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RESEARCH ARTICLE

# Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law

Mattia Pinto\*

This article analyses the role that human rights bodies play in triggering the application of criminal law. By examining the jurisprudence of the Inter-American Court of Human Rights, the European Court of Human Rights, the UN Human Rights Committee, as well as other human rights bodies, the article discusses how these institutions have started imposing on states positive obligations to criminalise, prosecute and punish serious human rights violations. While criminal law has traditionally been seen as a threat to fundamental rights, human rights bodies have contributed to presenting criminal law in a positive vein, as an essential instrument of human rights protection. The mainstream of the human rights movement has largely lauded the trend. This article challenges this view, by presenting the pitfalls of using human rights law to extend the reach of criminal justice in order to ensure that perpetrators are held accountable. Not only the imposition of duties to criminalise and punish ends up restricting the accused's fundamental rights and neglecting the conceptualisation of criminal law as *ultima ratio*, but the invocation of criminal-law enforcement might also contribute to enhancing the coercive power of the state and, therefore, make state abuses more likely.

**Keywords:** Human Rights Law; Criminal Law; Positive Obligations; European Court of Human Rights; Inter-American Court of Human Rights; United Nation Human Rights Committee

## I. Introduction

'The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of States responsible'.<sup>1</sup> These lines, pronounced by the Inter-American Court of Human Rights (IACtHR) in *Velásquez Rodríguez*, distinguish the role of international human rights law (IHRL) from that of criminal law. The former is designed to protect individuals from state abuse, whilst the latter has the antithetical aim of employing state power to punish those who commit a crime. Yet, it is somehow ironic that these words were pronounced in the judgment considered as the precursor to a trend that has made criminal punishment one of the main objectives of IHRL.

*Velásquez Rodríguez* is at the crossroads of a paradigmatic change in the relationship between human rights and criminal law. Until the mid-1980s, the large majority of human rights lawyers did not favour using criminal law for fear that employing penal powers might lead to abuses.<sup>2</sup> However, in the years immediately following, the end of the Cold-War inaugurated a period of democratic transitions and attempts to advance accountability for serious human rights violations.<sup>3</sup> In this context, criminal punishment gradually started being considered as the decisive instrument for banning practices of oppression and violence, as well as for promoting justice and peace.<sup>4</sup> Today, criminalisation, prosecution and punishment have assumed a central

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<sup>1</sup> *Velásquez Rodríguez v Honduras*, IACtHR Ser.C No.4 (29 July 1988) para 34.

<sup>2</sup> Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen Engle, Zinaida Miller, D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016) 18.

<sup>3</sup> Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 75–76.

<sup>4</sup> Karen Engle, Zinaida Miller, D. M. Davis, 'Introduction' in Karen Engle, Zinaida Miller, D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016) 1.

role in IHRL. This article moves from this development to analyse the role human rights bodies<sup>5</sup> play in triggering the application of criminal law. In particular, it discusses the implications of using IHRL to extend the reach of criminal justice.

### A. Literature Review

The shift in the role of IHRL in criminal justice has been noted.<sup>6</sup> The new trend has generally been welcomed in the belief that the best way to deal with perpetrators of human rights abuses is to prosecute and punish them.<sup>7</sup> Scholars ascribe several positive effects to the employment of criminal law within human rights. Kim and Sicking, for example, argue that human rights prosecutions 'are necessary to deter future violations' and 'have a deterrence impact beyond the confines of the single country'.<sup>8</sup> Safferling suggests that prosecution contributes 'to the finding of the truth', while punishment enhances 'the sense of reliability of the system' and improves 'the feeling of security under the law'.<sup>9</sup> Similarly, Landsman claims that prosecution 'can substantially enhance the prospects for the establishment of the rule of law', as well as 'function as a means of educating the citizenry to the nature and extent of prior wrongdoing'.<sup>10</sup>

Nevertheless, there are also those who have expressed perplexity at this new development.<sup>11</sup> Engle, in particular, has criticised the turn to criminal law within human rights movements. According to her, reliance on criminal law reinforces 'an individualized and decontextualized understanding of the harms [human rights movements] aim to address'.<sup>12</sup> Similarly, Sorochinsky has shown disapproval for the tendency of IHRL to mandate 'the use of the most intrusive forms of government intervention into the private sphere without giving governments the authority to devise other, less intrusive legal measures'.<sup>13</sup>

With respect to human rights bodies, a handful of authors have noted the growing case-law of these institutions regarding state obligations to criminalise, prosecute and punish serious human rights violations.<sup>14</sup> While for some scholars the invocation of criminal law by human rights bodies is highly desirable,<sup>15</sup> other authors have highlighted the risks of an increased criminalisation to the rights of the defendant and to other fundamental principles of criminal law.<sup>16</sup> Pastor, for instance, contends that the

<sup>5</sup> Throughout the text, the term "human rights bodies" encompasses both regional human rights courts and international human rights monitoring bodies.

<sup>6</sup> E.g. Kathryn Sikkink, *The Justice Cascade* (WW Norton & Company 2011); Mykola Sorochinsky, 'Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31(1) *Michigan Journal of International Law* 157; Karen Engle, 'Anti-Impunity and the Turn to Criminal Law' (2015) 100 *Cornell Law Review* 1069.

<sup>7</sup> Diane F. Orentlicher, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation' (1994) 26 *Studies in Transnational Legal Policy* 425, 426.

<sup>8</sup> Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939, 939.

<sup>9</sup> Christoph J.M. Safferling, 'Can Criminal Prosecution be the Answer to massive Human Rights Violations?' (2004) 5(12) *German Law Journal* 1469, 1482.

<sup>10</sup> Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 *Law & Contemporary Problems* 81, 83.

<sup>11</sup> E.g. Françoise Tulken, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577; Fernando Felipe Basch, 'The Doctrine of the IACtHR regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *American University International Law Review* 195; Frédéric Mégret and Jean-Paul S. Calderón, 'The Move Towards a Victim-Centred Concept of Criminal Law and the "Criminalization" of ICHR Law' in Haec and others (eds), *The IACtHR: Theory and Practice, Present and Future* (Intersentia 2015); Daniel Pastor, 'La deriva neopunitivista y el desprestigio actual de los derechos humanos' (*Jura Gentium*, 2006) <<http://www.juragentium.org/topics/latina/es/pastor.htm>> accessed 14 July 2018.

<sup>12</sup> Engle (n 6) 1071. In her article, Engle shows and questions the human rights movement's increased attention to the fight against impunity and its uses of criminal law in the process. She takes a position against a strong anti-impunity focus, with a critical look at the implications of connecting human rights remedies to criminal law.

<sup>13</sup> Sorochinsky (n 9) 210–211. In his article, Sorochinsky maintains that the increasing recognition of victims' rights by international human rights courts has led the latter to downplay their traditional commitment to due process for criminal defendants in favour of supporting increasingly punitive practices based on the assumption that criminal law can help solve social problems. Sorochinsky calls attention to this trend and tries to outline a new path for protecting victims' rights while remaining faithful to due process values.

<sup>14</sup> E.g. Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009); Andrew Ashworth, Ben Emmerson, Alison Macdonald, *Human Rights and Criminal Justice* (3rd edn, Sweet & Maxwell 2012).

<sup>15</sup> Keir Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21st Century' (2014) 11 *Criminal Law Review* 777; Sebastian Rădulețu, 'National Prosecutions as the Main Remedy in Cases of Massive Human Rights Violations' (2015) 9 *International Journal of Transitional Justice* 449, 457; Christina Binder, 'The Prohibition of Amnesties by the IACtHR' (2011) 12 *German Law Journal* 1203, 1208.

<sup>16</sup> Tulken (n 11); Basch (n 11); Paolo Caroli, 'Behind the Rhetoric: The Implications of Prohibiting Amnesties' (2018) 13(1) *Journal of Comparative Law* 95, 105; Natasa Mavronicola, 'Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR' (2017) 80(6) *Modern Law Review* 1026, 1026.

push to criminalise and punish coming from the IACtHR is becoming a form of “neo-punitivism” that elevates the penal law to a level of a social painkiller and confuses civil and constitutional protection with criminal law itself.<sup>17</sup>

### ***B. Purposes of the Article***

The contemporary turn to criminal law within IHRL has arisen with no systematic consideration about the aims and the risks of criminal law. It is, therefore, paramount to scrutinise such embracing of penal measures to advance human rights protection. The role played by human rights bodies in this development is particularly important. Although some research has been carried out into the role of human rights bodies in imposing state obligations on penal matters, it generally focuses on a single institution without a comprehensive review and comparison of jurisprudence with other human rights bodies.<sup>18</sup> Moreover, while attention has been devoted to the immediate effects of the doctrine of positive obligations,<sup>19</sup> only few scholars have analysed the wider implications this trend can have on the development of criminal law itself.<sup>20</sup> Specifically, what remains understudied is whether the shift towards a criminal justice increasingly focused on human rights protection may result in an overturning of the liberal model of criminal law.<sup>21</sup> This article aims to fill both gaps. Firstly, the case-law of human rights bodies is scrutinised and compared to trace the current tendencies and standards in human rights protection through criminal justice mechanisms. Secondly, the implications and the pitfalls of the aforementioned jurisprudence is investigated. The central thesis is that the uncritical imposition of duties to criminalise and punish is likely to produce unwanted consequences.

Firstly, there is a growing leaning to require prosecution and punishment in the interests of the victim. Yet, if criminal law is exercised in the name of the victim and no longer with an exclusive focus on the defendant, the door is open for placing limitations on the rights of the accused in order to better pursue the mandate of giving justice to the victim.<sup>22</sup> Furthermore, in the case of grave abuses of human rights, the tendency is to assume an outright duty to employ criminal measures, without giving much weight to the justification for that call. However, IHRL may eventually require alternative, non-criminal responses for addressing past abuses. Finally, the obligations to use criminal law have the potential to enhance the state’s coercive reach. When fundamental rights are no longer used as a constraint for the state’s control and dominance, but become the key drivers of such power, there is a very real risk of coercive overreach upon individuals subject to the state’s penal power. In this context, the question that arises is whether there is still room for a liberal model of criminal justice within the jurisprudence of human rights bodies.

### ***C. Course of Analysis***

An examination of the role of human rights bodies in triggering the application of criminal law presents an important opportunity to analyse the dynamic relationship between human rights and criminal law. Part I seeks to capture the fundamental ambiguity human rights present: both as limiting state power and as requiring it. In the context of criminal justice, while human rights have traditionally been used to limit the excesses of security of the state, they are increasingly presented as positive obligations, contributing to the extension of penal power. Part II analyses the case-law of the IACtHR, the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (HRC), as well as that of other human rights bodies. It outlines current trends in human rights protection through criminal law-mechanisms. The purpose is to take stock of existing standards within the different institutions and to consider to what extent duties to prosecute and punish are seen as means of human rights protection. Part III contends that the failure of human rights bodies to assess the implications of their resort to criminal justice is likely to have negative consequences, both for effective human rights protection and for the appropriate use of penal measures. In this regard, the “liberal theory of criminal law” is applied in reviewing the case-law of human rights institutions.

<sup>17</sup> Pastor (n 11). In his piece, Pastor criticises the Argentine Supreme Court, the IACtHR, and the Argentine human rights movement for their “neo-punitivism”, arguing that increased prosecutions violate prohibitions against double jeopardy, as well as other due process rights.

<sup>18</sup> E.g. Tulkens (n 11); Basch (n 11); Mégret and Calderón (n 11); Pastor (n 11).

<sup>19</sup> E.g. Tulkens (n 11); Mavronicola (n 16); Basch (n 11).

<sup>20</sup> E.g. Pastor (n 11); Sorochinsky (n 9).

<sup>21</sup> The terms “liberal model of criminal law” and “liberal theory of criminal law” are used to refer to a defensive criminal law policy, with a strong defence of the presumption of innocence and due process, as well as a normative preference for the defendant as opposed to other interests in punishment.

<sup>22</sup> Sorochinsky (n 9) 207.

Relying on the works of Feinberg<sup>23</sup> and Jareborg,<sup>24</sup> it is argued that, while a liberal system conceives criminal law as a ‘necessary evil’<sup>25</sup> that can be employed only as *ultima ratio*, the jurisprudence of human rights bodies shows an opposite trend towards a conceptualisation of criminal justice as the essential remedy for human rights violations.

