

# American University International Law Review

---

Volume 23

Issue 1 *Academy on Human Rights and Humanitarian  
Law Articles and Essays Analyzing Reparations in  
International Human Rights Law*

Article 8

---

2007

## The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers

Fernando Felipe Basch

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Basch, Fernando Felipe. "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers." *American University International Law Review* 23, no.1 (2013): 195-229.

This Academy on Human Rights and Humanitarian Human Rights Award is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# THE DOCTRINE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS REGARDING STATES' DUTY TO PUNISH HUMAN RIGHTS VIOLATIONS AND ITS DANGERS

FERNANDO FELIPE BASCH\*

INTRODUCTION .....	196
I. THE DUTY TO PUNISH DOCTRINE WITHIN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS .....	197
A. THE INTER-AMERICAN SYSTEM AND THE INTER- AMERICAN COURT OF HUMAN RIGHTS' JURISDICTION ....	197
B. THE DEVELOPMENT OF THE DUTY TO PUNISH DOCTRINE JURISPRUDENCE .....	199
1. <i>Velásquez-Rodríguez and Emerging States' Duties             With Respect to Human Rights Violations</i> .....	199
2. <i>Further Developments of the Duty to Punish             Doctrine and the Prominence of a Victim's Right             to Have the Offender Punished</i> .....	202
C. <i>BULACIO</i> AS A "WITNESS CASE": THE BROAD SCOPE OF THE DUTY TO PUNISH DOCTRINE .....	207
1. <i>The Facts of Bulacio</i> .....	208
2. <i>The Inter-American Court's Judgment and Its             Consequences in Domestic Criminal Proceedings</i> ....	208
D. THE DUTY TO PUNISH DOCTRINE TODAY .....	210

---

\* Attorney in Buenos Aires, Argentina and graduate of the Universidad de Buenos Aires Law School (Buenos Aires, Argentina), Master in Arts of Legal and Political Theory candidate at University College London. This paper was written during my stay as a Visiting Scholar at Southwestern University School of Law (Spring semester, 2006). This would not have been possible without the support of the Fulbright Commission, through its *Genaro Carrió Award*. I am especially grateful to Professors Catherine Carpenter and Jonathan Miller. Their suggestions and comments to an earlier version of this Article allowed me to clarify my ideas and improve its exposition. Needless to say, I am fully responsible of both the opinions and the mistakes that may have remained.

II. CONCERNS RAISED BY THE INTER-AMERICAN COURT'S DUTY TO PUNISH DOCTRINE .....	213
A. THE INTERFERENCE WITH DOMESTIC CRIMINAL PROCEEDINGS CHALLENGING WESTERN CONSTITUTIONALISM TRADITION .....	214
B. DEFENDANTS TREATED AS ENEMIES: THE POTENTIAL VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHT TO A DEFENSE AND TO BE PRESUMED INNOCENT IN DOMESTIC PROCEEDINGS.....	217
III. AN ALTERNATIVE APPROACH: THE DOCTRINE OF THE DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS UNDER THE EUROPEAN SYSTEM OF PROTECTION OF HUMAN RIGHTS.....	221
CONCLUSION .....	226

## INTRODUCTION

The Inter-American Court of Human Rights (“Inter-American Court”) demands that states party to the American Convention on Human Rights (“American Convention”) investigate, prosecute, and punish every violation of rights protected by the convention. The Inter-American Court underscored this duty through a consistent body of case law, and recognized the obligation as emerging from the commitment of states to ensure and guarantee rights protected by the American Convention and to satisfy victims’ rights. According to the court, victims of breaches to the American Convention are entitled to retribution through the punishment of their offenders. This Article raises concerns about that doctrine, described as the “duty to punish doctrine.”

Individual rights are always in conflict: Every right implies a restriction both on states to carry out their policies and on individuals to enjoy their personal liberty. This Article illustrates how the broad scope of victims’ rights enshrined by the Inter-American Court’s duty to punish doctrine restricts the scope of defendants’ rights within domestic criminal justice systems. If the doctrine is applied as it has developed thus far, it will have a counterproductive and

dangerous impact on the already conflicted relationship between individual rights and states' criminal systems.

Part I describes the role of the Inter-American Court in the development of human rights protections in the Inter-American system. Part I also explains the development of the court's duty to punish doctrine. After detailing the origins and general characteristics of the doctrine, this Article examines the Inter-American Court's decision in *Bulacio v. Argentina*<sup>1</sup> and its impact on Argentine domestic criminal proceedings. Part II analyzes the dangers of the duty to punish doctrine. Part III suggests an alternative approach to human rights violations as taken by the European Court of Human Rights. Finally, this Article concludes with a call to restrict the way in which the Inter-American Court has broadened victims' rights.

## I. THE DUTY TO PUNISH DOCTRINE WITHIN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

### A. THE INTER-AMERICAN SYSTEM AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS' JURISDICTION

The Inter-American system of human rights protection is comparable to other international and European systems designed to protect individuals from state violence and oppression.<sup>2</sup> The system centers on victims of state abuse.<sup>3</sup> The Inter-American Court plays a

---

1. See *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 10 (Sept. 18, 2003) (holding the State of Argentina responsible for the death of a young person detained by police forces in violation of several protected rights under the American Convention, and demanding the State provide the victim's next of kin with different types of reparations).

2. See SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 1 (1997) (providing a thorough analysis of the Inter-American human rights system).

3. See Jorge Cardona Llorens, *La Funcion de la Corte Interamericana de Derechos Humanos [The Function of the Inter-American Court of Human Rights]*, in *MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI* [Report of the Workshop: The Inter-American System Protection of Human Rights at the Threshold of the Twenty First Century] 331 (2d ed. 2003), available at [www.corteidh.or.cr/docs/libros/Semin1.pdf](http://www.corteidh.or.cr/docs/libros/Semin1.pdf) (elaborating that an individual cannot be a party before the court and a state can only be brought to the court by the court itself or by another state).

major role in this system and acts as an autonomous judicial institution. The court's purpose is to interpret and apply the American Convention and to decide contentious cases against states party to the treaty.<sup>4</sup> The court's judgments are binding on these states since they have accepted the treaty's competence.<sup>5</sup>

Similar to the International Court of Justice, the Inter-American Court is charged with establishing states' international responsibility for breaches of the American Convention. In addition, the court offers redress for victims of verified human rights violations by providing reparations.<sup>6</sup> The court is not a criminal tribunal and does not have jurisdiction over individuals, only over states.<sup>7</sup> The Inter-American Court itself said:

The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a

---

4. See Organization of American States, American Convention on Human Rights art. 26, Nov. 22, 1969, O.A.S. T.S. No. 36 [hereinafter ACHR] (requiring state parties to adopt all measures necessary to promote all the rights set forth in the charter of the Organization of American States); Corte Interamericana de Derechos Humanos, Information, <http://www.corteidh.or.cr/historia.cfm> (select "English version" hyperlink) (last visited Aug. 29, 2007) [hereinafter Inter-American Court Information] (noting that to date, twenty-four American nations have ratified or adopted the American Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Perú, Dominican Republic, Suriname, Uruguay and Venezuela). Of the twenty-four states which have ratified the convention, twenty-one have accepted the jurisdiction of the Inter-American Court. *Id.*

5. See ACHR, *supra* note 4, art. 62 (providing jurisdiction for the Inter-American Court of Human Rights arising out of Article 62(3) of the Convention); see also JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 281 (2003) (analyzing exhaustively the grounds for jurisdiction of the Inter-American Court of Human Rights and its practice).

6. Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 8-9 (1996) (explaining that the Inter-American Court provides reparations for victims where a state violates any right protected under the American Convention).

7. See Cardona Llorens, *supra* note 3, at 336 (explaining that the Inter-American Court, as a human rights tribunal, is distinct in nature from an international criminal tribunal in that international criminal tribunals hear cases involving state agents and specific actors, but human rights tribunals focus on reparations to victims of the abuses).

criminal action. 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.<sup>8</sup>

In pursuit of victims' reparations, the Inter-American Court developed a consistent body of case law regarding a states' duty to punish perpetrators of human rights violations.<sup>9</sup> The consequences of these decisions apply not only to offender states, but also to all states party to the treaty. Although the Inter-American Court is not a criminal tribunal, its decisions have a direct impact on the scope of defendants' rights in domestic criminal proceedings.<sup>10</sup>

## B. THE DEVELOPMENT OF THE DUTY TO PUNISH DOCTRINE JURISPRUDENCE

### 1. *Velásquez-Rodríguez and Emerging States' Duties With Respect to Human Rights Violations*

In 1988, the Inter-American Court delivered its first judgment in the contentious *Velásquez-Rodríguez v. Honduras* decision.<sup>11</sup> The case concerned the commission of grave human rights violations, such as the systematic practice of forced disappearances by the State of Honduras.<sup>12</sup> In the case, the Inter-American Court asserted:

---

8. See *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 134 (July 29, 1988).

9. Editorial, *Las Reparaciones en el Sistema Interamericano de Protección de los Derechos Humanos [Reparations in the Inter-American System of Human Rights]*, 22 CEJIL GACETA 1 (noting Inter-American Court case law has not only successfully granted economic reparations to the victims of human rights abuses, but also has gone beyond granting only economic reparations).

