly gay man, I know profoundly how criminal law signals which groups are deemed worthy of protection – and which of condemnation and ostracism. In this way, the criminal law performs an expressive function – and it has dramatic consequences on people’s lives. It sometimes entails a harshly discriminatory impact on groups identified with the disapproved or stigmatised conduct.

To add to this, criminal proscriptions may reinforce structural inequalities; they may codify discrimination, invest them with the law’s power and may foster stigma. All this may wreak terrible harm.

Criminal law may thus impel hostility, exclusion, inequality, discrimination and marginalization of individuals and groups, sometimes to the point of violence. As a result, human rights, democratic values and social inclusiveness all suffer.

For a number of years now, the UN Secretary-General, the Office of the High Commissioner for Human Rights, global and regional human rights mechanisms, bodies and experts, national courts, legislatures and domestic human rights institutions, as well as civil society have grappled with the problem of the harmful human rights impact of criminal laws that proscribe conduct associated with sex, reproduction, HIV, drug use, homelessness and poverty.

This led to a five-year, painstaking process. A group of jurists elaborated a set of principles that can constructively address these harms.

The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty – published by the International Commission of Jurists – are a timely intervention addressing the detrimental human rights impact of criminal laws targeting vulnerable groups.

The Principles aim to be practically useful to the widest range of stakeholders. From my own experiences, in my life and in my work, I know they will be of immediate significance to critical audiences. Here I include judges, who, in particular bear the critical responsibility of guarding the rule of law while upholding human rights and non-discrimination guarantees.

The Principles are based on general principles of criminal law and international human rights law and standards. They seek to offer a clear, accessible and workable legal framework – as well as practical legal guidance – on applying the criminal law to conduct associated with:

- sexual and reproductive health and rights, including termination of pregnancy;
- consensual sexual activities, including in contexts such as sex outside marriage, same-sex sexual relations, adolescent sexual activity and sex work;
- gender identity and gender expression;
- HIV non-disclosure, exposure or transmission;
- drug use and the possession of drugs for personal use; and
- homelessness and poverty.

And I foresee that these Principles may also be of practical use to others in the criminal justice system and beyond. Here I include prosecutors and legal practitioners, legislators, government officials, policymakers, national human rights institutions, oversight bodies, legal service providers, victims' groups, civil society organizations and academics. All these may play a critical role in mitigating the detrimental human rights impact of misapplied criminal laws.

Edwin Cameron

Retired Justice, Constitutional Court of South Africa

Inspecting Judge, Judicial Inspectorate for Correctional Services

Table of contents

Foreword	1
Introduction	5
Audience	9
Process	9
Structure	10
Preamble	10
General Part I – Basic Principles of Criminal Law	14
Principle 1 – Principle of legality	15
Principle 2 – Harm principle	15
Principle 3 – Individual criminal liability	15
Principle 4 – Voluntary act requirement	15
Principle 5 – Mental state requirement	16
Principle 6 – Grounds for excluding criminal liability	16
General Part II – Criminal Law and International Human Rights Law and Standards	17
Principle 7 – Human rights restrictions on criminal law	18
Principle 8 – Legitimate exercise of human rights	18
Principle 9 – Criminal law and prohibited discrimination	18
Principle 10 – Criminal liability may not be based on discriminatory grounds	19
Principle 11 – Limitations on criminal liability for persons under 18 years of age	19
Principle 12 – Criminal law and non-derogable human rights	19
Principle 13 – Criminal law sanctions	19
Special Part III – Application to the Criminalization of Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty	20
Principle 14 – Sexual and reproductive health and rights	21
Principle 15 – Abortion	22
Principle 16 – Consensual sexual conduct	22
Principle 17 – Sex work	23
Principle 18 – Sexual orientation, gender identity and gender expression	23
Principle 19 – HIV	24
Principle 20 – Drug use and possession, purchase, or cultivation of drugs for personal use	24
Principle 21 – Life-sustaining activities in public places and conduct associated with homelessness and poverty	24
Endorsers and Supporters	25

Introduction



Criminal law is among the harshest of tools at the disposal of the State to exert control over individuals. As such, it ought to be a measure of last resort, where other less restrictive means of achieving legitimate interests are insufficient. However, globally, States have exhibited a growing trend towards overcriminalization.

While retribution, deterrence, incapacitation and rehabilitation are generally considered to be its main purposes, criminal law may also perform an expressive function, through public condemnation of certain conduct seen as deserving reprobation and punishment. The desire to harness this expressive function is a critical factor contributing to the proliferation of criminal law.

The unjustified criminalization of individuals and sometimes entire communities is increasingly impeding progress in advancing human rights in many areas, including: racial and gender equality; reproductive autonomy; disability; economic justice; civil liberties; sexual orientation; gender identity; education; youth development; and public health.