## II. The Liberal Model of Criminal Law and Its Relationship with Human Rights

Traditionally, criminal law has been conceived as the state’s prerogative to preserve public order.<sup>26</sup> In classical liberalism, inspired by the will to limit and separate state power to enhance the individual’s freedom,<sup>27</sup> it is conceived as an “odious law” given its interference with the autonomy of the person.<sup>28</sup> Accordingly, the history of the twentieth century is marked by the development of national constitutions and international instruments aimed at limiting the coercive power of the state for the sake of personal liberties and political dissent.<sup>29</sup> In the words of von Liszt, the constitutional aspects of criminal law are ‘the criminal’s *Magna Charta*’: they ‘are the citizen’s bulwark against the State’s omnipotence; they protect the individual against the ruthless power of the majority, against Leviathan’.<sup>30</sup>

The last century also saw the growing recognition, development and enforcement of human rights law through domestic and international instruments.<sup>31</sup> In a context in which human rights have increasingly claimed greater enforcement, many have started seeing criminal law as the decisive instrument for banning practices of oppression and violence.<sup>32</sup> Criminal law has gradually ceased to be seen with disfavour and criminal trials have progressively become the pivotal places in which to protect individuals rights and freedoms. While IHRL has traditionally had a role of limiting the state’s coercive power, today it is progressively employed to trigger criminal law in order to promote accountability and uphold the rule of law.<sup>33</sup> In other words, in a ‘paradoxical relationship’,<sup>34</sup> human rights appear as both the “shield” to and the “sword” of criminal law.<sup>35</sup> On the one hand, by providing due process rights, human rights are a defence against an authoritarian use of criminal law.<sup>36</sup> On the other hand, human rights have also acquired an offensive role, by triggering the application of criminal law when serious violations have occurred.<sup>37</sup>

<sup>23</sup> Joel Feinberg, *The Moral Limits of the Criminal Law* (OUP 1984). In his four-volume work *The Moral Limits of the Criminal Law*, Feinberg address the question: “What acts may the state rightly make criminal?”. He identifies four principles that may limit liberty in certain circumstances, each of which is the subject of a volume of his book. The underlying assumption is that there are only few compelling reasons to subject persons to criminal punishment. In the first volume, Feinberg looks at the principle of harm to others. The other principles considered in subsequent volumes are the offense principle (it is necessary to prevent hurt or offence to others), legal paternalism (it is necessary to prevent harm to the actor herself) and legal moralism (it is necessary to prevent immoral conduct). Feinberg rejects legal paternalism and legal moralism, maintaining that the harm principle and the offense principle exhaust the class of morally relevant reasons for criminal prohibitions.

<sup>24</sup> Nils Jareborg, ‘What Kind of Criminal Law do we Want?’, in Annika Snare (ed), *Beware of Punishment* (Pax Forlag 1995). In his article, Jareborg warns against a ‘recent threat to the moral advances in the criminal law area’. He traces a worrying development from what he defines “a defensive criminal law model”, based on classical criminal law with the aim of protecting the individual against abuse of power by other individuals and by state authorities, towards what he calls “an offensive criminal law model”, where criminal law is used as a solution of social problem. While the defensive model is characterised by legal principles and due process guarantees, the offensive model is founded on an increased use of criminalisation.

<sup>25</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (OUP 1982).

<sup>26</sup> John Lisle, ‘The Defensive Function of Penal Law’ (1914) 4(6) *Journal of American Institute Criminal Law and Criminology* 800.

<sup>27</sup> John Locke, *Two Treatises of Government* (4<sup>th</sup> edn, John Churchill 1713); Thomas Paine, *Common Sense* (1776).

<sup>28</sup> Tulkens (n 11) 581. A minimalist approach to criminal law, seen as an “odious law” that should be constraint is present in Bentham (n 25) and Beccaria, *On Crimes and Punishments* (CreateSpace 2009).

<sup>29</sup> E.g. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res217A(III) (UDHR) arts 5, 9–11; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), arts 7, 9–10, 14–15; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force 3 November 1953) ETSNo005 (ECHR), art 3, 5–7; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR), arts 5, 7–9. For an overview, Cherif Bassiouni, ‘Human Rights in the Context of Criminal Justice’ (1993) 3 *Duke Journal of Comparative & International Law* 235.

<sup>30</sup> Franz von Liszt, ‘The Rationale for the Nullum Crimen Principle’ (2007) 5 *Journal of International Criminal Justice* 1009, 1010.

<sup>31</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

<sup>32</sup> E.g. Kim and Sikkink (n 8). For the role of human rights movements in the fight against impunity, Engle (n 6). Many legal scholars have also supported criminal trials to promote justice (e.g. Landsman (n 10) 83).

<sup>33</sup> Engle, Miller, Davis (n 4) 1.

<sup>34</sup> Mireille Delmas-Marty, ‘Le paradoxe pénal’ in Mireille Delmas-Marty and Claude Lucas de Leyssac (eds) *Libertés et droits fondamentaux* (Seuil 1996) 368.

<sup>35</sup> Tulkens ascribes to Christine Van den Wyngaert, judge at the ICC, the first reference to an opposition between the “shield” function and the “sword” function of human rights with regard to criminal law ((n 11) 577).

<sup>36</sup> Safferling (n 9) 1472.

<sup>37</sup> *ibid.*



### A. The Defensive Function of Human Rights in Criminal Justice

Criminal law is the body of law that interferes the most with the individual's private sphere and liberties. It expresses the highest legal censure of acts within society and it provides for the harshest sanctions, including incarceration and possibly loss of life.<sup>38</sup> Not only may criminal punishment provoke great suffering, but also the entire criminal trial entails subjection to an authority and exposure to public stigmatisation.<sup>39</sup> If employed arbitrarily, criminal law may become the state's main instrument of violence and oppression.<sup>40</sup>

On the other hand, IHRL has traditionally been concerned with neutralising the state's power when it may be employed in a manner detrimental to individual rights.<sup>41</sup> Consequently, the main concern of IHRL in criminal justice has long been the protection of the accused's rights and the limitation of the state's coercive power.<sup>42</sup> Hence, since its origin, IHRL has provided procedural and substantive principles for protecting the individual from state's arbitrary use of the criminal mechanisms.<sup>43</sup> Substantive principles include, for instance, the provisions that crimes and punishment must be established by law,<sup>44</sup> the prohibition of inhuman and degrading treatment or punishment,<sup>45</sup> and the prohibition upon unlawful or arbitrary detention.<sup>46</sup> Due process rights oppose state repression in the prosecution and adjudication of crimes, including the right to a fair trial, the presumption of innocence and the need to prove the guilt of the accused beyond reasonable doubt.<sup>47</sup>

From the above there emerges a particular conception of criminal law, that can be defined as a liberal model.<sup>48</sup> Firstly, even though it may be necessary to have criminal-law provisions, the fact that they threaten fundamental rights entails that criminalisation should be minimised and used only as the last tool among many offered by social policy.<sup>49</sup> The second element is a higher protection granted to the defendant as opposed to the state's or victim's interests in punishment. In this regard, whenever the defendant's rights conflict with other interests or in the event of ambiguities, the legal conflict should be resolved in favour of the former.<sup>50</sup>

### B. The Offensive Function of Human Rights in Criminal Justice

In recent years, a new function of human rights in criminal matters has arisen: human rights are invoked to trigger the application of criminal law and criminal measures are increasingly seen as the preferred means of ensuring the protection of IHRL.<sup>51</sup> The basic idea is that perpetrators of human rights abuses deserve criminal punishment, and impunity is a violation of human rights *per se*. Recourse to criminal solutions by means of IHRL generally has two limbs.<sup>52</sup> Firstly, IHRL requires states to criminalise conduct that endangers an individual's liberties. Secondly, effective criminal law-mechanisms (investigation, prosecution and punishment) should be put in place to enforce human rights provisions.

This new trend in the relationship between human rights and criminal law is the result of three developments. Firstly, since the 1980s, the traditional conception of human rights as a state's negative duty not to interfere with individuals' freedom has shifted to a "positive" approach to IHRL, where the latter requires the public authorities to act positively to remove barriers and ensure the exercise of freedoms.<sup>53</sup> Hence, for instance, the prohibition of torture and the right to life now entail the obligations of the state to investigate breaches of these provisions and to hold perpetrators accountable.<sup>54</sup>

<sup>38</sup> Jeremy Horder, *Ashworth's Principles of Criminal Law* (8<sup>th</sup> edn, OUP 2016) 75–76.

<sup>39</sup> *ibid.* 76.

<sup>40</sup> Soroichinsky (n 9) 173.

<sup>41</sup> Nigel Rodley, 'International Human Rights Law', in Malcom Evans (ed), *International Law* (4<sup>th</sup> edn, OUP 2014) 783.

<sup>42</sup> Bassiouni (n 29) 253–254.

<sup>43</sup> Soroichinsky (n 9) 169–176.

<sup>44</sup> Art 11 UDHR, Art 15 ICCPR, Art 7 ECHR, Art 9 ACHR.

<sup>45</sup> Art 5 UDHR, Art 7 ICCPR, Art 3 ECHR, Article 5 ACHR.

<sup>46</sup> Art 9 UDHR, Art 9 ICCPR, Art 5 ECHR, Art 7 ACHR.

<sup>47</sup> Arts 10–11 UNHR, Art 14 ICCPR, Art 6 ECHR, Art 8 ACHR.

<sup>48</sup> H. L. A. Hart, *Punishment and Responsibility* (OUP 1968); Feinberg (n 23).

<sup>49</sup> Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24(2) *Oxford Journal of Legal Studies* 207.

<sup>50</sup> Principle of *favorabiliores rei potius quam actores habentur* (Digest of Justinian I, D.50.17.125).

<sup>51</sup> Tulkens (n 11) 582–592.

<sup>52</sup> Krešimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill 2017) 11.

<sup>53</sup> For a general overview, Fredman (n 31).

<sup>54</sup> Rodley (n 41) 794; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), arts 4, 7.

A second development is related to the growing relevance of prosecution and punishment in international humanitarian law and transitional justice.<sup>55</sup> The idea of individual accountability for grave violations of international law originated after the Second World War with the Nuremberg trials. Nuremberg established the principle that serious acts of violence perpetrated against civilians should be prosecuted and punished.<sup>56</sup> Although criminal punishment was incorporated into the four Geneva Conventions of 1949, the legacy of Nuremberg remained a dead letter until the end of the Cold-War, when a new wave of transition raised the opportunity to impose accountability through criminal law for the abuses of past regimes.<sup>57</sup>

From Latin-America to Africa, from Asia to Eastern Europe, young democratic governments supplanted long-rooted dictatorships. Debates on how to deal with past abuses gave rise to a new field of scholarship, policy and practice called “transitional justice”.<sup>58</sup> From the beginning, the field was marked by the tension between punishment and amnesty.<sup>59</sup> On the one hand, there was a moral obligation to prosecute and punish past human rights abuses.<sup>60</sup> On the other, there emerged the practical and political difficulties in holding perpetrators accountable at the domestic level while promoting peaceful transitions and political stability.<sup>61</sup> Yet, over time, civilian demands for justice, fostered by NGOs and international institutions, have driven the approach towards retributive responses for human rights violations.<sup>62</sup>

In the same period, the atrocities that occurred in the former Yugoslavia and in Rwanda prompted the United Nation Security Council (UNSC) to establish *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994.<sup>63</sup> The latter led the way to the establishment of the International Criminal Court (ICC) in 1998.<sup>64</sup> The convergence of international crimes with serious human rights violations, as well as the fact that increasingly more international offences are committed in peacetime, have eventually contributed to strengthening the offensive function of human rights in criminal justice.<sup>65</sup> In particular, IHRL is increasingly used as a surrogate of international criminal law, when the latter is structurally unable to intervene.<sup>66</sup> Since international criminal law has failed to establish criminal responsibility for all serious human rights violations,<sup>67</sup> it has become more and more natural to resort to IHRL and its offensive function of promoting punishment of grave breaches of international law.

Thirdly, the new role of human rights as a driver of punishment has grown along with a general shift in focus in criminal justice.<sup>68</sup> Since the early 1980s, first in academia and then in practice, there has been a growing attention to the victims of crimes.<sup>69</sup> As a result, under the pressure of the victims’ rights movement, several international instruments, as well as domestic reforms dealing with victims’ rights, have been adopted.<sup>70</sup> The criminal-law perspective has moved from the exclusive relationship between the state and the accused to a three-party relationship that also includes the victim.<sup>71</sup> Moving the emphasis from the

<sup>55</sup> Seibert-Fohr (n 14) 2. This trend has been described as “the justice cascade” by Sikkink (n 6) and as “a revolution in accountability” by Sriram, ‘Revolutions in Accountability: New Approaches to Past Abuses’ (2003) 19(2) *American University International Law Review* 310.

<sup>56</sup> Ruti Teitel, ‘Transitional Justice: Postwar Legacies’ (2006) 27(4) *Cardozo Law Review* 1615.

<sup>57</sup> Teitel (n 3).

<sup>58</sup> Ruti Teitel, *Transitional Justice* (OUP 2000).

<sup>59</sup> Teitel (n 3) 76; Kieran McEvoy, Louise Mallinder, ‘Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy’ (2012) 39(3) *Journal of Law and Society* 410, 412.

<sup>60</sup> Diane F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100(9) *Yale Law Journal* 2537; Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78(2) *California Law Review* 449.

<sup>61</sup> McEvoy and Mallinder (n 59) 412.

<sup>62</sup> *ibid.* 413.

<sup>63</sup> UNSC Res 827 (25 May 1993) UNDocS/RES/827 (for the ICTY); UNSC Res 955 (8 November 1994) UNDocS/RES/955 (for the ICTR).

<sup>64</sup> Rome Statute of the International Criminal Court (17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90.

<sup>65</sup> Seibert-Fohr (n 14) 3.

<sup>66</sup> Alexandra Huneus, ‘International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts’ (2013) 107(1) *American Journal of International Law* 1.

<sup>67</sup> E.g. crimes against humanity requires a large-scale or systematic pattern; genocide requires a special intent to destroy a protected group. Seibert-Fohr (n 14) 293.

<sup>68</sup> Sorochinsky (n 9) 178–182.