10. See Julieta Di Corleto, *El Derecho de las Víctimas al Castigo a los Responsables de Violaciones Graves a los Derechos Humanos [Victims Rights to the Punishment of Those Responsible of Serious Violations of Human Rights]*, 2004-A REVISTA JURIDICA LA LEY 702, 703 (2004) (pointing out that the Inter-American Court's decisions are restricting the scope of defendants' rights in domestic criminal proceedings).

11. See generally *Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 2 (alleging that the State had violated the right to life under Article 4, the right to humane treatment under Article 5, and the right to personal liberty under Article 7 of the American Convention).

12. See *id.* ¶ 147 (recounting a period between 1981 and 1984 where

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 [to life and physical integrity of the person in the instant case] 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.<sup>13</sup>

The *Velásquez-Rodríguez* holding is a consequence of the Inter-American Court's interpretation of Article 1(1) of the American Convention.<sup>14</sup> The court explained:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.<sup>15</sup>

According to the *Velásquez-Rodríguez* holding, two state obligations arise from Article 1(1) of the American Convention. First, states must respect the "rights and freedoms recognized by the Convention,"<sup>16</sup> and second, states must "ensure the free and full exercise of [those] rights . . . to every person subject to its

---

approximately 150 people disappeared in a similar systematic fashion such that people were taken by force, in public, by men in unidentified vehicles with tinted windows and fake license plates from Honduras and were never recovered).

13. *Id.* ¶ 176.

14. ACHR, *supra* note 4, art. 1(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.").

15. *Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 164 (stating that the Inter-American Court may find a violation of Article 1(1) even if the Commission did not allege such a violation occurred).

16. *Id.* ¶ 165 (declaring that the protection of human rights serves to prove the existence of certain inalienable "attributes of the individual that cannot be legitimately restricted" by the government).

jurisdiction.”<sup>17</sup> The Inter-American Court clarified the meaning of the second obligation as follows:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. *As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention . . .*<sup>18</sup>

Moreover, the Inter-American Court enshrined the obligation to punish not only in cases involving crimes committed by the state apparatus, but also in cases of crimes committed by private individuals. The court stated:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>19</sup>

Finally, although the Inter-American Court stressed the need for criminal punishment in this decision, it did not order the state of Honduras to carry out the criminal proceedings needed to achieve that goal.<sup>20</sup> The Inter-American Court took a traditional approach to international human rights law, declaring that Honduras breached the American Convention and must pay a fair compensation to the victims' next of kin.<sup>21</sup>

17. *Id.* ¶ 166 (implying that the adjudicating entity should be structured in a way to guarantee the free exercise of the rights provided by the American Convention to all people).

18. *Id.* (emphasis added).

19. *Id.* ¶ 172.

20. *Id.* ¶¶ 174, 194 (announcing a duty to punish, but omitting any particular criminal punishment in the judgment beyond reparations for the next of kin).

21. *Id.* ¶ 194 (declaring that the form and amount of payment to the victims' families would be decided by the Inter-American Court, barring agreement between Honduras and the Inter-American Commission within six months of this decision).



2. *Further Developments of the Duty to Punish Doctrine and the Prominence of a Victim's Right to Have the Offender Punished*

*Velásquez-Rodríguez* involved gross human rights violations that were part of a systematic state practice, and deprived victims of their right to live free from torture. Following the decision, commentators thought the Inter-American Court's duty to punish doctrine would only apply to cases concerning comparable human rights violations, and in fact, subsequent cases did involve such violations.<sup>22</sup> However, the Inter-American Court decision in *Velásquez-Rodríguez* did not restrict the scope of the duty to punish doctrine to this set of facts. Instead, the court asserted that states must prosecute and punish every violation of any right protected by the American Convention.<sup>23</sup> Thus, the Inter-American Court's language suggests a broader scope for the doctrine, maintaining that the doctrine is applicable to any violation of the rights protected by the American Convention.

For instance, in *Godínez-Cruz v. Honduras*, the Inter-American Court maintained the broad language of the duty to punish doctrine.<sup>24</sup> *Godínez-Cruz* concerned similar facts to those assessed in *Velásquez-Rodríguez* and were part of the same systematic practice in Honduras.<sup>25</sup> Moreover, *Caballero-Delgado v. Colombia* also concerned detentions and forced disappearances with presumption of death carried out by the Colombian Army.<sup>26</sup> In addition, *Paniagua-*

---

22. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2578 (1991) ("Although the judgment suggested that a duty to punish applies to "every" violation of the American Convention, it is unlikely that the Court intended the obligation to extend to all violations, regardless of the severity of the breach. Instead, the Court's reasoning should, pending further clarification, be confined to the especially serious violations raised in the case before it—disappearances, probable torture, and probable extra-judicial execution.").

23. See *Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 161-167 (requiring states to adopt such measures as necessary to prevent further infringement on basic human rights in compliance with Article 1 of the American Convention because to not do so would constitute a breach of the state's duty to ensure the free and full exercise of those rights to persons within its jurisdiction).

24. *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 175 (Jan. 20, 1989) (implying that states have a duty to organize the government apparatus in a way that ensures the full enjoyment of one's human rights).

25. See *id.* ¶ 3 (alleging a teacher was abducted by government agents).

26. *Caballero-Delgado v. Colombia*, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶¶ 3-5 (Dec. 8, 1995) (attributing Caballero-Delgado and Santana's abduction to

*Morales v. Guatemala* involved a massive practice of arbitrary detentions, kidnappings, ill-treatment, and deprivations of life carried out by Guatemala.<sup>27</sup>

In deciding these cases, the Inter-American Court stressed the obligation of states to take every measure needed to end impunity.<sup>28</sup> In *Paniagua-Morales*, the court stated, "the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."<sup>29</sup> Also, by deciding these cases, the court complemented the *Velásquez-Rodríguez* decision by validating the normative sources of the duty to punish doctrine. Furthermore, while maintaining the obligation of states to investigate, prosecute, and punish every human rights violation emerging from Article 1(1) of the American Convention, the Inter-American Court started to underscore the importance of fulfilling the rights that victims have within domestic criminal proceedings.<sup>30</sup>

According to the Inter-American Court, victims' rights provided by the American Convention come from two sources. The first is Article 25 of the American Convention, which provides victims with a right to judicial protection, an effective remedy against violations of their rights.<sup>31</sup> The court stated in *Loayza-Tamayo v. Peru*:

Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter*

---

the fact that Caballero was involved in the Santander Teacher's Union).

27. *Paniagua-Morales v. Guatemala*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶¶ 4-12 (Mar. 8, 1998) (describing Paniagua-Morales' abduction in exchange for information from the State).

28. *Id.* ¶ 173 (defining impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention").

29. *Id.*

30. *Id.* ¶ 174.

31. ACHR, *supra* note 4, art. 25 (stating the Convention provides victims with prompt and effective judicial review of alleged violations of protected rights by any state party).

*alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.<sup>32</sup>

The second normative source of victims' rights is Article 8(1) of the American Convention, which guarantees victims a fair trial.<sup>33</sup> Article 8 of the American Convention is almost entirely dedicated to protecting the procedural rights of the accused within domestic criminal systems.<sup>34</sup> This is a basic norm found in almost every Western Constitution granting defendants due process rights.<sup>35</sup> However, its peculiarity is that it also protects "[every person's] rights . . . of a civil, labor, fiscal, or any other nature."<sup>36</sup> According to the Inter-American Court, this leads to asserting the right of the victim to a fair trial during the prosecution of offenders. From the court's perspective, the fair trial guaranty is quite important and serves to protect not only defendants but also victims in criminal proceedings.<sup>37</sup>

The Inter-American Court initially developed the idea of the victims' fair trial guaranty in *Genie-Lacayo v. Nicaragua*.<sup>38</sup> The court stated that "[i]n order to establish violation of Article 8, it is

---

32. *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 168 (Nov. 27, 1998) (rejecting the admissibility of a request for interpretation of a previous judgment of the Inter-American Court against Peru).

33. ACHR, *supra* note 4, art. 8(1) (defining a fair trial as one held in a timely manner by an independent court).

34. *Id.* art. 8 (outlining that these procedural rights include the presumption of innocence, timely notice of an action, the assistance of a translator, and the representation by counsel).

35. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 266-68 (1993) (stating that approximately thirty-eight national constitutions explicitly guarantee the right to a fair trial or hearing and twenty-one national constitutions explicitly guarantee the right to defense in criminal cases, while the right to be presumed innocent is explicitly included in sixty-seven national constitutions).

36. ACHR, *supra* note 4, art. 8.

37. See, e.g., *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162 (Sept. 18, 2003) (holding that Argentina violated several articles of the American Convention, including Article 8, because of the detrimental effect it had on the victim rather than the effect it had on the accused).

38. *Genie-Lacayo v. Nicaragua*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 12 (Jan. 29, 1997) (involving Nicaragua's violation of several articles of the American Convention in response to the death of a young citizen).

necessary, first of all, to establish whether the accusing party's procedural rights were respected in the trial to determine those responsible for the death of young Genie-Lacayo."<sup>39</sup> In another case, the court explained:

Article 8(1) of the Convention must be given a broad interpretation based on both the letter and the spirit of this provision . . . . Thus interpreted, the aforementioned Article 8(1) of the Convention also includes the rights of the victim's relatives to judicial guarantees . . . [and] recognizes the right . . . to have [the crimes] effectively investigated, . . . those responsible prosecuted for committing said unlawful acts; [and] to have the relevant punishment, where appropriate, meted out.<sup>40</sup>

The court also stated that Article 25 of the American Convention "is closely linked to Article 8(1) . . . . Consequently, it is the duty of the State to investigate human rights violations, prosecute those responsible and avoid impunity."<sup>41</sup> Therefore, Article 25 and Article 8 of the American Convention are interpreted as protecting victims' rights against states' abuses, and thus requiring satisfaction,<sup>42</sup>

39. *Id.* ¶ 75 (outlining parameters by which to judge Nicaragua's actions relative to Genie-Lacayo's rights under the American Convention).

40. *Blake v. Guatemala*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 96-97 (Jan. 24, 1998) (emphasis added) (deciding that Guatemala violated several rights protected by the American Convention and ordering the State to provide both monetary and "satisfaction" reparations). The same doctrine was repeated in several subsequent cases. *See* *19 Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 219 (July 5, 2004) (holding Colombia responsible for the deaths and forced disappearances of several persons and requiring the State to comply with multiple types of reparations); *Las Palmeras v. Colombia*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, ¶¶ 59-67 (Dec. 6, 2001) (determining that Colombia violated several rights protected by the American Convention after finding the State responsible for the death of two persons, and opening the reparations phase of the case); *Durand v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, ¶¶ 111, 131, 146 (Aug. 16, 2000) (deciding Peru violated several rights protected by the American Convention and ordering the State to provide reparations of different types).

41. *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 169-170 (Nov. 27, 1998) (reiterating that states are obligated "to use all the legal means at its disposal" to combat violations of rights protected by the American Convention).

42. *See Pasqualucci*, *supra* note 6, at 24 (positing that in addition to monetary restitution for medical and legal expenses, courts may also require a truthful public disclosure, apology, and admission).

criminal prosecution, and punishment of perpetrators as forms of reparations.<sup>43</sup>

The Inter-American Court also made important specifications in *Barrios Altos v. Peru*, which concerned killings practiced by death squadrons of Peruvian armed forces in their alleged fight against the *Sendero Luminoso* guerrilla.<sup>44</sup> In its judgment, the court pointed out:

[A]ll 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 of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>45</sup>

The holdings in *Caballero-Delgado*,<sup>46</sup> *Paniagua-Morales*,<sup>47</sup> *Loayza-Tamayo*,<sup>48</sup> and *Barrios Altos*<sup>49</sup> demonstrate that, in contrast to

43. *See id.* at 10 (stating that as currently ratified, the American Convention enables the Inter-American Court to order a state to provide remedies to the victims, including monetary compensation, termination of imprisonment, and medical care); *see also* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1417-18 (2002) ("The Inter-American Court has interpreted Articles 25 and 8 as directly related: the former requires the state to provide human rights victims access to a criminal trial as reparations for the violation, and the latter requires the criminal trial be conducted in a way that guarantees procedural fairness to victims.").

44. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 42 (Mar. 14, 2001) (recounting Peru's efforts to quash an investigation into the deaths of alleged members of *Sendero Luminoso* by members of the Peruvian military and to provide amnesty to the perpetrators of the killings).

45. *See id.* ¶ 41 (declaring that enactment of a law incompatible with the American Convention necessarily violates the convention); *see also* *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 14 (Sept. 3, 2001) (establishing that this holding is not only applicable to the specific facts there assessed, but also to any situation where amnesty laws apply).

46. *Caballero-Delgado v. Colombia*, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶¶ 3-5 (Dec. 8, 1995) (involving an illegal capture and detention by Colombia).

47. *See generally* *Paniagua-Morales v. Guatemala*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 1 (Mar. 8, 1998) (considering possible instances of illegal "abduction, arbitrary detention, inhuman treatment, torture and murder" by Guatemala).

48. *See generally* *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 3 (Nov. 27, 1998) (discussing Peru's alleged violations of various articles of the American Convention).

the original *Velásquez-Rodríguez* decision, the Inter-American Court has not only ordered states to pay monetary compensations to victims for declared breaches to the American Convention, but has also required states to carry out criminal judicial proceedings to punish persons responsible for crimes assessed in the particular cases examined.<sup>50</sup>

### C. *BULACIO* AS A “WITNESS CASE”: THE BROAD SCOPE OF THE DUTY TO PUNISH DOCTRINE

The Inter-American Court clarified three issues in *Bulacio*.<sup>51</sup> First, the duty to punish doctrine applies to all human rights violations and is not limited to the massive or gross violations previously described. Second, the doctrine not only rejects amnesty provisions, provisions on prescription, or the establishment of measures designed to eliminate responsibility—those legal institutions explicitly rejected in *Barrios Altos*—but also rejects any “domestic legal provision or institution” viewed as an obstacle to punishment.<sup>52</sup> Furthermore, *Bulacio* illustrates that when the complete exercise of defendants’ rights conflicts with victims’ rights, the Inter-American Court explicitly privileges the latter.<sup>53</sup> Therefore, this Article posits that while broadening victims’ rights, *Bulacio* demonstrates that application of the duty to punish doctrine by domestic criminal courts may restrict the constitutional rights of defendants.

49. See generally *Barrios Altos*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 1 (reviewing Peru’s alleged violations of the Obligation to Respect Rights in Article 1(1) and Domestic Legal Remedies in Article 2 of the American Convention).

50. See *id.* ¶ 51(5) (ordering Peru to conduct an investigation into the human rights abuses found in the case, and to prosecute and punish the relevant perpetrators); *Loayza-Tamayo*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 192(6) (ruling that Peru must conduct an investigation into the human rights abuses found in the judgment and punish those responsible appropriately); *Caballero-Delgado*, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 72(5) (stating that Colombia must continue judicial proceedings in regard to the human rights abuses detailed in the case and punish those responsible in accordance with domestic law).

51. *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 2 (Sept. 18, 2003) (discussing potential Argentinean human rights violations under the American Convention).

52. See *id.* ¶ 117 (asserting that, without this provision, the American Convention lacks effective protection).

53. See *id.* ¶¶ 114-117 (explaining that due process necessitates a timely defense, free of undue delays that may thwart a victim’s case).

### 1. *The Facts of Bulacio*

Police officers in the city of Buenos Aires illegally detained and beat seventeen year-old Walter Bulacio.<sup>54</sup> After telling numerous people about the police abuse, he died approximately one week after the incident, arguably as a consequence of his injuries.<sup>55</sup> Domestic investigation of the case led to the criminal prosecution of a police officer. However, the investigation lasted longer than ten years and extinguished due to statutory limitations under Argentinean criminal law.<sup>56</sup> While an appeal challenging that decision was being examined by the Argentinean Supreme Court of Justice, the Inter-American Court delivered its judgment.

### 2. *The Inter-American Court's Judgment and Its Consequences in Domestic Criminal Proceedings*

In *Bulacio*, the Inter-American Court reiterated that states party to the American Convention have a duty to punish every violation of the rights recognized therein.<sup>57</sup> However, in an unprecedented assertion, the court added "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."<sup>58</sup> The court held "*no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations.*"<sup>59</sup>

Furthermore, the Inter-American Court said, although not explicitly, that the defendant's exercise of procedural rights must be

---

54. *See id.* ¶ 3(1) (stating that the Argentine Federal Police eventually released Bulacio free of charge although the reason for his detention remains unknown).

55. *See id.* ¶ 3(2) (noting that the day following his detention, Bulacio admitted himself into a hospital where doctors diagnosed him with a cranial traumatism).