Moreover, in recent years, in some quarters, there has been a backlash against human rights, especially against sexual and reproductive health and rights and the human rights of women, lesbian, gay, bisexual, transgender, non-binary, gender diverse and intersex persons, as well as against sex workers, people who use drugs and people experiencing homelessness and/or living in poverty.

In particular, there has been continued use and, in some cases, a new proliferation of arbitrary criminal laws proscribing conduct associated with sex, reproduction, drug use and the possession of drugs for personal use, HIV, homelessness and poverty. These laws have led to egregious human rights violations, including by engendering and perpetuating stigma, harmful gender stereotypes and discrimination based on grounds such as sex, sexual orientation, gender identity, gender expression and other protected fundamental characteristics.

Unless criminal laws proscribing the above-mentioned conduct are directed at coercion or force or otherwise at the absence of consent, their mere existence – let alone their threatened or actual enforcement – violates human rights. The use of criminal law in these domains contributes to a broad range of human rights violations, especially of the rights to: freedom from discrimination, equality before the law and equal protection of the law without discrimination; life; freedom from torture or other ill-treatment, including gender-based violence against women; liberty and security of person; the highest attainable standard of physical and mental health; adequate standard of living; private and family life; freedom of opinion, expression, peaceful assembly and association; freedom of thought, conscience and religious belief; freedom of movement; rights to and at work; and participation in public affairs.

The failure to uphold human rights and protect people against abuses, including violence and the enforcement of discriminatory laws and practices, violates international human rights law. Such a failure has a far-reaching, harmful impact on society, contributing to increased risks of ill health, including drug overdose, HIV infection and unsafe abortions, and to social and economic exclusion. This harmful societal impact puts a strain on individuals, families and communities. Therefore, there is an urgent need to address the proliferation of unjust, arbitrary and unlawful criminal laws, and the human rights violations to which such laws give rise.

In recent years, the UN Secretary-General, the Office of the High Commissioner for Human Rights, and global and regional human rights mechanisms, bodies and experts, as well as national courts, legislatures and domestic human rights institutions, have expressed concern about the harmful human rights impact of criminal laws proscribing conduct associated with: sexual and reproductive health and rights; consensual sexual activity; gender identity; gender expression; HIV non-disclosure, exposure and transmission; drug use and the possession of drugs for personal use; and homelessness and poverty. They have called for the removal of criminal and other punitive laws, policies and practices pertaining to some or all of the above-mentioned conduct as a critical step to protect the right to health and other human rights.

Generally, criminalization in the above-mentioned contexts does not further the stated goals of the criminal law. For example, it does not protect third parties physically, psychologically or financially from direct harm. Instead, it typically seeks to clamp down on consensual conduct, stigmatized identities and personal status. The existence and enforcement of criminal laws proscribing the above-mentioned conduct punish, stigmatize, and deny services and rights to individuals – particularly those hailing from already marginalized communities facing exclusion and subjugation – solely for exercising their human rights guaranteed under international human rights law.

Time and again, criminal law provisions enshrining discriminatory proscriptions may be rooted in, embody and codify unequal power relations that, in turn, are often the legacy of colonial, xenophobic, racist, sexist, classist, ableist, cultural, religious, social, political, economic and other power dynamics. Moreover, substantive and procedural criminal law may, whether or not by design, effectively incorporate elements of discrimination embedded in perceived gender roles and patriarchal, heteronormative power relations between women and men and in other historical distinctions founded upon prohibited discrimination grounds. Ultimately, criminalization – in law and application – is the product of political decisions made in the service of existing relations of power that often detrimentally affect persons belonging to already marginalized or disadvantaged groups.

Even when criminalization gives rise to and exacerbates structural inequality and discrimination, it may, nonetheless, escape legal challenge and redress because of States' failure to identify, collect data on, and review the effects of criminal law across prohibited grounds of discrimination.

In light of the above, the principles below are intended to offer a clear, accessible and operational legal framework and practical legal guidance – based on general principles of criminal law and international human rights law and standards – on the application of the criminal law to conduct associated with:

- a) sexual and reproductive health and rights, including abortion;
- b) consensual sexual activities, including in such contexts as sex outside marriage, same-sex sexual relations, adolescent sexual activity and sex work;
- c) gender identity and gender expression;
- d) HIV non-disclosure, exposure or transmission;
- e) drug use and the possession of drugs for personal use; and
- f) homelessness and poverty.

The principles are additionally intended to address the detrimental impact of the criminalization of this conduct on health, equality and other human rights.

These principles may also assist in considering more broadly the question of which other conduct should not be criminalized, or whether the content and scope of a given criminal law provision are consistent with general principles of criminal law and international human rights law and standards. In particular, General Parts I and II may assist in considering the compliance of other criminal offences – including overbroad criminal provisions used to target conduct addressed in these principles – with general principles of criminal law and international human rights law and standards, such as, for example, those proscribing: apostasy; blasphemy; truancy; defamation; libel; propaganda; public nuisance; loitering; vagrancy; immorality; public indecency; same-sex marriage; the promotion of homosexuality; obscenity



and sexual speech; certain kinds of pornography; non-exploitative surrogacy; certain harmful practices; migration-related infractions; the provision of humanitarian assistance; acts of solidarity; and certain types of civil disobedience.