<sup>69</sup> Jock Young, ‘The Rising Demand for Law and Order and our Maginot Lines of Defense Against Crime’, in Nicholas Abercrombie and Alan Warde (eds), *Social Change in Contemporary Britain* (Polity Press 1992).

<sup>70</sup> E.g. UNGA ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, Res 40/34 (29 November 1985) UNDocA/RES/40/34.

<sup>71</sup> Leslie Sebba, ‘Victim-Driven’ Criminalisation? Some Recent Trends in the Expansion of the Criminal Law’ in Bernadette McSherry, Alan Norrie, Simon Bronitt, *Regulating Deviance* (Hart Publishing 2009); Silva Sánchez, *La expansión del Derecho penal* (Civitas 2001) 72.

defendant to also include the victim's interests has also resulted in a new attitude toward criminal law, namely no longer being solely a tool to preserve public order, but also an instrument for empowering and protecting the oppressed.<sup>72</sup>

### III. Criminal Justice as an Instrument of Human Rights Protection

The affirmation of the role of criminal law in promoting accountability for human rights violations and the struggle against impunity emerges in particular from the jurisprudence of human rights bodies, through what has been defined by Huneeus as 'international criminal law by other means'.<sup>73</sup> A growing number of cases before the IACtHR, the ECtHR and the HRC, as well as before other human rights bodies, show how human rights instruments are used for triggering the criminal law.<sup>74</sup> Criminal justice is increasingly seen as a necessary instrument of human rights protection, especially in situations of serious human rights violations (e.g. torture, murder, enforced disappearance, human trafficking). Accordingly, in order to protect victims' rights and freedoms, positive obligations to criminalise, prosecute and punish certain offences or negative obligations not to use "criminal clemency" (decriminalisation and amnesty laws) have been imposed on states. Within the context of the Organisation of American States (OAS), since *Velásquez Rodríguez*<sup>75</sup> the IACtHR has upheld that states have a duty to refrain from violations, to prevent and to punish them.<sup>76</sup> Punishment, in particular, is regarded not only as a form of deterrence, but also as a necessary remedy for the victims.<sup>77</sup> A slightly similar approach is visible in the case-law of the ECtHR and the HRC, although neither of these two bodies has come to recognise a victims' right to have offenders punished.<sup>78</sup>

#### A. Inter-American System of Human Rights

The efforts of the Organization of American States (OAS) bodies, the Inter-American Commission on Human Rights (IAComHR) and the IACtHR, in advancing criminal responsibility for human rights violations derive from a context of widespread impunity in Latin-America and massive repressions perpetrated during the authoritarian regimes in the 1970's and 1980's.<sup>79</sup> Pursuant to IACtHR's case-law, each Member State 'has the obligation to use all the legal means at its disposal to combat' situations of impunity.<sup>80</sup> Accordingly, the Inter-American institutions have progressively relied on criminal punishment as the preferred means for ending human rights abuses. In this regard, the OAS bodies have developed a rigorous jurisprudence requiring states to punish almost every human rights violation, including by invalidating or refraining from adopting amnesty laws.<sup>81</sup>

#### 1. Duty to Punish

The IACtHR's doctrine on state obligations in criminal matters has its starting point in *Velásquez Rodríguez*, the first decision of the Court in a contentious case.<sup>82</sup> Relying on Article 1(1) of the American Convention on Human Rights (ACHR), the Court held that State Parties have two obligations. First, they must respect the 'rights and freedoms recognized by the Convention'. Second, they must "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction'.<sup>83</sup> As a consequence of this second obligation, 'the States must prevent, investigate and punish any violation of the rights recog-

<sup>72</sup> Maria Lúcia Karam, 'Recuperar o Desejo da Liberdade e Conter o Poder Punitivo' (2009) 1 *Escritos Sobre a Liberdade*, 4. According to Caroli (n 16), this trend 'involves a redefinition of the concept of punitive power' (105).

<sup>73</sup> Huneeus (n 66) 1–3.

<sup>74</sup> E.g. *Barrios Altos v Peru*, IACtHR Ser.C No.76 (14 March 2001); *MC v Bulgaria* App No.39272/98 (ECtHR, 4 December 2003); *Njiru v Cameroon*, HRC Communication No 1353/2005, UNDocCCPR/C/89/D/1353/2005 (2007). For a general overview, Seibert-Fohr (n 14).

<sup>75</sup> *Velásquez Rodríguez* (n 1).

<sup>76</sup> Basch (n 11).

<sup>77</sup> *Villagrán Morales et al v Guatemala*, IACtHR Ser.C No.63 (19 November 1999) para 253(8); *Blake v Guatemala*, IACtHR Ser.C No.36 (14 January 1998) paras 96–97.

<sup>78</sup> Seibert-Fohr (n 14).

<sup>79</sup> Brian D. Tittmore, 'Ending Impunity in the Americas: The Role of the IAHR System in Advancing Accountability for Serious Crimes under International Law' (2005–2006) 12 *Southwestern JL & Trade in the Americas* 429, 430. According to the IACtHR, impunity encompasses 'the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention' (*Paniagua Morales et al v Guatemala*, IACtHR Ser.C No.37 (8 March 1998) para 173).

<sup>80</sup> *Paniagua Morales* (n 79) para 173.

<sup>81</sup> Basch (n 11) 196; Caroli (n 16) 101–105.

<sup>82</sup> *Velásquez Rodríguez* (n 1).

<sup>83</sup> *ibid.* para 165.



nized by the Convention', regardless of whether they are involved in the violation at issue.<sup>84</sup> Therefore, in addition to abuses perpetrated by public officials, States have a duty to punish human rights violations that are committed by private individuals and, as such, are not clearly attributed to the State.<sup>85</sup> Having found Honduras in breach of Article 1(1), the Court did not order the state to adopt criminal measures. Rather, it requested the latter to compensate the victim's next-of-kin.<sup>86</sup> However, in following cases from the mid-1990s onwards, the Court began to require the state to effectively punish individual perpetrators.<sup>87</sup>

In *Velásquez Rodríguez* and other cases in the 1990s, the IACtHR sustained, pursuant to Article 1, the call for punishment as a means to protect human rights *in general*.<sup>88</sup> Moreover, the Court also derived from Article 1(1) both a duty to prosecute and a duty to criminalise serious violations of human rights.<sup>89</sup> On the other hand, since the decision in *Paniagua-Morales*, the IACtHR has started relating the state obligations in criminal matters to the fulfilment of victims' rights.<sup>90</sup> Here, the Court justifies the duty to criminalise, prosecute and punish as a means to guarantee the victims 'free and full exercise' of their human rights.<sup>91</sup> In this way, the prosecution and punishment of the perpetrator become ways to ensure a retrospective restoration of victims' rights.<sup>92</sup>

Following decisions of the Inter-American Commission,<sup>93</sup> the IACtHR established the idea that the state's engagement with criminal law is necessary to protect victim's rights to a fair trial (Article 8) and to judicial protection (Article 25). Article 8 was originally provided to protect the accused's right to a due process within domestic criminal systems.<sup>94</sup> Yet, its broad scope, that also encompasses '[every person's] right to a hearing [...] for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature',<sup>95</sup> has allowed the Court to derive the victim's right to a fair trial during the prosecution of the offender.<sup>96</sup> According to the IACtHR, this provision covers the victim's right 'to have [the crimes] effectively investigated [...], those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out'.<sup>97</sup> Accordingly, the right to a fair trial is read as it provides for a right of victims to criminal justice. This does not include only a right to participation, but also the right to have the offender prosecuted and punished by a court.<sup>98</sup>

The second source of victims' rights is Article 25, which guarantees to everyone the right to an effective remedy in the event of violations of his/her rights. In *Loayza-Tamayo*, the IACtHR held that every state must 'guarantee to every individual access to the administration of justice [...] so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered'.<sup>99</sup> Currently, the IACtHR tends to combine Article 8 with Article 25 as providing a victim's right to criminal justice.<sup>100</sup> In *Goiburú*, the IACtHR held that in cases of violations of particular gravity (including torture and forced disappearance of persons) the state obligation to punish those responsible has attained the status of *jus cogens*.<sup>101</sup>

The offensive function of human rights in criminal justice emerges clearly from the jurisprudence of the IACtHR: the use of criminal courts and procedure appears at times to be no longer motivated by the need

<sup>84</sup> *ibid.* para 166.

<sup>85</sup> Seibert-Fohr (n 14) 54.

<sup>86</sup> *Velásquez Rodríguez* (n1) para 194(5).

<sup>87</sup> E.g. *Caballero-Delgado and Santana v Colombia*, IACtHR Ser.C No.22 (8 December 1995) para 72(5); *Paniagua Morales* (n 79) para 181(6); *Bámaca Velásquez v Guatemala*, IACtHR Ser.C No.70 (25 November 2000) paras 227–230.

<sup>88</sup> *Godínez-Cruz v Honduras*, IACtHR Ser.C No.5 (20 January 1989) para 175; *Gangaram-Panday v Suriname*, IACtHR Ser.C No.16 (21 January 1994) para 62; *Caballero-Delgado and Santana* (n.87) para 59.

<sup>89</sup> For the obligation to prosecute, *Durand and Ugarte v Peru*, IACtHR Ser.C No.68 (16 August 2000) para 146. For the obligation to criminalise, *Goiburú et al v Paraguay*, IACtHR Ser.C No.153 (22 September 2006) paras 91–92.

<sup>90</sup> *Paniagua Morales* (n 79) para 174.

<sup>91</sup> *Bámaca Velásquez* (n 87) para 129.

<sup>92</sup> Seibert-Fohr (n 14) 57.

<sup>93</sup> E.g. *Mendoza et al v Uruguay*, Cases 10.029,10.036,10.145,10.305,10.372,10.373,10.374,10.375, IACommHR Report No29/92, OEA/SerL/V/II83 Doc14 at 154 (2 October 1992) para 40; *Ignacio Ellacuría et al v El Salvador*, Case 10.488, IACommHR Report No136/99, OEA/SerL/V/II106 Doc3Rev (22 December 1999) para 195.

<sup>94</sup> Basch (n 11) 204.

<sup>95</sup> Art 8(1) ACHR.

<sup>96</sup> *Blake* (n 77) paras 96–97.

<sup>97</sup> *ibid.* para 97. See also *Tradesmen v Colombia*, IACtHR Ser.C No.109 (5 July 2004) para 219.

<sup>98</sup> Seibert-Fohr (n 14) 63.

<sup>99</sup> *Loayza-Tamayo v Peru*, IACtHR Ser.C No.42 (27 November 1998) para 168.

<sup>100</sup> E.g. *Durand and Ugarte* (n 89) para 130.

<sup>101</sup> *Goiburú* (n 89) paras 84, 131.

to protect the accused right to a fair trial, but by the need to advance victims' rights.<sup>102</sup> In particular, should the interests of the accused's and those of the victims collide, for the Court the latter must prevail.<sup>103</sup> In this regard, when rules in favour of the accused risk preventing the prosecution or the punishment of perpetrators of serious human rights violations, the Court has often asked for the rights of the accused to be restricted or even neutralised.<sup>104</sup>

There are two clear examples of this trend. Firstly, Article 8(4) provides for the principle of *ne bis in idem* for the accused acquitted by final judgment. However, the IACtHR stated that investigation can be re-opened 'even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the ACHR supersedes the protection of the *ne bis in idem* principle'.<sup>105</sup> Secondly, the Court has maintained that 'the State may not invoke [...] the non-retroactivity of criminal law [...] to decline its duty to investigate and punish those responsible' of the victim's death,<sup>106</sup> even though Article 9 provides no exception for the prohibition of *ex post facto* law.

To date, the IACtHR's doctrine on the duty to punish has been maintained in many cases. For the court, this duty applies to situations of serious human rights violations, as well as to other violations of rights enshrined in the Convention.<sup>107</sup> The rationale behind the Court's jurisprudence is that criminal prosecution and punishment are necessary mechanisms to end impunity and ensure human rights protection.<sup>108</sup> Ultimately, the development of this jurisprudence is a prominent example of the new role human rights have in criminal justice, as a driving force of punishment and criminalisation rather than as protection against state coercive power.

## 2. Prohibition of Amnesties

The Inter-American institutions have dealt with amnesty laws since the early 1990s.<sup>109</sup> In a series of cases in 1992, the IACommHR stated that amnesties for serious crimes in force in Argentina, El Salvador and Uruguay were incompatible with the ACHR since they had prevented the possibility of a criminal investigation and prosecution.<sup>110</sup> In 1996, the IACommHR stated that the victim's 'right to justice' stemming from Article 8(1) and 25 ruled out amnesties for serious human rights abuses.<sup>111</sup> Furthermore, according to the Commission, the application of amnesties eliminated 'the most effective means for protecting [human] rights, which is to ensure the trial and punishment of the offenders'.<sup>112</sup> Yet, throughout the 1990s the IACommHR did not refer any case concerning amnesties to the Court.

In 2001, in *Barrios Altos*, the IACtHR pronounced its first decision on amnesty laws.<sup>113</sup> In what is considered the leading case on amnesties, the Court held that 'self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention'.<sup>114</sup> Then, the IACtHR found specific violations of the duty to prosecute and punish derived from Article 1(1) and 2, as well as of victims' rights stemming from Article 8(1) and 25.<sup>115</sup>

In 2006, the Court confirmed its jurisprudence in *Almonacid*.<sup>116</sup> Here, the IACtHR ruled that the Chilean amnesty law constituted a violation of the Convention since it prevented the punishment of crimes against

<sup>102</sup> Seibert-Fohr (n 14) 76.