56. *See id.* ¶ 3(25) (pointing out that the Prosecutor's Office appealed the court's decision that this action was extinguished).

57. *See id.* ¶ 110 (proclaiming that victims of human rights violations and their next of kin have the right to demand states fulfill their duties under the American Convention).

58. *Id.* ¶ 116 (emphasis added) (invoking the obligations outlined in Articles 1(1), 2, and 25 of the American Convention).

59. *Id.* ¶ 117 (emphasis added) (stating that if the alternative were true, the rights guaranteed by the American Convention would be unenforceable).

limited to permit the full satisfaction of a victim's right to punish offenders.<sup>60</sup> In this case, the defendant introduced several presentations and appeals which delayed the court to the extent that the case was closed due to statute of limitations considerations. Therefore, the Inter-American Court claimed that domestic courts cannot tolerate the use of excessive resources by the defendant, stating:

This manner of exercising the means that the law makes available to the defense counsel has been tolerated and allowed by the intervening judiciary bodies, forgetting that their function is not exhausted by enabling due process that guarantees defense at a trial, but that they must also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.<sup>61</sup> The right to effective judicial protection therefore requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights.<sup>62</sup>

The court concluded that "it is necessary for the State to continue and conclude the investigation of the facts and to punish those responsible for them."<sup>63</sup> As in prior cases, the Inter-American Court ordered the domestic court to carry out the prosecution prescribed and to punish the persons responsible for Bulacio's murder, despite the fact that domestic courts had already closed the case.<sup>64</sup> The Argentinean court was obligated to follow the Inter-American Court's decision<sup>65</sup> and subsequently ordered the continuation of the

60. *Id.* ¶¶ 113-115 (declaring judges responsible of conducting trials in a manner that does not allow impunity by delay).

61. *Id.* ¶ 114 (expanding upon the defense counsel's plea for extinguishment of the criminal action).

62. *Id.* ¶¶ 114-115 (characterizing the defense counsel's filings as attempts to frustrate the victim's case).

63. *Id.* ¶ 121 (allowing Bulacio's next of kin to participate in any aspect of the continuing investigation and mandating that the investigation be made public upon its completion).

64. *See id.* ¶ 162(4) (ordering the State to continue investigations, punish the violators, and publicize all conclusions).

65. *See* ACHR, *supra* note 4, art. 68(1); *see also* Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 23/12/2004, "Espósito, Miguel Angel s/incidente de prescripción de la acción penal promovido por su defensa," La Ley [L.L.] (2004-E-224) (Arg.), ¶ 6 [hereinafter *Espósito*] (stating that this decision is binding on the State of Argentina under Article 68(1) of the American



criminal prosecution in spite of statutory limitations.<sup>66</sup> This decision is troublesome because under the Argentinean constitutional tradition, the applicability of the statute of limitations is intimately linked to the constitutional right to be tried within a reasonable time.<sup>67</sup> Although punishing perpetrators of horrible crimes (like that committed against Walter Bulacio) is of great importance, the facts under domestic investigation in *Bulacio* were not those to which under international law the statutory limitations should not apply—the actions were neither a crime against humanity nor a war crime.<sup>68</sup>

#### D. THE DUTY TO PUNISH DOCTRINE TODAY

To date, the Inter-American Court has maintained the duty to punish doctrine. All of the cases in which the court applied the doctrine concerned horrible crimes committed by the state apparatus, where

---

Convention and that the Argentinean Supreme Court of Justice must follow the precedent of the Inter-American Court).

66. See *Espósito*, *supra* note 65, ¶ 12 (explaining that, notwithstanding other reasons discussed in the case, the Argentinean Supreme Court of Justice does not share the restrictive approach to the right of defense set forth by the Inter-American Court because that right is protected under Article 18 of the National Constitution).

67. See *id.* (explaining that Article 18 of the Argentine National Constitution provides the inviolability of the right to due process in the defense of the person and of rights); Corte Suprema de Justicia [CSJN] [Argentinean Supreme Court of Justice], 10/03/2004, “Barra, Roberto Eugenio Tomás s/ defraudación por administración fraudulenta,” *La Ley* [L.L.] (2004-B-898) (Arg.), ¶ 6; Corte Suprema de Justicia [CSJN] [Argentinean Supreme Court of Justice], 29/11/1968, “Mattei,” *La Ley* [L.L.] (1968-272-188) (Arg.), ¶ 10; ACHR, *supra* note 4, art. 7 (maintaining that any person detained shall be promptly brought before a judge and entitled to trial within a reasonable time, and that every person has the right to an impartial hearing to substantiate any criminal accusation and to determine his rights and obligations); see also *Argentina Introductory and Comparative Notes*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 29, 32 (Gilbert H. Flanz ed., Marcia W. Coward trans., 1995) (providing a this translation of Article 18 of the Argentine National Constitution: “No inhabitant of the Nation may be punished without prior trial based on a law in force prior to the offense, or tried by special commissions, or removed from the jurisdiction of the judges designated by the law in force prior to the offense. No one can be compelled to testify against himself, or be arrested except by virtue of a written order from a competent authority. The right to due process in the defense of the person and of rights is inviolable . . .”).

68. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 26, 1968, 754 U.N.T.S. 73, 18 I.L.M. 68 (indicating that under international law statutes of limitations do not apply to these crimes).

grave human rights violations occurred during internal armed conflicts or states of emergency in Latin and Central American.<sup>69</sup> In

---

69. See *Blanco-Romero v. Venezuela*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 125 (Nov. 28, 2005) (holding Venezuela responsible for several deaths and forced disappearances and other violations of rights enshrined by the American Convention, as well as ordering the State to comply with several measures including the punishment of those responsible for the crimes as a way of reparation); *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 127 (Sept. 12, 2005) (declaring Colombia breached several clauses of the American Convention and ordering the State to comply with numerous measures and reparations, including the prosecution and punishment of those responsible); *Moiwana Community v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 233 (June 15, 2005) (ordering Suriname to comply with different types of reparations including the prosecution and punishment of those responsible as a result of its violation of rights protected by the American Convention); *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 218 (Mar. 1, 2005) (finding El Salvador violated rights protected by the American Convention and ordering prosecution and punishment of those responsible); *Carpio-Nicolle v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 117, ¶ 155 (Nov. 22, 2004) (holding Guatemala breached the American Convention by murdering and injuring several people, and ordering reparations including the punishment of the officials responsible for those violations of the victim's rights); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2) (Nov. 19, 2004) (deciding reparations, including the duty to punish the perpetrators on behalf of the victims and next of kin, where more than 268 people died and many other were abused and raped in a massacre conducted by Peruvian state officials in 1982); *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 280(3)-(10) (Sept. 7, 2004) (holding Ecuador violated Articles 1, 5, 7, 8, and 21 of the American Convention and different Articles of the Inter-American Convention to Prevent and Punish Torture, and ordering reparations to the victim including the prosecution and punishment of those responsible); *Gómez-Paquiyaury Brothers v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 231, 253(1)-253(3), 253(22) (July 8, 2004) (maintaining Peru violated several rights protected by the American Convention, as well as different articles of the Inter-American Convention to Prevent and Punish Torture, and ordering different forms of reparations for the victim's next of kin, including the reopening of a criminal case in order to punish those responsible); *19 Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶¶ 254, 295(1)-295(4) (July 5, 2004) (finding Colombia responsible for the deaths and forced disappearances of several persons, in violation of many rights protected by the American Convention, and requiring the State to comply with different types of reparations including those related with criminal justice); *Urrutia v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 194 (Nov. 27, 2003) (holding Guatemala breached several rights protected by the American Convention, and requiring the State to identify, prosecute, and punish those responsible); *Mack-Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(1)-(6) (Nov. 25, 2003) (declaring Guatemala responsible for violations of several rights protected by the American Convention, and demanding that the State provide the victims and the victims' next of kin with different

these cases, the court emphasized that it “is likewise needed for competent ordinary criminal courts to investigate and punish the law enforcement staff members that take part in violations of human rights cases.”<sup>70</sup> The Inter-American Court also maintains “the State shall refrain from resorting to amnesty, pardon, statute of limitations and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction.”<sup>71</sup> Moreover, as in *Bulacio*, the court ordered El Salvador, “in compliance with its obligation to investigate the reported facts, to identify and punish those responsible and to conduct a genuine search for the victims, to eliminate all the obstacles and mechanisms *de facto* and *de jure* that hinder compliance with these obligation [sic] . . . .”<sup>72</sup>

To summarize, the court’s duty to punish doctrine not only governs states’ international responsibility for human rights violations and victim redress in a traditional, compensatory approach, but also asserts that offenders must be punished. This approach applies to cases of grave human rights violations, as well as to every violation of any of the rights protected by the American Convention. It also applies to both violations committed by the state apparatus and those resulting from private crimes. Additionally, within criminal procedures directed toward punishing offenders, the Inter-American Court forbids states from taking positive actions like enacting amnesties, offering forgiveness, or favoring extinguishments of criminal prosecutions; furthermore, the court also refuses to allow domestic legal provisions or institutions which would impede punishment to apply.<sup>73</sup> By doing all this, I believe the Inter-American Court is changing the balance between defense and accusation enshrined by Western constitutionalism.<sup>74</sup>

---

reparations including the ability to prosecute and punish those responsible).

