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To Sarah, for all the love and support.

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 the States responsible.

Velásquez Rodríguez v Honduras Merits Judgment of 29 July 1988 Series C No 4 para 134.

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List of Abbreviations

AbCHR	Arab Charter on Human Rights
ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter)
ACHR, Convention	American Convention on Human Rights (Pact of San José)
American Declaration	American Declaration on the Rights and Duties of Man
CAT Committee	United Nations Committee Against Torture
CAT	United Nations Convention Against Torture
CFR	Charter of Fundamental Rights of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
IAComHR, Commission	Inter-American Commission on Human Rights
IACtHR, Court	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
OAS	Organization of American States
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Committee

Introduction

Assuming that human rights are a legitimate goal to be pursued and that international and regional human rights bodies are adequate instruments for this purpose, one may ask how far those bodies can go in order to fulfil their mandate of protecting human rights. That question is the common thread of this master thesis, which analyses how criminal punishment has been used to protect human rights and what are the consequences of such approach.

Although focused on the Inter-American Court of Human Rights (hereinafter IACtHR or Court) and its particularities, this thesis does not ignore the bigger picture. Instead, it uses the example of the Inter-American system to bring the discussion to a broader level.

In this sense, the first chapter offers an overview of the Inter-American system of human rights protection, with focus on how the particular characteristics of the region influenced the creation and the development of the Inter-American Commission on Human Rights (hereinafter IAComHR or Commission) and the IACtHR. The system's context is very relevant to comprehend its current structure and functioning.

The second chapter is dedicated to the case law of the IACtHR. After explaining the main characteristics of the Court's jurisprudence (subchapter 2.1.), it selects several cases from different decades in which criminal law was used by the IACtHR as a response to human rights violations (subchapter 2.2.). The thesis does not make an exhaustive analysis of the Court's jurisprudence, but rather checks a sample of cases and, based on that, answers if the case law of IACtHR has a punitive approach to human rights (subchapter 2.3.). Furthermore, chapter two also explains how the use of criminal law by the IACtHR affects the human rights of persons accused of committing human rights violations and how it has a counterproductive effect in the human rights protection system as a whole (subchapter 2.3.).

Lastly, the third chapter takes the discussion from the regional level to a more general perspective. It demonstrates how the punitive trend observed in the case law of the IACtHR is not an exclusive regional problem, but part of a global trend that is most forcefully expressed in the jurisprudence of the IACtHR (subchapter 3.1.). The last chapter is also dedicated to further discuss, still in a broader perspective, the shift occurred in the relation between human rights and criminal law over the last decades (subchapter 3.2.) and the consequences of this punitive trend for human rights and for domestic legal systems (subchapter 3.3.). Finally, using examples from the IACtHR, it indicates possible alternative responses to human rights violations, potentially able to tackle their root causes in a more effective manner than simply demanding criminal punishment (subchapter 3.4.).

In order to do so, the main research methods of this thesis are the analysis of the IACtHR caselaw and the pertinent legal documents, especially the American Convention on Human Rights, as well as the study of literature existent on the topic.

1. The Inter-American System of Human Rights Protection

Regional systems of human rights protection are not, and should not necessarily be, identical. From the moment of their creation, regional systems are influenced by the context of the region in which they are placed and moulded to tackle the particular human rights challenges faced by specific States.

In fact, the existence of a reduced number of States in a specific global region with cultural similarities, shared values and history, makes it easier to reach the political consensus necessary for the creation of regional human rights treaties and monitoring mechanisms¹ and can positively contribute to better compliance, especially when compared to global systems.²

Thus, before diving into the analysis of the IACtHR's case law, particularly of cases in which the Court used criminal law as a response to human rights violations, it is necessary to comprehend the context in which the Inter-American System of Human Rights Protection was created and has so far been developed. This context has a direct influence on the Court's structure, functioning and, most importantly for this thesis, on its specific approaches to protect human rights.

1.1. Context of the Inter-American System Creation and Development

Some scholars indicate 1826 as the first relevant year in the history of the Inter-American system due to the Panamá Congress, pointed out as a landmark of the period that preceded the creation of the regional system.³ However, for the purpose of this chapter it is more relevant to go directly to April 30, 1948, when the Charter of the Organization of the American States (hereinafter OAS) was signed in Bogotá, Colombia, during the Ninth International Conference of American States.⁴

The original version of the OAS Charter already included some 'general human rights provisions', although it did not define specific rights 'nor did it establish any procedures to

¹ Rhona K M Smith, *Textbook on international human rights* (5th ed, Oxford University Press 2012) 87.

² Christof Heyns and Frans Viljoen, 'An Overview of International Human Rights Protection in Africa' (1999) 15 S Afr J on Hum Rts 421, 423. Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 Eur J Int'l L 101, 106.

³ Thomas Buergenthal, Robert E Norris and Dinah Shelton, *Protecting Human Rights in the Americas* (3rd ed, International Institute of Human Rights 1990) 1-3. Caio Paiva and Thimotie A Heemann, *Jurisprudência Internacional de Direitos Humanos* (3rd ed, Editora CEI 2020) 521-522.

⁴ General information of the OAS Charter, < https://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp > accessed 26 May 2022.

ensure their implementation'.⁵ On the same Conference was adopted, by resolution, the American Declaration of the Rights and Duties of Man (hereinafter American Declaration), a non-binding document that contains not only civil and political rights, but also economic, social, and cultural rights,⁶ including even a right to seek and receive asylum (Article XXVII). Although initially non-binding, nowadays the American Declaration is 'considered as regional customary law'.⁷

Together, the OAS Charter and the American Declaration were 'the sole, albeit rather weak, legal basis for the protection of human rights by the OAS'⁸ and constituted the initial steps taken towards the setting of a regional human rights protection system. Contradictorily, though, among the first twenty-one signatories of the OAS Charter,⁹ twelve States had authoritarian regimes,¹⁰ four were considered semi-democratic,¹¹ and only four had democratic regimes.^{12 13} The system was thus being created by a majority of authoritarian States which, as such, did not have a real interest in protecting human rights.

The next relevant step was taken in 1959, during the Fifth Meeting of Consultation of Ministers of Foreign Affairs, in Santiago, Chile, with the adoption of the Resolution VIII, that created the Inter-American Commission on Human Rights.¹⁴ The Commission became a reality already in the next year, 1960, when the OAS Council created the Commission's Statute and elected its first seven members.^{15 16} Originally, the IAComHR had more basic functions such as raising

⁵ Thomas Buergenthal, 'The Revised OAS Charter and the Protection of Human Rights' (1975) 69 Am J Int'l L 828. For Buergenthal the most important provision was Article 5 (j), according to which 'the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex.'

⁶ Thomas Buergenthal, *ibid* 829. Christina Binder, 'The Inter-American Human Rights System' in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241.

⁷ Christina Binder, *ibid*.

⁸ Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 Am J Int'l L 783, 794.

⁹ The charter was originally signed by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay and Venezuela.

¹⁰ Namely Bolivia, Costa Rica, Dominican Republic, El Salvador, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.

¹¹ Argentina, Colombia, Cuba and Guatemala.

¹² Brazil, Chile, Ecuador and Uruguay.

¹³ The categories and classification used here were created by Scott Mainwaring and Aníbal Pérez-Liñán based on criteria regarding how people accessed and exercised political power (elections and government appointments), the existence of checks and balances mechanisms, the exercise of civil liberties, and civilian control, opposed to military control. Scott Mainwaring and Aníbal Pérez-Liñán, *Democracies and Dictatorships in Latin America* (Cambridge University Press 2013) 63-68. The United States of America is not included in this study.

¹⁴ Thomas Buergenthal, 'The Revised OAS Charter and the Protection of Human Rights' (1975) 69 Am J Int'l L 828, 829.

¹⁵ Thomas Buergenthal, *ibid*.

¹⁶ First members of the Commission: Gabino Fraga (México, 1960-1979), Manuel B Gundián (Chile, 1960-1976), Durwood V Sandifer (Estados Unidos, 1960-1972), Angela A de Chacón (Costa Rica, 1960-1972), Gonzalo Escudero (Ecuador, 1960-1968), Reynaldo G Pohl (El Salvador, 1960-1964) and Rómulo Gallegos (Venezuela,

awareness about human rights in the region, making recommendations to member States' governments, and preparing studies and reports (according to Article 9 of its Statute).¹⁷ At this point (1960) the OAS Charter had not been signed by any new State and from the original twenty-one signatories – all of which had already ratified the Charter – eight still had authoritarian regimes.¹⁸

The most important developments in the regional system, which brought it closer to the current format, happened over the next two decades. In 1965 the Commission's powers were extended to encompass, for example, the examination of individual communications regarding specific rights provided by the American Declaration and the annual submission of reports to the OAS General Assembly.¹⁹ In 1967 the OAS Charter was revised through the adoption of the Protocol of Buenos Aires. Besides transforming the Commission in one of the main organs of the OAS, which enhanced its relevance, the revised Charter determined the elaboration of a regional convention on human rights²⁰ and was, thereby, the responsible for establishing 'a treaty-based Inter-American system for the promotion and protection of human rights.'²¹ Two years later, in November of 1969, the American Convention on Human Rights (Pact of San José, Costa Rica, hereinafter ACHR or Convention) was adopted and open for signatures.²² Among the first twelve signatories,²³ half had authoritarian regimes in 1969.²⁴

The Convention finally entered into force on July 18, 1978, after being ratified by the eleventh State²⁵ (Article 74 (2) ACHR) and, with that, the Inter-American Court of Human Rights was formally created (Articles 52-69 ACHR). The official inauguration of the Court occurred in 1979, after its first judges were elected.²⁶

This apparent progress, however, did not reflect accurately the human rights situation of the

1960-1963). IAComHR, < <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/mandato/composicion.asp#3> > accessed 31 May 2022.

¹⁷ Thomas Buergenthal, 'The Revised OAS Charter and the Protection of Human Rights' (1975) 69 Am J Int'l L 828, 830.

¹⁸ Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Mexico, Nicaragua and Paraguay. Scott Mainwaring and Aníbal Pérez-Liñán, *ibid* 67-68.

¹⁹ Thomas Buergenthal, *ibid* 831-832.

²⁰ *ibid* 833-834.

²¹ *ibid* 836.

²² OAS, general information of the ACHR < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm > accessed 27 May 2022.

²³ Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panamá, Paraguay, Uruguay and Venezuela. OAS, *ibid*.

²⁴ El Salvador, Guatemala, Honduras, Nicaragua, Panamá, Paraguay. Scott Mainwaring and Aníbal Pérez-Liñán, *ibid* 67-68.

²⁵ First ratifications: Costa Rica (2 March 1970), Colombia (28 May 1973), Honduras (5 September 1977), Haiti (14 September 1977), Ecuador (8 December 1977), Dominican Republic (21 January 1978), Guatemala (27 April 1978), Panama (08 May 1978), El Salvador (20 June 1978), Peru (12 July 1978) and Grenada (14 July 1978). OAS, general information of the ACHR, *ibid*.

²⁶ IACtHR < <https://www.corteidh.or.cr/historia.cfm> > accessed 27 May 2022.

region at the time, when fourteen Latin-American States were under authoritarian regimes.²⁷ In fact, it was very contradictory, especially when compared to the creation of the European system of human rights protection, as explains Flávia Piovesan:

Differently from the European regional system, which had as inspirational source the inseparable triad of Rule of Law, Democracy and Human Rights, the Inter-American regional system has in its origin the paradox of being born in a highly authoritarian environment, which did not allow any direct and immediate connection between Democracy, Rule of Law and Human Rights.^{28 29}

While the European system represented a step further in the consolidation of human rights, rule of law and democracy, the creation of the Inter-American system seemed a disguise to hide, or at least try to hide, the regional context of ‘authoritarian regimes, mass atrocities, and violent human rights violations, such as massacres in indigenous communities and prisons, as well as widespread forced disappearances of political dissidents.’³⁰

Summed with huge ‘economic disparities between’ and within States,³¹ a high level of social exclusion,³² the existence of specific vulnerable groups, as the indigenous populations, and a very conservative society,³³ this was the context in which the Inter-American system was created and developed,³⁴ which explains some of its current peculiarities, especially in the

²⁷ In 1979 Argentina, Brazil, Chile, Cuba, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay had authoritarian regimes. Scott Mainwaring and Aníbal Pérez-Liñán, *ibid* 67-68.

²⁸ Flávia Piovesan, ‘Inter-American Human Rights System: Transformative impact, jurisdictional dialogs and challenges of reform’ (2014) 6 RECHTD 142, 143-144 translated by the author from Portuguese.

²⁹ On the same topic: ‘At the time, the membership of the European Convention consisted mainly of Western European democracies with relatively strong economies and political systems based on the rule of law and human rights. This was in sharp contrast to the situation prevailing in the Americas, where a majority of countries had never really known democracy and where poverty, corruption, and discrimination were rampant.’ Thomas Buergenthal, ‘New Upload - Remembering the Early Years of the Inter-American Court of Human Rights’ (2005) 37 NYU J Int’l L & Pol 259, 275.

³⁰ James L Cavallaro and Stephanie E Brewer, ‘Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court’ (2008) 102 Am J Int’l L 768, 774.

³¹ Christina Binder, ‘The Inter-American Human Rights System’ in Manfred Nowak, Karolina M Januszekski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241.

³² Flávia Piovesan, ‘Inter-American Human Rights System: Transformative impact, jurisdictional dialogs and challenges of reform’ (2014) 6 RECHTD 142, 143.

³³ The conservatism of the region can be observed, for example, on Article 4 (1) of the ACHR, which reads ‘1. Every person has the right to have his life respected. This right shall be protected by law and, in general, **from the moment of conception**. No one shall be arbitrarily deprived of his life.’ (ACHR, emphasis added). According to Buergenthal, ‘[d]elegates from Latin America’s overwhelmingly Catholic countries insisted on this provision during the drafting of the Convention.’ Thomas Buergenthal, ‘The Evolving International Human Rights System’ (2006) 100 Am J Int’l L 783, 796.

³⁴ ‘Extremes of poverty and wealth contributed to political instability in the Inter-American system. Misery, injustice, and exploitation were endemic. Not surprisingly, social and economic oppression gave rise to political oppression and to human rights violations.’ Jo M Pasqualucci, *The Practice and Procedure of the Inter-American*

Court's case law, which is the focus of this thesis. In fact, the Court's 'very broad interpretation of its own competences'³⁵ and standards of review, and the far-reaching scope of its decisions, including very detailed orders of reparations and little, if any, margin of appreciation on the execution of its judgments, are a response to 'the Latin American context of serious human rights violations, weak national institutions and fragile democracies.'³⁶ And the use of criminal law to address human rights violations, more specifically the imposition of an obligation to punish alleged perpetrators, sometimes regardless of legal obstacles, is part of this response.

1.2. The Inter-American Commission on Human Rights

The functioning of the IACtHR cannot be properly comprehended without an overview of the IAComHR. Since the revision of the OAS Charter in 1967 (Protocol of Buenos Aires)³⁷ the IAComHR is one of the OAS main organs,³⁸ designated to 'promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.'³⁹ The Charter, however, does not detail the Commission's structure, competences, or procedure, leaving this to the ACHR.⁴⁰ Currently, the IAComHR is regulated by the ACHR (Articles 34 to 51), the Commission's Statute,⁴¹ and the Rules of Procedure.⁴²

The IAComHR is integrated by seven members of 'high moral character and recognized competence in the field of human rights'^{43 44} who are elected by the OAS General Assembly

Court of Human Rights (2nd ed, Cambridge University Press 2013) 4.

³⁵ Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203, 1208.

³⁶ *ibid* 1205.

³⁷ 'The amended OAS charter entered into force on February 27, 1970'. Thomas Buergenthal, 'The Revised OAS Charter and the Protection of Human Rights' (1975) 69 Am J Int'l L 828.

³⁸ Article 53 of the OAS Charter. The other organs are the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the General Secretariat, the Specialized Conferences, and the Specialized Organizations.

³⁹ Article 106 of the OAS Charter.

⁴⁰ *ibid*.

⁴¹ According to Article 39 of the ACHR, the Commission was responsible for elaborating its own Statute, which would then be submitted to the approval of the OAS General Assembly. The approval came with the Resolution 447 OAS GA, in October of 1979. < https://www.oas.org/36ag/english/doc_referencia/Estatuto_CIDH.pdf > accessed 31 May 2022.

⁴² Rules of Procedure of the IAComHR, approved by the Commission at its 109^o special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions, held from October 7 to 25, 2002. < https://www.oas.org/xxxvga/english/doc_referencia/Reglamento_CIDH.pdf > accessed 21 May 2022.

⁴³ Article 34 of the ACHR and Article 2 of the Commission's Statute.

⁴⁴ Current members of the IAComHR: Julissa M Falcón (Peru, 1 January 2020 – 31 December 2023), Edgar S R Orellana (Guatemala, 1 January 2020 – 31 December 2023), Margarette M Macaulay (Jamaica, 1 January 2016 – 31 December 2023), Esmeralda A de Troitiño (Panama, 1 January 2016 – 31 December 2023), Joel H García (Mexico, 1 January 2018 – 31 December 2025), Roberta Clarke (Barbados, 1 January 2022 – 31 December 2025)

from a list of candidates proposed by the member States. As the Commission is not an inter-governmental organ, its members act in their personal capacity and represent all member States of the OAS.⁴⁵ The Commission's members are elected for a term of four years with only one possible re-election, and countries are not allowed to have more than one national citizen in the Commission at the same time.⁴⁶

The Commission is seated in Washington, D.C.,⁴⁷ and holds 'at least two regular periods of sessions per year'⁴⁸ with a quorum of an absolute majority of its members. It is empowered to 'develop awareness of human rights' in the region, 'make recommendations' to governments regarding human rights, prepare studies or reports, request information from governments, provide advisory services related to human rights, submit annual reports to the OAS General Assembly, 'conduct on-site observations' and propose its own budget to the OAS General Secretary.⁴⁹ Although the Commission cannot issue binding recommendations or decisions, it does have a relevant role to the system. During its countries visits to elaborate reports, for example, the Commission 'has discovered torture chambers and disappeared persons' and it 'has also succeeded in obtaining the repeal of objectionable laws through its reports'.⁵⁰ As those powers are related to all OAS member States⁵¹ and independent of the ACHR, the Commission's reports were an important tool to pressure States which had not yet ratified the ACHR 'to improve their human rights conditions'.⁵²

Regarding States which did not ratify the ACHR, the Commission is entitled to 'pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration', examine communications,⁵³ request information and make recommendations, as long as the domestic remedies were exhausted, condition which must be verified by the Commission.⁵⁴ According to Article 25 of its Rules of Procedure the Commission can also request States to 'adopt precautionary measures', which does not depend

and Carlos B Pulido (Colombia, 1 January 2022 – 31 December 2025) < <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/mandato/composicion.asp#1> > accessed 31 May 2022.

⁴⁵ Articles 35 and 36 of the ACHR and Articles 2 and 3 of the Commission's Statute.

⁴⁶ Article 37 of the ACHR and Articles 6 and 7 of the Commission's Statute.

⁴⁷ Article 16 of the Commission's Statute.

⁴⁸ Article 14 of the Commission's Rules of Procedure.

⁴⁹ Article 41 of the ACHR and Article 18 of the Commission's Statute.

⁵⁰ Dinah Shelton, 'Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights' (1988) 3 Am U J Int'l L & Pol'y 323, 327.

⁵¹ Christina Binder, 'The Inter-American Human Rights System' in Manfred Nowak, Karolina M Januszcwski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241, 242.

⁵² Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 Am J Int'l L 783, 795.

⁵³ The communications can be presented in format of petitions by '[a]ny person or group of persons or nongovernmental entity' according to Article 23 of the Commission's Rules of Procedure.