<sup>103</sup> *La Cantuta v Peru*, IACtHR Ser.C No.162 (29 November 2006) para 149.

<sup>104</sup> Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the IACtHR' (2012) *International Criminal Law Review* 665, 681.

<sup>105</sup> *Almonacid Arellano et al v Chile*, IACtHR Ser.C No.154 (26 September 2006) para 154. See more recently *Herzog et al. v Brazil*, IACtHR Ser.C No.353 (15 March 2018) para 272.

<sup>106</sup> *ibid.* para 151.

<sup>107</sup> *Bulacio v Argentina*, IACtHR Ser.C No.100 (18 September 2003) para 110.

<sup>108</sup> *Pastor* (n 11).

<sup>109</sup> For discussion of the Inter-American System and amnesties, Wayne Sandholtz and Mariana Rangel Padilla, 'Juggling Rights, Juggling Politics: Amnesty Laws and the IACtHR' (ISA-Flasco Conference, Buenos Aires, July 2014) <<http://web.isanet.org/Web/Conferences/FLASCO-ISA%20BuenosAires%202014/Archive/5211d97f-650e-4bfd-b352-05f6a013929b.pdf>> accessed 14 July 2018; Binder (n 15).

<sup>110</sup> *Alicia Consuelo Herrera et al v Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, IACommHR Report No.28/92, OEA/SerL/V/II83, Doc14 (2 October 1992) para 50; *Mendoza* (n 93) para 40.

<sup>111</sup> *Garay Hermosilla et al v Chile*, Case 10.843, IACommHR Report No. 36/96, OEA/SerL/V/II95 Doc7Rev (15 October 1996) para 64.

<sup>112</sup> *ibid.* para 50.

<sup>113</sup> *Barrios Altos* (n 74).

<sup>114</sup> *ibid.* para 45.

<sup>115</sup> *ibid.* para 51(4).

<sup>116</sup> *Almonacid Arellano* (n 105).

humanity.<sup>117</sup> Although the legislation concerned was not technically a self-amnesty because it applied also to political opponents, for the Court it acted as if it were, 'since it was issued by the military regime to avoid judicial prosecution of its own crimes'.<sup>118</sup> Moreover, the IACtHR excluded the possibility of truth and reconciliation commissions being an admissible 'substitute for the duty of the State to reach the truth through judicial proceedings', since they are unable to satisfy the victims' right to have the offender punished.<sup>119</sup>

The third landmark case is *Gomes Lund*.<sup>120</sup> The IACtHR found Brazil in breach of the Convention, because its amnesty law prevented criminal prosecution and punishment for enforced disappearance. Specifically, the Court established that only criminal prosecution was 'an appropriate instrument to prevent future violations of human rights' of *jus cogens* nature, including the crimes covered by the Brazilian amnesty law.<sup>121</sup> Most importantly, the IACtHR clarified that 'the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to [...] "self-amnesties"'.<sup>122</sup>

In 2011, in *Gelman* the Court invalidated Uruguay's amnesty law.<sup>123</sup> This legislation differed from the other amnesties scrutinised by the IACtHR because it had been enacted during the peace negotiations that led to the end of a civil war and it had been upheld twice by popular *referenda* in 1989 and in 2009. Nevertheless, the Court ruled that all 'amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the [Convention]'.<sup>124</sup>

The most recent judgment on amnesty laws is *El Mozote*.<sup>125</sup> In this case, the IACtHR did not limit itself to upholding its doctrine on an absolute ban on amnesties shielding human rights abuses, but it went as far as to interpret Article 6(5) of the 1977 Additional Protocol II to the 1949 Geneva Convention<sup>126</sup> as excluding amnesties that prevent prosecution and punishment of war crimes.<sup>127</sup>

To summarise, according to the Inter-American institutions, amnesties for serious human rights violations are always in contrast with the ACHR, regardless of their nature, purposes, and the context in which they have been adopted.<sup>128</sup> They are in breach of the general and absolute duty to ensure human rights through investigation, prosecution and conviction, as well as violating the victim's rights to a fair trial and judicial protection.<sup>129</sup> In this regard, criminal accountability ceases to be an instrument whose justification in terms of necessity is constantly required and becomes the preferred and unquestioned method for promoting justice.

## B. European Court of Human Rights

In the context of the European human rights system, there has also been a growing tendency to demand the intervention of criminal law to counter human rights violations, especially in response to the structural deficiency in accountability during and after the Kurdish and Chechnyan conflicts.<sup>130</sup> By imposing positive obligations on states, the ECtHR has increasingly triggered the application of domestic criminal law to protect the rights and freedoms enshrined in the European Convention (ECHR).<sup>131</sup> In particular, the Court tends to support several forms of positive obligations in criminal matters.<sup>132</sup> Firstly, states have the duty, in cases of violations of Convention rights, to ensure effective investigations capable of leading to the identification

<sup>117</sup> *ibid.* para 99.

<sup>118</sup> *ibid.* para 120.

<sup>119</sup> *ibid.* para 150.

<sup>120</sup> *Gomes Lund et al v Brazil*, IACtHR Ser.C No.219 (24 November 2010).

<sup>121</sup> *ibid.* paras 105–109.

<sup>122</sup> *ibid.* para 175.

<sup>123</sup> *Gelman v Uruguay*, IACtHR Ser.C No.221 (24 February 2011).

<sup>124</sup> *ibid.* para 126.

<sup>125</sup> *Massacres of El Mozote and nearby places v El Salvador*, IACtHR Ser.C No.252 (25 October 2012).

<sup>126</sup> This provision encourages the granting of amnesties at the end of non-international armed conflict.

<sup>127</sup> *Massacres of El Mozote* (n 125) paras 285–287.

<sup>128</sup> E.g. *Almonacid Arellano* (n 105) para 119; *Herzog* (n 105) paras 289–292. For a critical analysis, Fabia Fernandes Carvalho Veçoso, 'Whose Exceptionalism? Debating the Inter-American View on Amnesty and the Brazilian Case' in Engle, Miller, Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016); Caroli (n 15) 96, 101.

<sup>129</sup> *Gomes Lund* (n 120) para 172.

<sup>130</sup> Ruti Teitel, 'Transitional Justice and Judicial Activism: A Right to Accountability?' (2015) 48 *Cornell International Law Journal* 385, 390.

<sup>131</sup> Stefano Manacorda, "'Dovere di punire'? Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto' in Massimo Meccarelli, Paolo Palchetti, Carlo Sotis (eds) *Il lato oscuro dei Diritti umani* (Carlos III University of Madrid 2014) 314. For a discussion on state obligations in criminal matters, Kamber (n 529); Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Lucia Zedner and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012); Mavronicola (n 16); Starmer (n 15).

<sup>132</sup> *Nikolova and Velichkova v Bulgaria* App No.7888/03 (ECtHR, 20 December 2007) para 57; for a discussion, Seibert-Fohr (n 14) 111–152.

and punishment of the offender.<sup>133</sup> Secondly, states are asked to criminalise serious offences.<sup>134</sup> Another obligation is the duty to establish an effective criminal-law system to deter the commission of offences and prosecute those responsible.<sup>135</sup> Moreover, the Court requires states to punish serious human rights violations, including torture, domestic and sexual violence as well as systematic killings.<sup>136</sup> Finally, there is the duty to refrain from adopting measures that would prevent criminal justice.<sup>137</sup>

### 1. Positive Obligations to Criminalise, Prosecute and Punish

The jurisprudence of the ECtHR concerning the use of criminal law to protect human rights results from the theory of “horizontal applicability of human rights” and the doctrine of “positive obligations”.<sup>138</sup> Since the decision in *Marckx*, the Court has established that not only do states have “negative obligations” not to interfere with individuals’ rights, but they also have “positive obligations” to ensure effective protection of the provisions of the ECHR.<sup>139</sup> States are not only responsible for violations of Convention rights attributed to their agents, but even abuses committed by private individuals where the state failed to prevent the violations due to negligence or tolerance.<sup>140</sup>

Both the horizontal effect and the theory of positive obligations emerge from *X and Y*, the leading judgment concerning the duty to protect human rights by means of criminal law.<sup>141</sup> The point at issue was the inability of the applicant to open a criminal prosecution against the alleged rapist of his daughter, a minor with learning disabilities. Having criticised the shortcomings in the national legislation, the ECtHR held that in the case of wrongdoing against sexual integrity ‘effective deterrence is indispensable’ and ‘it can be achieved only by criminal-law provisions’.<sup>142</sup> The requirement that states must have in place criminal laws securing compliance with Article 8 in the sphere of sexual life has subsequently been confirmed in subsequent cases.<sup>143</sup>

The duty to create particular criminal offences so as to protect fundamental rights has also been announced in regard to other rights. Firstly, in *Kiliç* the ECtHR stated that states have an obligation to secure the right to life (Article 2) ‘by putting in place effective criminal-law provisions’.<sup>144</sup> Yet, in *Cavelli and Ciglio* the Court stated that ‘if the infringement of the right to life [...] is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case’.<sup>145</sup>

Secondly, in *A v UK* the Court concluded that the protection of criminal law is required to prevent torture or inhuman or degrading treatment (Article 3).<sup>146</sup> In *MC*, in particular, the ECtHR pointed out that ‘the member States’ positive obligations under Articles 3 [...] must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act’.<sup>147</sup> Furthermore, in *Cestaro* the Court ordered Italy ‘to introduce into the Italian legal system legal mechanisms capable of imposing appropriate penalties on those responsible for acts of torture’.<sup>148</sup>

Finally, positive obligations to criminalise are provided in relation to the prohibition of slavery (Article 4).<sup>149</sup> Notably, in *Siliadin* the ECtHR held that ‘states have positive obligations [...] to adopt criminal-law provisions

<sup>133</sup> *Kaya v Turkey* App Nos.158/1996/777/978 (ECtHR, 19 February 1998) para 107.

<sup>134</sup> *X and Y v Netherlands* App No.8978/80 (ECtHR, 26 March 1985) para 27. For a discussion on positive obligations to create criminal offences, Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2015) ch.8.

<sup>135</sup> *Osman v United Kingdom* App Nos.87/1997/871/1083 (ECtHR, 28 October 1998) para 115.

<sup>136</sup> *Van Der Heijden v Netherlands* App No.42857/05 (ECtHR [GC] 03 April 2012) para 62.

<sup>137</sup> *Marguš v Croatia* App No.4455/10 (ECtHR [GC] 27 May 2014) para 139.

<sup>138</sup> Tulkens (n 11) 583.

<sup>139</sup> *Marckx v Belgium* App No.6833/74 (ECtHR, 13 June 1979); for a discussion on positive obligations, Alastair Mowbray, *The Development of Positive Obligations under the ECHR by the ECtHR* (Hart Publishing 2004).

<sup>140</sup> *Cyprus v Turkey* App No.25781/94 (ECtHR [GC], 10 May 2001) para 81.

<sup>141</sup> *X and Y* (n 134) (1985).

<sup>142</sup> *ibid.* para 27.

<sup>143</sup> E.g. *MC* (n 74) para 150; For analysis, Patricia Londono, ‘Positive Obligation, Criminal Procedure and Rape Case’ (2007) 2 European Human Rights Law Review 158.

<sup>144</sup> *Kiliç v Turkey* App No.22492/93 (ECtHR, 28 March 2000) para 62.

<sup>145</sup> *Calvelli and Ciglio v Italy* App No.32967/96 (ECtHR, 17 January 2002) para 51. See also *Lopes De Souse Fernandes v Portugal* App No.56080/13 (ECtHR [GC], 19 December 2017) para 215.

<sup>146</sup> *A v United Kingdom* App Nos.100/1997/884/1096 (ECtHR, 23 September 1998) para 22.

<sup>147</sup> *MC* (n 74) para 174.

<sup>148</sup> *Cestaro v Italy* App No.6884/11 (ECtHR, 07 May 2015) para 246.