70. See *Gutiérrez-Soler*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 97 (proving that states must not exonerate those responsible, plead a statute of limitations bar, or permit any measure delaying prosecution or conviction).

71. See *id.*

72. *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 180 (Mar. 1, 2005).

73. See *Moiwana Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (reasoning that if states employed such measures, the American Convention would lack actual authority to prosecute abuses and deliver justice to the victims).

74. See DAVIDSON, *supra* note 2, at 175 (noting that where a state does not supply the necessary information concerning complainant’s allegations once the

## II. CONCERNS RAISED BY THE INTER-AMERICAN COURT'S DUTY TO PUNISH DOCTRINE

Although the Inter-American Court has explicitly claimed that the duty to punish doctrine is applicable when any right protected by the American Convention is violated, either by state officials or by private individuals, it has always been applied in cases of crimes committed from the state apparatus. Moreover, the cases in which the doctrine has been applied also show that the failure of the states to prosecute and punish grave human rights violations was in general due to their own lack of will to do so.

Because cases concerning human rights violations are brought against states, the activism of external and independent organizations is required to ensure states compliance and domestic enforcement. In the Inter-American system, in particular, the tradition of state atrocities demanded that independent organizations maintain strong oversight to ensure states comply with and enforce human rights. Therefore, the Inter-American Court's mandate requiring states to prosecute human rights violations is of great importance. However, beyond the outcomes of the specific cases decided by the court, concerns linger regarding the future application of the duty to punish doctrine and the consequences that its application may produce within domestic criminal systems.

There are two reasons for these concerns. First, the Inter-American Court's decisions invoking the duty to punish doctrine might impinge on defendants' rights in concrete criminal cases, thereby interfering with a domestic tribunal's ability to consider a defendant's constitutional rights in making its decision, as witnessed in *Bulacio*. Second, the Inter-American Court has given the doctrine a broad scope which, in combination with the language it has used, may generate trouble when applied by domestic courts. Namely, a "criminal law of the enemy" might emerge.

---

Commission has accepted a petition, the facts in the petition will be assumed true so long as there is no other evidence purporting a different conclusion per Article 42 of the Commission Regulations).

## A. THE INTERFERENCE WITH DOMESTIC CRIMINAL PROCEEDINGS CHALLENGING WESTERN CONSTITUTIONALISM TRADITION

Prior to the *Bulacio* decision, the Inter-American Court referred to its jurisdiction, stating that the tribunal

does not act as an appellate court or a court for judicial review of rulings handed down by the domestic courts. All it is empowered to do . . . is call attention to the procedural violations of the rights enshrined in the Convention . . . however, it lacks jurisdiction to remedy those violations in the domestic arena . . . .<sup>75</sup>

However, *Bulacio* illustrates that the Inter-American Court does act like an appellate court.<sup>76</sup> The Inter-American Court explicitly required the Argentine domestic court not to tolerate acts of the defendant exercised within his right to defense; thus, it cannot be perceived as respecting domestic judicial decisions.<sup>77</sup> Additionally, the court explicitly demanded the continuation of a prosecution which had already been extinguished based on statute of limitations considerations.<sup>78</sup> The problematic side of this issue is not just the interference: regional human rights tribunals were created in order to interfere with domestic institutions and require them to comply with human rights. Their basic original goal was to interfere.<sup>79</sup> The more

75. See *Genie-Lacayo v. Nicaragua*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 94 (Jan. 29, 1997).

76. See *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162(4) (Sept. 18, 2003) (demanding that Argentina continue investigating the facts of the case).

77. See *id.* (mandating that Argentina ultimately punish those responsible and requiring Argentina to pay reparations to the victim's next of kin).

78. See *id.* ¶¶ 3(24)-(25), 4 (establishing that although the appellate court determined the cause of action was extinguished, the Inter-American Court was able to consider the case pursuant to Articles 62 and 63(1) of the Convention); see also *Espósito*, *supra* note 65, ¶ 9 (opinion of Justice Carlos Fayt) (“[I]f taken as a derivation of the interpretation of the American Convention carried out by the Inter-American Court, we can conclude that we should apply with no legal basis and retroactively the principle of non-applicability of statutory limitations to the defendant Miguel Angel Espósito, that tribunal would be—in a certain way—deciding over the destiny of a person who did not declare, nor could declare, his responsibility.”) [translation by author].

79. It could be argued that the original goal of the regional courts was to make states comply with human rights but not by directly interfering with domestic institutions; instead regional courts could garner compliance by different means,

problematic issue, as seen in *Bulacio*, is that the Inter-American Court asked a domestic court to limit a defendant's exercise of his constitutional rights.

The cause for this judgment is easily traceable. Part II described how the Inter-American Court's affords victims' rights the same protection as it does defendants' procedural rights, if not more. For instance, in *Bulacio* and subsequent cases, the court held that even where domestic courts respect defendants due process rights, courts must also satisfy a victim's right to punish the offender. Yet, the Inter-American Court has given more weight to the latter, thereby challenging what might be the core of Western society's constitutionalism: a higher protection of defendants' rights as opposed to states' or victims' interest in punishment.<sup>80</sup>

Western constitutionalism tradition is based on the historic belief that the criminal system is a state's main tool for oppression. Indeed, human rights law has always supported this belief, and its main concern within criminal justice is the protection of the rights of the accused.<sup>81</sup> It is true that Western criminal law seeks to punish guilty offenders; however, since the Enlightenment, it is more accurate to understand criminal law as a means for limiting states' violence and as a tool designed to avoid every prosecution and punishment carried out in violation of individual rights.<sup>82</sup> By challenging the

---

such as declaring international responsibility of the noncompliant states or by applying political sanctions to those states.

80. See DAVIDSON, *supra* note 2, at 210 (discussing the Inter-American Court's ability to weigh evidence as it sees fit (citing *Velasquez-Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 127-128 (July 29, 1988) (noting that standards of proof in international proceedings are more informal than in domestic proceedings)).

81. See Bassiouni, *supra* note 35, at 253-54 ("Neither democracy nor human rights can exist without one another—and neither can exist without the individual protection of persons brought into the criminal process, because it is in that arena where most human rights violations occur.").

82. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 360 (1986) (citing DOUGLAS GREENBURG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, at 228-36 (1976) (accounting for how Enlightenment theorists instigated American criminal law reforms)); see also Timothy A. Razel, Note, *Dying to Get Away With It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2201 (2007) ("The Enlightenment also produced the notion of due process protections for criminal defendants, which was enshrined in

constitutional rights of a defendant to exercise a defense, as the Inter-American Court did in *Bulacio*, the court is interfering with this tradition.

In its decision following the Inter-American Court's judgment in *Bulacio*, the Argentine Supreme Court asserted:

[T]he Inter-American Court's decision resolves the collision between the right of the defendant to develop a wide defense and to the right of having the process decided within a reasonable time, intimately related to the statute of limitations as one of the proper tools to comply with that right, . . . through their subordination to the rights of the accuser, on the grounds that a violation of human rights under the terms of the American Convention on Human Rights has been ascertained.<sup>83</sup>

It then intelligently added:

[W]e are in front of a paradox in that it is only possible to comply with the duties imposed to the Argentine state by the human rights international jurisdiction by restricting the rights to a defense and by having a judicial decision within a reasonable time.<sup>84</sup>

---

the U.S. Constitution." (citing Jennie L. Cassie, Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647, 649-50 (1998)).

83. *Espósito*, *supra* note 65, ¶ 14 [translation by author] (lamenting that the American Convention lacks a framework to guide the court in deciding which procedural rights of the offender may be legitimately restricted).