⁵⁴ Article 20 of the Commission's Statute.

on the exhaustion of the domestic remedies.⁵⁵ In 2002, for example, the IAComHR ‘granted precautionary measures in favour of the detainees at Guantanamo Bay, requesting the United States to take the “urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal”’.⁵⁶ More recently, on May 8, 2022, the IAComHR granted a precautionary measure to avoid the execution of a prisoner in the United States.^{57 58}

On the other hand, for the States which did ratify the ACHR,⁵⁹ the Commission has broader powers. In addition to the powers explained above, it can examine petitions regarding alleged violations of the ACHR, represent cases before the IACtHR (if the States accepted the Court’s jurisdiction under Article 62 ACHR), request the IACtHR to grant provisional measures (also depending on the acceptance of the Court’s jurisdiction), consult the IACtHR about the interpretation of the ACHR and other human rights treaties, and submit draft protocols to the ACHR to the OAS General Assembly.⁶⁰

Most importantly, since the ‘institutional structure of the American Convention is modeled on that of the European Convention as originally drafted, that is, before its Protocol No 11 entered into force’,⁶¹ the Commission is the only entrance door for the contentious jurisdiction of the IACtHR. Although the Commission and States Parties to the ACHR are allowed to submit cases to the Court, this can only happen after the completion of the procedures before the Commission.⁶² During these procedures the Commission must verify the admissibility criteria and, in case the application is admissible, help the parties to reach a friendly settlement if there is interest in such agreement, carry out investigations, collect oral or written statements,

⁵⁵ Caio Paiva and Thimotie A Heemann, *Jurisprudência Internacional de Direitos Humanos* (3rd ed, Editora CEI 2020) 424.

⁵⁶ Brian D Tittmore, ‘Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle against Terrorism’ (2006) 6 Hum Rts L Rev 378.

⁵⁷ IAComHR Resolution 22/2022, Precautionary Measure No 331-22 Clarence Wayne Dixon v the United States of America 10 May 2022. < https://www.oas.org/en/iachr/decisions/mc/2022/res_22-22_mc_331-%2022_us_en.pdf > accessed 1 June 2022.

⁵⁸ The USA did not comply with the measure and carried out the death penalty. IAComHR, < https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/115.asp > accessed 1 June 2022.

⁵⁹ Up to 1 June 2022, Antigua y Barbuda, Bahamas, Belize, Canada, Guiana, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines and the United States did not ratify the ACHR. Trinidad & Tobago ratified the Convention in 3 April 1992 but denounced it on May of the same year. OAS, < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm > accessed on 1 June 2022.

⁶⁰ Article 19 of the Commission’s Statute, Articles 41 and 45 of the ACHR and Chapter II of the Commission’s Rules of Procedure.

⁶¹ Thomas Buergenthal, ‘The Evolving International Human Rights System’ (2006) 100 Am J Int’l L 783, 796.

⁶² Article 61 of the ACHR. The current rules regarding which cases can or must be referred to the Court are explained below on subchapter 1.3.

elaborate reports and make recommendations.⁶³ And even when a case is presented before the Court by a State based on Article 45 of the ACHR, the Commission also necessarily participates on the procedure.⁶⁴

Differently from the European system,⁶⁵ upon ratification of the ACHR States automatically accept that ‘[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization’ may submit complaints about violations of the ACHR to the Commission⁶⁶ – *actio popularis* –, while inter-States complaints are optional.⁶⁷ Up to June 6, 2022, Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Nicaragua, Peru, Uruguay and Venezuela⁶⁸ had accepted the Commission’s competence to receive and examine inter-States complaints, but this procedure has rarely been used in the Inter-American system.⁶⁹

1.3. The Inter-American Court of Human Rights

The IACtHR is a part-time Court composed since its inauguration by only seven judges^{70 71} who are elected by an absolute majority of votes of the States Parties to the Convention from a

⁶³ Article 46 through Article 51 of the ACHR.

⁶⁴ Article 57 ACHR.

⁶⁵ Flávia Piovesan, *Direitos humanos e o direito constitucional internacional* (14th ed, Saraiva 2013) 333. Thomas Buergenthal, ‘The Inter-American Court of Human Rights’ (1987) 2 Conn J Int’l L 303, 309.

⁶⁶ Article 44 of the ACHR.

⁶⁷ Article 45 of the ACHR.

⁶⁸ Venezuela denounced the ACHR on 10 September 2012, but it deposited a new instrument of ratification on 31 July 2019, recognizing the Commission’s competence under Article 45 of the ACHR. < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm > accessed on 6 June 2022.

⁶⁹ ‘As Farer accurately predicted, to date interstate complaints have been rare. Only two interstate complaints have been filed in the Inter-American system. The Nicaraguan complaint against Costa Rica was found to be inadmissible, but the Commission found the claim by Ecuador against Colombia to be admissible.’ Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013) 116. The author refers to the Inter-state Case 01/06 Nicaragua v Costa Rica Report No 11/07 (2007) and the Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina (Ecuador-Colombia) Report No 112/10 (21 October 2010).

⁷⁰ In June 2022 the IACtHR was integrated by Judge Ricardo C Pérez Manrique (President), from Uruguay; Judge Humberto Antonio Sierra Porto (Vice President), from Colombia; Judge Eduardo Ferrer Mac-Gregor Poisot, from Mexico; Judge Nancy Hernández López, from Costa Rica; Judge Verónica Gómez, from Argentina; Judge Patricia Pérez Goldberg, from Chile; and Judge Rodrigo Mudrovitsch, from Brazil. IACtHR, < <https://www.corteidh.or.cr/composicion.cfm> > accessed 6 June 2022.

⁷¹ Buergenthal criticizes the reduced number of the judges not only because of the workload, but also because most States rarely ‘have an opportunity to interact with the Court except when their governments are parties to a case. This lack of interaction between these governments and the Court, and between national judges and international judges, cannot help but affect the interest and confidence of the governments and their judicial institutions in the Court.’ Thomas Buergenthal, ‘New Upload - Remembering the Early Years of the Inter-American Court of Human Rights’ (2005) 37 NYU J Int’l L & Pol 259, 279.

list of candidates ‘of the highest moral authority and recognized competence in the field of human rights’ proposed by the same States.⁷² The judges act in their personal capacity and can be nationals of any OAS member State, even if the State did not ratify the ACHR.⁷³ But there cannot be two judges of the same State.⁷⁴ They serve a six-year term with one possible re-election.

Paradoxically born in an authoritarian regional context, the IACtHR did not have an easy beginning, especially because countries which did not ratify the ACHR had a voice in determining the Court’s destiny:

In 1979, most of South America – including Brazil, Argentina, Paraguay, Bolivia, Chile, and Uruguay – was either in the hands of military regimes or controlled by them. With the exception of democratic Costa Rica, the situation in Central America was not much better, nor in neighboring Panama, Haiti, or the Dominican Republic. Mexico’s then so called ‘democracy’ was also not favorably disposed to human rights or international human rights institutions. Yet, all of these countries had a vote in deciding on the contents of our Statute and our budget, despite the fact they had not even ratified the Convention.⁷⁵

In fact, the first elected judges,⁷⁶ who took office in 1979, were responsible for drafting the Court’s Statute and proposing its first budget. However, these propositions had to be approved by the OAS General Assembly,⁷⁷ where ‘non-democratic states’ hindered the possibility of the IACtHR be a full-time Court and blocked the adoption of a budget.⁷⁸ The two first regular meetings of the Court were only possible due to financial support from Costa Rica and ‘an emergency appropriation from the OAS’.⁷⁹ The Court also depended on the good will of Costa Rica to establish its headquarters, which since then is in the capital San José,⁸⁰ and to grant the

⁷² Article 52 through Article 55 of the ACHR.

⁷³ The Court already had judges from the United States (Thomas Buergenthal, 1979 – 1991) and Jamaica (Margarette May Macaulay (2007 – 2012); and Huntley Eugene Munroe (1979–1985)), States which did not ratify the ACHR < [corteidh.or.cr/docs/composiciones/composiciones.pdf](https://www.corteidh.or.cr/docs/composiciones/composiciones.pdf) > accessed 7 June 2022.

⁷⁴ Article 52 (2) of the ACHR.

⁷⁵ Thomas Buergenthal, ‘New Upload - Remembering the Early Years of the Inter-American Court of Human Rights’ (2005) 37 NYU J Int’l L & Pol 259, 262.

⁷⁶ Judge Rodolfo Piza Escalante (President), from Costa Rica; Judge Juez Máximo Cisneros Sánchez (Vice president), from Peru; Judge Huntley Eugene Munroe, from Jamaica; Judge César Ordóñez Quintero, from Colombia; Judge Carlos Roberto Reina, from Honduras; and Judge Thomas Buergenthal, from the United States. < <https://www.corteidh.or.cr/docs/composiciones/composiciones.pdf> > accessed 6 June 2022.

⁷⁷ Article 60 of the ACHR.

⁷⁸ Thomas Buergenthal, ‘New Upload - Remembering the Early Years of the Inter-American Court of Human Rights’ (2005) 37 NYU J Int’l L & Pol 259, 263-264.

⁷⁹ *ibid* 263.

⁸⁰ *ibid* 263.

judges ‘full diplomatic protection even if they incurred the displeasure of their own governments’, which well illustrates the context of tension and fear created by regional dictatorial regimes.⁸¹

To date the IACtHR has contentious jurisdiction over twenty-one of the thirty-five OAS member States⁸² and advisory jurisdiction over all of them.⁸³

The Court’s advisory jurisdiction is not the focus of this thesis, however, it is worth mentioning, since it has an impact on the Court’s workload and exemplifies some specificities of the Inter-American system. The advisory jurisdiction is prescribed by Article 64 of the ACHR. In this area the IACtHR has a ‘vastly broader’ competence than the European Court of Human Rights (hereinafter, ECtHR).⁸⁴ While the latter can only issue advisory opinions ‘on legal questions concerning the interpretation of the [European] Convention and the Protocols thereto’ when requested by the Committee of Ministers, the first can be consulted by any member State and any main organ of the OAS about the interpretation of the ACHR or ‘other treaties concerning the protection of human rights in the American states.’^{85 86} In other words, the IACtHR can, if requested to do so, issue advisory opinions regarding any human rights treaty, as long as it was ratified by an American State (interpretative advisory opinion).⁸⁷ Besides, the Court can also be consulted to say if domestic laws are in accordance with specific human rights treaties⁸⁸ (compatibility advisory opinion).⁸⁹

The contentious jurisdiction of the IACtHR is limited to States which not only ratified the

⁸¹ *ibid* 264.

⁸² Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay and Venezuela. The Court’s annual report of 2021 mentions only twenty States, excluding Venezuela, that denounced the ACHR on September 10, 2012. < <https://www.corteidh.or.cr/docs/informe2021/portugues.pdf> > accessed 7 June 2022. However, Venezuela deposited a new instrument of ratification on July 31, 2019, accepting the Court’s jurisdiction < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm > accessed 7 June 2022.

⁸³ Christina Binder, ‘The Inter-American Human Rights System’ in Manfred Nowak, Karolina M Januszcwski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241, 243.

⁸⁴ Gerald L Neuman, ‘Import, Export, and Regional Consent in the Inter-American Court of Human Rights’ (2008) 19 *Eur J Int’l L* 101, 102.

⁸⁵ Article 64 (1) of the ACHR.

⁸⁶ ‘In the first Advisory Opinion (1982), the Court stressed the specificity of the instruments of international protection of human rights and the wide scope of its advisory faculty. The Court was of the opinion that its advisory jurisdiction could “be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have a right to become parties thereto”’ Antonio A C Trindade, ‘The Developing Case Law of the Inter-American Court of Human Rights’ (2003) 3 *Hum Rts L Rev* 1, 2.

⁸⁷ Caio Paiva and Thimotie A Heemann, *Jurisprudência Internacional de Direitos Humanos* (3rd ed, Editora CEI 2020) 450-453.

⁸⁸ Article 64 (2) of the ACHR.

⁸⁹ Caio Paiva and Thimotie A Heemann, *ibid* 453-454.

ACHR but also expressly admitted the Court's jurisdictions, since it is not automatic upon ratification.⁹⁰ It is also possible that States accept the Court's jurisdiction to rule on specific cases.⁹¹ The IACtHR has jurisdiction 'on all matters relating to the interpretation or application' of the ACHR⁹² and it is specifically on the Court's contentious case law that the use of criminal law and a demand of punishment as a response to human rights violations can be more strongly observed, as addressed below on chapter two. Besides the Convention, the Court also has jurisdiction over other regional treaties, as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'),⁹³ the Inter-American Convention on Forced Disappearance of Persons,⁹⁴ the Inter-American Convention to Prevent and Punish Torture⁹⁵ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ('Convention of Belém do Pará').⁹⁶ Within its contentious jurisdiction the Court can also adopt provisional measures '[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'.⁹⁷

Initially, the Court was forcibly focused on its advisory jurisdiction because States and even the IAComHR were unwilling 'to utilize the Court as a means to decide individual human rights cases' (contentious jurisdiction).⁹⁸ In fact, until 2001 it did not exist clear and objective rules regarding what cases should be referred to the Court by the Commission, which 'exercised full discretionary control' over this matter⁹⁹ and, due to rivalry, 'refused to refer contentious cases to the Court'¹⁰⁰ for almost a decade.¹⁰¹ A modification on the Rules of Procedure of the IAComHR in 2001 changed this situation.¹⁰² Since then the Commission must refer to the Court

⁹⁰ Article 52 of the ACHR.

⁹¹ Article 62 (2) of the ACHR.

⁹² Article 62 (1) of the ACHR.

⁹³ According to its Article 19 (6).

⁹⁴ According to its Article XIII.

⁹⁵ According to its Article 8. This provision does not mention the IACtHR specifically, but 'international fora whose competence has been recognized by that State'.

⁹⁶ According to its Article 12.

⁹⁷ Article 63 (2) of the ACHR.

⁹⁸ Dinah Shelton, 'Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights' (1988) 3 Am U J Int'l L & Pol'y 323, 328-329.

⁹⁹ James L Cavallaro and Stephanie E Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 Am J Int'l L 768, 780.

¹⁰⁰ Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 Eur J Int'l L 101, 103. According to Neuman, 'The long-established Commission did not welcome a new Court that might impair its autonomy and undermine its prestige.'

¹⁰¹ 'The Commission did not forward contentious cases to the Court until 1986, seven years after the Court's inception.' Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013) 6.

¹⁰² About this subject: Thomas Buergenthal, 'New Upload - Remembering the Early Years of the Inter-American

every case in which the State has not complied with the Commission's recommendations, except if 'there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.'¹⁰³ This reform has 'more than doubled the number of cases sent to the Court each year'.^{104 105}

When compared to the ECtHR, with its forty-seven full-time judges,¹⁰⁶ the numbers of the IACtHR are very low. In 2021 the ECtHR decided 36.092 applications, with a backlog of 70.150 pending applications on 31 December 2021.¹⁰⁷ On the same period the IACtHR received 40 new cases and issued 27 sentences,¹⁰⁸ with 63 pending applications on 31 December 2021.¹⁰⁹ Although these numbers are much lower than the European ones, for seven judges in a part-time Court they are still quite high, especially considering that the IACtHR also holds court hearings (19), oversees the execution of its own judgements (258), orders provisional measures (22) and issues advisory opinions (2).¹¹⁰ On the other hand, however, they do not adequately reflect, in terms of quantity, the human rights situation of the region, as most of the violations occurred will never reach the Court. In terms of budget there is also a huge gap between the two systems. In 2021 the IACtHR received a total of US\$ 8,329,573.40,¹¹¹ while the ECtHR had a budget of € 73,062,000.00.¹¹²

The challenge of the Court on the last decades, therefore, has been to adapt itself in order to enhance the human rights situation on the region despite its financial and structural deficits, the low number of judges, the increasing number of cases (although still far for representing the amount of human rights violations in the region) and non-compliance of States with its

Court of Human Rights' (2005) 37 NYU J Int'l L & Pol 259, 278. Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 Am J Int'l L 783, 797. Flávia Piovesan, *Direitos humanos e o direito constitucional internacional* (14th ed, Saraiva 2013) 333.

¹⁰³ Article 44 (1) of the Rules of Procedure of the IAComHR.

¹⁰⁴ James L Cavallaro and Stephanie E Brewer, *ibid* 780.

¹⁰⁵ In 2001 the Court's Rules of Procedure were also modified to allow victims to appear before the Court and plead their cases, without excluding the indispensable participation of the Commission. Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 Am J Int'l L 783, 796-797. Judge Cançado Trindade was an advocate for the victim's right to participate on the procedures before the IACtHR and considered this modification a legacy of his, 'an acquired conquest, which no one can undermine in the future'. Lauri R Tanner, 'Interview with Judge Antonio A Cancado Trindade, Inter-American Court of Human Rights' (2009) 31 Hum Rts Q 985, 991.

¹⁰⁶ Composition of the ECtHR < <https://echr.coe.int/Pages/home.aspx?p=court/judges&c=> > accessed 7 June 2022.

¹⁰⁷ ECtHR Statistics 2021 < https://echr.coe.int/Documents/Stats_annual_2021_ENG.pdf > accessed 7 June 2022.

¹⁰⁸ 24 on Preliminary Objections, Merits and Reparations and 3 on interpretation.

¹⁰⁹ IACtHR annual report 2021 < <https://www.corteidh.or.cr/docs/informe2021/portugues.pdf> > accessed 7 June 2022.

¹¹⁰ Numbers of 2021, according to the Court's annual report.

¹¹¹ US\$ 5,024.000,00 (60.32%) from the OAS, US\$ 899,657.13 (10.80%) from voluntary contributions of member States, namely Costa Rica and Mexico, and US\$ 2,405,916.27 (28.88%) from international cooperation projects. < <https://www.corteidh.or.cr/docs/informe2021/portugues.pdf> > accessed 7 June 2022.

¹¹² Council of Europe Programme and Budget 2020-2021 < <https://rm.coe.int/1680994ffd> > accessed 7 June 2022.

judgments.¹¹³ For that, the Court has resorted to some creative solutions, including demanding the imposition of criminal sanctions despite the existence of domestic and even international legal obstacles, which ultimately can jeopardize the very human rights that should be protected by the Court.

¹¹³ There are judgments from the 1990's and 2000's which are still under supervision, waiting for execution. IACtHR annual report 2021 < <https://www.corteidh.or.cr/docs/informe2021/portugues.pdf> > accessed 7 June 2022. Regarding Brazil, for example, there are judgements of cases related to the dictatorship period (ended in 1985) which are still not complied with (case *Gomes Lund and other (Guerrilha do Araguaia) v Brazil* and case *Herzog and other v Brazil*).

2. The Case Law of the Inter-American Court of Human Rights

This chapter does not intend to present an exhaustive analysis of the Court's case law since its creation, but rather to select and study a sample of cases in which the IACtHR resorted to criminal law to solve cases of human rights violations. To avoid an outdated conclusion and to verify whether there is a permanent pattern or an evolution on the case law, judgments from different years were selected. Before that, however, this chapter will also briefly expose some of the main characteristics of the Court's jurisprudence, which are related to the specificities of the region.

2.1. Main Characteristics of the Court's Case Law

Despite the few cases it decides every year – disproportionate to the reality of human rights violations in the Americas –, the IACtHR is considered to have a 'crucial role for human rights protection'¹¹⁴ in the region, which is a result of 'its creativity and its innovative approaches to human rights protection.'¹¹⁵

This creativity and innovation can be observed, for instance, on the fact that the Court took for itself the duty to supervise the execution of its own judgments,¹¹⁶ 'which is not provided for in the Convention'.¹¹⁷ This demonstrates the Court's lack of confidence in the Governments to voluntarily fulfil its obligations and also in the political will of the OAS to address this matter. Instead of simply reporting the non-compliance to the OAS General Assembly (Article 65 ACHR), the Court keeps a very detailed supervision mechanism of the execution of its judgments. Only in 2021 the IACtHR held 14 hearings related to 17 cases at monitoring

¹¹⁴ Christina Binder, 'The Inter-American Human Rights System' in Manfred Nowak, Karolina M Januszekowski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241, 243.