The principles may also be helpful in determining whether other penalties, under other legal instruments, are in compliance with international human rights law and general principles of criminal law. These include penalties enshrined in subsidiary legislation (e.g., regulations, rules, guidelines), disciplinary laws, civil laws, by-laws, administrative laws and regulations (e.g., zoning, curbing) and mental health commitment laws, among others. These laws and regulations, while not necessarily characterized as criminal under domestic law, have an analogous punitive character or stigmatizing intent or effect, given the severity of the penalty or other adverse impacts that the person concerned risks incurring. The nature, duration or manner of execution of certain sanctions – such as fines, asset forfeiture, civil commitment of people with disabilities, mandated drug or other medical treatment, deportation and administrative removals, removal of parental authority – may also be evidence of their punitive, quasi-criminal character.



Audience

The principles aim to be useful to the widest range of concerned stakeholders; however, they should be of immediate relevance to certain critical audiences. These comprise:

- a) legislators, at all levels, who are responsible for the drafting, adoption or review and reform of laws;
- b) administration officials with delegated legislative powers, including powers to adopt secondary legislation, binding rules, regulations and policies;
- c) judges, including magistrates, presiding over criminal cases;
- d) prosecutors and legal practitioners (e.g., defence lawyers, legal aid advocates, paralegals) involved in criminal cases; and
- e) judicial benches in higher courts, such as Constitutional and Supreme Courts, seized of cases considering the lawfulness of certain criminal law provisions and administrative penal provisions, where pertinent.

These principles may also be of practical use to other actors in the criminal justice system, including: heads of prosecution services or similar authorities responsible for establishing policies and guidelines or issuing instructions to prosecutors and other law enforcement officials; policymakers; executive officials; national human rights institutions; oversight bodies; legal service providers; victims' groups; civil society organizations; and academics.

Further, criminal law intersects with the application of other bodies of law, such as immigration law, administrative law, and various regulatory frameworks, in ways that may render these principles of interest beyond those concerned solely with criminal law.

The principles may also be of importance to human rights defenders more broadly engaged in human rights advocacy.

Process

In 2018, the Joint UN Programme on HIV/AIDS (UNAIDS), the Office of the High Commissioner for Human Rights and the International Commission of Jurists – inspired by recent international initiatives, such as the 2017 Joint UN Statement on Ending Discrimination in Health Care Settings – convened an expert meeting to discuss the role of jurists in addressing the harmful human rights impact of criminal laws proscribing sexual and reproductive health and rights, consensual sexual

activity, gender identity, gender expression, HIV non-disclosure, exposure and transmission, drug use and the possession of drugs for personal use. The convening endorsed the call by civil society and other stakeholders for the elaboration of a set of jurists' principles aimed at assisting legislatures, the courts, administrative and prosecutorial authorities and advocates to address the detrimental human rights impact of criminalization in the above-mentioned areas. Subsequently, civil society and other stakeholders identified the need for such a set of principles to also address the criminalization of conduct associated with homelessness and poverty.

Following this expert meeting, the International Commission of Jurists produced successive drafts of the principles and circulated them to a wide range of expert jurists, academics, legal practitioners, human rights defenders and various civil society organizations working in diverse legal traditions, for their review. Between 2020 and 2022, a series of in-person and on-line consultations took place, until this final version of the principles was finalized and circulated for endorsement in early 2023.

Structure

General Part I and General Part II, below, reflect the criteria that must be met under general principles of criminal law and international human rights law, respectively, to proscribe certain conduct in a non-discriminatory way, respecting the rule of law.

Special Part III, below, features principles derived from the application of General Parts I and II to the criminalization of conduct associated with sex, reproduction, drug use and the possession of drugs for personal use, HIV, homelessness and poverty.

Preamble

Acknowledging that both substantive criminal law – namely, the law that defines what conduct is criminal and determines the permissible punishment for the proscribed conduct – and its enforcement through criminal procedure laws, practices and policies, including those related to policing, investigations, arrests, deprivation of liberty, detention conditions and trial and sentencing procedures, may violate human rights;

Concerned that the criminal proscription of certain conduct is not in conformity with general principles of criminal law and international human rights law, either because the proscribed conduct should not be criminalized at all, since it involves the

legitimate and lawful exercise and enjoyment of human rights, or because the content and scope of certain criminal offences are otherwise inconsistent with general principles of criminal law;