84. *Id.* ¶ 16 [translation by author] (justifying the Argentinian Supreme Court's decision to impose restrictions on defendants' procedural rights by citing to how the Inter-American Court required the restrictions in order to assure protection of the rights set forth in the American Convention); *see also* Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.," La Ley [L.L.] (2005-S-1767) (Arg.), ¶ 9 [hereinafter *Simón*] (resulting from an Inter-American Court decision, the Argentine Supreme Court said that in order to punish violations of human rights the State must remove all its possible obstacles, including both the prohibition against *ex post facto* laws and *res judicata*). This is due not only to Article 68(1) of the American Convention, but also to Argentina's constitutional design, which has held various international conventions about human rights—including the American Convention—at the same level of the Constitution itself. *See* Thomas Buergethal, *Implementation of the Judgments of the Court*, in 1 MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI [Report of the Workshop: The Inter-American System Protection of Human Rights at the Threshold of the Twenty First Century], *supra* note 3, at 175, 190 (explaining that "for States in

B. DEFENDANTS TREATED AS ENEMIES: THE POTENTIAL  
VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHT TO A  
DEFENSE AND TO BE PRESUMED INNOCENT IN DOMESTIC  
PROCEEDINGS

The decisions of the Inter-American Court are binding on states party to the American Convention, and provide guidance regarding the interpretation states must give to rights protected therein.<sup>85</sup> However, question remains as to how likely domestic institutions are to welcome the duty to punish doctrine. Arguably, the doctrine is creating a special system of criminal law, namely a "criminal law of the enemy."<sup>86</sup> This new approach to criminal law, already visible in some legal systems<sup>87</sup> and recently proposed in others,<sup>88</sup> is designed to combat serious threats to Western systems of government like terrorism.<sup>89</sup> The approach, designed to work with "enemies," is to run

---

which the Convention has the status of domestic law, particularly constitutional law or law superior to that to ordinary domestic law, the 'obligation to comply with the judgment of the Court' assumed by a state party under Article 68(1), converts the judgment of the Court into a treaty obligation which, as such, enjoys the same normative status under domestic law as the treaty itself").

85. See ACHR, *supra* note 4, art. 1 (declaring that member states are obligated to respect certain basic rights and freedoms of all people, and asserting that ratification or adherence to the Convention binds that ratifying or adhering nation).

86. See Daniel R. Pastor, *La Deriva Neopunitivista de Organismos y Activistas Como Causa del Desprestigio Actual de los Derechos Humanos* [The Nonpunitive Drift of Agencies and Activists as a Cause of Present Loss of Prestige of the Human Rights], in 1 *Nueva Doctrina Penal* 73, 73-114 (2005), available at <http://www.juragentium.unifi.it/es/surveys/latina/pastor.htm> (criticizing the case law produced by the Inter-American system of human rights protection and the approach to criminal law taken by human rights NGOs in the Argentinean context); see also Simón, *supra* note 84, ¶ 96 (opinion of Justice Carlos Fayt) (describing the theory of the "criminal law of the enemy"); GÜNTHER JAKOBS, *LA CIENCIA DEL DERECHO PENAL ANTE LAS EXIGENCIAS DEL PRESENTE* [The Science of Criminal Law Before the Exigencies of the Present] (2000) (explaining the theoretical grounds, main characteristics, and promoting the application of a system called "criminal law of the enemy" in the modern world).

87. In general, the new approach is apparent in statutes addressing the prevention and fight against terrorism. Examples include legislation by the United States, Germany and Spain.

88. For example, Argentina.

89. See generally GÜNTHER JAKOBS & MANUEL CANCIO MELIÁ, "DERECHO PENAL" DEL ENEMIGO? ["CRIMINAL LAW" OF THE ENEMY?] (2003) (describing and analyzing the theory of the "criminal law of the enemy" and its applications in current legislations of Western societies).



parallel to the ordinary criminal system for “citizens.” One of its main characteristics is the relaxation of individual rights and liberal criminal law principles. Under the “criminal law of the enemy,” constitutional principles assumed by criminal law shall not represent an obstacle to punishment.<sup>90</sup>

Two categories of defendants are likely to confront domestic criminal systems in countries bound by the Inter-American Court’s duty to punish doctrine. In the first category are defendants charged with crimes constituting violations of rights protected by the American Convention. In the second category are defendants charged with crimes that do not constitute breaches to the American Convention. While the latter group would enjoy the full exercise of their right to a defense and every other guaranty under the due process of law, the former would not. 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.<sup>91</sup> The unequal treatment thus created for these defendants accused of crimes violating the American Convention would be flagrant.

To determine that no domestic legal provision or institution, or factual or judicial mechanism, could impede punishment is excessive. Are defendants’ constitutional rights included within the “domestic legal provisions or institutions” that the Inter-American Court rejects as well? Additionally, orders requiring that domestic courts stop tolerating defendants’ exercise of their right to a defense, as the Inter-American Court did in *Bulacio*, are also excessive.

The point is that the Inter-American Court’s words are dangerous. Could they be interpreted to mean that a lack of evidence is a “legal

---

90. *Simón*, La Ley [L.L.] (2005-S-1767) (Arg.), ¶ 95 (Fayt, J., dissenting) (quoting Pérez del Valle, Carlos, *Sobre los Orígenes del “Derecho Penal de Enemigo”*: *Algunas Reflexiones en Torno a Hobbes y Rousseau* [On the Origins of the “Criminal Law of the Enemy”]: *Some Reflections as to Hobbes and Rousseau*], in *Cuadernos de Política Criminal* No. 75 (2001)).

91. See *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 116 (Sept. 18, 2003) (maintaining that the American Convention requires states to adopt any provision necessary to guarantee no one is denied the right to judicial protection).

obstacle" to punishment and thereby dismiss a defendant's constitutional presumption of innocence? This would be an undesired outcome of the application of the Inter-American Court's doctrine. The basic aim of the right to be presumed innocent is to avoid the unequal treatment of defendants based on the crimes they are accused of having committed. The basic claim of the presumption of innocence is that every person, accused of whatever crime, is entitled to equal rights when confronting a state's criminal system.<sup>92</sup> This presumption might be eliminated by the Inter-American Court's duty to punish doctrine because courts might deprive defendants of their constitutional rights during trial on the grounds that the allegation involved violation of a right protected by the American Convention.

Indeed, if domestic courts strictly apply the Inter-American Court's words, the accusation of having violated any right protected by the American Convention allows the promotion of a trial where "no domestic legal provision or institution" could impede punishment. In those cases the whole posture of criminal trials would be nonsense. By definition, criminal trials are arranged to conduct state actions ending in punishment only by enforcing the legal provisions and institutions in place to ensure that states comply with individual rights. Furthermore, the long list of rights protected by the American Convention makes domestic courts' application of the doctrine even more dramatic and concerning.<sup>93</sup> The list is so long that

---

92. See ACHR, *supra* note 4, art. 8(2) (providing that as long as guilt has not already been proven, every person accused of a crime will be presumed innocent). But see DAVIDSON, *supra* note 2, at 297 (observing that the American Convention does not specify what standard of proof ought to be required of the state in proving guilt which can affect one's presumption of innocence).

93. See ACHR, *supra* note 4, arts. 3-25 (delineating specific fundamental rights, including the right to a juridical personality under Article 3, to life under Article 4, to humane treatment under Article 5, to freedom from slavery under Article 6, to personal liberty under Article 7, to a fair trial under Article 8, to freedom from *ex post facto* laws under Article 9, to freedom of conscience and religion under Article 12, to freedom of thought and expression under Article 13, to freedom of association under Article 16, to freedom of assembly under Article 15, to participate in government under Article 23, to equal protection under Article 24, and to judicial protection under Article 25; but also the right to a compensation under Article 10, to privacy and honor under Article 11, to reply under Article 14, to a name under Article 18, to a nationality under Article 20, to property under Article 21, and to freedom of movement and residence under Article 22). It is difficult to think of a crime that does not collide with any of these rights.

almost every offender could potentially be tried under a system “for enemies” if domestic courts follow the Inter-American Court’s decisions.<sup>94</sup>

While the Inter-American Court developed this doctrine in response to cases involving massive or grave state atrocities that arguably amounted to crimes against humanity, the court has always referred to the duty to punish doctrine as applicable to any violation of rights protected by the American Convention. If this is truly the case, then any violation of the right to private property, either committed by state officials or by private actors, might promote the obligation of the state to have those offenses punished. No legal obstacle could be raised, for instance, against the criminal punishment of any fraud or robbery, nor could such an obstacle be raised against the punishment of slander. Almost every offender would become “an enemy” with no right to invoke a defense or to be presumed innocent.

Finally, it is important to note that the countries party to the American Convention are all Latin or Central American countries.<sup>95</sup> The Inter-American Court is very prestigious in many of those countries, and its decisions are used not only as a basic tool for the interpretation of the provisions of the American Convention, but also as a guide for constitutional adjudication.<sup>96</sup> Encouraging these states to punish and enshrine criminal punishment as the most important means for improvement of social values is not a good idea. Latin and Central American countries’ history shows that every time any “threat” that “must be punished” is aroused, tragedy begins. In fact, the majority of the crimes that the Inter-American Court punished were committed by states in their alleged fight against terrorism. In

---

94. See Michael Ignatieff, *Human Rights as Idolatry*, in HUMAN RIGHTS AS POLITICS AND IDOLATRY 53, 90 (2001) (pointing out that “rights inflation—the tendency to define anything desirable as a right—ends up eroding the legitimacy of a defensible core of rights”).