¹¹⁵ *ibid.* About the creativity of the Court Judge Cançado Trindade declared: 'I think that the judgments of an international tribunal do have a pedagogical sense as well. It's not only a matter of settling a dispute, and I emphasize this point: it's also a matter of saying "what the law is." ... Also the concept of the judicial function is different from one judge to another. For instance, there are some judges who think that it's only a matter of applying the law. **There are other judges who say it is also a matter of creating the law. I absolutely support a more creative role of an international case law, of an international human rights tribunal.**' Lauri R Tanner, 'Interview with Judge Antonio A Cancado Trindade, Inter-American Court of Human Rights' (2009) 31 Hum Rts Q 985, 1000-1001 emphasis added.

¹¹⁶ Christina Binder, *ibid.* 244. Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 Am J Int'l L 1, 9-10.

¹¹⁷ Lauri R Tanner, *ibid.* 994. According to the Court's annual report of 2021, the supervision of the execution of its judgments 'constitutes one of the most demanding activities of the Court, since it faces a constant increase of cases on this phase'. IACtHR annual report 2021 < <https://www.corteidh.or.cr/docs/informe2021/portugues.pdf> > accessed 7 June 2022.

compliance stage and issued 47 monitoring compliance resolutions.¹¹⁸

Furthermore, the Court ‘considerably’ extends its standard of review beyond the ACHR, considering international human rights instruments and ‘even soft law standards (*e.g.* the UN Guiding Principles on Internal Displacement) when examining whether a violation’ of human rights has happened.¹¹⁹

The Court’s jurisprudence is also characterized by an ‘extensive interpretation of substantive human rights’¹²⁰ provided for in the ACHR, which can be an important tool to protect specific vulnerable groups of the region. In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, for example, the Court concluded that Article 21 of the ACHR (right to property)¹²¹ includes the ‘right to communal property’¹²² of Indigenous communities, giving special consideration to the particular relations existent between these groups and their lands:

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.¹²³

Another important innovation of the Court is observed in its amnesty jurisprudence. Instead of ordering States ‘to amend or repeal deficient legislation’ – more specifically amnesty laws that violated the ACHR –, the Court simply declared that such laws had no effect *ab initio* and

¹¹⁸ IACtHR annual report 2021 < <https://www.corteidh.or.cr/docs/informe2021/portugues.pdf> > accessed 15 June 2022.

¹¹⁹ Christina Binder, ‘The Inter-American Human Rights System’ in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241, 243-244.

¹²⁰ *ibid* 243.

¹²¹ ‘1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.’

¹²² Antonio A C Trindade, ‘The Developing Case Law of the Inter-American Court of Human Rights’ (2003) 3 *Hum Rts L Rev* 1, 15.

¹²³ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Merits Reparations and Costs Judgment of 31 August 2001 Series C No 79. This argumentation can also be observed, for example in *Xákmok Kásek Indigenous Community v Paraguay* Merits Reparations and Costs Judgment of 24 August 2010 Series C No 214 paras 85-87.

should, thus, not be applied.¹²⁴ Thereby the Court does not give any margin of appreciation for States to decide how to better adapt their legislation to the ACHR and how to implement the judgments according to their domestic contexts.

Moreover, the Court also created a ‘decentralised conventionality control’,¹²⁵ according to which domestic tribunals must refrain from applying laws that contravene the ACHR and its interpretation made by the IACtHR, as decided in *Almonacid Arellano et al v Chile*:

The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.¹²⁶

The IACtHR is also known for its ‘considerable powers to order reparations’¹²⁷ under Article 63 (1) of the ACHR,¹²⁸ which include very detailed instructions concerning how exactly its judgments should be implemented by the States. Those orders can go from more general ‘public acts or ceremonies in which the State acknowledges responsibility for the human rights violations and issues a public apology’ to very specific ‘measures such as building memorials or naming schools after the victims to commemorate them’.¹²⁹ Pasqualucci argues that the

¹²⁴ Christina Binder, ‘The Inter-American Human Rights System’ in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241, 244.

¹²⁵ *ibid.*

¹²⁶ *Almonacid Arellano et al v Chile* Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 para 124.

¹²⁷ Christina Binder, *ibid* 244.

¹²⁸ ‘If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.’

¹²⁹ Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013) 204.

Court is specific enough to orientate the State but still grants a margin of appreciation regarding the judgments' implementation.¹³⁰ However, there seems to be very little margin of appreciation for the State when the Court demands, for example, the construction of a memorial or naming schools to commemorate victims. Another common form of reparation ordered by the Court is for the State to investigate, prosecute and punish the perpetrators of human rights violations. This is the meeting point of human rights and criminal law that will be discussed below, especially because of the potential consequences of such orders to the human rights of the alleged perpetrators, which should also be protected by the Court.

On one hand, these specific characteristics of the IACtHR's innovative case law indeed contributed to outweigh its reduced caseload and to enhance human rights despite the regional challenges discussed above, as acknowledged by scholars.¹³¹ On the other hand, however, they also trigger criticisms for lacking 'a firm legal basis in the ACHR' and considerably restricting 'domestic authorities (legislators and courts in particular) in their choice of how to best give effect to the ACHR at the national level, which raises legitimacy concerns as regards domestic decision-making.'¹³² The conventionality control, for example, is applied 'irrespective of the status of international treaties in those States' constitutions and laws'.¹³³ In fact, judicial activism, punitivism and supranationalisation have been pointed out as 'the main characteristics of the IACHR's case law of recent years'. They can be described as follows:¹³⁴

The first refers to judicially modifying laws with the goal of updating them to suit current social needs, (needs that are obviously identified by judges themselves). The second essentially has to do with the recognition of new rights for the victim (and new rules deriving from those rights) that are not provided for in the ACHR, and that ultimately nullify fundamental rights of the accused explicitly guaranteed in the ACHR. The third alludes to interference by the IACHR, through its judgements on reparations, with the

¹³⁰ *ibid.*

¹³¹ Flávia Piovesan, 'Inter-American Human Rights System: Transformative impact, jurisdictional dialogs and challenges of reform' (2014) 6 RECHTD 142, 153-154. Christina Binder, 'The Inter-American Human Rights System' in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (ed), *Vienna Manual on Human Rights* (Wien Graz NWV 2012) 241, 243-245. Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203, 1229. Antonio A C Trindade, 'The Developing Case Law of the Inter-American Court of Human Rights' (2003) 3 Hum Rts L Rev 1, 24-25.

¹³² Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203, 1218.

¹³³ Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013) 218.

¹³⁴ Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 Int'l Crim L Rev 665, 668.

functions of the national levels of the judiciary, legislature and executive, which clearly leads to an undermining of state sovereignty.¹³⁵

Bearing in mind that these three characteristics are interconnected and mutually influence each other, this thesis focuses on the punitive approach of the Court and its consequences. In this sense, the next subchapter selects cases in which this specific approach can be observed and offers an overview of how the Court uses criminal law as a response to human rights violations.

2.2. Human Rights and Criminal Law – Selected Jurisprudence

According to Judge Cançado Trindade already on the first contentious cases where a violation of the right to life was found (*Velásquez Rodríguez v Honduras* and *Godínez Cruz v Honduras*),¹³⁶ the Court ‘elaborated on the triple duty of the States Parties to prevent, investigate and punish’ human rights violations.^{137 138} Both cases referred by Cançado Trindade are related to a situation of systematic human rights violations that took place during the period from 1981 to 1984, when ‘100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again’.¹³⁹ In *Velásquez Rodríguez* (1988) as well as in *Godínez Cruz* (1989) the Court found a violation of Articles 7 (right to personal liberty), 5 (right to humane treatment) and 4 (right to life) of the Convention, all of them in conjunction of Article 1 (1) thereof (obligation to respect rights).¹⁴⁰ According to the IACtHR Article 1 (1) of the ACHR imposes to States the duty to prevent human rights violations and, when failing to do so, to investigate them and punish the perpetrators:

The State has a legal duty to take reasonable steps to prevent human rights violations and

¹³⁵ *ibid.*

¹³⁶ *Velásquez Rodríguez v Honduras* Merits Judgment of 29 July 1988 Series C No 4 (first contentious case decided by the IACtHR). *Godínez Cruz v Honduras* Merits Judgment of 20 January 1989 Series C No 5.

¹³⁷ Antonio A C Trindade, ‘The Developing Case Law of the Inter-American Court of Human Rights’ (2003) 3 *Hum Rts L Rev* 1, 9.

¹³⁸ Lauri R Tanner, ‘Interview with Judge Antonio A Cancado Trindade, Inter-American Court of Human Rights’ (2009) 31 *Hum Rts Q* 985, 1001.

¹³⁹ *Velásquez Rodríguez v Honduras* Merits Judgment of 29 July 1988 Series C No 4 para 147. *Godínez Cruz v Honduras* Merits Judgment of 20 January 1989 Series C No 5 para 153.

¹⁴⁰ Although the judgments refer to enforced disappearance, the Inter-American Convention on the Forced Disappearance of Persons had not been adopted at this point. This Convention was adopted only on 9 June 1994 and entered into force on 28 March 1996. < <https://www.oas.org/juridico/english/sigs/a-60.html> > accessed 20 June 2022.

to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

[...]

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.¹⁴¹

Therefore, besides the negative obligation not to interfere with the rights to life, to personal liberty, to humane treatment, and to any other civil and political right provided for in the ACHR, States also have positive obligations to prevent, investigate and punish violations of such rights, which is done mainly through criminal law. The criminalization of behaviours that violate human rights are supposed to have a general deterrent effect – prevention –, while the actual punishment of human rights violators should have a punitive (retributive) and a special deterrent effect to avoid recidivism.

The Court also established in these two cases that when 'there is uncertainty about the fate of the person who has disappeared' the State must investigate it and take all the necessary and possible measures to determine the person's fate and to inform his/her family, '[e]ven in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished'¹⁴² anymore. This is a very important passage of the judgement, as it asserts the need for investigation in such cases, but without disregarding the possibility that the perpetrator might not be held accountable due to legal obstacles, even in cases of systematic human rights violations. Curiously, however, after finding a violation of Articles 7, 5 and 4 of the ACHR, all of them in conjunction of Article 1 (1) thereof, the Court just ordered the payment of a compensation, which was the only measure required by the Commission, and not the investigation of the facts or the punishment of the responsible.¹⁴³

¹⁴¹ *Velásquez Rodríguez v Honduras* ibid paras 174-176. Those paragraphs are reproduced in *Godínez Cruz v Honduras* ibid paras 184 and 187.

¹⁴² *Velásquez Rodríguez v Honduras* ibid para 181. *Godínez Cruz v Honduras* ibid para 191.

¹⁴³ *Velásquez Rodríguez v Honduras* ibid paras 109-192. *Godínez Cruz v Honduras* ibid paras 200-201. 'Perhaps because it had in mind a clear distinction between itself and a criminal court and because it had little faith in the

Nevertheless, this position of respecting legal obstacles to the punishment of human rights violators has changed through time and ‘[i]n the mid-1990s, the Inter-American Court started prescribing states to effectively punish individual perpetrators.’¹⁴⁴ In the case *Caballero-Delgado and Santana v Colombia* (1995),¹⁴⁵ also related to forced disappearance, the Court gave a big step further on the use of criminal law to address human rights violations on the regional level. Building up on the arguments used in *Velásquez Rodríguez* and *Godínez Cruz* concerning Article 1 (1) of the Convention, the IACtHR established that investigating and trying to sanction the persons responsible for the violations are not enough and States must necessarily punish the perpetrators:

[...] Colombia has undertaken a prolonged judicial investigation, not free of defects, to find and sanction those responsible for the detention and disappearance of Isidro Caballero-Delgado and María del Carmen Santana, and those proceedings have not been closed.

[...]. Nevertheless, to fully ensure the rights recognized in the Convention, it is not sufficient that the Government undertake an investigation and try to sanction those guilty; rather it is also necessary that all this Government activity culminate in the reparation of the injured party, which in this case has not occurred.¹⁴⁶

In the instant case, reparations should consist of the continuation of the judicial proceedings inquiring into the disappearance of Isidro Caballero-Delgado and María del Carmen Santana and punishment of those responsible in conformance with Colombian domestic law.¹⁴⁷

Honduran government to investigate the case’. Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law’ (2015) 100 Cornell L Rev 1069, 1082. However, on its decision on reparation and costs the Court stated: ‘in its judgment on the merits (*Velásquez Rodríguez* Case, supra 2, para 181), the Court has already pointed out the Government’s continuing duty to investigate so long as the fate of a disappeared person is unknown (supra 32). The duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible (*Velásquez Rodríguez* Case, supra 2, para. 174). 35. Although these obligations were not expressly incorporated into the resolutive part of the judgment on the merits, it is a principle of procedural law that the bases of a judicial decision are a part of the same. Consequently, the Court declares that those obligations on the part of Honduras continue until they are fully carried out.’ *Velásquez Rodríguez v Honduras* Reparations and Costs Judgment of 21 July 1989 Series C No 7 paras 34-35.

¹⁴⁴ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 Hum Rts Q 729, 756. Karen Engle *ibid*.

¹⁴⁵ *Caballero Delgado y Santana v Colombia* Merits Judgment of 8 December 1995 Serie C No 22.

¹⁴⁶ *Caballero Delgado y Santana v Colombia* Merits Judgment of 8 December 1995 Serie C No 22 paras 57-58.

¹⁴⁷ *ibid* para 69.

Despite making several references to *Velásquez Rodríguez* and *Godínez Cruz* throughout the judgment, the Court clearly contradicts very relevant arguments made on those cases, in which it was held for example that '[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result'.¹⁴⁸ Should that be true, the Court could not find a violation just because the State, after carrying out a proper and due investigation, was not able to punish anyone.

Most importantly, in *Velásquez Rodríguez* and *Godínez Cruz* the Court drew a line between 'criminal justice' and 'international protection of human rights', making it clear that the punitive power of States has, and should have, limits:

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 the States responsible.¹⁴⁹

[...] regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.¹⁵⁰

The Court's conclusion in *Caballero-Delgado and Santana v Colombia* blurred this important line, that has since then not only been overstepped, but actually erased to the point that the IACtHR referred 'to the failure to deploy criminal sanctions as a violation of human rights *per se*'.¹⁵¹

In *Goiburú et al v Paraguay* (2006),¹⁵² another case related to enforced disappearance in the context of a dictatorial regime, the Court elevated the duty to investigate and punish the responsible for forced disappearance to the category of *jus cogens*.¹⁵³ So not only the prohibition of forced disappearance would be *jus cogens* – which is already innovative –, but

¹⁴⁸ *Velásquez Rodríguez v Honduras* Merits Judgment of 29 July 1988 Series C No 4 para 177. *Godínez Cruz v Honduras* Merits Judgment of 20 January 1989 Series C No 5 para 188.

¹⁴⁹ *Velásquez Rodríguez v Honduras* ibid para 134. *Godínez Cruz v Honduras* ibid para 140.

¹⁵⁰ *Velásquez Rodríguez v Honduras* ibid para 154. *Godínez Cruz v Honduras* ibid para 162.

¹⁵¹ Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Hum Rts Q 729, 756.

¹⁵² *Goiburú et al v Paraguay* Merits Reparations and Costs Judgment of 22 September 2006 Serie C No 153.

¹⁵³ 'In brief, the Court finds that, as may be deduced from the preamble to the aforesaid Inter-American Convention [Inter-American Convention on Forced Disappearance of Persons], faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.' *Goiburú et al v Paraguay* ibid para 84.

also the State's obligation to necessarily punish the perpetrators. This *jus cogens* status was praised in the separate opinion of Judge Cançado Trindade,¹⁵⁴ who classified this case as of 'historical transcendence'¹⁵⁵ and highlighted the relevance of the 'process of criminalization of grave violations of human rights' to end impunity.¹⁵⁶

Similarly to *Caballero-Delgado and Santana v Colombia*, in *Goiburú et al v Paraguay* the IACtHR concluded that the investigations and criminal procedures undertaken by the State were not enough, as it 'has not punished all those criminally responsible for the illegal acts'.¹⁵⁷ Therefore, in its very specific, detailed, and extensive reparation orders, which included for example the construction of a '[m]onument in memory of the disappeared victims' located 'in a central and prominent site in Asunción'¹⁵⁸ and 'physical and psychological treatment' for the victims' next of kin,¹⁵⁹ the Court explicitly ordered the State to circumvent all the existing obstacles to criminally sanction the perpetrators:

The Court also recalls that the victims' next of kin have the right, and the States the obligation, to ensure that what happened to the victims is investigated effectively by the State authorities, proceedings are filed against those allegedly responsible for the illegal acts and, if applicable, pertinent penalties are imposed on them. Consequently, the State must take the necessary measures forthwith to activate and conclude effectively, within a reasonable time, the investigation to determine the identity of the masterminds and perpetrators of the acts [...]; and must complete the criminal proceedings that have been instituted. To this end, it must remove all the *de facto* and *de jure* obstacles that maintain impunity and use all available means to expedite the investigation and the respective proceedings and thus avoid a repetition of such serious acts as those examined in the instant case.¹⁶⁰

For the Court, thus, there cannot exist any factual or legal justification able to impede the punishment of human rights violators, which is a very dangerous statement. In fact, if no legal obstacle can stop a conviction in a criminal trial, ultimately someone could even be convicted

¹⁵⁴ *Goiburú et al v Paraguay* ibid Separate Opinion of Judge A A Cançado Trindade paras 62-68.

¹⁵⁵ ibid para 2.

¹⁵⁶ ibid paras 7-8.

¹⁵⁷ *Goiburú et al v Paraguay* Merits Reparations and Costs Judgment of 22 September 2006 Serie C No 153 para 133.

¹⁵⁸ ibid para 177.

¹⁵⁹ ibid para 176.

¹⁶⁰ ibid para 165.

based on illegal evidence.

That was also the base-argument used a few years earlier in the case *Barrios Altos v Peru* (2001),¹⁶¹ when the IACtHR established an absolute prohibition of amnesties laws. Although the case *Barrios Altos* concerned two specific self-amnesties laws, and not just amnesty laws in a broader sense,¹⁶² the Court made some very generic and categorical statements on the need of criminal punishment as a response to human rights violations and the unacceptability of legal obstacles. For the Court, ‘all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment’¹⁶³ of perpetrators of serious human rights violations. Albeit recognizing the legitimacy of amnesty laws – not of self-amnesty laws – and its potential to restore peace, Judge Sergio García-Ramírez stated in his concurring opinion that even those cannot justify ‘the impunity of conduct that most gravely violates the essential legal rights protected by’¹⁶⁴ international human rights law and international criminal law. Moreover, similarly to *Goiburú et al v Paraguay*,¹⁶⁵ Judge García-Ramírez extended this prohibition of impunity beyond amnesties laws and urged States to not apply any other measure that could possibly result in impunity:

The codification of such conduct and the prosecution and punishment of the perpetrators – and other participants – is an obligation of the State, one that cannot be avoided by measures such as amnesty, prescription, admitting considerations that exclude incrimination, and others that could lead to the same results and establish the impunity of acts that gravely violate those primordial legal rights. Thus, extrajudicial executions, the forced disappearance of persons, genocide, torture, specific crimes against humanity and certain very serious human rights violations must be punished surely and effectively at the national and the international level.¹⁶⁶

¹⁶¹ *Barrios Altos v Peru* Merits Judgment of 14 March 2001 Series C No 75.