Further concerned that in such circumstances, criminalization violates or otherwise impairs the exercise and enjoyment of the full range of civil, cultural, economic, political and social rights, especially of the rights to: dignity; equality; non-discrimination; personal integrity; freedom from violence; including torture or other cruel, inhuman or degrading treatment or punishment; freedom of expression and association; liberty and security of person; life; privacy; and health;

Recognizing that people may experience discrimination on one or multiple, intersecting grounds of discrimination prohibited by international human rights law, whether real or imputed, such as age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; minority or other status;

Concerned that, when criminal law discriminates on grounds prohibited by international human rights law, criminalization often serves to signal which groups are considered deserving of protection and which warrant condemnation in a society, and that, in such circumstances, criminal proscription reinforces structural inequalities, codifies discriminatory attitudes, vests them with power of the law, and sanctions stigmatization, causing extensive societal harm;

Equally concerned that these harms typically manifest through a pattern of discriminatory criminal law enforcement against certain groups identified with the proscribed conduct, such as by targeting them for arrests and surveillance, or through selective and arbitrary prosecution of targeted minorities;

Further concerned that the stigmatizing effects of criminal law drive hostility, exclusion, inequality, discrimination and marginalization of both individuals and groups, sometimes to the point of violence, to the detriment of human rights, democratic values and social inclusion at local, national and global levels;

Concerned also about frequent attempts by States and others to justify human rights violations resulting from the existence and/or application of criminal law by relying upon claims of cultural, traditional or community values or religious beliefs, or stated threats to the rights and reputation of others, national security, public order, public morals or public health;



Reaffirming that – whether or not adopted with the stated aim of protecting culturally specific, traditional or community values or religious beliefs, or of protecting against purported threats to the rights and reputation of others, national security, public order, public health or public morals – in any given country or society criminal law may not be used for illegitimate purposes, including as a justification or an excuse for human rights violations, such as violence or discrimination, or to defend limitations on human rights that do not comply with principles of liability in criminal law, the universality of human rights or otherwise with international human rights law and standards;

Concerned that criminal law is often misused as a substitute for addressing complex, structural social challenges;

Further concerned that legitimate interests invoked to justify the use of criminal law, including public health or public order, may often be better pursued by efforts aimed at realizing gender equality and human rights, including, in particular, social and economic rights in all spheres, and by supplanting and/or complementing the minimal use of the criminal law with other measures of prevention, reparation and redress aimed at social injustice and structural inequalities;

Noting that, at a minimum, consent sets the boundary between justifiable and unjustifiable State interference in certain conduct and contexts, and that ascertaining the presence or absence of consent is a matter of evidence and factual investigation, with due regard to the strictures of the law and one's capacity to consent;

Acknowledging that the absence of consent may give rise to criminal liability for the conduct concerned;

Emphasizing that, with respect to the application of criminal law in connection with consent, international human rights law requires paying due regard to:

- a) the legal capacity of people with disabilities to consent, including through supported decision-making;
- b) adolescents' evolving capacity to consent in certain contexts, in fact, even if not in law, when they are below the prescribed minimum age of consent in domestic law; and
- c) non-discrimination and equality with respect to sex, sexual orientation, gender identity, gender expression, race, disability and other protected fundamental characteristics;

Noting that the principles below concern the criminal liability of individuals, without prejudice to criminal liability for conduct engaged in by legal persons, including corporations and other business enterprises, associations, or other actors under doctrines of legal personality;



Further noting that these principles reiterate or reflect: existing general principles of criminal law; international human rights law, including customary and treaty law; judicial decisions; national law and practice; and legal scholarship in accordance with accepted practice and Article 38 of the Statute of the International Court of Justice;

Emphasizing that the principles below do not establish new elements of international law. Rather, they are drawn from, and restate, existing criteria under general principles of criminal law and international human rights law, with the aim of clarifying a human rights-based approach to criminal law proscribing conduct associated with sex, reproduction, drug use and the possession of drugs for personal use, HIV, homelessness and poverty;

Further emphasizing that the principles should be interpreted in light of general principles of criminal law and in accordance with international human rights law and standards, applying the most favourable guarantees for the exercise and enjoyment of human rights, including under domestic law;

Reaffirming that domestic law, however, cannot be invoked as a justification for a breach of international law;

Acknowledging that the principles set out minimum standards, and that nothing in them should be construed as justifying a lower level of protection for individuals than that which is provided in national laws or under general principles of criminal law or in a manner that would limit, restrict or undermine human rights guaranteed under international human rights law and standards;

Recommending that the principles be interpreted as a 'living document': that is, dynamically, in the light of present-day conditions and responsive to the evolution of human rights law and standards;

Further recommending that judges, including magistrates, as well as those members of the judiciary charged with the task of reviewing the lawfulness of criminal law, and other concerned stakeholders, such as legislators, prosecutors, defence and other lawyers, administrative regulators, policy-makers, government officials, law enforcement officials, national human rights institutions and civil society actors and organizations, at the national, regional and international levels, disseminate, adopt and apply the principles to achieve the full realization of human rights, in the context of the enforcement of criminal law;

The jurists listed at the end of this document are the first to endorse the following principles. In addition, the organizations and institutions whose names appear at the end support these principles.