<sup>149</sup> Vladislava Stoyanova, ‘Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking’ (2014) 3(2) Cambridge Journal of International and Comparative Law 407.



which penalise the practices referred to in Article 4'.<sup>150</sup> From the case-law it emerges that, unlike the IACtHR, the recourse to criminal law is prescribed by the ECtHR only in the most serious violations (i.e. murder, torture, sexual and domestic violence) and only when the core of a fundamental right is at stake.<sup>151</sup> However, the duty to criminalise certain human rights breaches is not limited to cases where such duty already exists in customary or conventional international law (i.e. Article 4(1) of the Convention Against Torture), but it has progressively been extended to other violations where the opportunity of criminalisation is more questionable.<sup>152</sup>

Another obligation imposed by the ECtHR is the duty to enforce criminal law. In *Öneryildiz* the Court expressed the view that states should establish a criminal-law machinery 'capable of ensuring that criminal penalties are applied' when the right to life is breached,<sup>153</sup> while in *Ali and Ayşe Duran* the ECtHR stated the same principle in relation to Article 3.<sup>154</sup> Generally, the Court does not provide for an express duty to criminal prosecution, only requiring the state to conduct 'effective investigation capable of leading to the identification and punishment of those responsible'.<sup>155</sup> Yet, in recent cases, the Court has gone as far as to maintain that in cases of serious violence (e.g. assaults for racial reasons or police ill-treatments), measures that could lead only to civil compensation, but not to the prosecution of the offender, do not fulfil the State's procedural obligations under Article 2 or 3.<sup>156</sup>

Some authors have discussed whether the ECtHR has ever affirmed a duty to punish serious human rights violations.<sup>157</sup> In most cases, the Court only affirms a general obligation to set up 'a law-enforcement machinery for the prevention, suppression and punishment' of breaches of Convention rights, without providing for an express duty to sanction the individual offender.<sup>158</sup> Nevertheless, there are a few decisions where the Court has been more willing to assert an obligation of punishment.<sup>159</sup> In some cases of torture by state officials the ECtHR has highlighted the necessity of punishment,<sup>160</sup> but in relation to the right to life the Court has recognised that the obligation to punish would apply only 'if appropriate'.<sup>161</sup>

From the case-law it emerges that the ECtHR generally imposes state obligations in criminal matters with the aim of ensuring the effective enjoyment of Convention rights.<sup>162</sup> In this regard, criminal law is employed for prevention and deterrence.<sup>163</sup> Moreover, when the Court has to deal with extreme situations of human rights violations, criminal justice is considered as the preferred means to ensure 'adherence to the rule of law',<sup>164</sup> to avoid impunity<sup>165</sup> and to restore 'public confidence in the State's monopoly on the use of force'.<sup>166</sup> Accordingly, the need for criminal-justice responses to human rights abuses is justified by the Court in order to safeguard society as a whole from future human rights violations.

Indeed, unlike the IACtHR, the obligation to employ criminal law does not derive from an individual right of the victim to have the offender prosecuted or punished as a form of restoration.<sup>167</sup> The individual victim is only recognised as having a right to criminal investigation being instituted and, if appropriate,

<sup>150</sup> *Siliadin v France* App No.73316/01 (ECtHR 26 July 2005) para 89. For a comment, Holly Cullen, '*Siliadin v France*: Positive Obligations under Article 4 of the ECHR' (2006) 6 HRLR 585. See also *CN v United Kingdom* App No.4239/08 (ECtHR, 13 November 2012) para 81–82.

<sup>151</sup> Seibert-Fohr (n 14) 113–114.

<sup>152</sup> *Siliadin v France* (n 150) para 89; *Mehmet Şentürk and Bekir Şentürk v Turkey* App No.13423/09 (ECtHR, 9 April 2013) paras 104–106; *Asiye Genç v. Turkey* App No.24109/07 (ECtHR, 27 January 2015) para 73.

<sup>153</sup> *Öneryildiz v Turkey* App No.48939/99 (ECtHR [GC], 30 November 2004) para 94.

<sup>154</sup> *Ali And Ayşe Duran v Turkey* App No.42942/02 (ECtHR 08 May 2008) para 61.

<sup>155</sup> *Kaya v Turkey* (n 133) para 107. See also *Al Nashiri v Romania* App No.33234/12 (ECtHR, 31 May 2018) para 638; *Abu Zubaydah v Lithuania* App No.46454/11 (ECtHR, 31 May 2018) para 607.

<sup>156</sup> For Article 2, *Nikolova and Velichkova* (n 132) para 55; *Movsesyan v Armenia* App No.27524/09 (ECtHR, 16 November 2017) para 74. For Article 3, *Abdu v Bulgaria* App No.26827/08 (ECtHR, 11 March 2014) para 51; *Jeronovičs v Latvia* App No.44898/10 (ECtHR [GC] 05 July 2016) para 105; *Aleksandr Kononov v Russia* App No.39708/07 (ECtHR, 28 November 2017) para 37.

<sup>157</sup> Among those who deduce from the ECtHR's case-law a duty to punish, Kamber (n 52) 12; Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (CUP 2016) 260–261.

<sup>158</sup> E.g. *Keenan v United Kingdom* App No.27229/95 (ECtHR, 03 April 2001) para 88.

<sup>159</sup> E.g. *Öneryildiz* (n 153) para 91; *Jelić v Croatia* App No.57856/11 (ECtHR, 12 June 2014) para 96.

<sup>160</sup> *Gäfgen v Germany* App No.22978/05 (ECtHR [GC], 1 June 2010) para 119.

<sup>161</sup> *Armani Da Silva v United Kingdom* App No.5878/08 (ECtHR [CG], 30 March 2016) para 286.

<sup>162</sup> E.g. *Osman* (n 135) para 115. For a discussion, Seibert-Fohr (n 14) 116–120.

<sup>163</sup> E.g. *Opuz v Turkey* App No.33401/02 (ECtHR, 09 June 2009) para 128.

<sup>164</sup> *Öneryildiz* (n 153) para 96; *Al Nashiri* (n.155) para 654; *Abu Zubaydah* (n 155) para 620.

<sup>165</sup> *Gäfgen* (n 160) para 119; *Al Nashiri* (n.155) para 638; *Abu Zubaydah* (n 155) para 607.

<sup>166</sup> *Ramsahai and Others v Netherlands* App No.52391/99 (ECtHR [GC], 15 May 2007) para 325.

<sup>167</sup> *Brecknell v United Kingdom* App No.32457/04 (ECtHR, 27 November 2007) para 66.



punishment of the perpetrator.<sup>168</sup> Yet, according to the Court, this is an obligation of means, not of result.<sup>169</sup>

Nevertheless, in a handful of cases, the ECtHR has shown that future developments in line with the IACtHR cannot be excluded.<sup>170</sup> In *Nikolova and Velichkova* the Court went so far as to consider criminal proceedings and sanctions as remedial measures for the victim.<sup>171</sup> Similarly, in *Al Nashiri v Romania* and *Abu Zubaydah v Lithuania*, the ECtHR held that ‘the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a procedure enabling a thorough and effective investigation capable of leading to the identification and punishment of those responsible’.<sup>172</sup> Most importantly, the ECtHR, along the same lines as the IACtHR, has shown no hesitation in considering the criminal-law mechanism as the best means to protect fundamental rights. This tendency has been noticed by Judge Tulkens who, in several concurring or dissenting opinions, felt free to criticise such human rights development.<sup>173</sup> As a former professor of criminal law, she warned her colleagues of the risk from using criminal punishment to protect rights and freedoms, namely that of losing ‘sight of the subsidiarity principle, which is a basic axiom of criminal law’.<sup>174</sup> Indeed – she added – ‘use of the weapon of punishment is acceptable only if there are no other means of protecting the values or interests at stake’.<sup>175</sup>

## 2. Amnesties

Throughout its jurisprudence, the ECtHR has taken a censorious approach towards states’ use of measures that hinder criminal justice, including amnesties, pardons and statutes of limitations.<sup>176</sup> In 1991, the European Commission of Human Rights was called upon to review an amnesty law that had been enacted by France for New Caledonia with the aim of resolving conflicts in the island.<sup>177</sup> The Commission declared the application inadmissible, by stating that ‘the crime of murder may be covered by an amnesty [...] unless [the amnesty] can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes’.<sup>178</sup> This reasoning, based on the idea that amnesty laws are permissible provided that they are exceptional in character and necessary for pursuing a legitimate aim, was followed by the Court in *Tarbuk*.<sup>179</sup>

This approach differs from the absolute ban provided by the IACtHR, but is limited to complaints in relation to the right to life. When the ECtHR is called upon to deal with alleged violations of Article 3, it tends to adopt a stricter approach. In *Abdulsamet Yaman* and *Yeşil and Sevim*, for instance, the Court declared that statutes of limitations, amnesties and pardons are inadmissible in cases of torture or ill-treatment.<sup>180</sup> This idea was restated in *Ould Dah*.<sup>181</sup> Notably, the Court held that ‘[t]he obligation to prosecute criminals should not [...] be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law’.<sup>182</sup>

In 2014 the ECtHR pronounced its most recent and authoritative decision on amnesties in *Marguš*.<sup>183</sup> The applicant, a Croatian national, complained that his 2007 conviction for war crimes was in violation of the prohibition of double-jeopardy since he had previously been subjected to proceedings for the same charges

<sup>168</sup> *Malik Babayev v Azerbaijan* App No.30500/11 (ECtHR, 1 June 2017) para 80.

<sup>169</sup> *ibid.*

<sup>170</sup> *Marguš* (n.137); *Nikolova and Velichkova* (n 132).

<sup>171</sup> *Nikolova and Velichkova* (n 132) para 55, 64.

<sup>172</sup> *Al Nashiri* (n 155) para 706; *Abu Zubaydah* (n 155) para 673.

<sup>173</sup> *MC* (n 74) (concurring opinion of Judge Tulkens); *Gäfgen* (n 160) (joint partly-dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku, Power)

<sup>174</sup> *Gäfgen* (n 160) (joint partly-dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku, Power) para 5.

<sup>175</sup> *ibid.*

<sup>176</sup> For a discussion, Josepha Close, ‘Crafting an international norm prohibiting the grant of amnesty for serious crimes’ (2016) 7 Queen Mary Law Journal 109; Louise Mallinder, Luke Moffett, Kieran McEvoy and Gordon Anthony, ‘Investigations, Prosecutions, and Amnesties under Articles 2 & 3 of the ECHR’ (*Amnesties, Prosecutions and Public Interest in the Northern Ireland Transition*, March 2015) <<https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/03/Investigations-Prosecutions-and-Amnesties-under-Article-2-and-3-Final-24-March-2015.pdf>> accessed 14 July 2018; Jackson, ‘Amnesties in Strasbourg’ (2018) Oxford Journal of Legal Studies 1, 10–13.

<sup>177</sup> *Dujardin v France* App No.16734/90 (EcommHR, 2 September 1991).

<sup>178</sup> *ibid.*

<sup>179</sup> *Tarbuk v Croatia* App No.31360/10 (ECtHR, 11 December 2012) para 50.

<sup>180</sup> *Abdulsamet Yaman v Turkey* App No.32446/96 (ECtHR, 02 November 2004) para 55; *Yeşil and Sevim v Turkey* App No.34738/04 (ECtHR 05 June 2007) para 37.

<sup>181</sup> *Ould Dah v France* App No.13113/03 (ECtHR, 17 March 2009).

<sup>182</sup> *ibid.* 17.

<sup>183</sup> *Marguš* (n 137).

and released by application of an amnesty law. Having reviewed the state of international jurisprudence on amnesties, the ECtHR stated that a ‘growing tendency in international law is to see amnesties [for war crimes] as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights’.<sup>184</sup> For these reasons, according to the Court, granting amnesty to the applicant amounted to a fundamental defect. Yet, the European judges left open the possibility that amnesties for war crimes *might* be acceptable in ‘some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims’.<sup>185</sup>

In summary, according to the ECtHR, measures that would prevent criminal justice are generally incompatible with the ECHR since they foster impunity and hinder accountability. Ultimately, from the Court’s point of view, it is no longer the employment of a criminal-law mechanism that should always be justified, but rather the decision not to make use of it.

### C. Other Human Rights Bodies

In recent years, there has been a general rising tendency to favour criminal accountability for those responsible for serious human rights violations.<sup>186</sup> Beyond the IACtHR and the ECtHR, other international and regional human rights bodies have begun to order criminal prosecutions and punishment when states failed to act.<sup>187</sup>

#### 1. UN Human Rights Committee

Since the beginning of the 1990s, the HRC has developed a significant jurisprudence focused on the duty of states to bring to justice and punish perpetrators of serious human rights abuses, including arbitrary killing, enforced disappearance, torture or ill-treatment, sexual and domestic violence, as well as human trafficking.<sup>188</sup> In early cases the Committee merely used to order states ‘to bring to justice any persons found to be responsible’ for human rights violations.<sup>189</sup> Conversely, in more recent views, the HRC has explicitly prescribed prosecution and punishment.<sup>190</sup>

The underlying rationale is that impunity fosters human rights violations and, accordingly, punishment is necessary to deter future violations.<sup>191</sup> According to the HRC, the criminal sanction is not only an option for the state, but it is mandatory in order ‘to respect and to ensure to all individuals’ the rights recognised in the International Covenant on Civil and Political Rights (ICCPR).<sup>192</sup> Until 2008, the position of the HRC was that the ICCPR ‘does not provide that private individuals have the right to demand that the State criminally prosecute another person’.<sup>193</sup> However, in more recent cases, the Committee has started pointing out that the failure to prosecute and punish violates both the victim’s individual rights (especially the right to life and the prohibition of torture and mistreatment) and the right to an effective remedy under Article 2(3) (a).<sup>194</sup> According to the HRC, ‘criminal investigation and consequential prosecution are necessary remedies for violations of human rights’.<sup>195</sup> Therefore, ‘the State party is under an obligation to provide the [victims] with an effective remedy, including initiation and pursuit of criminal proceedings’.<sup>196</sup> This implies that the duty to prosecute and punish gross human rights abuses may no longer be conceived as a due diligence obligation, but as mandatory in all circumstances.<sup>197</sup>

<sup>184</sup> *ibid.* para 139.

<sup>185</sup> *ibid.* para 139.

<sup>186</sup> Kim and Sikkink (n 8).

<sup>187</sup> Huneeus (n 66) 1.