¹⁶² ‘Amnesty laws are frequently portrayed, generically, as measures to help restore peace or ease the transition to peace. To shed light on this issue, distinctions can and should be made among amnesty laws taking the following relevant factors into account: the circumstances under which they were promulgated, the means by which they were adopted, and their efficacy. Accordingly, a distinction must be made between the so-called “self-amnesty laws” promulgated by and for those in power, and amnesties that are the result of a peace process, with a democratic base and reasonable in scope, that preclude prosecution for acts or behaviors of members of rival factions but leave open the possibility of punishment for the kind of very egregious acts that no faction either approves or views as appropriate.’ *Castillo Páez v Peru* Reparations and Costs Judgment of 27 November 1998 Series C No 43 Concurring Vote of Judge Sergio García-Ramírez.

¹⁶³ *Barrios Altos v Peru* Merits Judgment of 14 March 2001 Series C No 75 para 41.

¹⁶⁴ *ibid* Concurring Opinion of Judge Sergio García-Ramírez para 13.

¹⁶⁵ Para 165 reproduced above.

¹⁶⁶ *Barrios Altos v Peru* Merits Judgment of 14 March 2001 Series C No 75 Concurring Opinion of Judge Sergio

Even though the Court apparently limits, or tries to limit, the application of this understanding to specific and more severe hypotheses, the expression ‘certain very serious human rights violations’ is quite broad and subject to different interpretations. In any case, this prohibition has no legal basis, as the ACHR does not forbid amnesty laws nor the existence of statute of limitations or other legitimate legal obstacles to criminal punishment. Furthermore, this attempt to restrict the prohibition of impunity to graver cases did not last, as *Bulacio v Argentina* (2003)¹⁶⁷ demonstrates.

While *Barrios Altos* referred to the killing of fifteen people and the serious injuring of four others who were shot by members of the Peruvian Army in 1991, on the verge of Alberto Fujimori’s *autogolpe* and subsequent dictatorship, the case *Bulacio v Argentina* referred to a minor who was unlawfully ‘detained by agents of the State, and died one week after his detention’ as a consequence of ill treatment by the police.¹⁶⁸ Bulacio’s detention and death happened in 1991, in the context of a democratic regime.¹⁶⁹ Without diminishing the suffering endured by victims of police violence and the fact that democratic regimes are obviously not sanctuaries of human rights, those cases clearly have different dimensions of human rights violations. An intentional massacre entails graver human rights violations than one non-intentional murder as possible consequence of police violence. However, the same argument used in *Barrios Altos* can be observed in *Bulacio v Argentina*. After saying that the domestic courts were lenient with the defence counsel, who allegedly delayed the proceedings by filing ‘a large number of diverse legal questions and remedies’,¹⁷⁰ resulting in the expiration of the statute of limitations,¹⁷¹ the Court stated that the execution of its judgments can never be hindered by domestic legislation, not even a statute of limitations (extinguishment):

[...] this Court has stated that extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible. [...]

117. In accordance with the obligations undertaken by the States pursuant to the Convention, no domestic legal provision or institution, including extinguishment, can

García-Ramírez para 13.

¹⁶⁷ *Bulacio v Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100.

¹⁶⁸ *ibid* paras 3 and 98.

¹⁶⁹ Scott Mainwaring and Aníbal Pérez-Liñán, *Democracies and Dictatorships in Latin America* (Cambridge University Press 2013) 67.

¹⁷⁰ *ibid* para 113.

¹⁷¹ In the English version of the judgment ‘prescripción’ was translated as ‘extinguishment’.

oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations. If that were not the case, the rights enshrined in the American Convention would be devoid of effective protection.’¹⁷²

In light of the above, it is necessary for the State to continue and conclude the investigation of the facts and to punish those responsible for them.¹⁷³

In his reasoned opinion,¹⁷⁴ Judge Cançado Trindade once again highlighted the importance of punishing the responsible for human rights violations, which would be one of the main forms of *reparatio*.¹⁷⁵ For him, ‘*reparatio* is an unavoidable duty’ and ‘the realization of justice overcomes any and every obstacle’, which justifies the Court’s right and significant decision of ‘making crimes against human rights inextinguishable’.¹⁷⁶

Based on the judgment of *Bulacio v Argentina*, in which the Court explicitly created a rule that is not provided for in the ACHR, every and any violation of human rights must always be necessarily punished,¹⁷⁷ regardless of its seriousness or of when it took place, as they can never be subject to a statute of limitations or any other domestic legal obstacle. In other words, the IACtHR seeks to avoid impunity at any costs, which includes even circumventing guarantees that are traditionally protected by international human rights law, as demonstrated by the following judgments of the Court.

In *Almonacid Arellano et al v Chile* (2006),¹⁷⁸ for example, the Court relativised the principles

¹⁷² *Bulacio v Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100 paras 116-117.

¹⁷³ *ibid* para 121.

¹⁷⁴ There seems to be no pattern on how judges denominate their separate opinions, therefore, this thesis simply reproduces the different denominations used by judges on the cases mentioned (separate opinion, concurring opinion, reasoned opinion, etc).

¹⁷⁵ ‘The Law, issuing from and moved by human awareness, provides *reparatio* (from the Latin *reparare*, “to dispose once again”); it also intervenes to avoid repetition of the wrong, in other words, to establish, as one of the non-pecuniary forms of reparation of damage resulting from violations of human rights, the guarantee of *non-recidivism of the injurious acts*. Said guarantee of non-recidivism already has a definite place among the range of forms of reparation for human rights violations. 36. Its importance is undeniable: it is not by chance that, among the operative paragraphs of the instant Judgment of the Inter-American Court on forms of reparation (ns. 4-13), the first are those pertaining to investigation and punishment of those responsible (n. 4)39 and the guarantee of non-recidivism of the injurious facts (n. 5), before pecuniary reparations (operative paragraphs ns. 7-13).’ *Bulacio v Argentina* *ibid* Reasoned Opinion of Judge A A Cançado Trindade paras 35-36.

¹⁷⁶ *ibid* para 38.

¹⁷⁷ Mykola Sorochinsky, ‘Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law’ (2009) 31 Mich J Int’l L 157, 191.

¹⁷⁸ This case is ‘related to the alleged failure to investigate and punish all those persons responsible for the extra-legal execution of Mr. Almonacid-Arellano, based on the Amnesty Law enacted in Chile by Decree Law No. 2.191 of 1978, as well as to the alleged lack of reparation in favor of his next of kin.’ *Almonacid Arellano et al v*

of *ne bis in idem* and of the non-retroactivity of criminal law, under the argument that the assassination of Mr. Alfredo Almonacid-Arellano was a crime against humanity.¹⁷⁹

The State may not invoke any domestic law or provision to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for Mr. Almonacid-Arellano's death. The Chilean State may not apply Decree Law No. 2.191 again, on account of all the considerations presented in this Judgment, especially those included in paragraph 145. Additionally, the State may not invoke the statute of limitations, the non-retroactivity of criminal law or the *ne bis in idem* principle to decline its duty to investigate and punish those responsible.

152. Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable.¹⁸⁰

Despite recognizing that Chile did not ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,¹⁸¹ the Court still sustained that the State must comply with it, since this is 'a norm of General International Law (*ius cogens*), which is not created by said Convention, but it is acknowledged by it', as the Court

Chile Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 para 3. The application claimed that Chile had violated Articles 8 and 25 of the ACHR in conjunction with Article 1 (1) thereof, as well as Article 2 of the ACHR. It was not argued a violation of Article 4 as the death occurred in 1973, before the State recognized the jurisdiction of the IACtHR, in 1990. Setting aside the State's arguments, the Court decided that it has jurisdiction 'over the facts [...] regarding the transfer of the case to the military courts to the prejudice of the civil courts, and the application of the Amnesty Law in the instant case by the military judicial authorities, as such facts were subsequent to August 21, 1990' (para 49).

¹⁷⁹ The classification of his death as a crime against humanity is a matter that would require a more detailed analysis, since it is not such a clear fact. In his concurring opinion in the case *Gomes Lund et al* ('*Guerrilha do Araguaia*') *v* *Brazil*, judge *ad hoc* Roberto de Figueiredo Caldas stated: 'Similarly, attention should be paid to the role played by the Nuremberg Charter in establishing the elements which characterize crimes against humanity. The existence of an international custom was recognized, as an expression of international law prohibiting such crimes (Case Almonacid, paragraph 96). Unlike in this case, **Almonacid referred to a single attack, thus harder to classify as a crime against humanity, and even so, this Court established the precedent.**' (Emphasis added). However, such debate would escape from this thesis' focus.

¹⁸⁰ *Almonacid Arellano et al v Chile Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 paras 151-152.*

¹⁸¹ Article 1 (b) of this Convention provided that '[n]o statutory limitation shall apply to the following crimes, irrespective of the date of their commission: [...] Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations [...], even if such acts do not constitute a violation of the domestic law of the country in which they were committed.' < https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf > accessed 22 June 2022. Up to 22 June 2022, Chile had not yet ratified Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. United States Treaty Collection, Status of Treaties < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=_en > accessed 22 June 2022.

‘believes’.¹⁸²

Furthermore, the Court stated that the *ne bis in idem* principle ‘is not an absolute right’ and should not be applicable in cases where the trials were used to ‘shield the accused party’, the tribunals were not independent and impartial or there was no ‘real intent’ to carry out justice.¹⁸³

But not only that. For the IACtHR the *ne bis in idem* principal can also be circumvented:

[...] if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, 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 American Convention supersedes the protection of the *ne bis in idem* principle.¹⁸⁴

Although the relativisation of the *ne bis in idem* principle is built on the argument that the death of Mr. Alfredo Almonacid-Arellano was a crime against humanity, the Court’s conclusion is much broader, as it allows the opening of any case of human rights violations – not only of crimes against humanity – upon the appearance of new evidence.

Similarly, in *La Cantuta v Peru* (2006)¹⁸⁵ the Court prohibited the Respondent State to apply not only its amnesty laws, which should ‘produce no effect’,¹⁸⁶ but many rights that are traditional guarantees of criminal defendants against the punitive power of States, such as ‘statute of limitations, non-ex post facto nature of criminal laws or *res judicata* defenses, or rely upon the principle of double jeopardy’.¹⁸⁷ Although the Court notes that the State must ‘punish the guilty parties’ only ‘if appropriate’,¹⁸⁸ it also makes a very general statement vetoing the use of ‘any other similar measure designed to eliminate responsibility in order to escape its duty to investigate and punish those responsible’,¹⁸⁹ which rises serious doubts about when punishment is considered appropriate or not in the Court’s understanding. Also in *La Cantuta v Peru* the Court relativised the principle of reasonableness of the duration of the trial. Albeit recognizing that the proceedings have ‘far exceeded the term that could be considered

¹⁸² *Almonacid Arellano et al v Chile* Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 paras 152-153.

¹⁸³ *ibid* para 154.

¹⁸⁴ *ibid*.

¹⁸⁵ *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162.

¹⁸⁶ *ibid* para 226.

¹⁸⁷ *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162 para 226.

¹⁸⁸ *ibid*.

¹⁸⁹ *ibid*.

reasonable', the IACtHR held that 'the State's duty to wholly serve the purposes of justice prevails over the guarantee of reasonable time'.¹⁹⁰

In the cases *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* (2010)¹⁹¹ and *Gelman v Uruguay* (2011),¹⁹² more recent than those aforementioned, the Court still reinforced the State's duty under Article 1 (1) of the ACHR to investigate and punish persons responsible for human rights violations in general.¹⁹³ Furthermore, the IACtHR sustained its position that not only the prohibition of forced disappearance has reached *jus cogens* status, but also the obligation to investigate and punish the perpetrators.¹⁹⁴ And since both cases are related to forced disappearances that took place during authoritarian regimes in Brazil and Uruguay and were later subject of amnesty laws, the Court held that such laws are not compatible with the American Convention on Human Rights. For the IACtHR, this incompatibility with the ACHR 'includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties"'.¹⁹⁵

On those aspects, there is nothing new on the Court's case law. However, it is possible to observe in these two judgments a subtle change on the Court's language, which shows some concern with the limits of criminal law. Although the duty to punish is still considered *jus cogens* and the Court insists on making generic affirmations about the need to overcome legal obstacles, it contemplates the possibility that the investigation may not necessarily result on a criminal prosecution and, ultimately, in punishment:

Since its first judgment, this Court has highlighted the importance of the State's obligation to investigate and punish for human rights violations. The obligation to investigate, and **where applicable** prosecute and punish, has particular importance given the severity of the crimes committed and the nature of the injured rights [...].¹⁹⁶

The Court determines that, after assessing the proven facts and in conformity with the declared violations, the State must investigate the facts, and identify, prosecute, and

¹⁹⁰ *ibid* para 149.

¹⁹¹ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* Preliminary Objections Merits Reparations and Costs Judgment of 24 November 2010 Series C No 219.

¹⁹² *Gelman v Uruguay* Merits and Reparations Judgment of 24 February 2011 Series C No 221.

¹⁹³ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* *ibid* para 140. *Gelman v Uruguay* *ibid* para 189.

¹⁹⁴ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* *ibid* para 137. *Gelman v Uruguay* *ibid* para 183.

¹⁹⁵ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* *ibid* para 175. *Gelman v Uruguay* *ibid* para 229.

¹⁹⁶ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* *ibid* para 137 emphasis added. The same reservation is made in paras 141, 147 and 219 among others.

where appropriate, punish those responsible for the enforced disappearance [...].¹⁹⁷

This apparent change on the Court's position is also reflected on the reparations ordered after the finding of a violation. Instead of simply requiring punishment, the Court orders an investigation to 'ascertain' the facts and 'determine the corresponding criminal, civil, and administrative responsibilities and apply the consequential sanctions'.¹⁹⁸

This caution can also be observed in more recent cases, such as *Digna Ochoa et al v México* (2021), related to the 'lack of due diligence in the investigation into the death' of the lawyer and human rights defender Digna Ochoa y Plácido.¹⁹⁹ The State of Mexico partially acknowledged its responsibility for the violations claimed by the Commission and reached an agreement²⁰⁰ regarding the reparations that included the duty to 'promote and continue all necessary investigations to determine the circumstances of Digna Ochoa's death and, as appropriate, prosecute and eventually punish the person or persons responsible'.²⁰¹ Differently from previous cases, this judgment did not command the State to 'remove all the *de facto* and *de jure* obstacles'²⁰² to the punishment of the responsible for the victim's death, but simply to conduct a proper investigation. Besides, the very detailed reparations granted by the Court included measures such as rehabilitation ('medical and/or psychological, psychiatric or psychosocial treatment' for the victims),²⁰³ publication and dissemination of the judgment, public apologies, the creation of 'an annual award for the defense of human rights named after the lawyer Digna Ochoa y Plácido'²⁰⁴ and some very important structural changes to avoid repetitions.²⁰⁵

¹⁹⁷ *Gelman v Uruguay* ibid para 252 emphasis added.

¹⁹⁸ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* ibid operative para 9. *Gelman v Uruguay* ibid operative para 9.

¹⁹⁹ *Digna Ochoa et al v México* Preliminary Objections Merits Reparations and Costs Judgment of 25 November 2021 Series C No 447 para 84.

²⁰⁰ The partial acknowledge of responsibility and the agreement regarding reparations does not preclude the Court from assessing the case. The conditions agreed upon by the State and the victims (the relatives of Digna Ochoa) became part of the reparation orders after the Court concluded that the State violated the ACHR and the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women.

²⁰¹ *Digna Ochoa et al v México* ibid para 159.

²⁰² *Goiburú et al v Paraguay* Merits Reparations and Costs Judgment of 22 September 2006 Serie C No 153 para 165.

²⁰³ *Digna Ochoa et al v México* ibid para 163.

²⁰⁴ ibid para 177 (1).

²⁰⁵ '16. The State shall draw up a plan to reinforce the "Mechanism for the protection of human rights defenders and journalists," [...] 17. The State shall create and implement a "protection mechanism for witnesses who intervene in criminal proceedings," [...] 18. The State shall elaborate, present and promote a proposed constitutional amendment to grant the Forensic Services autonomy and independence [...] 19. The State shall elaborate, present and promote a proposal to amend the "Federal law for the protection of persons who intervene in criminal proceedings" to "include the relevant international parameters and standards for the creation and effective operation of a witness protection mechanism," [...] 20. The State shall create and implement at the

Similarly, in *Vicky Hernández et al v Honduras* (2021),²⁰⁶ besides very creative measures that included the ‘[c]reation of the “Vicky Hernández” study grant for trans women’²⁰⁷ and the production of an ‘audiovisual documentary [...] on the situation of discrimination and violence experienced by trans women in Honduras’,²⁰⁸ the Court also ordered a thorough investigation of the case with due regard to the gender aspects involved in it and also an investigation regarding the flaws committed during the first proceedings.²⁰⁹

In *Buzos Miskito (Lemoth Morris et al) v Honduras* (2021), a case concerning violations of several human rights, from right to life to right to work, of a specific vulnerable group, the Miskito Indigenous people,²¹⁰ the duty to ‘carry out the appropriate investigations through the competent institutions to determine the corresponding responsibilities in accordance with applicable legal rules’²¹¹ – a very cautious wording – was by far not one of the most important reparations ordered by the Court. The long list of reparations was much more focussed on structural changes to avoid repetitions and to protect the victims, assuring health care and education, among other measures. It is important to clarify that the reparations were agreed upon by victims and State in a friendly settlement validated by the Court. In any case, it still points out the existence of other solutions more relevant than punishment.

Lastly, it is worth mentioning the case *Massacre of the Village of Los Josefinos v Guatemala*,²¹²

federal level a specific protocol for the investigation of attacks on human rights defenders [...]’ *Digna Ochoa et al v México* ibid operative paras 16-20. Only the last measure was created by the Court and was not part of the agreement between State and victims.

²⁰⁶ *Vicky Hernández et al v Honduras* Merits Reparations and Costs Judgment of 26 March 2021 Series C No 422.

²⁰⁷ ibid para 164.

²⁰⁸ ibid para 163.

²⁰⁹ ‘[...] the Court establishes that the State, within a reasonable time and through officials training in responding to victims of discrimination and violence against trans persons, must promote and continue the necessary extensive, systematic and thorough **investigations to determine, prosecute and punish, as appropriate, those responsible** for the murder of Vicky Hernández, avoiding the application of discriminatory stereotyping and any action that could revictimize her family members. This investigation must follow specific lines of investigation that take into account the victim’s gender identity and the possibility that her murder was related to this identity and/or her activities as a defender of the rights of LGBTI persons and as a sex worker, as well as the possibility that acts of sexual violence had been committed against her. [...] Likewise, the State must determine the administrative, disciplinary and criminal responsibilities of the public servants and agents culpable of the negligence and errors committed in the investigation of the case pursuant to the applicable law.’ *Vicky Hernández et al v Honduras* ibid para 152 emphasis added.

²¹⁰ ‘[...] violation of the right to personal integrity of 34 Miskito divers [...] who suffered accidents as a result of deep dives that caused them decompression sickness. [...] the right to life of 12 divers who died shortly after those accidents. [...] these violations “were the result of the State’s omissions and indifference to the problem of labor exploitation by fishing companies and the performance of diving activities in dangerous conditions.” [...] the right to life of seven Miskito divers was violated after the boat in which they were traveling exploded, as well as that of a 16 year-old boy who disappeared while working on a fishing boat. [...] violation of the principle of equality and non-discrimination, given the multiple factors of vulnerability of the divers. [...] the State did not have administrative, judicial and other mechanisms in place to respond adequately and effectively to the violations indicated in the Merits Report. [...] violation of the right to personal integrity of the next of kin of the alleged victims.’ *Buzos Miskitos (Lemoth Morris et al) v Honduras* Judgment of 31 August 2021 Series C No 432 para 1.

²¹¹ ibid para 145.