General PART I

Basic Principles of Criminal Law

PRINCIPLE 1 – PRINCIPLE OF LEGALITY

No one may be held criminally liable for any act or omission that did not constitute a criminal offence, under national or international law, at the time when such conduct occurred. The principle of legality also requires that the law be publicly and sufficiently accessible and the criminal liability foreseeable and capable of being clearly understood in its application and consequences. Thus, crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed.

Criminal law must not proscribe any act or omission in terms that are vague, imprecise, arbitrary or overly broad.

Criminal law must not be construed broadly to an accused person's disadvantage. In the case of ambiguity, the definition of a particular offence should be interpreted in favour of the accused.

PRINCIPLE 2 – HARM PRINCIPLE

Criminal law may only proscribe conduct that inflicts or threatens substantial harm to the fundamental rights and freedoms of others or to certain fundamental public interests, namely, national security, public safety, public order, public health or public morals. Criminal law measures justified on these grounds must be narrowly construed, and the assertion of these grounds by the State must be continuously scrutinized.

PRINCIPLE 3 – INDIVIDUAL CRIMINAL LIABILITY

No one may be held criminally liable for any act or omission except on the basis of their individual criminal liability for such conduct.

PRINCIPLE 4 – VOLUNTARY ACT REQUIREMENT

No one may be held liable for a criminal offence unless that person has engaged in a voluntary act or omission as defined in that offence. Criminal liability may not be based on thoughts, intentions, beliefs or status alone.



PRINCIPLE 5 – MENTAL STATE REQUIREMENT

No one may be held liable for a criminal offence unless that person has committed the material elements of that offence with the mental state required in the definition of the offence, such as intent, purpose, knowledge, recklessness, or criminal negligence. Every criminal offence that is punishable with deprivation of liberty must include a mental state requirement with respect to each material element.

PRINCIPLE 6 – GROUNDS FOR EXCLUDING CRIMINAL LIABILITY

No one may be held criminally liable for an offence if that person has a lawful defence for their conduct, including that the conduct is justified or excused, such as by reason of necessity, self-defence or duress.





General
PART II

Criminal Law and
International Human Rights
Law and Standards

PRINCIPLE 7 – HUMAN RIGHTS RESTRICTIONS ON CRIMINAL LAW

Criminal law must be interpreted consistently with international human rights law. Criminal law may not restrict the exercise of any human right unless such a limitation is:

- a) in accordance with the law – the principle of legality;
- b) in pursuit of one of the limited and narrowly defined, legitimate fundamental public interests allowed under international human rights law, namely, for the protection of the fundamental rights and freedoms of others, national security, public safety, public order, public health or public morals;
- c) strictly necessary to achieve these legitimate interests;
- d) proportionate to the legitimate interest(s) it pursues, meaning that it must be the least intrusive or restrictive means to achieve the desired result;
- e) appropriate to the legitimate interest(s) to be protected, including by being rationally and reasonably connected to it;
- f) not arbitrary;
- g) non-discriminatory; and
- h) consistent with other rights recognized under international human rights law.

To the extent that criminal law measures restrict or impair the exercise of human rights, they must be narrowly construed. The State must go beyond merely asserting an interest in the protection of the fundamental rights and freedoms of others, national security, public safety, public order, public health or public morals, including by showing concrete evidence of the necessity of a criminal law response to protect them, and its assertions must be continuously scrutinized.

The substantial harm that the proscribed conduct is said to inflict or threaten must be foreseeable and not unreasonably remote. To be proportionate, criminal law may be applied only as a last resort, where other less restrictive means of achieving the above-mentioned legitimate interests are insufficient.

PRINCIPLE 8 – LEGITIMATE EXERCISE OF HUMAN RIGHTS

Except as in accordance with the permissible limitations set forth in principle 7, criminal law may not proscribe any conduct that is protected under human rights law, namely, because this conduct constitutes the legitimate exercise and enjoyment of human rights guaranteed under international or domestic human rights law.

PRINCIPLE 9 – CRIMINAL LAW AND PROHIBITED DISCRIMINATION

Criminal law may not, on its face or as applied, in substance or in form, directly or indirectly discriminate on any, including multiple and intersecting, grounds prohibited by international human rights law.



Prohibited grounds of discrimination include: age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; minority or other status.

PRINCIPLE 10 – CRIMINAL LIABILITY MAY NOT BE BASED ON DISCRIMINATORY GROUNDS

No one may be held criminally liable for conduct that does not constitute a criminal offence if committed by another person and where the criminalization of such conduct constitutes prohibited discrimination under international or domestic law.