95. See Inter-American Court Information, *supra* note 4 (listing the Latin and Central American countries party to the Convention).

96. See Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 26/9/1996, “Giroldi, Horacio David y otro s/ recurso de casación,” La Ley [L.L.] (1996-G-342) (Arg.), ¶ 11 (noting how Argentina’s National Supreme Court of Justice asserted that the decisions of the Inter-American Court of Human Rights must serve as a guide for interpreting the provisions of the American Convention on Human Rights).

“wars on terror,” states have usually fallen into terrorism themselves. Therefore, when the idea of punishment as a “must be” is claimed, the result is grave state abuses, individual rights infringements, and the punishment of innocent people.<sup>97</sup>

The path taken by the Inter-American Court of Human Rights is the wrong one because it makes the duty to punish doctrine applicable not only for state crimes but also for common crimes (crimes committed by private persons), and it can be used by states as a free ride to combat crime.<sup>98</sup>

### III. AN ALTERNATIVE APPROACH: THE DOCTRINE OF THE DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS UNDER THE EUROPEAN SYSTEM OF PROTECTION OF HUMAN RIGHTS

Following the Inter-American Court’s decision in *Velásquez-Rodríguez*, the European Court of Human Rights developed a similar body of case law regarding the need for state investigation of human rights violations. However, the European Court’s approach is less punitive than that of the Inter-American Court because prosecution and punishment of offenders is not considered the only means for victims’ redress and is only required in cases of grave state crimes such as killings, suspicious deaths under official custody, and ill-treatment.

Article 13 of the European Convention of Human Rights and Fundamental Freedoms (“European Convention”) gives victims of breaches the right to an effective remedy.<sup>99</sup> In *Aksoy v. Turkey*, the

---

97. See Pastor, *supra* note 86, at 90-91 (lamenting that the fervor for human rights has led international organizations and activists to promulgate abuses of the fundamental rights of the accused).

98. I wonder, if the United States were a party of the American Convention on Human Rights, how hard would it be to frame the atrocities committed by U.S. officials in the prisons of Abu Ghraib and Guantanamo Bay, or the restriction of detainees’ rights as necessary to comply with the duty to punish doctrine? Is it not possible that the United States could claim its actions were required in order to comply with its international duty prescribed by the Inter-American Court of Human Rights to remove “any legal obstacle or institution” impeding punishment?

99. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter

European Court interpreted Article 13 as requiring “the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.”<sup>100</sup>

In contrast with the Inter-American Court’s doctrine set forth in *Velásquez-Rodríguez*, requiring criminal investigation, prosecution, and punishment for every breach of the American Convention, the European Court stated the scope of Article 13 will depend on the complaint alleged.<sup>101</sup> Criminal prosecution is only required in cases of grave facts, such as suspicious death or ill-treatment allegedly committed by the state apparatus.<sup>102</sup> In a recent case reaffirming the doctrine set forth in *Aksoy*, the European Court stated:

[T]he scope of the state’s obligation under Art. 13 varies depending on the nature of the applicant’s complaint, and in certain situations the Convention requires a particular remedy to be provided. Thus, in cases of suspicious death or ill-treatment, given the fundamental importance of the rights protected by Arts. 2 and 3, Art. 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.<sup>103</sup>

In these cases, Article 1 of the European Convention,<sup>104</sup> requiring parties to secure protected rights and freedoms to everyone within their jurisdiction, is interpreted by the European Court in a manner

---

ECHR] (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

100. *Aksoy v. Turkey* (No. 26), 1996-VI Eur. Ct. H.R. 2260, 2286.

101. *Id.*

102. *See Menesheva v. Russia*, App. No. 59261/00, 44 Eur. H.R. Rep. 56, 1162, 1162-63 (2007) (judgment Mar. 9, 2006) (involving a Russian national who alleged that she was unlawfully arrested, detained, and mistreated by the authorities).

103. *Id.* at 1176 (ruling that Russia violated Article 13 of the European Convention by failing to effectively investigate the victim’s allegations of ill-treatment, and, therefore, the court ordered the State to compensate the victim).

104. ECHR, *supra* note 99, art. 1 (prohibiting discrimination based on the following: “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”).

similar to the interpretation given by the Inter-American Court to Article 1(1) of the American Convention:

Where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Art. 3, that provision, read in conjunction with the State's general duty under Art. 1 of the Convention . . . requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible.<sup>105</sup>

However, the European Court restricted its doctrine to cases involving violations of the right to life or the right to be free from torture and inhumane or degrading treatment or punishment.<sup>106</sup> The European Court has never said that every time a state or private actor violates a right protected by the European Convention, victims have the right to have offenders punished, as the Inter-American Court has done.<sup>107</sup>

---

105. *Menesheva*, App. No. 59261/00, 44 Eur. H.R. Rep. 56, at 1174 (requiring these investigations to be “independent, impartial and subject to public scrutiny” and that they be completed expeditiously and competently).

106. *See Bekos v. Greece*, App. No. 15250/02, 43 Eur. H.R. Rep. 2, 22, 35 (2006) (judgment Dec. 13, 2005) (asserting that Article 1 of the European Convention demands an official investigation after any violation of Article 3). *See generally* *Jankauskas v. Lithuania*, App. No. 59304/00, ¶ 35(2), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database> (follow “HUDOC” hyperlink; then enter “59304/00” in application number field) (finding a violation of Article 8 of the European Convention but not requiring the State to provide an effective investigation); *Kaya v. Turkey* (No. 65), 1998-I Eur. Ct. H.R. 297, 324 (requiring official investigation following any deaths resulting from use of state force under Article 2 of the European Convention).

107. States' duty to carry out criminal proceedings as set forth by the European Court in cases involving violations of the right to life or to be free from torture may emerge from the difficulty of making domestic courts determine civil or administrative liability, absent a declaration of criminal liability. *See Aksoy v. Turkey* (No. 26), 1996-VI Eur. Ct. H.R. 2260, 2287 (declaring the State's failure to conduct a criminal investigation and sentencing “was tantamount to undermining the effectiveness of any other remedies that may have existed”); *see also* *Ognyanova v. Bulgaria*, App. No. 46317/99, 44 Eur. H.R. Rep. 7, 169, 196, 199 (2007) (judgment Feb. 23, 2006) (holding Bulgaria in violation of Article 13 of the European Convention where authorities failed to conduct an effective investigation, and ordering payment of the claimant's costs and expenses); *Menesheva*, App. No. 59261/00, 44 Eur. H.R. Rep. 56, at 1176 (concluding Russia failed to conduct an effective criminal investigation thereby limiting remedies, such as damages, available to the victim).

Indeed, even in a case where the European Court held that Turkey violated a person's right to life, it nevertheless stated:

It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence . . . or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.<sup>108</sup>

Furthermore, the European Court stated, "neither Article 13 nor any other provision of the Convention guarantees an applicant a right to secure the prosecution and conviction of a third party or a right to "private revenge."<sup>109</sup>

The European Court further explained that even in cases involving violations of the right to life, a victim's redress can be fulfilled by establishing responsibility for the crime in civil or administrative processes. In the European Court's words:

It is true that [this tribunal] has found on occasion a violation of Article 13 in cases involving allegations of unlawful killing by or with the connivance of the members of the security forces . . . on account of the authorities' failure to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible . . . . However, it is to be observed that those cases, arising out of the conflict in south-east Turkey in the 1990s, were characterized by the absence of any such investigations into the applicants' complaints . . . . It was precisely this element which led the Court to find that the applicants in those cases had been deprived of an effective remedy, in that they had not had the possibility of establishing liability for the incidents . . . whether by applying to join criminal proceedings as an intervening party or by instituting proceedings before the civil or administrative courts.<sup>110</sup>

---

108. *Öneryıldız v. Turkey*, App. No. 48939/99, 2004-XII Eur. Ct. H.R. 79, 117 (2004) (judgment Nov. 30, 2004) (involving two Turkish nationals who blamed the authorities for their relatives' death when a municipal rubbish tip in Istanbul exploded).

109. *Id.* at 134 (discussing how Article 13 differentiates between types of remedies available for the violations of different rights).

110. *Id.* (adding that "[w]hat is important is the impact the State's failure to comply with its procedural obligation under Article 2 had on the deceased's family's access to other available and effective remedies for establishing liability on the part of State officials or bodies for acts or omissions entailing the breach of their rights under Article 2 and, as appropriate, obtaining compensation").