²¹² *Massacre of the Village of Los Josefinos v Guatemala* Preliminary Objection Merits Reparations and Costs

related to forced disappearance, forced displacement, rights of the family and children, judicial guarantees and judicial protection.²¹³ Since the massacre itself (referred in the case's name) occurred in 1982, before Guatemala accepted the Court's jurisdiction (1987), the Court only assessed violations that occurred or continued to occur after 1987, such as the lack of investigation and punishment of the responsible. And to remedy the latter, the Court once again ordered the State to remove all obstacles that contribute to impunity:

[...] the Court orders that the State must remove all obstacles, *de facto* and *de jure*, that maintain impunity in this case, and initiate, continue, promote and/or reopen the investigations that are necessary to identify, prosecute and, where appropriate, punish those responsible for the human rights violations that are the subject of this case and establish the truth of the facts, all within a reasonable period of time, taking into account that more than 39 years since they happened. In particular, the State must ensure that the following criteria are observed:

a) In consideration of the seriousness of the facts, it may not apply amnesty laws or prescription provisions, nor use purported exclusions of responsibility, nor rely on arguments such as State secrecy or confidentiality of information, which are actually a pretext to impede investigation²¹⁴

Despite stating that punishment should be applied 'where appropriate', the IACtHR demonstrates one more time a very broad comprehension of what is appropriated punishment, as there can be no obstacles to it. The case *Massacre of the Village of Los Josefinos v Guatemala* counterbalances the other mentioned cases of 2021, in which the Court was not so strict about the need to criminal punishment.

The fifteen cases aforementioned range from 1988 to 2021²¹⁵ and can, therefore, be considered a demonstrative sample of how the IACtHR uses criminal law as a response to human rights violations in its jurisprudence. While explaining the cases, this subchapter already presented some considerations about the Court's case law, which will be more carefully analysed on the next subchapter. Aside from verifying if the IACtHR has a punitive

Judgment of 3 November 2021 Series C No 442.

²¹³ *ibid* para 17.

²¹⁴ *Massacre of the Village of Los Josefinos v Guatemala* *ibid* para 143 translated by the author from Spanish.

²¹⁵ This year (2022) up to 23 of June the IACtHR had decided only two cases on the merits (*Pavez Pavez v Chile* Merits Reparations and Costs Judgment of 4 February 2022 Series C No 449 and *National Federation of Maritime and Port Workers (FEMAPOR) v Peru* Preliminary Objections Merits and Reparations Judgment of 1 February 2022 Series C No 448), but none of them involved the use of criminal law as a response to human rights violations.

jurisprudence, the next subchapter will also examine how the use of criminal law as a response to human rights violations affects human rights themselves.

2.3. Analysis of the Selected Jurisprudence – Relativising Human Rights on the Quest for Punishment at All Costs

The notion that every violation of human rights must be necessarily sanctioned through criminal law despite the existence of legal obstacles is what Daniel Pastor calls ‘absolute penal power’ (*poder penal absoluto*).²¹⁶ In this logic, there are no better possibilities to respond to human rights violations other than the infliction of criminal sanctions.²¹⁷ Thus, criminal law becomes a ‘one-way trip, a dead end’²¹⁸ that can only reach one conclusion, the conviction of the defendant. Furthermore, this conclusion must be reached at any costs, even in detriment of the defendant’s human rights. This absolute penal power is fruit of the neo-punitivism – ‘understood as a political-criminal current that is characterized by the renewed messianic belief that punitive power can and should reach all corners of social life’²¹⁹ – and can be observed in the case law selected on the previous chapter.

In fact, since its first contentious case the IACtHR made it clear that no violation of human rights should go unpunished. Although the Court did not explicitly order the State to investigate, prosecute and punish the responsible in *Velásquez v Honduras* as a form of reparation, it already built the foundation of the argument which would later allow such kind of reparation order to become common:

The second obligation of the States Parties is to ‘ensure’ the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are

²¹⁶ ‘[...] international protection organizations and activist organizations consider, surprisingly, to say the least, that reparation for human rights violations is achieved primarily through criminal punishment and that this is something so laudable and advantageous that it must be achieved without controls and without limits, especially with disregard for the fundamental rights that those who are confronted with the public penal power for committing such violations should have as defendants. It is believed, in this way, in an absolute penal power.’ Daniel R Pastor, ‘La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos’ (2005) *Nueva Doctrina Penal* 73, 78-79 translated by the author from Spanish.

²¹⁷ *ibid* 85.

²¹⁸ *ibid* 84.

²¹⁹ *ibid* 74.

capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish **any violation** of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.²²⁰

This argumentation quickly evolved in the Court's jurisprudence until the consolidation of its 'duty to punish doctrine',²²¹ which is based on a creative and innovative interpretation of the American Convention focused on victim's rights that 'restricts the scope of defendants' rights within domestic criminal justice systems.'²²²

As demonstrated on the previous subchapter, the cornerstone of such approach is Article 1 (1) of the ACHR, on which the Court relies to develop the duty to investigate, prosecute and punish as a form of ensuring 'to all persons subject to their jurisdiction the free and full exercise'²²³ of the rights and freedoms guaranteed by the Convention. But not only that. Article 2 of the ACHR is also mentioned to sustain the argument that States must 'adopt all the measures to revoke the legal provisions that may contradict'²²⁴ the Convention:

Article 2 of the Convention [...] sets forth the general duty of each State Party to adjust its domestic law to the provisions thereof to guarantee the rights enshrined therein, which implies that the domestic law measures must be effective pursuant to the *effet utile* principle.

[...] such adjustment implies adopting two sets of measures, to wit: (i) repealing rules and practices of any nature involving violations to the guarantees provided for in the Convention or disregarding the rights enshrined therein or hamper the exercise of such rights, and (ii) issuing rules and developing practices aimed at effectively observing said

²²⁰ *Velásquez Rodríguez v Honduras* Merits Judgment of 29 July 1988 Series C No 4 para 166 emphasis added.

²²¹ Fernando F. Bosch, 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *Am U Int'l L Rev* 195. 'The emphasis has thus shifted away from a state's general duty to guarantee rights and toward the victim's individual right to have the government investigate and punish.' Alexandra Huneus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *Am J Int'l L* 1, 8.

²²² *ibid* 196.

²²³ 'Article 1. Obligation to Respect Rights 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being.' Article 1 of the ACHR.

²²⁴ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* Preliminary Objections Merits Reparations and Costs Judgment of 24 November 2010 Series C No 219 para 173.

guarantees. [...] the first set of duties is breached while the rule or practice running counter to the Convention remains part of the legal system, and is therefore satisfied by modifying, repealing, or otherwise annulling, or amending, such rules or practices, as appropriate.²²⁵

Furthermore, Articles traditionally designed and interpreted to protect people from State abuses and interferences²²⁶ are used by the Court as source of victim's rights in detriment of alleged human rights violators. Article 8 of the American Convention,²²⁷ for example, 'is almost entirely dedicated to protecting the procedural rights of the accused within domestic criminal systems'.²²⁸ Nevertheless, for the IACtHR Article 8 also entails the victim's right 'to a fair trial during the prosecution of offenders',²²⁹ which is a rather innovative interpretation. Besides, Article 8 is usually applied in conjunction with Article 25 of the ACHR²³⁰ to guarantee that victims have access to the effective legal remedies within criminal procedures.²³¹ According to the IACtHR, those articles protect 'victims' rights against states' abuses, and thus requir[e] satisfaction, criminal prosecution, and punishment of perpetrators as forms of reparations.'²³² Together, those are the main articles used by the IACtHR to justify its duty to punish doctrine:²³³

²²⁵ *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162 paras 171-172.

²²⁶ Mykola Sorochinsky, 'Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31 Mich J Int'l L 157, 170-172.

²²⁷ 'Article 8. Right to a Fair Trial 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'

²²⁸ Fernando F Basch, 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 Am U Int'l L Rev 195, 204.

²²⁹ *ibid.* 'Article 8 of the Convention establishes that the victims of human rights violations, or their next of kin, should have wide-ranging possibilities of being heard and taking part in the respective proceedings, both in order to ascertain the facts and punish those responsible, as well as to seek due reparation.' *Gelman v Uruguay* Merits and Reparations Judgment of 24 February 2011 Series C No 221 para 187.

²³⁰ 'Article 25. Right to Judicial Protection 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.'

²³¹ Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht J Int'l & Eur L 161, 168-169.

²³² Fernando F Basch, *ibid* 205-206.

²³³ Fernando F Basch, *ibid* 203-206. Brian D Tittmore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law' (2006) 12 Sw J L & Trade Am 429, 439-440.

In light of the American Convention, the States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25) that must be substantiated pursuant to the rules of due process of law (Article 8(1)), all within the general obligation of those States to ensure the free and full exercise of the rights recognized in the Convention to every person subject to their jurisdiction (Article 1(1)). The right of access to justice, within a reasonable time, must ensure the right of the presumed victims or their next of kin that everything necessary is done to know the truth of what happened and to investigate, prosecute and, punish, as appropriate, those eventually found responsible.²³⁴

In sum, the IACtHR has developed a very strong protection for victims of human rights violations. However, this happened ‘through the recognition of new rights [...] that are not provided for in the Convention, cannot be derived from its provisions by means of interpretation, and which nullify fundamental rights of the accused’.²³⁵

As the Court’s case law demonstrates, when rights of victims conflict with rights of alleged human rights violators, the Court relativises the latter to protect the former,²³⁶ jeopardizing some very important guarantees that are provided by the ACHR and, therefore, should be protected by the Court.

In *Almonacid Arellano et al v Chile*, for example, the IACtHR held that new evidence allows the reopening of cases even if they had ‘ended in an acquittal with the authority of a final judgment’, as the *ne bis in idem* principal can be superseded by ‘the dictates of justice, the rights of victims, and the spirit and the wording of the American Convention’.²³⁷ The Court also relativised the *ne bis in idem* principle in other cases, as *La Cantuta v Peru*,²³⁸ *Gelman v*

²³⁴ *Vicky Hernández et al v Honduras* Merits Reparations and Costs Judgment of 26 March 2021 Series C No 422 para 103. This argument can also be observed, for example, in *Digna Ochoa et al v México* Preliminary Objections Merits Reparations and Costs Judgment of 25 November 2021 Series C No 447 para 98, *Gomes Lund et al* (*‘Guerrilha do Araguaia’*) *v Brazil* Preliminary Objections Merits Reparations and Costs Judgment of 24 November 2010 Series C No 219 para 173, *Barrios Altos v Peru* Merits Judgment of 14 March 2001 Series C No 75 para 42, and *Bulacio v Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100 para 116.

²³⁵ Ezequiel Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 Int’l Crim L Rev 665, 681.

²³⁶ Fernando F Basch, ‘The Doctrine of the Inter-American Court of Human Rights regarding States’ Duty to Punish Human Rights Violations and Its Dangers’ (2007) 23 Am U Int’l L Rev 195, 207. Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 Utrecht J Int’l & Eur L 161, 169.

²³⁷ *Almonacid Arellano et al v Chile* Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 para 154.

²³⁸ *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162 para 226.

*Uruguay*²³⁹ and *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil*.²⁴⁰ Such understanding is blatantly against the explicit text of Article 8 (4) of the Convention, according to which '[a]n accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.' The ACHR does not provide any exception to this rule, thus, it is clear that the 'wording' of the Convention cannot justify the Court's decision:

Article 8.4 is therefore not applied on the basis of victims' rights not explicitly provided for in the Convention, requirements of justice that are arbitrarily identified, and, paradoxically, the wording and spirit of the Convention. Although what constitutes the spirit of the Convention is not obvious, the wording is clear, stating *ne bis in idem* for the accused acquitted by final judgement.²⁴¹

The wording of the American Convention is also very clear in its Article 9 about the non-retroactivity of criminal law, which has only one exception, if it benefits the accused.²⁴² Article 9 is part of the Convention's hard core, as it cannot be suspended even in 'time of war, public danger, or other emergency that threatens the independence or security of a State Party'.²⁴³ However, the Court has also prohibited States from applying Article 9 of the ACHR to facts that it considers to be crimes against humanity,²⁴⁴ despite not being a criminal court and, thus, not having competence to establish criminal liability. In doing so, the Court creates a rule not provided for in the ACHR²⁴⁵ and actually violates the Convention, specifically Articles 9 and 1, as the Court prohibits certain persons of enjoying the right to not be convicted 'on the basis of *ex post facto* laws'.²⁴⁶

²³⁹ *Gelman v Uruguay* Merits and Reparations Judgment of 24 February 2011 Series C No 221 para 254.

²⁴⁰ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* Preliminary Objections Merits Reparations and Costs Judgment of 24 November 2010 Series C No 219 para 256 (b).

²⁴¹ Ezequiel Malarino, *ibid* 682.

²⁴² 'Article 9. Freedom from Ex Post Facto Laws. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.'

²⁴³ Article 27 (1) (2) of the ACHR.

²⁴⁴ *Almonacid Arellano et al v Chile* Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 para 151. *Gelman v Uruguay* Merits and Reparations Judgment of 24 February 2011 Series C No 221 para 254. *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162 para 226.

²⁴⁵ 'The Court appears to have derived directly from international law a rule authorizing the retroactivity of criminal law in the case of international crimes. Besides the question of whether this rule actually exists in international criminal law (the Rome Statute of the International Criminal Court, for example, prescribes, without exception, the rule of non-retroactivity of criminal law for international crimes) the Court is clearly not allowed to derive unwritten norms from the International legal order.' Ezequiel Malarino, *ibid* 682.

²⁴⁶ *ibid* 682-683.

The IACtHR has also contradicted Article 8 (1) of the American Convention when it declared in *La Cantuta v Peru* that ‘the State’s duty to wholly serve the purposes of justice prevails over the guarantee of reasonable time’ in cases of serious human rights violations,²⁴⁷ another exception that is not covered by the Convention. It does not exist a strict rule regarding how long is too long for a case to be tried. This assessment depends on the circumstances of every and each case. Therefore, when analysing a violation of the right to be tried in a reasonable time the IACtHR considers three aspects, ‘(a) the complexity of the matter, (b) the procedural activities carried out by the interested party, and (c) the conduct of judicial authorities.’²⁴⁸ What is too long for a simple case, might be not enough for a more complex case. The problem in *La Cantuta v Peru* is that the Court recognized that even weighting the specific aspects of the case, it had ‘by far exceeded the term that could be considered reasonable’.²⁴⁹ Nevertheless, such contravention of Article 8 (1) was deemed acceptable to ‘serve the purposes of justice’ due to the seriousness of the violation.²⁵⁰ The Court thus applies the same provisions of the ACHR differently according to the seriousness of the alleged violation in the specific case, creating a different set of human rights, or limiting the existent human rights for certain persons:

[T]he Court is not allowed to declare that the duration of the trial was indeed unreasonable but that, in the case being discussed, the violation of the right to be tried within a reasonable time is justified on the basis of the seriousness of the crime. This guarantee benefits every person subject to legal proceedings, and in the Convention there is no exception to this rule where serious crimes have been committed. Even those accused of serious crimes have the right to see the suffering that a criminal trial implies come to an end within a fixed period of time. That is why ‘requirements of justice’ based on the seriousness of the crime cannot authorize the IACHR to deprive a person of his or her right to be tried within a reasonable time.²⁵¹

Those are some ‘clear-cut examples’ of the Court’s ‘illiberal and *contra conventionem* activism’²⁵² and demonstrate the existence of a punitive approach in the defence of human rights by the IACtHR. But they are not the only ones. As the case law selected on the previous

²⁴⁷ *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162 para 149.

²⁴⁸ *La Cantuta v Peru* *ibid* para 149.

²⁴⁹ *ibid*.

²⁵⁰ *ibid*.

²⁵¹ Ezequiel Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 Int’l Crim L Rev 665, 683.

²⁵² *ibid* 681.

subchapter clearly shows, the Court also created a complete ban on amnesty laws²⁵³ – not only on self-amnesties²⁵⁴ –, rejecting non-punitive solutions, prohibited States of applying statute of limitations,²⁵⁵ ordered States to remove all *de facto* and *de jure* obstacles²⁵⁶ that may hinder punishment of human rights violators, and even implied that the accused’s defence is an obstacle to the ‘natural culmination’ of domestic criminal proceedings.²⁵⁷ In essence, the Court sees the punishment of human rights ‘as a necessary remedy for the victims’,²⁵⁸ a right in itself that is above the human rights of the defendants.²⁵⁹

Although in some recent cases the Court has been more careful regarding the legal limitations to punishment,²⁶⁰ in others it still demands that States remove all the *de facto* and *de jure* obstacles to punishment.²⁶¹ Therefore, when the Court says that punishment should be applied ‘where appropriate’,²⁶² it is hard to define what an appropriate punishment is. According to the IACtHR’s case law a punishment applied in violation of Article 8 (1), 8 (4) and 9 of the ACHR in detriment of the defendant could be considered appropriate. Once the Court starts to

²⁵³ *Barrios Altos v Peru* Merits Judgment of 14 March 2001 Series C No 75 para 41. *Castillo Páez v Peru* Reparations and Costs Judgment of 27 November 1998 Series C No 43 Concurring Vote of Judge Sergio García-Ramírez. *Gomes Lund et al (‘Guerrilha do Araguaia’) v Brazil* Preliminary Objections Merits Reparations and Costs Judgment of 24 November 2010 Series C No 219 para 175. *Gelman v Uruguay* Merits and Reparations Judgment of 24 February 2011 Series C No 221 para 229. *Massacre of the Village of Los Josefinos v Guatemala* Preliminary Objection Merits Reparations and Costs Judgment of 3 November 2021 Series C No 442 para 143.

²⁵⁴ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 Hum Rts Q 729, 758. ‘[T]he IACHR [...] has ruled against the state in every case in which amnesty laws have been challenged.’ Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law’ (2015) 100 Cornell L Rev 1069, 1087.

²⁵⁵ *Bulacio v Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100 paras 116-117. *Massacre of the Village of Los Josefinos v Guatemala* Preliminary Objection Merits Reparations and Costs Judgment of 3 November 2021 Series C No 442 para 143.

Almonacid Arellano et al v Chile Preliminary Objections Merits Reparations and Costs Judgment of 26 September 2006 Series C No 154 paras 151-152.

²⁵⁶ *Goiburú et al v Paraguay* Merits Reparations and Costs Judgment of 22 September 2006 Serie C No 153 para 165. *Massacre of the Village of Los Josefinos v Guatemala* *ibid* para 143.

²⁵⁷ *Bulacio v Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100 para 113. ‘It is not entirely clear what this “natural” culmination was understood to be but, given the Court’s recognition of the right to punishment, the natural culmination would appear to be conviction and punishment of the accused.’ Mykola Sorochinsky, ‘Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law’ (2009) 31 Mich J Int’l L 157, 191.

²⁵⁸ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 Utrecht J Int’l & Eur L 161, 167. ‘For the Inter-American Court, prosecution and punishment ensure retrospective restoration of the infringed right but also enable the fulfilment of victims’ right to have the perpetrator properly tried and punished.’ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 Hum Rts Q 729, 757.

²⁵⁹ ‘In the jurisprudence of the IACtHR, the duty to deploy criminal sanction is absolute. The Court has often declared of no legal effect measures that frustrate criminal justice, including amnesty laws, statutes of limitations, the principle of non-retroactivity, and the prohibition against double jeopardy.’ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ *ibid* 758.

²⁶⁰ *Digna Ochoa et al v México* Preliminary Objections Merits Reparations and Costs Judgment of 25 November 2021 Series C No 447 para 159.

²⁶¹ *Massacre of the Village of Los Josefinos v Guatemala* Preliminary Objection Merits Reparations and Costs Judgment of 3 November 2021 Series C No 442 para 143.

²⁶² *Gelman v Uruguay* Merits and Reparations Judgment of 24 February 2011 Series C No 221 para 252.

disregard the Convention's clear text, there is no possible foreseeability anymore and one cannot know in which case punishment will be demanded at all costs or not.