PRINCIPLE 11 – LIMITATIONS ON CRIMINAL LIABILITY FOR PERSONS UNDER 18 YEARS OF AGE

No one under the age of 18 may be held criminally liable for any conduct that does not constitute a criminal offence if committed by a person who is 18 or older.

PRINCIPLE 12 – CRIMINAL LAW AND NON-DEROGABLE HUMAN RIGHTS

Criminal law may not, even in times of ‘an emergency threatening the life of the nation’, contravene the State’s non-derogable human rights obligations under international human rights law.

PRINCIPLE 13 – CRIMINAL LAW SANCTIONS

Criminal law sanctions must be consistent with human rights, including by being non-discriminatory and proportionate to the gravity of the offence. Custodial sentences may only be imposed as a measure of last resort.





Special PART III

Application to the Criminalization of Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty

The principles set out below result from, reflect and have been elaborated by applying the general principles and legal standards in General Part I and Part II, above, to the criminalization of conduct associated with:

- a) sexual and reproductive health and rights, including abortion;
- b) consensual sexual activities, including in such contexts as sex outside marriage, same-sex sexual relations, adolescent sexual activity and sex work;
- c) gender identity and gender expression;
- d) HIV non-disclosure, exposure or transmission;
- e) drug use and the possession of drugs for personal use; and
- f) homelessness and poverty.

PRINCIPLE 14 - SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

No one may be held criminally liable for exercising their rights to sexual and reproductive health, such as requesting, accessing or using sexual and reproductive health facilities, services and goods, including information.

Criminal law may not in any way impair the right to:

- a) make and act on decisions about one's own body, sexuality and reproduction – such as about pregnancy; contraception, including emergency contraception; comprehensive abortion care; prophylaxis for sexually transmitted infections; gender-affirming care/therapy; and/or
- b) access health facilities, services and goods, including information.

No one may be held criminally liable on the basis that their conduct is alleged to be harmful to their own pregnancy, such as alcohol or drug consumption or contracting HIV or transmitting it to the foetus while pregnant, or for their own pregnancy loss. Where the person's conduct might also constitute an independent criminal offence, unrelated to their pregnancy, there must be no additional criminal consequences arising from any alleged harm to their pregnancy.

Health providers may not be held criminally liable for conduct, such as providing contraception, abortion services or accurate, evidence-based, non-biased information, that enables others to freely exercise their rights to sexual and reproductive health, unless they engage in coercion, force, fraud, medical negligence or otherwise violate the right to free and informed decision-making.

No one may be held criminally liable for providing assistance to another to enable them to exercise their rights to sexual and reproductive health, unless there is coercion, force, or lack of free and informed decision-making in relation to the exercise of such rights.



Parents, guardians, carers, or other persons who enable or assist children or people in their care, including persons with disabilities, to exercise their sexual and reproductive rights, including by procuring sexual and reproductive health services, goods or information, may not be held criminally liable, unless they have engaged in coercion, force, fraud, or there was a lack of free and informed decision-making on the part of the child or person for whom they were caring.

PRINCIPLE 15 – ABORTION

No one may be held criminally liable for their pregnancy loss, including a pregnancy loss resulting from an obstetric emergency, such as a miscarriage or stillbirth, or for attempting or undergoing an abortion or for other decisions they make around their pregnancy or childbirth.

Criminal law may not proscribe abortion. Abortion must be taken entirely out of the purview of the criminal law, including for having, aiding, assisting with, or providing an abortion, or abortion-related medication or services, or providing evidence-based abortion-related information.

No other criminal offence, such as murder, manslaughter or any other form of unlawful homicide, may proscribe or be applied to having, aiding, assisting with, or providing an abortion, or abortion-related medication or services, or providing evidence-based abortion-related information.

PRINCIPLE 16 – CONSENSUAL SEXUAL CONDUCT

Consensual sexual conduct, irrespective of the type of sexual activity, the sex/gender, sexual orientation, gender identity or gender expression of the people involved or their marital status, may not be criminalized in any circumstances. Consensual same-sex, as well as consensual different-sex sexual relations, or consensual sexual relations with or between trans, non-binary and other gender-diverse people, or outside marriage – whether pre-marital or extramarital – may, therefore, never be criminalized.

With respect to the enforcement of criminal law, any prescribed minimum age of consent to sex must be applied in a non-discriminatory manner. Enforcement may not be linked to the sex/gender of participants or age of consent to marriage.

Moreover, sexual conduct involving persons below the domestically prescribed minimum age of consent to sex may be consensual in fact, if not in law. In this context, the enforcement of criminal law should reflect the rights and capacity of



persons under 18 years of age to make decisions about engaging in consensual sexual conduct and their right to be heard in matters concerning them. Pursuant to their evolving capacities and progressive autonomy, persons under 18 years of age should participate in decisions affecting them, with due regard to their age, maturity and best interests, and with specific attention to non-discrimination guarantees.