<sup>188</sup> E.g. *General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UNDocCCPR/C/21/Rev1/Add13 (26 May 2004) para 18; *Concluding Observations of the Human Rights Committee: Slovenia*, UNDocCCPR/CO/84/SVN, para 11 (2005). For a discussion, Seibert-Fohr (n 14) 11–51; Peters (n 157) 261–262.

<sup>189</sup> *Barbato v Uruguay*, HRC Communication No84/1981, UNDocA/38/40 at 124 (1983) para 11. See also *Baboeram et al v Suriname*, HRC Communications Nos 146/1983, 148–154/1983, UNDocCCPR/C/24/D/146/1983p.172 at 176 (1985) para 16.

<sup>190</sup> *Njaru* (n 74) para 8; *Boucherf v Algeria*, HRC Communication No 1196/2003, UNDocCCPR/C/86/D/1196/2003 (2006) para 11.

<sup>191</sup> *General Comment No 31* (n.188) para 18.

<sup>192</sup> Art 2(1) ICCPR. See also *Felipe und Evelyne Pestaño v Philippines*, HRC Communication No 1619/2007, UNDocCCPR/C/98/D/1619/2007 (2010) paras 7.2–7.6.

<sup>193</sup> *José Vicente and Others v Colombia*, HRC Communication No612/1995, UNDocCCPR/C/60/D/612/1995 (1997) para 8.8.

<sup>194</sup> *Sathasivam v Sri Lanka*, HRC Communication No1436/2005, UNDocCCPR/C/93/D/1436/2005 (2008) paras 6.4, 8; *Felipe und Evelyne Pestaño* (n 192) paras 7.2–7.6.

<sup>195</sup> *Sathasivam* (n 194) para 6.4.

<sup>196</sup> Peters (n 157) 261–262.

<sup>197</sup> *Sathasivam* (n 194) para 6.4.

The Committee has also supported a general prohibition of amnesties for grave human rights violations. Amnesty laws are generally seen as 'incompatible with the duty of States to investigate' serious abuses, 'to guarantee freedom from such acts', as well as 'to ensure that they do not occur in the future'.<sup>198</sup> Consequently, states should ensure that amnesties are 'not applied or utilized for granting impunity to persons accused of serious human rights violations'.<sup>199</sup> Thus, the HRC has repeatedly rejected the claim that amnesties might be necessary for reconciliatory purposes.<sup>200</sup>

## 2. Other Bodies

There are several human rights conventions that stipulate an obligation to prosecute and, where appropriate, to punish.<sup>201</sup> Notably, Article 4(1) of the UN Convention Against Torture (CAT) requires State parties to ensure that 'all acts of torture are offences under [their] criminal law'. The UN Committee Against Torture, the CAT monitoring body, has repeatedly declared that states must investigate and punish acts of torture and ill-treatment.<sup>202</sup> The same body has also expressed negative opinions towards amnesties.<sup>203</sup> Neither the CAT nor the Committee Against Torture grant an individual right of the victim to have the perpetrator punished.<sup>204</sup> The African Commission on Human and Peoples' Rights has also criticised amnesties granting immunity from prosecution to violators of human rights on the basis that they infringe the victims' right to legal protection enshrined in Article 7(1) of the African Charter on Human and Peoples' Rights.<sup>205</sup> In the Arab world and in Asia, mechanisms such as the Arab Committee of Human Rights and the ASEAN Inter-governmental Commission on Human Rights have not yet produced relevant case-law in relation to positive obligations in criminal matters.

## D. Conclusion

The overview of the practice of human rights bodies shows an ever-rising tendency to order states to employ their domestic criminal law in the context of human rights violations. It should be noted that this practice has largely been confined to serious human rights violations that involve an absolute right,<sup>206</sup> but it has started creeping into somewhat lesser human rights breaches. Criminal prosecution and punishment are increasingly seen as necessary tools to advance the promoting and safeguarding of human rights, as well as to deter future abuses. Although the duty to employ criminal law is often interpreted as a due diligence obligation, there is growing case-law requiring states to prosecute perpetrators of gross human rights abuses in all circumstances.

Yet, there are still important differences within the jurisprudence of different bodies. The OAS bodies have the most radical approach. Not only is criminal law considered as a necessary mechanism to end human rights violations, but it is also seen as indispensable to protect the rights of the victims and give them restoration. In this respect, the IACtHR has long established the victim's right to have the offender tried and punished. Given the conception of criminal law as the undisputed and essential tool in safeguarding

<sup>198</sup> *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UNDoc HRI/GEN/1/Rev9(Vol I) (10 March 1992) para 15.

<sup>199</sup> *Concluding Observations of the Human Rights Committee: Croatia*, UN Doc CCPR/CO/71/HRV30 (2001) para 11.

<sup>200</sup> *Concluding Observations by the Human Rights Committee: Colombia*, UN Doc CCPR/C/79/Add75 (1997) paras 30–32. In so doing, the HRC ends up treating the duty to prosecute as absolute.

<sup>201</sup> E.g. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78UNTS277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. For a discussion, Seibert-Fohr (n.14) 153–187.

<sup>202</sup> E.g. CAT, *Communication No 327/2007*, UNDocCAT/C/47/D/327/2007 (decision on Canada) (13 January 2012); *Communication No 353/2008*, UNDocCAT/C/47/D/353/2008 (decision on Ukraine) (16 January 2011).

<sup>203</sup> E.g. CAT, *General Comment No 2*, UNDocCAT/C/GC/2 (24 January 2008) para 5.

<sup>204</sup> Peters (n 157) 261.

<sup>205</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR128 (ACHPR, 15 May 2006) para 215; *Mouvement Ivoirien des Droits Humains v Cote d'Ivoire(I)* (2008) AHRLR62 (ACHPR 29 July 2008) paras 97–98. There is currently no relevant case-law of the African Court of Human and People's Rights.

<sup>206</sup> Most of the cases where the criminal law is invoked by human rights bodies involve violations of human rights that are regarded as absolute, including the prohibition of torture and the prohibition of slavery. Given that there are a number of treaties providing for a duty to prosecute or extradite in case of particular crimes (the principle of *aut dedere aut judicare*), i.e. the UN Convention against Torture and the Geneva Conventions, many have derived a customary international law duty to prosecute serious human rights violations that constitute international crimes (see M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6<sup>th</sup> edn, OUP 2014) 9. However, it is doubtful whether such a general principle exists with regard to all international crimes (Seibert-Fohr (n 14) 260). Moreover, it has been argued that the absolute status of certain human rights does not necessarily extend beyond the simple duty not to directly infringe such rights (Jackson (n 176) 16). In other words, the duty not to torture or the right to life are absolute, but the duty to prosecute violations of such rights is not.

human rights, every measure that hinders criminal justice is declared by the Court of no legal effect, including amnesty laws, statutes of limitations, the principle of non-retroactivity and the prohibition against double-jeopardy.<sup>207</sup>

From the ECtHR practice it also emerges a growing tendency to require criminal-law enforcement, as part of states' duties to investigate, prosecute and punish those responsible for human rights violations, as well as part of the obligation to criminalise serious offences. However, this has been affirmed only with regard to serious violations, namely the right to life, acts of torture and ill-treatment, domestic and sexual violence, and systematic breaches of Convention rights. For now the ECtHR has yet to go as far as the IACtHR to require punishment as a measure of *individual* redress and satisfaction. Nevertheless, there are signs of a potential development in this direction.<sup>208</sup>

Regarding the HRC, prosecution and punishment are required in case of gross human rights abuses. In addition, the HRC has started considering the criminal sanction as a remedy but it has remained more cautious on conceptualising a victim's right to criminal justice.

Finally, there are also common traits among different human rights bodies. One is the idea that a greater use of criminal law will benefit society as a whole and provide *general* human rights protection. Another shared feature is the aversion towards amnesty laws, especially for international crimes, because they prevent criminal prosecutions, trials and punishments from taking place. Yet, while the ECtHR has to date accepted that amnesties for serious crimes might be acceptable in exceptional circumstances, the IACtHR and the HRC appear to have imposed an absolute ban on amnesties shielding gross human rights abuses.

#### IV. The Impact of the Human Rights Treaty Bodies' Jurisprudence

In the development of positive obligations in criminal matters, human rights bodies appear to have often failed to assess the potential implications of their doctrine. While it is always important to consider the impact of a decision, this is especially true in the context of criminal law as a threat to an individual's freedoms.<sup>209</sup> Indeed, human rights bodies are mostly concerned with individual accountability and protection of victims in the particular case rather than with the impact of their outcomes on domestic criminal justice systems, as well as on the conception of criminal law. There is no serious assessment concerning the necessity of criminal law, nor on what purposes criminal accountability may serve or whether such may be achieved.<sup>210</sup> Even in case of violations of absolute human rights (arbitrary killings, enforced disappearances, torture), uncritical reliance on criminal-law mechanisms may become problematic if it comes to disregard relevant considerations on the opportunity of criminalisation.<sup>211</sup>

##### A. Allegedly Positive Effects

Human rights bodies generally share a basic assumption: prosecuting and punishing perpetrators of human rights violation is the optimal method for combating impunity.<sup>212</sup> Consequently, if prosecution and punishment for those who committed atrocities is "intrinsically good", little or no justification is needed for imposing state obligations in criminal matters.<sup>213</sup> However, although there is no doubt that human rights violations should be condemned and prevented, the idea that criminal law best serves the purpose of addressing these abuses is more controversial.

The aims pursued by human rights bodies when they turn to criminal law are mostly deterrence, restoration of the rule of law and, for the IACtHR, redress for victims.<sup>214</sup> Yet, whether these purposes are achieved by criminal prosecutions and punishment is a matter of great debate. According to Orentlicher 'criminal punishment is based, above all, on a deterrence rationale'.<sup>215</sup> In this respect, – she continues – 'states' duty

<sup>207</sup> *La Cantuta* (n 103) para 226.

<sup>208</sup> E.g. *Marguš* (n 137), where the ECtHR expressly mentioned the IACtHR's case-law on amnesties; *Nikolova and Velichkova* (n 132) para 55, 64; *Al Nashiri* (n 155) para 706; *Abu Zubaydah* (n 155) para 673, where the ECtHR seemed to consider criminal proceedings and sanctions as remedial measures for the victim.

<sup>209</sup> Samuel Moyn, 'Anti-Impunity as Deflection of Argument' in Karen Engle, Zinaida Miller, D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016) 77.

<sup>210</sup> Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39.

<sup>211</sup> Jackson (n 176) 7.

<sup>212</sup> *ibid.* 40.

<sup>213</sup> Moyn (n 209) 70.

<sup>214</sup> Roht-Arriaza (n 60) 509 ("Punishment [...] can provide the families with a measure of satisfaction. [...] [I]t can serve a deterrent function. [...] Finally, it can [...] restore faith in the rule of law").

<sup>215</sup> Orentlicher (n 7) 427; see also Orentlicher (n 60) 2537.

to punish human rights crimes is owed as much to society as to individual victims'.<sup>216</sup> Kim and Sikkink have supported the idea that human rights prosecutions have, at least, 'a strong and statistically significant impact' on decreasing the level of abuses.<sup>217</sup> This view is shared by Safferling, who maintains that criminal prosecutions may effectively contribute to reducing human rights violations, strengthening the legal system, and helping individual victims to bear their suffering.<sup>218</sup>

Yet, these claims are rejected by other scholars. In his response to Orentlicher, Nino contends that an indiscriminate duty to punish human rights abuses 'would probably provoke, by a causal chain, similar or even worse abuses'.<sup>219</sup> Koskeniemi has highlighted the inability of criminal law to deal with events of "extraordinary evil", given their 'enormous moral, historical, or political significance'.<sup>220</sup> Similarly, Drumbl argues that '[c]riminal law [...] is inherently limited as a response to mass atrocity and as a device to promote justice in its aftermath'.<sup>221</sup> According to Engle, criminal law's focus on individual accountability risks overlooking the root causes of human rights violations.<sup>222</sup> Finally, Aukerman has shown that, in cases of serious human rights abuses, not only are prosecutions 'ineffective deterrents compared to other political and diplomatic tools',<sup>223</sup> but also the merits of prosecution in establishing the rule of law and providing restorative justice are unclear.<sup>224</sup>

Because it is controversial that prosecution and punishment are the most effective means to protect human rights, human rights bodies should not blindly turn to criminal law nor should they rule out non-criminal-law alternatives as less effective.

### **B. Weakening the Rights of the Accused**

If not adequately justified and pondered case-by-case, the human rights bodies' mandate requiring states to use criminal law to protect human rights has the potential to lead to undesirable outcomes. Although this practice concerns mainly serious abuses, the human rights bodies have laid the groundwork to extend it to other violations. Should this approach become more pervasive, there may be troubles to come. Concerns arise especially regarding the consequences that the doctrine of positive obligations in criminal matters may produce for the liberal model of criminal law, which has to date characterised human rights bodies' approach to crime and punishment.<sup>225</sup> The first cause for concern is that decisions invoking indiscriminately the duty to prosecute and punish might negatively affect defendants' rights in concrete criminal cases.