This very strict and punitive approach of the IACtHR in the protection of human rights, which completely disregards the *ultima ratio* principle of criminal law,²⁶³ is a result of the region's particularities. '[C]onfronted with mass, state-sponsored violations of fundamental rights'²⁶⁴ and governments that 'have failed to fulfill their obligation to prosecute serious crimes under international law and have enacted laws to ensure that such prosecutions never take place',²⁶⁵ the IACtHR concluded that pecuniary compensation was not enough²⁶⁶ and resorted to a very rigorous application of criminal law as a solution to end impunity in the region.

To highlight how much the region's history and particularities affects the case law of the IACtHR until today and what kind of violations are brought before the Court, it is worth mentioning that from the twenty-four sentences on merits issued in 2021, five were still related to facts that took places during authoritarian regimes,²⁶⁷ one is related to extrajudicial execution

²⁶³ 'If criminal law must always be and cannot stop being applied for any reason, neither repealed nor relegated to non-punitive solutions, then there is nothing left from the *ultima ratio* of criminal law textbooks' Daniel R Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos' (2005) *Nueva Doctrina Penal* 73, 84 translated by the author from Spanish. Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 179 and 181.

²⁶⁴ Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *Am J Int'l L* 1, 5.

²⁶⁵ Brian D Tittmore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law' (2006) 12 *Sw J L & Trade Am* 429, 438. 'The efforts of the Organization of American States (OAS) bodies, the Inter-American Commission on Human Rights (IACoHR) 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.' Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 167. About the context of the region during the development of the IACtHR case law: 'While the region has emerged from the military dictatorships of the 1970s and 1980s, leading to a reduction in the levels of state-sponsored civil and political rights abuses, widespread violations of fundamental rights continue, ranging from systematic, targeted executions and forced displacement by paramilitary groups in Colombia; to death squad and police killings in Brazil; to military abuses and the use of torture to extract confessions in Mexico; to pervasive extrajudicial violence in Honduras, Guatemala, and El Salvador. In many areas, the rule of law is still solidifying, and in some cases members of the military or of the political party responsible for massive, state-sponsored violations in recent decades continue to hold influential positions in current governments. Moreover, even if the national government of a state attempts to put human rights reforms in place, resistance by local governmental authorities and actors directly involved in abuse often obstructs their implementation.' James L Cavallaro and Stephanie E Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *Am J Int'l L* 768, 785.

²⁶⁶ Alexandra Huneeus, *ibid* 5.

²⁶⁷ *Vicky Hernández et al v Honduras* Merits Reparations and Costs Judgment of 26 March 2021 Series C No 422. *Massacre of the Village of Los Josefinos v Guatemala* Preliminary Objection Merits Reparations and Costs Judgment of 3 November 2021 Series C No 442. *Maidanik et al v Uruguay* Merits and Reparations Judgment of 15 November 2021 Series C No 444. *Teachers of Chañaral and other municipalities v Chile* Preliminary Objection Merits Reparations and Costs Judgment of 10 November 2021 Series C No 443. *Julien Grisonas Family v Argentina* Preliminary Objections Merits Reparations and Costs Judgment of 23 September 2021 Series C No 437.

and police violence during a semi-democratic regime,²⁶⁸ and one is related to forced disappearance in the context of a democratic regime.²⁶⁹

This context of state violence, serious human rights violations and impunity explains the development of Court's jurisprudence. Nevertheless, it should not be an excuse for the IACtHR to suppress human rights of the alleged perpetrators in name of protecting victims of human rights violations. The American Convention does not put human rights of victims and perpetrators on different levels. They are both equally protected according to Article 1 (2), which clearly states that "‘person’ means every human being’ and not only victims of violations. When the Court legitimizes the relativization of some human rights under the justification of protecting victims and ending impunity of serious human rights violations, it creates a ‘law of exception’:

The justification given by the Court for nullifying fundamental rights of the accused explicitly enshrined in the Convention refers to the exceptional need to protect victims on the basis of the seriousness of the crime. The Court is judicially creating a law of exception for serious violations of human rights where the principles of *ne bis in idem*, of non-retroactivity of criminal law, and of the reasonable duration of the trial (speedy trial), are not contemplated and the statute of limitations and amnesty norms are abrogated.²⁷⁰

Brian Tittmore argues that the ‘eradication of impunity for gross violations of human rights, through the prosecution and punishment of those responsible’²⁷¹ is a main objective of the Court – an objective, according to him, shared by other human rights bodies and the International Criminal Court (hereinafter ICC) –, therefore, the case law of the IACtHR and the Inter-American system as whole has a positive long-term effect in the region, contributing to ‘the consolidation of a culture of democracy and the rule of law’.²⁷² This statement, however, has two problems. First, the IACtHR is not responsible for guaranteeing prosecution and

²⁶⁸ *Guerrero Molina et al v Venezuela* Merits Reparations and Costs Judgment 3 of June 2021 Series C No 424. For details on the classification of regimes in democratic, semi-democratic and authoritarian, see footnote 14.

²⁶⁹ *Garzón Guzmán et al v Ecuador* Merits Reparations and Costs Judgment of 1 September 2021 Series C No 434.

²⁷⁰ Ezequiel Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 Int’l Crim L Rev 665, 683.

²⁷¹ Brian D Tittmore, ‘Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law’ (2006) 12 Sw J L & Trade Am 429, 470-471.

²⁷² *ibid* 469.

punishment of human rights violators. Its role is to assess the international responsibility of States for human rights violations, according to the ACHR,²⁷³ which has the goal of consolidating ‘a system of personal liberty and social justice based on respect for the essential rights of man’.²⁷⁴ Second, the consolidation of the rule of law and democracy cannot possibly be achieved through the violation of the ACHR by the IACtHR because they are clearly contradictory. Either the IACtHR protects the rights and freedoms of all persons equally, or it paves the way for the creation of a ‘criminal law of the enemy’ (*Feindstrafrecht*)²⁷⁵ as it has been doing:

Arguably, the doctrine is creating a special system of criminal law, namely a ‘criminal law of the enemy.’ [...] One of its main characteristics is the relaxation of individual rights and liberal criminal law principles.²⁷⁶

Under this system, every person accused of committing a crime in violation of any right protected by the American Convention would likely be treated the way enemies are treated under ‘criminal law of the enemy’ systems. For these offenders, the Inter-American Court stated that ‘no domestic legal provision or institution’ could impede punishment. The unequal treatment thus created for these defendants accused of crimes violating the American Convention would be flagrant.²⁷⁷

But even assuming that it is legitimate to relativize human rights of persons accused of crimes against humanity or serious human rights violations committed by the State (State’s agents) or with the State’s acquiescence – which it is not –, the Court’s duty to punish doctrine would still be unacceptable, since it is not limited to those categories of human rights violations. The case law selected on the previous subchapter demonstrates that the Court’s punitive approach is much broader than that. Any violation of human rights protected by the ACHR must be

²⁷³ Articles 1, 2, 62 (3) and 63, regarding the Court’s contentious jurisdiction.

²⁷⁴ Preamble of the ACHR.

²⁷⁵ Referring to the theory of Günther Jakobs, Francisco Muñoz Conde summarizes the main characteristics of the criminal law of the Enemy: ‘1. Increase in the severity of the penalties beyond the idea of proportionality, even applying «draconian penalties». 2. Abolition or reduction to a minimum of procedural guarantees of the defendant [...] 3. Criminalization of conducts that do not really represent a real danger for specific legal interests [...]’ Francisco Muñoz Conde, ‘¿Es el derecho penal internacional un derecho penal del enemigo?’ (2008) 21 *Revista Penal* 93, 94 translated by the author from Spanish.

²⁷⁶ Fernando F Basch, ‘The Doctrine of the Inter-American Court of Human Rights regarding States’ Duty to Punish Human Rights Violations and Its Dangers’ (2007) 23 *Am U Int’l L Rev* 195, 217-218.

²⁷⁷ *ibid* 218.

punished by the State,²⁷⁸ not only the very serious ones, and cannot be hindered by any obstacle,²⁷⁹ regardless of being committed by State agents or by private actors.²⁸⁰

Therefore, despite stating that it is not a criminal court,²⁸¹ the IACtHR adopt decisions that directly impact defendants' rights 'in domestic criminal proceedings.'²⁸² And it does so in an international proceeding where the alleged human rights violator does not participate and, hence, cannot produce evidence or challenge the evidence produced by others. In a dispute before the IACtHR, the claimant is the IAComHR and the victim of the human rights violation or a State, while the respondent is a State.²⁸³ However, it is not the respondent State who will face a criminal investigation, prosecution, and trial before the domestic courts. It is either a State's agent or a private person. And the Court can decide, for example, that investigations must be reopened against these persons, and cases must be retried even after a final acquittal decision, in a proceeding where they do not participate,²⁸⁴ and which has very different rules of evidence than a criminal court,²⁸⁵ much less favourable to defendants:

In international proceedings, the State cannot rely on the defence that the complainant has failed to present evidence, given that in some cases an inversion of the burden of proof is admissible; the State must cooperate in the presentation of evidence favourable to the complainant, indeed it controls the means to verify acts occurring within its territory; silence of the State may be interpreted as an acknowledgment of its responsibility; it is not necessary to prove the crimes' mental elements (see for instance

²⁷⁸ *Velásquez Rodríguez v Honduras* Merits Judgment of 29 July 1988 Series C No 4 para 166.

²⁷⁹ *Bulacio v Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100 paras 116-117.

²⁸⁰ In *Buzos Miskitos (Lemoth Morris et al) v Honduras*, for example, the responsible for the violations were private companies. Fernando F Basch, 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 Am U Int'l L Rev 195, 212. Brian D. Tittmore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law' (2006) 12 Sw J L & Trade Am 429, 441-442. Mykola Sorochinsky, 'Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31 Mich J Int'l L 157, 163.

²⁸¹ '[...] the Court is not a criminal court with power to ascertain liability of individual persons for criminal acts. International liability of the States arises automatically with an international wrong attributable to the State and, unlike under domestic criminal law, in order to establish that there has been a violation of the rights enshrined in the American Convention, it is not necessary to determine the responsibility of its author or their intention, nor is it necessary to identify individually the agents who are attributed with the violations.' *La Cantuta v Peru* Merits Reparations and Costs Judgment of 29 November 2006 Series C No 162 para 156.

²⁸² Fernando F Basch, *ibid* 199.

²⁸³ Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 Int'l Crim L Rev 665, 690 footnote 63.

²⁸⁴ Alexandra Huneus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 Am J Int'l L 1, 14.

²⁸⁵ '[T]he standard of proof and rules of evidence applicable to international criminal tribunals are generally more rigorous than those applied by international human rights bodies.' Brian D Tittmore, *ibid* 471.

Velásquez Rodríguez v. Honduras, *supra* note 7, paras. 135 et seq.). Moreover, in some cases, the IACHR declined to consider evidence submitted by the State, arguing that the State, after submitting such evidence, had accepted its international responsibility (see *Bulacio v. Argentina*, *supra* note 7, para. 59).²⁸⁶

So when the Court uses the argument of ending impunity to restrict human rights that are protected by the Convention and constitute traditional guarantees of defendants in criminal trials, and to prohibit the use of any ‘domestic legal provision or institution, including extinguishment’,²⁸⁷ it contradicts not only specific conventional rights, such as those provided for in Articles 8 (1) and (4) and 9 in conjunction with Article 1, but also Article 29 (a) and (b) of the ACHR.²⁸⁸ In fact, the Court interprets the Convention in a manner that suppresses ‘the enjoyment or exercise of the rights and freedoms recognized in [the] Convention’ or restricts ‘them to a greater extent than’ the ACHR does. Moreover, it also openly restricts ‘the enjoyment or exercise’ of rights recognized by domestic laws.²⁸⁹

In sum, the way the IACtHR has been using criminal law as a necessary response to human rights, with a clear punitive approach,²⁹⁰ is ‘counterproductive’²⁹¹ as it jeopardizes the purposes of the ACHR and the Inter-American system. If the own IACtHR does not observe the rule of law and does not assure that all people have their human rights equally guaranteed, it will never be possible to ‘consolidate in [that] hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man’.²⁹²

To conclude this thesis the next and last chapter will briefly show that, despite being much stronger in the IACtHR, the use of criminal law as a response to human rights violations is not

²⁸⁶ Ezequiel Malarino, *ibid* 690 footnote 61.

²⁸⁷ *Bulacio v. Argentina* Merits Reparations and Costs Judgment of 18 September 2003 Series C No 100 para 117.

²⁸⁸ ‘Article 29. Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.’

²⁸⁹ Ezequiel Malarino, *ibid* 684 and 693.

²⁹⁰ ‘This robust and progressively developing jurisprudence has led to the agreement within the Inter-American system that victims of human rights violations and their next of kin have an enforceable, substantive right to ensure that perpetrators are criminally punished.’ Mykola Sorochinsky, ‘Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law’ (2009) 31 *Mich J Int’l L* 157, 194.

²⁹¹ Fernando F Basch, *ibid* 228.

²⁹² Preamble of the ACHR.

an exclusive issue of the region.²⁹³ Furthermore, it will discuss in a broader perspective the relations between criminal law and human rights law and, finally, point out the need for a human rights self-limitation and the use of other alternatives rather than criminal law.

²⁹³ To do so chapter 3 will refer only to scholars. It will not analyse specific cases of other regional human rights courts and bodies.

3. Human Rights and Criminal Law – A Paradoxical Relationship Worldwide

3.1. Not an Exclusive Regional Problem

The increasing use of criminal law as a response to human rights violations is not an exclusive characteristic of the IACtHR. It is rather a global tendency that can also be observed in other regional human rights systems and international fora as well as in the work of non-governmental organizations (hereinafter NGOs).

On the international level, for example, the United Nations Committee Against Torture (hereinafter CAT Committee), which is a treaty-based monitoring body for the United Nations Convention Against Torture (hereinafter CAT), ‘has repeatedly declared that states must investigate and punish acts of torture and ill-treatment’²⁹⁴ and it has also opposed amnesty laws concerning those acts.²⁹⁵ Even more assertive is the jurisprudence developed by the United Nations Human Rights Committee (hereinafter UNHRC)²⁹⁶ since the 1990’s on ‘the duty of states to bring to justice and punish perpetrators of serious human rights abuses’.²⁹⁷ Initially the UNHRC held in a more generic approach that perpetrators of human rights violations should be brought to Justice by States, but acknowledging that the International Covenant for Civil and Political Rights (hereinafter ICCPR) does not provide an individual right for victims to have perpetrators criminally prosecuted.²⁹⁸ Nevertheless, since 2008 the UNHRC ‘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

²⁹⁴ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 Utrecht J Int’l & Eur L 161, 175. Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 Hum Rts Q 729, 757. ‘The Committee Against Torture has also issued decisions on individual cases, declaring that the state must investigate and punish for the underlying crime, although its orders are declaratory, and the supervision of these decisions is not public.’ Alexandra Huneus, ‘International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts’ (2013) 107 Am J Int’l L 1, 26-27.

²⁹⁵ ‘The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.’ UN Committee Against Torture (CAT) *General Comment No 2 Implementation of Article 2 by States Parties* 24 January 2008 CAT/C/GC/2, <https://www.refworld.org/docid/47ac78ce2.html> accessed 12 July 2022.

²⁹⁶ The UNHRC is the treaty-based monitoring body established by the International Covenant on Civil and Political Rights.

²⁹⁷ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 Utrecht J Int’l & Eur L 161, 174. The expression ‘serious human rights abuses’ includes ‘arbitrary killing, enforced disappearance, torture or ill-treatment, sexual and domestic violence, as well as human trafficking.’ *ibid.*

²⁹⁸ Mattia Pinto, *ibid.*

effective remedy'.²⁹⁹ For the Committee, investigation and criminal prosecution are necessary measures to remedy human rights violations.³⁰⁰ Furthermore, similar to the jurisprudence of the IACtHR, 'the UNHRC has imposed an absolute ban on amnesties shielding gross human rights violations.'³⁰¹

On the regional level, the IACtHR's understanding on amnesty laws, already discussed above, has influenced the African and the European human rights systems:

The IACHR has clearly taken the lead on jurisprudence on amnesties. [...]. For example, both the African Commission on Human and Peoples' Rights (notwithstanding AZAPO) and the European Court of Human Rights (ECHR) have used the IACHR decisions to find amnesty laws incompatible with their respective conventions.³⁰²

In 2014, for example, the Grand Chamber of the ECtHR issued a very important and highly contentious judgment in the case *Marguš v Croatia*. In short, the applicant claimed that Croatia had violated 'his right against double jeopardy, enshrined in Article 4 of Protocol No. 7 to the European Convention'³⁰³ because he was convicted in 2007 for war crimes, even though in 1997 the charges against him for the same facts were discontinued due to 'the application of Croatia's General Amnesty Act'.³⁰⁴ For the ECtHR, however, the State's duty to protect the right to life and assure the prohibition of torture supersedes the applicant's right against double jeopardy:

[T]he majority of the Grand Chamber considered whether the amnesty law itself, as applied to the crimes for which Marguš was tried, violated other provisions of the

²⁹⁹ *ibid.*

³⁰⁰ *ibid.* According to Huneeus, the UNHRC also requires punishment as a remedy: 'In its 2011 Annual Report, the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, reported that it issued 151 Views on individual cases, and it included its supervision of fifty-three cases in which it had issued a view. Of these, twenty-eight included recommendations that the state investigate and punish.' Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *Am J Int'l L* 1, 26.

³⁰¹ Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 *Hum Rts Q* 729, 758.

³⁰² Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell L Rev* 1069, 1103. The AZAPO case, mentioned in this citation, is comprehensively explained on pages 1087-1091 of the same article. '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.' Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 175.

³⁰³ Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell L Rev* 1069, 1105.

³⁰⁴ *ibid.*

European Convention, namely the right to life and the prohibition of torture [...]. In doing so, it reviewed the state of international jurisprudence on amnesty laws, looking in depth at the jurisprudence of the IACHR [...]. It then concluded that, because Croatian authorities were acting in compliance with their obligations under Articles 2 and 3 of the [European] Convention, the proscription of double jeopardy in Protocol No. 7 is not applicable.³⁰⁵

This relatively recent case demonstrates that the ECtHR is also willing to relativise human rights of perpetrators in order to offer a response or to remedy human rights violations. But this tendency did not start in the last ten years. It is being developed since the 1980's,³⁰⁶ led³⁰⁷ by the case *X and Y v the Netherlands*,³⁰⁸ of 26 March 1985, in which '[t]he applicants complained, under Article 8 ECHR, of their inability to have criminal proceedings instituted against the person who had raped a young girl with learning disabilities.'³⁰⁹ On that opportunity the ECtHR found a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereinafter ECHR), arguing that the civil protection provided by the State was insufficient, since 'in cases like this effective deterrence was "indispensable" and could be achieved only through criminal law provisions'.

The ECtHR has highlighted the importance of criminal law and criminalization of certain conducts to protect human rights in many cases, such as *M C v Bulgaria*, *Siliadin v France*, *Kiliç v Turkey* and *Cestaro v Italy*.³¹⁰ But different from the IACtHR, this trend seems limited to 'the most serious violations (i.e. murder, torture, sexual and domestic violence) and only when the core of a fundamental right is at stake.'³¹¹ Furthermore, the ECtHR also imposes to

³⁰⁵ *ibid*, 1105-1106.

³⁰⁶ Before that the ECtHR had already held that states must not only abstain of interfering, but also take positive measures to protect rights enshrined in the European Convention. Mykola Sorochinsky, 'Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31 *Mich J Int'l L* 157, 196 footnote 217.

³⁰⁷ This case is referred as a leading judgment by Francoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *J Int'l Crim Just* 577, 196; and Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 171; and as a 'seminal case' by Mykola Sorochinsky, *ibid* 196.

³⁰⁸ 'In X. & Y, a father brought a criminal complaint alleging that the defendant had sexually abused his mentally disabled daughter. The complaint was dismissed, however, due to a loophole in Dutch criminal law: as the victim was over sixteen years of age, she was legally required to bring the complaint herself rather than through her representatives, but was unable to do so since she was mentally incompetent.' Mykola Sorochinsky, *ibid* 196.