PRINCIPLE 17 – SEXWORK

The exchange of sexual services between consenting adults for money, goods or services and communication with another about, advertising an offer for, or sharing premises with another for the purpose of exchanging sexual services between consenting adults for money, goods or services, whether in a public or private place, may not be criminalized, absent coercion, force, abuse of authority or fraud.

Criminal law may not proscribe the conduct of third parties who, directly or indirectly, for receipt of a financial or material benefit, under fair conditions – without coercion, force, abuse of authority or fraud – facilitate, manage, organize, communicate with another, advertise, provide information about, provide or rent premises for the purpose of the exchange of sexual services between consenting adults for money, goods or services.

PRINCIPLE 18 – SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION

No one may be held criminally liable for conduct or status based on their gender identity or gender expression. This includes gender identities and forms of gender expression that are perceived not to conform to societal expectations or norms relating to gender roles, the sex assigned to a person at birth or a male-female binary, among others.

No one may be held criminally liable for consensual practices aiming to assist others with the exploration, free development and/or affirmation of sexual orientation or gender identity, unless there was force, coercion, fraud or medical negligence, or a lack of free and informed decision-making on the part of the person concerned.

Practices aiming to change or suppress a person's sexual orientation, gender identity or gender expression carried out without the concerned person's free and informed consent and decision-making, including through force, coercion or abuse of authority, may be addressed through other provisions in the criminal law.



PRINCIPLE 19 – HIV

Criminal law may not proscribe non-disclosure of HIV status or exposure to HIV or HIV transmission *per se*.

The use of criminal law should be limited to cases of intentional transmission of HIV: that is, where a person knows their HIV-positive status, acts with the intent to transmit HIV, and does in fact transmit it. In those circumstances, criminal law enforcement must be based on the best available scientific and medical evidence about HIV and modes of transmission, prevention and treatment.

PRINCIPLE 20 – DRUG USE AND POSSESSION, PURCHASE, OR CULTIVATION OF DRUGS FOR PERSONAL USE

Criminal law may not proscribe:

- a) drug use or the possession, purchase or cultivation of drugs for personal use, including by anyone under the age of 18 or while pregnant;
- b) possession or distribution of equipment, goods and information relating to personal drug use or regarding health services for people who use drugs;
- c) activities or services carried out as part of quality-assured, scientifically-sound and medically appropriate efforts to prevent or reduce the harms associated with drug use, including the distribution of safer drug use kits, sterilized needles and syringes, naloxone, and the provision and supervision of safe consumption sites; or
- d) seeking, receiving or imparting information about health services for people who use drugs, including about equipment, goods, facilities or information intended to prevent or reduce the harms associated with drug use.

PRINCIPLE 21 – LIFE-SUSTAINING ACTIVITIES IN PUBLIC PLACES AND CONDUCT ASSOCIATED WITH HOMELESSNESS AND POVERTY

No one may be held criminally liable:

- a) for engaging in life-sustaining economic activities in public places, such as begging, panhandling, trading, touting, vending, hawking or other informal commercial activities involving non-contraband items;
- b) for engaging in life-sustaining activities in public places, such as sleeping, eating, preparing food, washing clothes, sitting or performing hygiene-related activities, including washing, urinating and defecating, or for other analogous activities in public places, where there are no adequate alternatives available; or
- c) on the basis of their employment or means of subsistence or their economic or social status, including their lack of a fixed address, home or their experiencing homelessness in practice.

Endorsers and Supporters

The following jurists are the first to endorse the Principles and do so in their individual capacity. Organizations, institutions or affiliations are listed with the names of jurists for the purpose of identification only.

MEGHNA ABRAHAM

Executive Director
Center for Economic and
Social Rights

MÓNICA ARANGO OLAYA

Former Deputy Justice
Constitutional Court
Colombia

CATALINA BOTERO

Director of the UNESCO Chair
of Freedom of Expression,
University of Los Andes
ICJ Commissioner, Colombia

LUISA CABAL

Director, Regional Support
Team for Latin America and the
Caribbean
UNAIDS

EDWIN CAMERON

Retired Justice, Constitutional
Court of South Africa
Inspecting Judge, Judicial
Inspectorate for Correctional
Services

SILVIA CARTWRIGHT

ICJ Commissioner and Chair of
the ICJ Executive Committee
New Zealand

MARKUS D. DUBBER

Professor, Faculty of Law &
Centre for Criminology and
Sociological Studies, University
of Toronto
Canada

RICHARD ELLIOTT

Consultant, health and human
rights law and policy
Chair, Supervisory Board, HIV
Justice Network

FANNY GÓMEZ-LUGO J.D., LL.M.