Firstly, criminal punishment is increasingly presented as the only effective method to secure accountability for grave human rights breaches. As illustrated by Mégret and Calderón,<sup>226</sup> this approach may encourage a "culture of conviction" where punishment is seen as the end to pursue whatever the cost. While this risk is present but yet limited within the context of the ECHR by a jurisprudence that refers to the duty to punish as an obligation of means,<sup>227</sup> the same cannot be said with regard to the IACtHR, where failure to punish is increasingly seen as a violation of human rights *per se*.<sup>228</sup>

Secondly, while the focal point for human rights courts in relation to criminal law has long been the rights of the accused to due process, the greatest attention is now devoted to the need to satisfy the rights of the victim.<sup>229</sup> This is not only the case of the IACtHR (where the Court has recognised the victim's right to have perpetrators of human rights violations properly tried and punished), but also of the ECtHR, where criminal proceedings are at times seen as remedial measures.<sup>230</sup>

<sup>216</sup> Orentlicher (n 7) 427.

<sup>217</sup> Kim and Sikkink (n 8) 951.

<sup>218</sup> Safferling (n 9) 1479.

<sup>219</sup> Carlos S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100(8) Yale Law Journal 2619, 2620. Nino considers that "it would be much more helpful for international law to recognize the right of the world community to punish human rights violations in an international forum" (2638).

<sup>220</sup> Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 2.

<sup>221</sup> Mark Drumbl, *Atrocity, Punishment, and International Law* (OUP 2007) xii. See also, *ibid.* 18 (arguing that, in case of atrocities, 'liberal prosecutorial and correctional modalities make very modest gains in terms of actualising retributive and deterrent goals').

<sup>222</sup> Engle (n 2) 44–46.

<sup>223</sup> Aukerman (n 210) 91.

<sup>224</sup> *ibid.* 75, 82.

<sup>225</sup> Horder (n 357) 76–77.

<sup>226</sup> Mégret and Calderón (n 11) 438.

<sup>227</sup> *Malik Babayev* (n 168) para 80.

<sup>228</sup> *Goiburú* (n 89) para 84; *Njaru* (n 74) para 8.

<sup>229</sup> *Pastor* (n 11).

<sup>230</sup> *Nikolova and Velichkova* (n 132) para 55 and 64; *Al Nashiri* (n 155) para 706; *Abu Zubaydah* (n 155) para 673.



The structural framework of IHRL contributes to placing the victim rather than the defendant in the spotlight. In a system where cases are brought to court by victims or their next-of-kin and where the respondent is the state and not the accused, it seems inevitable that the focus is on the victim rather than on the criminal defendant, to whom human rights bodies do not even give standing.<sup>231</sup> This situation is not problematic *per se*. The victim's right to justice and the defendant's due process guarantees are not mutually exclusive and ordered prosecution may of course be undertaken in compliance with the latter rights. Nonetheless, the accused's and the victim's interests may collide.

In a situation of conflict between the call for criminal punishment and the protection of due process for the accused, the temptation may be to give precedence to the former, whilst restricting the fundamental rights of the latter. In *La Canuta*, for instance, the IACtHR stated that the victim's right to an expeditious trial should trump the defendant's right to have adequate time for his defence.<sup>232</sup> This normative preference for the victim is particularly acute where rules in favour of the accused might culminate in shielding perpetrators of human rights abuses from criminal accountability. In this regard, human rights bodies appear to be willing to construct various limitations to the principle of fair trial, the prohibition against double-jeopardy and retrospective law when they are perceived to hinder criminal responsibility.<sup>233</sup>

Ultimately, since in several legal systems such principles are not yet settled enough, should this trend become predominant, domestic authorities may interpret the decisions of human rights bodies as enabling them to disregard the fundamental rights of defendants.<sup>234</sup> As shown by Tittlemore, this may already be the case in South America, where national courts in Argentina, Chile, Peru and Colombia have declared the prohibition against applying provisions designed to shelter criminal defendants in cases involving serious human rights abuses.<sup>235</sup> In the *Simón Case*, for instance, the Argentinian Supreme Court relied on *Barrios Altos* to prevent national legal provisions such as amnesty, statutory limitations and the legality principle from hindering criminal accountability for gross human rights violations.<sup>236</sup> In addition, there is the risk that in the long-run the courts may pass the idea that due process rights are applicable only to defendants charged with crimes that do not constitute a human rights violations, while others deserve a less robust form of protection from punishment. As observed by Basch,<sup>237</sup> such an approach is not dissimilar to the "criminal law of the enemy" of Jakobs.<sup>238</sup> Yet, this model, based on the idea that not all human beings possess the dignity of humanity, is very far from a liberal model of criminal law, as well as from the concept of human rights as rights of every man and woman.

At the same time, the gravity of harm caused and the seriousness of the abuses committed in the context of grave human rights violations is not helping to maintain the primacy of the accused's rights. The temptation is to apply the medieval principle "*in atrocissimis licet iudici iura transgredi*".<sup>239</sup> The statement in *Opuz*, where the ECtHR underlined that 'in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity',<sup>240</sup> appears to go in this direction.<sup>241</sup> However, the rights of the defendant should be protected regardless of the gravity of the harm in question, and, when not absolute, balanced with competing rights and interests, but they must never be suspended. Every individual, whatever the allegation of crime, is entitled to equal rights when facing criminal trial. Ultimately, the risk is not just of weakening the position of the accused, but of jeopardising the core function of human rights as shield and shelter against the arbitrariness of power.

<sup>231</sup> Seibert-Fohr (n 14) 284.

<sup>232</sup> *La Cantuta* (n 103) para 149.

<sup>233</sup> *Almonacid Arellano* (n 105) para 151; *G.I.E.M. S.r.l. and Others v Italy* App Nos.1828/06, 34163/07, 19029/11 (ECtHR [GC], 28 June 2018) para 260.

<sup>234</sup> Sorochinsky (n 9) 209.

<sup>235</sup> Tittlemore (n 79) 449–460, who welcomes this trend as a positive way to advance accountability for serious crimes.

<sup>236</sup> Simón, Julio Héctor y otros s/privación ilegítima de la libertad, Supreme Court, causa No. 17.768, (14 June 2005) S.1767.XXXVIII.

<sup>237</sup> Basch (n 11) 218.

<sup>238</sup> Günther Jakobs 'On the Theory of Enemy Criminal Law' in Markus D. Dubber (eds) *Foundational Texts in Modern Criminal Law* (OUP 2014). Jakobs theorises two models of criminal law: one, provided for "citizens", is characterised by all the fundamental principles of criminal law; the other, devised for the most dangerous criminals, considers the latter as "enemies" that do not deserve any protection.

<sup>239</sup> For a critique, Beccaria (n 257) 29.

<sup>240</sup> *Opuz* (n 163) para 147.

<sup>241</sup> Lazarus (n 131) 153.

### C. Disregarding the Principle of Subsidiarity

The second reason of concern is that, as long as prosecutions and punishments are presented as unquestionably positive methods of human rights protection, the conceptualisation of criminal law as *ultima ratio* may cease to have relevance.<sup>242</sup> The indisputable ideal, that human rights violations do not go unanswered, may become questionable if accountability and justice are limited to criminal punishment.<sup>243</sup> Throughout their case-law, both the ECtHR and the IACtHR have maintained that criminalisation of certain abuses is required to effectively secure certain human rights.<sup>244</sup> In particular, from this jurisprudence there emerges an endorsement of criminal-law mechanisms – as opposed to other forms of legal regulation – as a means of deterring future crimes, promoting the rule of law and restoring public confidence in government, as well as providing justice to the victims. As shown by Engle, ‘the correspondence between criminal prosecution and human rights has become so ingrained that expressing opposition to any particular international prosecution is sometimes seen as anti-human rights’.<sup>245</sup> In this context, the principle of subsidiarity of the criminal law finds it difficult to resist such impulses of criminalisation that arise from the human rights framework.<sup>246</sup>

The principle that criminal law must be regarded as a last resort is one of the fundamental pillars of a liberal model of criminal law.<sup>247</sup> It postulates that criminal law should only be applied if less intrusive measures are inadequate to achieve the aims of security.<sup>248</sup> This principle is based on the recognition that criminal law entails the harshest restrictions on individual liberties and, therefore, it should be employed with restraint.<sup>249</sup> Its practical application presumes that, before resorting to criminal law, an evaluation should be carried out in order to ascertain whether criminal law should be applied or if less intrusive measures (including civil reparations, loss of rank and monetary fines) would be sufficient.<sup>250</sup>

However, should human rights bodies consider criminal law as the only adequate method for addressing serious human rights violations, any different form of accountability is excluded.<sup>251</sup> Yet, if we accept that finding those responsible for abuses, preventing future crimes, restoring the rule of law and giving redress are the goals to be pursued with a view to human rights protection, it appears that, beside criminal prosecution, there are other possible means, including civil trials,<sup>252</sup> truth and reconciliation commissions (TRCs), and other non-legal measures (such as legislative reparations, public inquiries, transparency, and the politics of commemoration).<sup>253</sup>

Actually, as argued by Aukerman, the superiority of criminal law in pursuing those aims is controversial and, rather, in most cases prosecution and punishment ‘have no clear advantages over other mechanisms’.<sup>254</sup> Criminal trials are focused on individual cases and inevitably fail to investigate the roots of systematic abuses as a bigger social phenomenon. In this regard, TRCs are more suitable institutions, being a forum for discussion and confrontation between victims and offenders. Moreover, economic, political, social, and cultural factors are to be taken into account whilst assessing the efficiency of criminal law in comparison to other measures. Clearly, what works well in one country might not work as well in others. It is for this reason that the resorting to criminal law at the international level might be especially problematic without a careful examination of its local suitability.<sup>255</sup>

Ultimately, instead of accepting uncritically that serious human rights abuses are to be addressed primarily through criminal law, human rights bodies should first look at the specifics of the case to determine which measures are adequate and necessary to secure effectively the rights at issue. Penal instruments might indeed prove to be necessary, but a compelling justification is constantly needed for their employment.

<sup>242</sup> Piet Hein van Kempen, ‘Four Concepts of Security—A Human Rights Perspective’ (2013) 13 Human Rights Law Review 23, 19.

<sup>243</sup> Drumbl (n 221) 181.

<sup>244</sup> See, e.g., the position of the courts on amnesties.

<sup>245</sup> Engle (n 2) 42.

<sup>246</sup> Manacorda (n 131) 241.

<sup>247</sup> Jareborg (n 24).

<sup>248</sup> Husak (n 49) 217.

<sup>249</sup> Jareborg (n 24) 89.

<sup>250</sup> Iwona Seredyńska, *Insider Dealing and Criminal Law* (Springer 2012) 207.

<sup>251</sup> van Kempen (n 242) 19; Jackson (n 176) 17.

<sup>252</sup> Drumbl (n 221) 195 argues that ‘[t]ort, contract, and restitution implicate involved masses more effectively by permitting more carefully calibrated measurements of degrees of responsibility beyond the scarlet letter of guilt’.

<sup>253</sup> Ibid 194–204 (suggesting that encouraging multiple forms of accountability through diverse legal and extra-legal modalities could be a better way to promote justice in the aftermath of atrocities rather than ordinary criminal law-mechanisms).

<sup>254</sup> Aukerman (n 210) 91–92.

<sup>255</sup> Soroichinsky (n 9) 211.

Most importantly, such justification cannot only be built upon the gravity of the offence or the importance of the rights violated, but also upon the actual need for criminal law in concrete cases.<sup>256</sup>

#### **D. Enhancing the State's Coercive Power**

Another cause for concern arises regarding the future application of the human rights courts' doctrine on penal obligations within domestic systems. In particular, when human rights bodies impose on states duties to resort to criminal law, human rights protection is advanced to demand more criminalisation and, ultimately, more coercive power on the part of the state.<sup>257</sup> Yet, criminal law is the most disruptive instrument a state can apply against individuals.<sup>258</sup> Therefore, should the call for penal measures not properly balance the need to fulfil the rights of individuals at harm whilst safeguarding the perpetrators' rights of defence, there is a serious risk of justifying the state's arbitrariness through the very same IHRL. In other words, the potential for the state to exploit the doctrine on positive obligations in order to enhance its power to the detriment of individuals' autonomy becomes high.<sup>259</sup>

Security legislation that has been adopted all around the world in the aftermath of the 9/11 attacks clearly illustrates the potential for negative spill-overs in requiring states to adopt coercive protective measures.<sup>260</sup> In particular, the right to security and the correlated duty to protect people's lives have been employed to justify increasing police power, to allow complete surveillance over citizens, and to authorise indefinite detention without trial.<sup>261</sup> Similarly, the idea of human rights security through criminal law might offer domestic authorities the opportunity to invoke human rights in defence of various penal measures that restrict freedom.<sup>262</sup> Encouraging states to make more extensive use of penal measures might have troublesome consequences especially (but not only) in young and fragile democracies where there is a history of abuses committed by public authorities in their alleged fight against crime and terrorism. As noted by some authors, the 'risk of coercive overreach' is already high both in Latin-American and European countries.<sup>263</sup> Engle reports, for instance, that, in the wake of the international pressure on the Mexican government to prosecute those responsible for the murders of some women in Ciudad Juárez, the state authorities arrested and detained a number of innocent people, and also tortured them to coerce confessions.<sup>264</sup> As a matter of fact, an uncritical invocation of criminal justice could mean in practice large-scale incarceration, harsher punishments and wider powers to arrest and detain suspects. Conversely, criminal justice reform initiatives, directed at implementing alternatives to prison and humanising imprisonment, risk being completely neglected.