³⁰⁹ Francoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *J Int'l Crim Just* 577, 584.

³¹⁰ Mykola Sorochinsky, 'Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31 *Mich J Int'l L* 157, 196-199. Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 171-172.

³¹¹ Mattia Pinto, *ibid* 172. Considering the ECtHR's decision in *Marguš v Croatia*, war crimes should be also

States a ‘duty to enforce criminal law’, meaning that States must effectively investigate facts, which does not include an explicit duty to prosecute and punish.³¹² However, some exceptions seem to exist:

[T]here are a few decisions where the Court has been more willing to assert an obligation of punishment. In some cases of torture by state officials the ECtHR has highlighted the necessity of punishment, but in relation to the right to life the Court has recognised that the obligation to punish would apply only ‘if appropriate’.³¹³

[I]n a handful of cases, the ECtHR has shown that future developments in line with the IACtHR cannot be excluded. In *Nikolova and Velichkova* the Court went so far as to consider criminal proceedings and sanctions as remedial measures for the victim. 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’.³¹⁴

The ECtHR has not yet reached the same standard of punitivism observed in the jurisprudence of the IACtHR.³¹⁵ However, it is not necessarily too far from it. As the previous chapter demonstrated, limits imposed by some judgments can be quickly overcome by new judgments that relativise human rights to assure that criminal punishment is applied as a response to any human right violation.

Lastly, despite not being the focus of this thesis, it is worth to briefly mention that this punitive trend can be also observed on human rights NGOs.³¹⁶ Amnesty International, for example, ‘was founded in the early-1960s to organize letter-writing campaigns calling for the release of political prisoners’ and relied precisely on amnesties.³¹⁷ Three decades later, however, it

included in the list of ‘most serious human rights violations’.

³¹² *ibid.*

³¹³ *ibid.*

³¹⁴ *ibid* 173.

³¹⁵ ‘European human rights institutions have consistently held that the victim of a crime has no right to have the perpetrator criminally punished.’ Mykola Sorochinsky, *ibid* 178.

³¹⁶ ‘Human rights NGOs, in particular, deeply rely on international prosecution in their fight for justice. The advocacy work of many of them is so much framed in the terms of international criminal justice that they devote more time in lobbying support for international criminal institutions than in monitoring states’ human rights compliance.’ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 Hum Rts Q 729, 752.

³¹⁷ Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights’ (2015) 100 Cornell L Rev 1069, 1072.

became ‘one of the most vocal opponents of amnesties, now for perpetrators of human rights violations rather than prisoners of conscience’.³¹⁸

Although lacking a deeper and more detailed analysis of the other organizations and institutions aforementioned, which would require a lengthier thesis, the short considerations of this subchapter are just enough to demonstrate that the punitivism observed in the case law of the IACtHR is part of a larger, global trend³¹⁹ that also involves other regional and international human rights systems and even NGOs. Nevertheless, due to the specificities of the American region, the IACtHR is still the institution that went further on this trend and ‘set the stage for the human rights movement’s anti-impunity emphasis, normalizing the turn to criminal law both inside and outside of the Inter-American system’.³²⁰ The jurisprudence of the IACtHR is the most explicit and radical example of the shift that took place in the relationship between human rights and criminal law over the last decades,³²¹ which will be explored on the next subchapter.

3.2. More Sword than Shield

Human rights and criminal law have always been interconnected, but not always on the same manner. Since the Universal Declaration of Human Rights (hereinafter UDHR) was proclaimed by the General Assembly of the United Nations in 1948, ‘international human rights law and theory imposed limits on what states could do to their own nationals’³²² and anyone living in their territories. In this sense, on what concerns to criminal law ‘the traditional role of human

³¹⁸ *ibid.* ‘This unsettling situation has been reached because the human rights defence organizations – public, semi-public or private – and the international organizations of fundamental rights protection have followed the neopunitivist trend. Born and established to protect individuals facing criminal power, they have recently become the main promoters of the application of criminal law to individuals.’ Daniel R Pastor, ‘La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos’ (2005) *Nueva Doctrina Penal* 73, 104 translated by the author from Spanish. Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law’ (2015) 100 *Cornell L Rev* 1069, 1090.

³¹⁹ Karen Engle, *ibid* 1083.

³²⁰ *ibid* 1079.

³²¹ ‘The rationale behind the Court’s jurisprudence is that criminal prosecution and punishment are necessary mechanisms to end impunity and ensure human rights protection. 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.’ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 *Utrecht J Int’l & Eur L* 161, 169.

³²² Mykola Sorochinsky, ‘Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law’ (2009) 31 *Mich J Int’l L* 157, 169-170. ‘[T]he entire enterprise of human rights law was initially concerned to a large extent with limiting what nation-states can do to their own nationals’ *ibid* 173.

rights is to afford protection' from it.³²³ Based on the idea that a criminal process is a 'confrontation' between the accused and the State, the latter being 'infinitely more powerful' than the former,³²⁴ human rights seek to limit this power and protect people. Not only because States might commit abuses while exercising their power, but because criminal law inherently interferes with people's fundamental rights,³²⁵ as it is 'the most potent tool of coercion the modern nation-state wields.'³²⁶ That is also why criminal law is, or at least should be, the *ultima ratio* of the legal system, applied only when other law branches, less invasive, are not enough to protect certain rights, according to the principles of subsidiarity and necessity.³²⁷

In this context, human rights operate as a 'shield' against criminal law,³²⁸ exercising a defensive role³²⁹ to break States' power and limit repression.³³⁰ Hence, international and regional human rights instruments have provisions cleared direct to guarantee some balance, or reduce the imbalance, in this confrontation between State and accused, such as the right to liberty,³³¹ presumption of innocence,³³² non-retroactivity of criminal law,³³³ fair trial,³³⁴ right to appeal³³⁵ and prohibition of double jeopardy (*ne bis in idem*).³³⁶ Those guarantees are in line with what Herbert Packer called 'due process' model of criminal law:

³²³ Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 J Int'l Crim Just 577, 579.

³²⁴ Mykola Sorochinsky, *ibid* 173.

³²⁵ '[A]ny criminalization of an act as an infringement of whatever right or freedom it restricts, any accusation as an infringement of the right to a reputation deriving from respect for private life, and any punishment as an infringement of the right to life, liberty, reputation or property.' Françoise Tulkens, *ibid* 581-582

³²⁶ Mykola Sorochinsky, *ibid*. '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. Not only may criminal punishment provoke great suffering, but also the entire criminal trial entails subjection to an authority and exposure to public stigmatisation. If employed arbitrarily, criminal law may become the state's main instrument of violence and oppression.' Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht J Int'l & Eur L 161, 165.

³²⁷ Françoise Tulkens, *ibid* 582.

³²⁸ *ibid* 578.

³²⁹ *ibid* 579.

³³⁰ *ibid* 583. 'IHRL has traditionally been concerned with neutralising the state's power when it may be employed in a manner detrimental to individual rights. 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.' Mattia Pinto, *ibid* 165.

³³¹ Article 9 UDHR, Articles 9 and 10 ICCPR, Article 7 ACHR, Article 5 ECHR, Article 6 of the Charter of Fundamental Rights of the European Union (CFR), Article 6 of the African Charter on Human and Peoples' Rights (hereinafter ACHPR), and Article 14 of the Arab Charter on Human Rights (hereinafter AbCHR).

³³² Article 11 (1) UDHR, Article 14 (2) ICCPR, Article 8 (2) ACHR, Article 6 (2) ECHR, Article 48 CFR, Article 7 (1.2) ACHPR, and Article 16 AbCHR.

³³³ Article 11 (2) UDHR, Article 15 ICCPR, Article 9 ACHR, Article 7 ECHR, Article 49 (1-2) CFR, Article 7 (2) ACHPR, and Article 15 AbCHR.

³³⁴ Article 10 UDHR, Article 14 (1) (3) ICCPR, Article 8 ACHR, Article 6 ECHR, Article 47 CFR, Article 7 ACHPR, and Articles 13 and 16 AbCHR.

³³⁵ Article 14 (5) ICCPR, Article 8 (2) (h) ACHR, Article 2 of Protocol No 7 to the ECHR, Article 7 (1.1) ACHPR, and Article 16 (7) AbCHR.

³³⁶ Article 14 (7) ICCPR, Article 8 (4) ACHR, Article 4 of Protocol No 7 to the ECHR, Article 50 CFR, and Article 19 (1) AbCHR.

The due process model can be described as willing to impose procedural restrictions on application of criminal law even if these restrictions can limit the efficiency of this application. Conviction of those who are not guilty is seen in the model as unacceptable and to be avoided, even at the cost of slowing down the process and risking acquittal of the guilty. The basic motivation underlying the due process model is a desire to minimize mistakes in ascertaining guilt. The more fundamental value behind it, however, is recognition of the primacy of the individual and the complementary limitation on state power. It is based on the notion that power is subject to abuse and that penal power can be abused with particular brutality. To prevent such abuse the model seeks to subject the exercise of this power to certain checks and controls which are capable of reducing the efficiency of the system.³³⁷

Nevertheless, this relationship started to shift after the end of the Cold War, when ‘a period of democratic transitions and attempts to advance accountability for serious human rights violations’ began.³³⁸ In the urge to seek accountability, ‘human rights organizations did not hesitate’ in resorting to criminal law, which was ‘perceived as the obvious avenue for human rights enforcement’³³⁹ without further debate about the possible negative consequences or even its efficiency.³⁴⁰ Besides its defensive role (‘shield function’), human rights developed an

³³⁷ Mykola Sorochinsky, *ibid* 166. They can also be referred to as ‘liberal model of criminal law’ (Mattia Pinto, *ibid* 165-165) or ‘liberal guarantees’ Ezequiel Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 *Int’l Crim L Rev* 665, 695. On this perspective, Pastor explains that ‘the system is recognized as civilized not because of the multiple cases in which the guilty are convicted, but because of those in which the costly decision is made not to punish in consideration of the forms and the unrestricted respect for the fundamental rights of the accused individual. [...] There will be civilization only where there is no punishment for cases in which the forms established by the legal-criminal culture for the determination, prosecution and punishment of punishable acts have not been respected. Impunity, naturally, is not a value to be pursued, but it is a preferable value under the assumption that in a certain case it is not possible to proceed or sentence with respect for all the fundamental rights of the accused and his judicial guarantees.’ Daniel R Pastor ‘La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos’ (2005) *Nueva Doctrina Penal* 73, 100 translated by the author from Spanish.

³³⁸ Mattia Pinto, *ibid* 161. Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law’ (2015) 100 *Cornell L Rev* 1069, 1076.

³³⁹ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 *Hum Rts Q* 729, 744. ‘In the early 1990s, the focus and approach of the human rights movement also began to change in ways that coincided with, and perhaps fueled, the increased attention to and faith in criminal justice systems-domestic, international, and transnational.’ Karen Engle, *ibid* 1077. ‘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.’ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 *Utrecht J Int’l & Eur L* 161.

³⁴⁰ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 *Utrecht J Int’l & Eur L* 161, 163.

offensive role ('sword function').³⁴¹ Instead of limiting the State's power and the repression inherent to criminal law, the sword function triggers it, turning human rights into 'a driving force for intervention and [a] justification for states' deployment of their power, in particular that of coercion.'³⁴² Thereby, human rights developed a paradoxical relationship with criminal law. On one hand, human rights have the duty to protect people from the States' coercive power and possible abuses, which includes criminal law. On the other hand, they trigger criminal law as a form of States' positive obligation to protect human rights.³⁴³

This paradox could work if it was guided by the explicit human rights provisions of international and regional legal instruments. However, the balance soon started to weigh more on the sword side, as victims' rights were given preference in detriment of offender's rights and against clear legal texts. That is precisely what is reflected in the jurisprudence of the IACtHR and other regional and international organizations, as demonstrated above. This shift is identified as 'justice cascade' or 'revolution in accountability':

The turn of the century marked what has been called the 'justice cascade' or the 'revolution in accountability': individual criminal accountability by reference to human rights gained momentum and became an integral part of all international, regional, and national projects of justice. The general perception was that a 'new age of accountability' was replacing an 'old era of impunity.' The dilemma between peace and justice became less relevant. Criminal justice had to be done, not only to hold perpetrators accountable, but also to report the truth and vindicate the victims.³⁴⁴

Grounded on the 'assumption that criminal sanction is effective in reducing crime, providing justice, and protecting victims' (penal optimism),³⁴⁵ human rights legal frame and discourse were transformed in a justification to inflict criminal punishment.³⁴⁶ The sword function of

³⁴¹ Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 J Int'l Crim Just 577.

³⁴² *ibid* 583.

³⁴³ Françoise Tulkens, *ibid*.

³⁴⁴ Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Hum Rts Q 729, 746.

³⁴⁵ Mykola Sorochinsky, 'Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31 Mich J Int'l L 157, 161.

³⁴⁶ Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Hum Rts Q 729, 731-731. '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.' Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht J Int'l & Eur L 161, 164.

human rights was normalized, while the shield function is being gradually put aside,³⁴⁷ especially in the IACtHR, as its case law demonstrate. Criminal sanction became ‘one of the main objectives of human rights’³⁴⁸ in detriment of ‘non-punitive measures (truth commissions, fact finding inquiries, reparation programs, or limited amnesties)’³⁴⁹ which can be only used as long as they do not hinder criminal accountability. Within this logic, the subsidiarity of criminal law fades away, because the pursuit of a legitimate end – protection of human rights – ‘justifies the choice of means, no matter how harmful, as long as they are the most effective’.³⁵⁰ In other words, the deployment of criminal law with the relativization of human rights of accused persons are justified for the protection of human rights, which is clearly contradictory. Granting victims the right to have the offender punished means ‘treating the accused as an object in [the] pursuit of victims’ redress’³⁵¹ and this is a huge step back on human rights.

This is not to say that human rights must necessarily repeal in any circumstances the use of criminal law, which can indeed be an instrument of protection through its deterrence effect and a possible form of redress, especially in the Americas due to its historical context of authoritarian regimes, state violence, serious human rights violations and impunity. Nevertheless, criminal law must be applied by as *ultima ratio*, in consideration of the subsidiarity and necessity principles and, most importantly, respecting the human rights of accused persons, who cannot be treated as objects or means to an end. The shield function of human rights, when necessary to be applied, must coexist with the sword function and, when those are in conflict, the former must prevail.³⁵² Otherwise, human rights will be acting against

³⁴⁷ ‘Although human rights courts may acknowledge due process concerns, it is clear that they often see other priorities as more important. First, they increasingly require exercise of state penal power against perpetrators, in favor of protecting victims from human rights abuses. Second, to a much greater extent than traditional due process would allow, the new human rights law stresses efficiency over process. [...] Finally, human rights courts today often favor the use of criminal law to address social problems which they see as important, even beyond the areas of traditional crime or traditional human rights concerns. The doubt about desirability and effectiveness of criminal punishment is replaced by enthusiasm and indeed demand for such punishment.’ Mykola Sorochinsky, *ibid* 207.

³⁴⁸ Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 *Hum Rts Q* 729, 760.

³⁴⁹ Mattia Pinto, *ibid* 747-748.

³⁵⁰ Françoise Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’ (2011) 9 *J Int’l Crim Just* 577, 594. ‘[A]s 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.’ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 *Utrecht J Int’l & Eur L* 161, 179.

³⁵¹ Mattia Pinto, *ibid* 182.

³⁵² ‘It has been clear since the Enlightenment that to be effective, the rights of the defendants should carry more weight than the desire for prosecution and punishment. As noted, individual rights were created to prevent states’ abuses of power during the investigation, prosecution, and punishment of crimes. The basic nature of individual rights requires that they supersede states’ and victims’ interest in punishing illegal conduct. If the human rights movement serves to protect people from state abuses, it has to make a choice between the protection of defendants’

themselves, in a self-sabotage movement with severe consequences that will be discussed on the next subchapter.

3.3. Undesirable Consequences

When analysing the jurisprudence of the IACtHR, subchapter 2.3. already pointed out how the Court's punitive approach, that can also be observed in other regional and international systems with less intensity,³⁵³ directly affects the human rights of accused persons, which are relativised in the pursuit of criminal punishment as a form of redress for victims of human rights violations. Moreover, subchapter 2.3. argued that this punitivism jeopardizes 'the core function of human rights as shield and shelter against the arbitrariness of power.'³⁵⁴ Bearing those initial considerations in mind, this subchapter will further discuss the consequences of such punitive understanding of human rights.

Besides the negative impact caused within the international and regional systems of human rights protection, where rights as the *ne bis in idem*, non-retroactivity of criminal law and fair trial, for example, are violated, this punitivism has a relevant and very dangerous impact in domestic legal systems:

[S]hould 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.³⁵⁵

The human rights legal frame and discourse, especially the 'the rhetoric of victims' rights,'³⁵⁶

rights and victims' right to punishment.' Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 Am U Int'l L Rev 195, 227-228.

³⁵³ See subchapter 3.1.

³⁵⁴ Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht J Int'l & Eur L 161, 180.

³⁵⁵ Mattia Pinto, *ibid* 161. '[T]he 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.' *ibid* 163.

³⁵⁶ Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Hum Rts Q 729, 737.

can be used by States to ‘legitimize and endorse’³⁵⁷ the expansion of criminal law, toughening punishments and restricting human rights of accused persons.³⁵⁸ And that is because human rights and criminal law became so interdependent, that opposing criminal trials and punishment can even be ‘seen as anti-human rights.’³⁵⁹ In this climate, punitive public policies become much more acceptable for a larger part of the society when they are wrapped in a human rights package.³⁶⁰

[T]he 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. 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. [...] 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.³⁶¹

The history of Latin and Central American States ‘shows that every time any “threat” that “must be punished” is aroused, tragedy begins’.³⁶² The new threat is the impunity of human rights violations, and the tragedy may have already started. This phenomenon can be exemplified by how Mexico responded to the international pressure for investigating and prosecuting cases of feminicides in *Ciudad Juárez*: with more human rights violations, such as illegal arrests and tortures to obtain confessions.³⁶³ In this regard, a literal interpretation of

³⁵⁷ Ezequiel Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 Int’l Crim L Rev 665, 736.

³⁵⁸ Mattia Pinto, *ibid.* Fernando F Basch, ‘The Doctrine of the Inter-American Court of Human Rights regarding States’ Duty to Punish Human Rights Violations and Its Dangers’ (2007) 23 Am U Int’l L Rev 195, 213-215.

³⁵⁹ Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law’ (2015) 100 Cornell L Rev 1069, 1118. , ‘Debates over the value and consequences of, or alternatives to, prosecution no longer take place within the human rights movement. Instead, advocates have come to see human rights as incompatible with a reluctance to pursue an aggressive anti-impunity stance through criminal justice mechanisms.’ *ibid* 1119.

³⁶⁰ Mykola Sorochinsky, ‘Prosecuting Torturers, Protecting Child Molesters: Toward a Power Balance Model of Criminal Process for International Human Rights Law’ (2009) 31 Mich J Int’l L 157, 208. ‘The current international victims’ rights discourse in the field has succeeded or is close to succeeding in arming crime control advocates with the language of rights instead of the more traditional language of law and order’ *ibid*.

³⁶¹ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 Utrecht J Int’l & Eur L 161, 180.

³⁶² Fernando F Basch, ‘The Doctrine of the Inter-American Court of Human Rights regarding States’ Duty to Punish Human Rights Violations and Its Dangers’ (2007) 23 Am U Int’l L Rev 195, 220.