Interestingly, even in cases where the European Court found criminal investigation and punishment necessary, the court never ordered states to carry out prosecutions and criminal punishments in the operative paragraphs of its decisions. Moreover, the European Court never required states to take any measure in criminal proceedings already open, to re-open criminal cases already extinguished, or to initiate proceedings never initiated. When it found states had not complied with their duty to carry out criminal proceedings, the European Court simply declared the breach to the European Convention and required payment of monetary compensations to the victims.<sup>111</sup>

For example, in *Tanli v. Turkey*, the European Court found Turkey responsible for the death of a person in police custody where the three police officers accused of killing the victim were acquitted at trial because the cause of the death was not established.<sup>112</sup> The court declared the State's responsibility for the detainee's death and established that the State failed to conduct an effective criminal investigation. However, the European Court limited its decision to declaring Turkey's breaches of the European Convention and to ordering payment of fair compensation to the victim's next of kin. It did not order the State to re-open the case, as the Inter-American Court did in *Bulacio*.<sup>113</sup>

---

111. See *Tanli v. Turkey*, App. No. 26129/95, 2001-III Eur. Ct. H.R. 213, 217, 220, 238-39 (involving a Turkish national who blamed the government for torturing and murdering his son while he was under police custody for allegedly aiding and abiding the PKK).

112. *Id.* at 239 (awarding non-pecuniary damages of GBP 20,000 for the victim's next of kin and non-pecuniary damages of GBP 10,000 for the victim).

113. *Id.* See generally *Ognyanova v. Bulgaria*, App. No. 46317/99, 44 Eur. H.R. Rep. 7, 169, 196, 199 (2007) (judgment Feb. 23, 2006) (providing, generally, a similar assessments of facts and method of ruling by the European Court); *Iovchev v. Bulgaria*, App. No. 41211/98, ¶¶ 98, 116 (Feb. 2, 2006), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database> (follow "HUDOC" hyperlink; then enter "41211/98" in application number field) (deciding Bulgaria violated different procedural rights protected by the European Convention and ordering the State to repair the victim with monetary compensation); *Kaya v. Turkey* (No. 65), 1998-I Eur. Ct. H.R. 297, 323, 333 (deciding that Turkey conducted an artificial and ineffective investigation, violating Article 2 of the European Convention, and ordering state payment of monetary compensation as reparation); *Ergi vs. Turkey* (No. 81), 1998-IV Eur. Ct. H.R. 1751, 1779, 1784, 1785 (finding Turkish authorities failed to protect the right to life and lacked adequate and effective investigation of the victim's death, and ordering payment of



Finally, the limited doctrine set forth by the European Court is not applicable when the crimes assessed were not committed by the state apparatus. Violations of the right to life and the right to be free from torture, inhumane, or degrading treatment or punishment raise a state duty to carry out criminal proceedings only “in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”<sup>114</sup>

## CONCLUSION

*“An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself.”*<sup>115</sup>

State atrocities have a widespread record in modern history. Whether and how to punish gross violations of human rights have always been key and complex issues with which societies have had to deal.<sup>116</sup> There is no doubt that states must punish crimes against humanity.<sup>117</sup> It is also a generally accepted view that hideous crimes

---

monetary compensation as reparation).

114. *Ognyanova*, App. No. 46317/99, 44 Eur. H.R. Rep. 7, 169, 191 (awarding only non-pecuniary and out-of-pocket expenses to applicants and dismissing the applicants' other claims for “just satisfaction”).

115. THOMAS PAINE, *Dissertations on First Principles of Government, in RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS* 385, 408 (Mark Philip ed., Oxford Press 1995).

116. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (Beacon Press 1998), reprinted in 14 *NEGOTIATION J.* 319 (1998) (describing and analyzing the different experiences and approaches taken by societies leaving behind regimes of massive state atrocities); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 41-104 (1996) (describing trials of former state officials who committed hideous crimes, analyzing their political and legal problems, and describing Argentina's transition to democracy, its policies regarding the promotion of human rights, and the trial conducted against the military juntas).

117. It is worth noting that it might be dangerous to use the category of “crimes against humanity.” See David Luban, *A Theory of Crimes Against Humanity*, 29 *YALE J. INT'L L.* 85, 120 (2004) (“[T]alk of crimes against humanity whose perpetrators are ‘enemies of humanity’ threatens to demonize the perpetrators, to brand them as less than human, and hence to expel them from the circle of those who deserve human regard. The obvious paradox is that doing so undercuts the

should be punished. The punishment of crimes is desirable in every state under the rule of law, and the more hideous the crime, the more desirable a need for punishment. However, that cannot mean that in order to punish crimes, states are to disregard defendants' rights.<sup>118</sup> Yet, the existence of a victim's right to punish an offender is likely to produce this unwanted consequence.

Through consistent development of case law, the Inter-American Court maintained that every violation of any of the rights protected by the American Convention, including both public and private violations, must be punished by states party to the Convention. Part III explained why this doctrine is dangerous. The way in which the Inter-American Court has broadened victims' rights results in the restriction of some of the most valuable rights achieved by Western civilizations: the rights of the people accused of having committed a crime. Not in vain, every national constitution provides rights to defendants but not to victims. Nothing is more dangerous for individuals than the states' criminal power. Therefore, law cannot simultaneously assure both criminal procedural rights to defendants and a victim's right to punish an offender. The existence of a duty to punish will likely lead to abuse of power and infringement of individual rights.<sup>119</sup>

As *Bulacio* illustrated, the decision to provide both protection to defendants' rights and a victim's right to have offenders punished is equivalent to eliminating defendants' rights. 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

---

root idea of international human rights, namely that *everyone* deserves human regard." (emphasis in original)).

118. See generally Agnes Heller, *The Limits to Natural Law and the Paradox of Evil*, in ON HUMAN RIGHTS 149, 152 (Stephen Shute & Susan Hurley eds., 1993) (asserting that to disregard defendants' rights in order to punish sinister state crimes erodes the legitimacy of the states).

119. Pastor, *supra* note 86, at 94. Western constitutions are especially concerned about protecting defendants' rights, while never mentioning rights associated with victims of crimes. See George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 551 (2005) (explaining that constitutions "are devoted to the problem of a fair trial for the accused, not the issue of justice for those who have suffered from crime").

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' rights and victims' right to punishment. The Inter-American Court's duty to punish doctrine promotes the violation of an individual's right to equal treatment and to be presumed innocent. It also permits the violation of a defendant's right to defense in a fair trial. Therefore, the Inter-American Court's doctrine is counterproductive because it infringes on the very objectives of the Inter-American system of human rights protection. As the Inter-American Court stated, "[t]he safeguard of the individual in the face of the arbitrary exercise of the power of the State is the primary purpose of the international protection of human rights."<sup>120</sup> In addition, "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power."<sup>121</sup>

Of course, victims' rights look appealing when dealing with state atrocities because they make the punishment of sinister criminals easier. Moreover, the very creation of regional systems of human rights protection, such as the Inter-American system, emerged from the need to have international tribunals hear victims of states' crimes, and direct states on how to deal with human rights violations. However, to excessively broaden the scope of victims' rights produces unwanted legal outcomes under the rule of law. The European Court has good reason to differentiate its approach from its Inter-American counterpart.

In its approach to fight against state officials' impunity, the Inter-American Court gives states excessive power. Ironically, the court is

---

120. *Baena-Ricardo v. Panama*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104, ¶¶ 78, 128 (Nov. 28, 2003) (holding that the Inter-American Court "has the authority, inherent in its attributions, to determine the scope of its own competence, and also of its orders and judgments, and compliance with the latter cannot be left to the discretion of the parties").

121. The Word "Laws" in Article 30 of the American Convention on Human Rights (Advisory Opinion), 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, ¶¶ 21, 38 (May 9, 1986) (defining "laws" as a "general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose").

using state criminal punishment as a tool to prevent and deter state abuses.<sup>122</sup> This collides with the very same idea of protection of human rights. As Cardona Llorens said, "the rights recognized by the human rights treaties must be interpreted in a way to protect the individual against the state."<sup>123</sup> Every time a criminal trial is developed, defendants' rights are in danger. More importantly, every time the state's criminal system is called into action, innocent people might suffer infringements on their freedoms.

By approaching every human rights violation as if it could only be responded to with punishment, the Inter-American Court might enhance states' power to punish and weaken individuals' rights. 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.<sup>124</sup>

---

122. See Di Corleto, *supra* note 10, at 704 (clarifying that lack of a specifically outlined duty to investigate and punish human rights abuses in various international human rights conventions does not signify that there is no such duty).

123. See Cardona Llorens, *supra* note 3, at 321 [translation by author].

124. See Pastor, *supra* note 86, at 85 ("This ideology of an infinite punishment does not admit alternatives to criminal law. To claim this in such a categorical way and with no tolerance for solutions other than punitive is equivalent to re-found a medieval and counter-illustrated criminal law already superseded long time ago".) [translation by author].