Adjunct Professor of Law,
Georgetown University Law
Center
USA

ANAND GROVER

Co-founder and Director
Lawyers Collective
India

ROOJIN HABIBI

Research Fellow,
Global Strategy Lab
York University
Canada

CATHERINE HEARD

Director, World Prison Research
Programme
Institute for Crime & Justice
Policy Research, School of Law,
Birkbeck, University of London,
United Kingdom

ESZTER KISMÖDI

International Human Rights
Lawyer,
Chief Executive, Sexual and
Reproductive Health Matters

RAJAT KHOSLA

Adjunct Research Professor,
University of Southern California
Institute on Inequalities in Global
Health

MONICA MBARÚ

Judge, Employment and Labour Relations Court
Kenya

ALLAN MALECHE

Executive Director
Kenya Legal & Ethical Issues Network on HIV and AIDS

ALICE M. MILLER, JD

Co-Director, Global Health Justice Partnership of the Yale Law and Public Health Schools, Yale University, USA

SANJI MONAGENG

Former Judge, International Criminal Court
ICJ Commissioner, Botswana

ZIONE NTABA

Justice of the High Court
Malawi

LUCINDA O'HANLON

Formerly Adviser on Women's Rights
UN Office of the High Commissioner for Human Rights

JARNA PETMAN

Associate Professor of International Law, University of Stockholm, Adjunct Professor of International Law, University of Helsinki
ICJ Commissioner, Finland

IVANA RADAČIĆ

Vice-Chair, UN Working Group on discrimination against women and girls
Croatia

TRACY ROBINSON

Professor of Law
The University of the West Indies
Mona, Jamaica

REBECCA SCHLEIFER

Consultant, health and human rights law and policy

PATRICIA SCHULZ

Senior Research Associate
United Nations Research Institute for Social Development

IAN SEIDERMAN

Legal and Policy Director
ICJ

KALYAN SHRESTHA

Former Chief Justice of the Supreme Court
ICJ commissioner, Nepal

TRIPTI TANDON

Advocate
Lawyers Collective
India

JAIME TODD-GHER

Fellow, University of Toronto, International Reproductive and Sexual Health Law Program, Faculty of Law

CHRISTINA ZAMPAS

Fellow, University of Toronto, International Reproductive and Sexual Health Law Program, Faculty of Law
Independent Consultant

LIVIO ZILLI

Senior Legal Adviser & UN Representative
ICJ

The following organizations and institutions are the first to support the Principles.

Amnesty International

CREA

Global Health Justice Partnership of the Yale Law and Public Health Schools Yale University, USA

Global Network of Sex Work Projects

HIV Justice Network

International Network of People who Use Drugs

Sexual and Reproductive Health Matters



Commission Members

President

Prof Robert K. Goldman, USA

Vice-Presidents

Prof Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee

Sir Nicolas Bratza, United Kingdom

Dame Silvia Cartwright, New Zealand

Mr Shawan Jabarin, Palestine

Ms Nahla Haidar El Addal, Lebanon

Ms Mikiko Otani, Japan

Prof Marco Sassoli, Italy/Switzerland

Mr Wilder Tayler, Uruguay

Executive Committee Alternates

Justice Martine Comte, France

Ms Ambiga Sreenevasan, Malaysia

Commission Members

Ms Hadeel Abdel Aziz, Jordan

Prof Kyong-Wahn Ahn, Republic of Korea

Ms Chinara Aidarbekova, Kyrgyzstan

Prof Carlos Ayala, Venezuela

Prof Adolfo Azcuna, Philippines

Dr Elizabeth Biok, Australia

Ms Catalina Botero, Colombia

Sir Nicolas Bratza, UK

Mr Reed Brody, United States

Prof José Luis Caballero Ochoa, Mexico

Justice Azhar Cachalia, South Africa

Dame Silvia Cartwright, New Zealand

Justice Moses Chinhengo, Zimbabwe

Prof Sarah Cleveland, USA

Justice Martine Comte, France

Mr MarzenDarwish, Syria

Justice Radmila Dicic, Serbia

Mr Belisario dos Santos Junior, Brazil

Mr Gamal Eid, Egypt

Ms Leilani Farha, Canada

Prof Robert Goldman, USA

Ms Nahla Haidar El Addal, Lebanon

Mr Michelo Hansungule, Zambia

Ms Gulnora Ishankhanova, Uzbekistan

Mr Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Ms Asne Julsrud, Norway

Justice Kalthoum Kennou, Tunisia

Ms Jamesina King, Sierra Leone

Justice Qinisile Mabuza, Swaziland

Prof José Antonio Martín Pallín, Spain

Prof Juan Mendez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Sanji Monageng, Botswana

Ms Tamara Morschakova, Russia

Justice Willy Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John O'Meally, Australia

Ms Mikiko Otani, Japan

Dr Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof Mónica Pinto, Argentina

Mr Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Prof Marco Sassòli, Switzerland

Mr Michael Sfard, Israel

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Dr Rodrigo Uprimny Yepes, Colombia



International
Commission
of Jurists

P.O. Box 1740
Rue des Buis 3
CH 1211 Geneva 1

Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org