³⁶³ ‘The state falsely arrested, detained, and tortured a number of individuals, many of whom lacked the resources to challenge the accusations against them. A 2005 study of femicides in Mexico by the Latin American Working

Bulacio v Argentina, for example, would allow States to punish every violation of any human right, despite of possible legal obstacles. Ultimately, not even a case of theft could go unpunished because of statute of limitations, for example, as the right to private property is protected by Article 21 of the ACHR.³⁶⁴

If domestic courts welcome the duty to punish doctrine in literal terms, criminal law would no longer limit states' power against individuals. If an obligation to punish exists, consequently, the obligation not to punish when the evidentiary burden is not met or by using *ex post facto* laws does not exist anymore. The obligation to investigate and prosecute without infringing on human dignity would also not exist anymore. In short, if an obligation to punish exists, the rights of the accused do not exist anymore. There would no longer be the criminal law that Western societies enshrined since the Enlightenment, but an unlimited criminal system.³⁶⁵

Instead of empowering victims and enhancing their rights, which is the justification given to relativise human rights of defendants, this punitive trend empowers the State, who actually has the control of the criminal prosecution.³⁶⁶ And even if the offender is indeed punished, this 'might not remedy the situation of a victim in a concrete, tangible way'.³⁶⁷ In fact, when criminal punishment is seen as the main or only possible response, the human rights violation is individualized and decontextualized.³⁶⁸ This approach ignores 'underlying structural causes of human rights violations' and makes States comfortable enough to focus on the punishment of the offender and not seek other possible solutions able to tackle the root causes of the problem.³⁶⁹

For Soroichinsky, the case law of regional human rights courts regarding victims' rights sends a 'mixed message about due process', particularly to those States which do not have 'strong

Group Education Fund (LAWGEF) reported strong evidence for false imprisonment in approximately one-sixth, and the use of physical or psychological torture to coerce confessions in nearly one-half, of the murder cases in which the state had detained a suspect. Given Mexico's widespread use of pretrial detention and its practice of considering a femicide case "resolved" for official reporting purposes once a suspect is in custody, wrongful arrest and detention offer a particularly expedient means for officials to alleviate concerns surrounding impunity for human rights violations.' Karen Engle, 'Anti-Impunity and the Turn to Criminal Law' (2015) 100 Cornell L Rev 1069, 1125.

³⁶⁴ Fernando F Basch, *ibid*, 220.

³⁶⁵ *ibid*, 229.

³⁶⁶ Mykola Soroichinsky, *ibid* 210-212.

³⁶⁷ *ibid*, 212.

³⁶⁸ Karen Engle, *ibid* 1120-1122.

³⁶⁹ *ibid*.

traditions of legality and rule of law'.³⁷⁰ He argues that the jurisprudence enhances rights that are 'in tension with traditional due process values', which could legitimize punitivism by domestic courts.³⁷¹ However, the message is not really 'mixed', but quite clear, especially from the IACtHR, which has the most radical approach: when victims' rights conflict with offender's rights, the former prevails.³⁷²

It is undoubtful that States have a positive obligation to protect the human rights of everyone on its territory, but as the IACtHR held in *Velásquez Rodríguez v Honduras*, 'regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends.'³⁷³ The protection of someone's human rights cannot justify violations of the human rights of others. Either the international and regional human rights systems limit themselves by human rights – right to liberty, presumption of innocence, non-retroactivity of criminal law, fair trial, right to appeal, prohibition of double jeopardy (*ne bis in idem*), etc – and preserve the shield function or they will weaken human rights and lose legitimacy:

Legitimacy in human rights systems requires that the systems do not violate, or even appear to violate, their own principles. Legitimacy is particularly important for human rights tribunals whose power to affect government behavior depends crucially on the force of their moral authority, which in turn depends in large part on coherence. Any appearance of a lack of integrity undermines this authority and is dangerous for the long-term interests of human rights' protection. Legitimacy becomes gradually more problematic as human rights courts develop their jurisprudence and in doing so depart from the clear textual authority of major international human rights instruments.³⁷⁴

Besides, even when applied in a legitimate way, within the legal frame of human rights, criminal punishment can hardly contribute to improve situations of systematic violation of

³⁷⁰ Mykola Sorochinsky, *ibid* 209.

³⁷¹ *ibid*, 209-210.

³⁷² See subchapter 2.3. Fernando F Basch, 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *Am U Int'l L Rev* 195, 207. Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 169.

³⁷³ *Velásquez Rodríguez v Honduras* Merits Judgment of 29 July 1988 Series C No 4 para 154.

³⁷⁴ Mykola Sorochinsky, *ibid* 212. 'Human rights systems cannot effectively perform their role as educators if they are themselves open to accusations of applying double standards, inconsistency, or at the very least ad hoc reasoning. In addition, the double standard is particularly damaging in a field of law where the idea of universality is so important for the moral power of law.' *ibid* 213.

human rights.³⁷⁵ Therefore, international and regional systems of human rights protection should focus on responses capable of tackling the root sources of human rights violations, especially in IACtHR, since it decides so few cases every year. In this sense, the next and last subchapter will discuss some possible alternative responses to human rights violations than demanding criminal punishment at all costs.

3.4. Possible Alternatives

After recognizing the punitive trend of the Inter-American and the European systems of human rights protection,³⁷⁶ Sorochinsky suggests as a solution what he calls a ‘power balance model of criminal process in international human rights law’.³⁷⁷ The author acknowledges the ‘need to correct the natural imbalance of power’ in the conflict (criminal process) between State and defendant.³⁷⁸ Nevertheless, he also points out the possibility that ‘state criminal justice institutions and their officials can in fact identify with the interests of the accused where he is closer to them by virtue of his position or social status than the victim’,³⁷⁹ which can result in impunity or at least demotivation to investigate, prosecute and punish. In other words, the imbalance of the criminal process can be detrimental to the accused, in case of common crimes, or to the victims, in case of state or state-related crimes. And the power balance model of criminal process would solve both situations:

The power balance model highlights the fact that certain categories of cases and defendants are not similar and are indeed strikingly different in important respects, and that doing justice in these cases requires this different treatment. However, this different treatment is based on the equal application of a uniform principle: the need to prevent and remedy extreme imbalances of power.³⁸⁰

³⁷⁵ ‘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.’ Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 *Utrecht J Int'l & Eur L* 161, 177.

³⁷⁶ ‘[T]he two regional human rights systems are moving from the traditional due process model toward a more punitive victims’ rights model’ Mykola Sorochinsky *ibid* 207.

³⁷⁷ *ibid* 218-228.

³⁷⁸ *ibid* 174.

³⁷⁹ *ibid* 216.

³⁸⁰ *ibid* 225.

Sorochinsky argues that this model would protect victims' rights without disregarding 'due process values.'³⁸¹ This conclusion, however, is debatable, as the own author recognizes that it would lead to the same results in cases such as *Barrios Altos v Peru* and *Bulacio v Argentina*, but with a 'substantially different reasoning'.³⁸² Therefore, this model seems also open to accept the relativization of certain human rights, depending on who is the defendant and who is the victim, which sounds dangerously close to a criminal law of the enemy.³⁸³ Besides, even if it was effective, this solution is still based on the use of criminal punishment as a response to human rights violations. It disregards the fact that, despite being a possible form of redress expected by victims, criminal punishment is not an effective instrument to solve systematic human rights violations:

[A]s argued by Aukerman, the superiority of criminal law in pursuing those aims [finding those responsible for abuses, preventing future crimes, restoring the rule of law and giving redress] is controversial and, rather, in most cases prosecution and punishment 'have no clear advantages over other mechanisms'. Criminal trials are focused on individual cases and inevitably fail to investigate the roots of systematic abuses as a bigger social phenomenon. [...] 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.³⁸⁴

International and regional systems of human rights protection should not ignore neither prohibit other possible and less aggressive solutions for human rights violations as 'civil trials, truth and reconciliation commissions (TRCs), and other non-legal measures (such as legislative reparations, public inquiries, transparency, and the politics of commemoration)',³⁸⁵ and even

³⁸¹ *ibid* 228.

³⁸² Regarding *Bulacio v Argentina*, he explains that '[r]ather than holding that *all* restrictions on prosecution were inconsistent with human rights norms, the Court would likely have limited its holding to the cases involving law enforcement personnel, who the model assumes the state favors. In doing so, it would have highlighted rather than camouflaged the need for special treatment in cases in which the criminal justice system identified with the interests of the offender, and would have avoided categorically invalidating all restrictions on prosecution.' *ibid*, 226-227.

³⁸³ See footnote 275.

³⁸⁴ Mattia Pinto, 'Awakening the Leviathan through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht J Int'l & Eur L* 161, 179.

³⁸⁵ *ibid*.

amnesty laws, which can also be a valid democratic choice for a specific situation, and not necessarily an instrument to assure impunity. Considering this thesis' focus on the Inter-American Court of Human Rights, it is worth noting, albeit risking stating the obvious, that none of these alternative solutions are prohibited by the ACHR and, therefore, could not be generally banned by the Court, as it happened with amnesties.

The best solution for one case in one country is not necessarily the best solution for a similar case in another country or for different cases on the same country. That is why 'human rights bodies should first look at the specifics of the case [and of the State] to determine which measures are adequate and necessary to secure effectively the rights at issue',³⁸⁶ not only to order reparations, but also to avoid repetition. The challenge is to bear in mind the bigger picture and try to offer a response that, being adequate to the specific case at trial, can also tackle its root causes and contribute to the general improvement of the human rights situation in that State and region. This is particularly relevant in the Inter-American system, since its small part-time Court decides only a few dozen cases every year.

In this sense, despite the necessary criticism on its punitive approach made by this thesis, the case law of the IACtHR can also offer some good examples, as the case *Buzos Miskito (Lemoth Morris et al) v Honduras*, already briefly mentioned in subchapter 2.2. above. This case is related to Honduras' 'international responsibility for the violation of several rights to the detriment of 42 Miskito divers and their next of kin'.³⁸⁷ Nevertheless, the root causes of the human rights violations discussed in it concern not only those specific victims, but a whole group who suffers the consequences of systematic and structural deficiencies of the State. According to the judgment, '[t]he Miskitos are a binational indigenous people who share the border territories of Honduras and Nicaragua. In 2003, [their] population numbered approximately 40,000, and was mostly concentrated in rural areas of the department of Gracias a Dios [...] in Honduras'.³⁸⁸ The group endures 'high rates of poverty, illiteracy, unemployment, chronic malnutrition, lack of sanitation and electricity services, and a lack of water sources, among other problems',³⁸⁹ such as being explored under dangerous and illegal work conditions:

PAHO [Pan American Health Organization] has noted that Miskito boys begin this work

³⁸⁶ *ibid.*

³⁸⁷ *Buzos Miskitos (Lemoth Morris et al) v Honduras* Judgment of 31 August 2021 Series C No 432 para 1.

³⁸⁸ *ibid* para 28.

³⁸⁹ *ibid* para 29.

when they are 14 years old, that it takes place outside of current labor legislation and that it causes occupational accidents, intoxications and disabilities in people of working age. Of the 9,000 divers involved in lobster fishing – 98 percent of whom are Miskitos – 97 per cent have suffered some type of decompression-related syndrome and 4,200 are totally or partially disabled.

[...] according to PAHO, most diving accidents are preventable [...].

[...] one of the main problems faced by Miskito divers is the fact that fishing companies do not meet the minimum standards required to work in dive fishing, since they do not offer formal employment contracts or provide appropriate equipment to perform this activity, and therefore divers lack adequate safety conditions. [...] some divers have been offered drugs in order to help them remain fishing underwater for as long as possible, and in some cases they receive part of their wages in cash and part in drugs.³⁹⁰

As disclosed in subchapter 2.2., the parties of this case reached a friendly settlement agreement endorsed by the IACtHR in which the ‘State expressly acknowledged its responsibility for the violation of’ several rights protected by the ACHR³⁹¹ and measures of restitution and satisfaction were agreed upon. One of the measures was the investigation, prosecution and punishment of the responsible for ‘accidents resulting from underwater fishing activities in which the victims were affected’.³⁹² Despite offering a form of redress, the eventual punishment of the responsible would not tackle the structural problems identified in this case, which was also noted by the parties, who agreed on undertaking much more substantial and relevant remedies.³⁹³

³⁹⁰ *ibid* paras 31-33.

³⁹¹ ‘[R]ights to life, to life with dignity, to personal integrity, to judicial guarantees, to the rights of the child, to equal protection of the law, to judicial protection, health, work, social security, and to non-discrimination (Articles 4(1), 5(1), 8(1), 19, 24, 25(1) and 26, in relation to Articles 1(1) and 2’ of the American Convention. *ibid* para 13.

³⁹² ‘The State undertakes to initiate and diligently pursue all actions necessary to identify all persons responsible for the accidents resulting from underwater fishing activities in which the victims were affected and to punish them appropriately, in criminal, civil, labor or administrative proceedings, **as appropriate**, imposing sanctions proportional to the seriousness of the facts. To this end, the State shall carry out the appropriate investigations through the competent institutions to determine the corresponding responsibilities in accordance with applicable legal rules. To that end, specialized personnel in the subject matter must be incorporated and given the necessary support and resources. When appropriate, both the Public Prosecutor’s Office and the Office of the Secretary of State for Labor and Social Security (STSS) shall maintain constant contact and coordination with the victims and their representatives.’ *ibid* para 145.

³⁹³ The Court’s orders entailed ‘[c]omprehensive and specialized medical and psychological care for victims and their families, including rehabilitation treatment’; ‘[e]ducational scholarships for the victims, their children and/or their grandchildren’; ‘[p]rogram of productive projects’;³⁹³ housing; ‘[p]roduction and broadcasting of a television documentary’; ‘[p]ublic act of acknowledgment of international responsibility, apology and commitment to non-repetition’; ‘[i]nclusion of Miskito divers and their families in existing social programs’; specific ‘[m]easures to ensure the adequate regulation, control and supervision of the activities of industrial fishing companies in Miskito territory’ and to strengthen ‘the health system in La Mosquitia from the perspective of inclusive social

Measures focused on granting education, health and social assistance, access to justice and public services, raising awareness about the problem, supervising work conditions, etc., are much more efficient and relevant to solve this context of systemic human rights violations than demanding criminal punishment at all costs. They not only aim at solving the work conditions of the divers, but also at assuring other opportunities of subsistence, trying to break the cycle of poverty and exploration of this specific vulnerable group that resulted in the human rights violations discussed in the case. Moreover, those measures do not affect human rights of third parties who did not participate in the procedure before the IACtHR.

One may argue that such measures are only possible in friendly settlement agreements, since the State acknowledges its responsibilities and is willing to remedy the situation. However, the IACtHR also orders extensive and creative measures in cases where States challenge the claims of human rights violations. In *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil*, for example, despite adopting a punitive approach, the Court also ordered the State to provide medical and psychological treatment for the victims, to provide human rights education within the Armed Forces, to codify the crime of enforced disappearance, and to allow access to information and documents 'regarding the human rights violations which occurred during the military regime'.³⁹⁴

The IACtHR does so based on a broad interpretation of Article 63 (1) of the American Convention,³⁹⁵ which has a vague wording and does not limit the concept of reparation. This provision of the ACHR should not be interpreted as 'a blank cheque to interfere with national public policy',³⁹⁶ especially when the State does not acknowledge its international responsibility and does not settle a friendly agreement with the victim. Nevertheless, it can be used with the necessary cautious to order measures able to tackle the root causes of human rights violations.

In sum, it is possible for the IACtHR and similar institutions to respond to human rights violations effectively without applying a punitive approach that affects human rights of third parties, delegitimises human rights systems and discourse and enhances the coercive power of

development'; '[a]wareness and sensitization campaign'; 'exhaustive search for the victims who are still missing'; 'structural measures to ensure access to justice'; '[s]trengthening the education system' of the region; and 'measures to ensure the accessibility of all public institutions in La Mosquitia' *ibid* paras 116-151.

³⁹⁴ *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* Preliminary Objections Merits Reparations and Costs Judgment of 24 November 2010 Series C No 219 operative paras 9-15.

³⁹⁵ 'If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.'

³⁹⁶ Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 *Int'l Crim L Rev* 665, 685.

States. The way to do so is through the self-limitation of human rights. When responding to human rights violations, the IACtHR and other international and regional system of protection can go as far as human rights allow. The protection of victims' human rights cannot justify violations of human rights of others, let alone by a human rights body which has the mandate to protect them regardless of whom they belong to.

Conclusion

After analysing a demonstrative sample of the IACtHR's case law ranging from 1988 to 2021, this thesis concluded that the Court has a punitive approach when applying criminal law as a response to human rights violations. Under the arguments of protecting victim's rights that are not explicitly provided by the American Convention and of ending impunity for human rights violations, the Court orders States to assure accountability through criminal punishment, disregarding guarantees of due process and human rights of defendants. This approach is not limited to massive or more serious human rights violations, but extended to any violation of human rights committed by state agents or private persons.

Moreover, this thesis pointed out that the punitivism observed in the case law of the IACtHR is not an exclusive regional problem. It can also be observed in other international and regional human rights bodies. It is part of a global trend that relies on criminal law as a miraculous remedy to solve every and any problem. Nevertheless, the IACtHR is the one who takes the strictest approach, creating a victims' right to punish the perpetrator and openly admitting the relativization of human rights, in contradiction with the clear wording of the ACHR.

It was also demonstrated above that this punitive trend is deleterious not only for the human rights of criminal defendants (alleged perpetrators of human rights violations) within international and regional bodies, but for human rights themselves as a whole. In fact, it contributes for delegitimizing the human rights discourse and mechanisms, converting them in an instrument for criminal punishing. Furthermore, it enhances the coercive power of States, allowing domestic legal systems to restrict human rights and due process guarantees under the argument of protecting victims.

Finally, this thesis argued that human rights violations do not necessarily demand criminal punishment as a response, especially because there are other possible alternatives which can tackle the issues much more efficiently, aiming at their root causes, instead of just demanding criminal punishment at all costs. In order to legitimately protect human rights and fulfil their mandates, international and regional human rights bodies must observe a limit: human rights.

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Abstract

This thesis analyses the relationship between human rights and criminal law in the jurisprudence of the Inter-American Court of Human Rights. After an overview of the regional system and its particularities, the thesis selects and examines a sample of cases that demonstrate the existence of a punitive approach in the Court's case law. This punitivism has a direct negative effect on criminally accused persons, whose human rights are relativised in name of ending impunity, and jeopardizes the very purpose of the Inter-American system as a whole. The thesis also demonstrates that this punitivism is part of a global trend and represents a shift in the relation between human rights and criminal law that can be observed in other international and regional human rights bodies and has severe consequences within those bodies and for domestic legal systems. The thesis points out the existence of alternative responses for human rights violations rather than demanding criminal punishment at all costs and ultimately argues that human rights must be self-limited and cannot violate human rights of accused persons to protect victims.

Abstrakt

Diese Arbeit analysiert das Verhältnis zwischen Menschenrechten und Strafrecht in der Rechtsprechung des Interamerikanischen Gerichtshofs für Menschenrechte. Nach einem Überblick über das regionale System und seine Besonderheiten werden einige Fälle ausgewählt und untersucht, die zeigen, dass die Rechtsprechung des Gerichtshofs einen strafenden Ansatz verfolgt. Dieser Punitivismus wirkt sich direkt negativ auf die Angeklagten aus, deren Menschenrechte im Namen der Beendigung der Straflosigkeit relativiert werden, und gefährdet den eigentlichen Zweck des interamerikanischen Systems als Ganzes. Die Arbeit zeigt auch, dass dieser Punitivismus Teil eines globalen Trends ist und eine Verschiebung des Verhältnisses zwischen Menschenrechten und Strafrecht darstellt, die in anderen internationalen und regionalen Menschenrechtsgremien zu beobachten ist und schwerwiegende Folgen innerhalb dieser Gremien und für die nationalen Rechtssysteme hat. Die Arbeit zeigt auf, dass es alternative Reaktionen auf Menschenrechtsverletzungen gibt, anstatt eine strafrechtliche Bestrafung um jeden Preis zu fordern, und argumentiert schließlich, dass die Menschenrechte sich selbst beschränken müssen und die Menschenrechte der Beschuldigten nicht verletzt werden dürfen, um die Opfer zu schützen.