Human rights have long served to protect the individual from governmental interference. Ironically, here the situation is reversed: IHRL end up legitimising and even requiring the use of the most intrusive forms of governmental interference.<sup>265</sup> That is not to say that the intervention of the state may not be advisable and even necessary to secure fundamental rights.<sup>266</sup> Yet, such intervention should not violate, or appear to violate, the very essence of human rights.<sup>267</sup> Therefore, any extension of the state's power needs to be adequately justified and carefully pondered, and not simply triggered by the finding of a positive obligation.

#### **E. The End of a Liberal Model of Criminal Law?**

The resort to criminal law in securing human rights protection that emerges throughout the jurisprudence of human rights bodies is a prime example of the new, offensive role of human rights in criminal justice. However, the emergence of the latter function appears to be accompanied by a general weakening of the traditional, defensive role of human rights in relation to criminal punishment. While the IACtHR is clearly moving in this direction, the ECtHR's approach, though not yet reaching the OAS bodies' levels, is taking the

<sup>256</sup> *MC* (n 74) (concurring opinion of Judge Tulkens).

<sup>257</sup> Pastor (n 11).

<sup>258</sup> van Kempen (n 242) 16.

<sup>259</sup> Lazarus (n 131) 149–153.

<sup>260</sup> See, generally, Giorgio Agamben, *State of Exception* (University of Chicago Press 2005); Brad Evans, *Liberal Terror* (Polity Press 2013).

<sup>261</sup> Agamben (n 260) 3; Andrew Ashworth, 'Criminal Law, Human Rights and Preventive Justice' in McSherry, Norrie, Bronitt (eds), *Regulating Deviance* (Hart Publishing 2009) 89–90.

<sup>262</sup> van Kempen (n 242) 19.

<sup>263</sup> Lazarus (n 131) 148, referring to the case of *R v G* [2008] UKHL 37 in the UK; Tittmore (n 79) 449–460.

<sup>264</sup> Engle (n 2) 47.

<sup>265</sup> van Kempen (n 241) 19.

<sup>266</sup> Fredman (n 30).

<sup>267</sup> Sorochinsky (n 9) 212.

European Court along a similarly problematic path.<sup>268</sup> Alongside this, one wonders whether human rights bodies are abandoning a liberal model of criminal justice to embrace a more authoritarian approach.

The very concept of human rights, permeated by the idea of limiting the state's power, has always prompted liberal models of criminal justice, and human rights bodies had long been the leading supporter of defensive criminal-law policies.<sup>269</sup> A liberal system of criminal justice (also known as defensive<sup>270</sup> or due process model)<sup>271</sup> is based on the idea that criminal repression should be constrained in respect of the autonomy of the individuals who are subject to the system.<sup>272</sup> Therefore, principled restraints and compelling justifications on criminalisation and on the infliction of punishment are to be provided.<sup>273</sup>

Many scholars have elaborated theories on limiting the reach of criminal law. Feinberg's work on the harm principle as a limit to criminalisation is one of the most familiar examples.<sup>274</sup> Inspired by JS Mill,<sup>275</sup> Feinberg established that liberal democracies ought to criminalise behaviours only if they are harmful to others. Yet, harm is not sufficient: in order to resort to criminal law, there should also not be 'other means that [are] equally effective at no greater cost to other values'.<sup>276</sup> Another influential doctrine is the German *Rechtsgut* ("legally protected good") theory.<sup>277</sup> On the base of this theory, a state can properly apply criminal law against behaviours that violate a determined *Rechtsgut*. According to Roxin, the only *Rechtsgüter* worthy of criminal-law protection are the personal freedoms mentioned in the Constitution.<sup>278</sup> The harm principle, but also the *Rechtsgut*, acts as justifications for the state's ability to criminalise and punish, as well as marking the scope for the greatest possible expansion of criminal law within liberal states.<sup>279</sup> It should be stressed that such principles serve as a limitation and not as a driver of criminal law.

Another important constraint is that human rights must be respected.<sup>280</sup> Three fundamental principles are put to work: necessity (restrictions to human rights are to be necessary to prevent harm), subsidiarity (less intrusive measures should be assessed as inadequate), and proportionality (criminal measures must be equally and proportionately applied to the actor's wrongdoing).<sup>281</sup> These principles, along with due process rights, are also what give legitimacy to criminal trials and convictions. Indeed, the failure to adhere to such safeguards may contribute to the perception that criminal justice is unfair and arbitrarily exercised.<sup>282</sup> Finally, in a penal system embracing liberal principles, the punishment of an individual can never be a means to pursuing other goals, including the well-being of other persons or the solving of emerging social problems.<sup>283</sup>

While a liberal system conceives criminal law as a 'necessary evil'<sup>284</sup> that can be employed only as *ultima ratio*, the jurisprudence of all human rights bodies increasingly shows an opposite trend towards a conceptualisation of criminal justice as the pivotal remedy for gross human rights violations. In this regard, the liberal model of a criminal law justified *only* when directed to prevent "harm to others" is moving to the idea that criminal law *must always* intervene in protection of fundamental rights. Paradoxically, the "harm principle" ends up promoting rather than restraining the application of criminal law.<sup>285</sup>

To a limited degree, authoritarian traits are visible throughout the jurisprudence of human rights bodies. Firstly, human rights bodies' prime concern in relation to criminal justice is the efficiency of the penal system

<sup>268</sup> Mavronicola (n 16) 1037.

<sup>269</sup> This approach is the result of the recognition that criminal law inevitably interferes with certain fundamental rights. Farkhanda Zia Mansoor, 'Reassessing Packer in the Light of International Human Rights Norms' (2005) 4 Connecticut Public Interest LJ 262, 265–266.

<sup>270</sup> Jareborg (n 24) 21.

<sup>271</sup> Hebert L. Packer, 'Two Models of Criminal Process' (1964) 113 University of Pennsylvania Law Review 1.

<sup>272</sup> Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 Leiden Journal of International Law 925, 926.

<sup>273</sup> Husak (n 49) 207.

<sup>274</sup> Feinberg (n 23).

<sup>275</sup> John Stuart Mill, *On Liberty* (Kitchener 2001).

<sup>276</sup> Joel Feinberg, *The Moral Limits of the Criminal Law, Vol.4: Harmless Wrongdoing* (OUP 1988) XIX.

<sup>277</sup> The notion was coined by Birnbaum and afterwards developed by Binding, von Jhering and von Liszt (Seredyńska (n 250) 192).

<sup>278</sup> Claus Roxin, *Strafrecht: Allgemeiner Teil I* (CH Beck 2003) 15.

<sup>279</sup> Domenico Pulitandò, 'Diritti Umani e Diritto Penale' in Massimo Meccarelli Paolo Palchetti, Carlo Sotis (eds) *Il lato oscuro dei Diritti umani* (Carlos III University of Madrid 2014) 95.

<sup>280</sup> Horder (n 38) 76.

<sup>281</sup> Ashworth (n 261) 102.

<sup>282</sup> Aukerman (n 210) 49.

<sup>283</sup> Jareborg (n 24) 23–24; Douglas Husak, *Philosophy of Criminal Law* (OUP 1987). This principle is based on Kant's theory that it is immoral to use another person merely as a means to an end.

<sup>284</sup> Bentham (n 25) 179.

<sup>285</sup> Manacorda (n 131) 339.

in preventing crime.<sup>286</sup> Notably, when criminal justice systems are criticised, this is usually because they are not efficient enough in ensuring the identification and punishment of the offender. Despite the insistence of the ECtHR that the duty to punish is ‘not an obligation of result but of means’,<sup>287</sup> as Sorochinsky correctly highlights, ‘the test for the effectiveness involves, to a large extent, considering whether the desired result has been or could have been achieved’.<sup>288</sup>

Another clear example of the “illiberal” traits of human rights bodies is the tendency to make the accused’s prosecution and punishment a clear object lesson. Notably, in *Öneryildiz* and *Ramsahai* the enforcement of criminal law against the perpetrators served for the ECtHR the didactic function of protecting the fundamental values of society.<sup>289</sup> Yet, here the Court forgets that the punishment of an individual cannot be used as a mere instrument to protect society and enhance its welfare.<sup>290</sup> This form of instrumentalism is particularly problematic when the pursuit of the aim comes to justify the choice of means, including the reduction of the accused’s rights to due process.<sup>291</sup>

The same might occur due to the increasing focus on maximising victims’ rights.<sup>292</sup> This approach, though laudable at first sight, is scarcely justifiable from a liberal point of view if it culminates in narrowing defence rights and expanding criminal liability.<sup>293</sup> Of particular concern, then, is the IACtHR’s doctrine on victims’ right to punish that results in treating the accused as an object in its pursuit of victims’ redress. Moreover, in banning almost every type of amnesty law, human rights bodies show great confidence in the use of criminal law and in the deployment of its powers with little restraint, what Pastor has described as the “renewed messianic belief” that punitive power can and should reach all corners of social life.<sup>294</sup> This attitude completely forgets the liberal disfavour for the criminal law and the recognition that every penal measure inevitably interferes with fundamental rights.<sup>295</sup> However, what is most ironic is that such “illiberal” stances arrive in a liberal guise, that of IHRL, and thus are easily welcomed into the system, raising only few criticism. Yet, in doing so, an authoritarian conception of criminal law emerges from IHRL, leaving little room for containing principles and the protection of the accused’s autonomy.

## V. Conclusion

While IHRL’s prime function had long been that of restraining the state’s power in order to avoid abuses against human autonomy and dignity, in recent years a new function has tended to emerge: human rights are the driving force of the state’s penal power. The traditional defensive role of human rights in criminal justice, which has contributed to loosening the arbitrary application of the criminal law, risks being put aside to make way for a new human rights mandate: the criminalisation, prosecution and punishment of attacks on fundamental rights.

Human rights bodies are the very protagonists of this shift in IHRL. They have made criminal law the main instrument of human rights protection, by imposing on states positive obligations to criminalise, prosecute and punish, as well as by prohibiting acts of criminal clemency for gross human rights violations. Despite some differences within the jurisprudence of different bodies, human rights bodies all share the assumption that criminal law is a necessary tool to advance the promoting and safeguarding of human rights.

Yet, this is not free of implications. In particular, human rights bodies have generally advanced unjustified optimism regarding criminal law and criminal punishment as a means to ensure human rights protection. However, the failure to justify the resort to penal measures might have negative consequences. Firstly, decisions invoking the duty to exercise penal power against perpetrators might foster a “culture of conviction” at the domestic level, where limitations on due process guarantees for criminal defendants may be the price to be paid to protect victims from human rights abuses and ensuring accountability. Secondly, uncritical reliance on criminal measures as the optimal approach to ensure human rights accountability risks undermining the conception of criminal law as a last resort, as well as ruling out more adequate alternative to criminal trials. Moreover, the risk is real that the doctrine of positive obligation may be exploited by national

<sup>286</sup> E.g. *Kiliç* (n 144) para 62; *Sathasivam* (n 194) para 6.4.

<sup>287</sup> *Malik Babayev* (n 168) para 80.

<sup>288</sup> Sorochinsky (n 9) 186.

<sup>289</sup> *Öneryildiz* (n 153) para 96; *Ramsahai* (n 166) para 325.

<sup>290</sup> Hart (n 48) 77–78.

<sup>291</sup> *Opuz* (n 162) para 147; *Almonacid Arellano* (n 105) para 151.

<sup>292</sup> E.g. *Durand and Ugarte* (n 89); *Nikolova and Velichkova* (n 132); *Sathasivam* (n 194).

<sup>293</sup> E.g. *La Cantuta* (n 103) para 149.

<sup>294</sup> Pastor (n 11).

<sup>295</sup> Sorochinsky (n 9) 205.



authorities to enhance their coercive power, thus making state abuses more likely. Ultimately, the shift toward an offensive function of human rights in criminal justice may be resulting in an overturning within the liberal model of criminal law. While the “harm principle” begins promoting – instead of restraining – the application of criminal law, there is the risk that emerging authoritarian tendencies will be covered by the human rights veil.

What remains to be asked is whether the expansive dynamics of positive obligations in criminal matters is leading to an irreversible overturning of the relationship between human rights and criminal law, or whether the punitive wishes stemming from the jurisprudence of human rights bodies are nothing but further evidence of the fundamental ambiguity that has always characterised criminal law: aimed at protecting the right to security, it culminates in limiting other fundamental rights such as privacy and personal liberty. Several elements support the second scenario. Punitive wishes have always been present in liberal democracies, where the fundamental principles of criminal law have constantly been in tension with other societal aims, including the reduction of crime. A real liberal system of criminal justice has always been nothing more than an “ideal-type” in a Weberian sense.<sup>296</sup> Yet, the situation analysed in this article is new because the threats to the liberal model of criminal law do not come from the usual quarters. They come from human rights bodies that traditionally have a moderating influence on states’ punitive policies. Also, they come hidden behind the morality of human rights language. This makes them less visible and more devious than a threat from “law-and-order” politicians or crime control advocates.

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The author has no competing interests to declare.

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<sup>296</sup> Max Weber, ‘Objectivity in Social Science and Social Policy’ in Edward Shils and Henry A. Finch (eds and trans), *The Methodology of the Social Science* (Free Press 1949) 90.

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