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Doctrines Regarding the Fight Against Impunity and the Victim's Right for the Perpetrator to be Punished

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Doctrines Regarding "The Fight Against Impunity" and "The Victim's Right for the Perpetrator to be Punished"

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I. Introduction

Over the course of the last decade, particularly in recent years, two doctrines have emerged within criminal law that have a major bearing, in theoretical and practical terms, namely, the doctrine of *the fight against impunity*[1] or *"zero impunity"*[2] and the doctrine of *the victim's right for the perpetrator to be punished.*[3] Both doctrines have different origins and likewise address differing motivations. However, they do share common ground, for instance, when attempts are made to justify the right to combat impunity by referring to a victim's presumed right to justice, which is identified as the perpetrator's punishment. This paper strives to look into both doctrines and the purported interplays existing between them.

II. The Doctrine (or Doctrines) of the Fight Against Impunity

2.1 *Introduction*

The first point that must be highlighted in relation to the doctrines of the *fight against impunity* is the fact that said doctrines are highly prominent in both academic and forensic circles, as well as in public opinion.[4] This good reputation is largely due to the specific field in which they have been formed-

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1. DANIEL PASTOR, EL PODER PENAL INTERNACIONAL: UNA APROXIMACIÓN JURÍDICA CRÍTICA A LOS FUNDAMENTOS DEL ESTATUTO DE ROMA 75 (2006).

2. *Id.* at 80.

3. JAN PHILIPP REEMTSMA, DAS RECHT DES OPFERS AUF DIE BESTRAFUNG DES TÄTERS–ALS PROBLEM (1999).

4. PASTOR, *supra* note 1, at 182-83. It should be noted, for instance, that organizations that defend human rights, such as Amnesty International, have adopted many postulates of this ideology.

crimes against humanity. It is also due to the bodies of law that have developed them, international courts and national constitutional courts; and lastly, to the source from which they have been drawn, international treaties for the protection of human rights.

Accordingly, preventing impunity has become the most "contemporary" goal in criminal law and indeed one of the foremost factors leading to changes in the scope of traditional criminal justice principles[5] during the last decade. The duty of States and the International Community to issue punishments for the sole purpose of bringing an end to impunity is set out in the Preamble to the Statute of the International Criminal Court, the case law of the Inter-American Court of Human Rights,[6] judgments issued by constitutional courts, and a large body of doctrinal papers.[7]

Doctrines against impunity have unfolded within the framework of transitional justice,[8] as it is called. These doctrines advocate an unrestricted appeal to criminal law in the face of the proposals of truth, compensation, and rehabilitation for victims. Along these lines, not only do the doctrines throw

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5. WOLFGANG NAUCKE, DIE STRAFJURISTISCHE PRIVILEGIERUNG STAATSVERSTÄRKTER KRIMINALITÄT 55, 76, 80-81 (1996) [hereinafter NAUCKE, DIE STRAFJURISTISCHE]; Wolfgang Naucke, *Normales Strafrecht und die Bestrafung staatsverstärkter Kriminalität*, *in* FESTSCHRIFT FÜR GÜNTER BEMMANN 75, 82 (Joachim Schulz & Michael Damnitz eds., 1997) [hereinafter Naucke, *Normales Strafrecht*]; Ilse Staff, *Zur Problematik staatsverstärkter Kriminalität*, *in* DAS RECHT DER REPUBLIK 232, 259 (Brunkhorst & Niesen eds., 1999). *See also* George Fletcher, *Justice and Fairness in The Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 554-55 (2005) [hereinafter Fletcher, *Justice and Fairness*]. Fletcher approves of and notices that in new international instruments, the notion of justice, seen as the victims' right for perpetrators to receive the punishment they deserve, has taken precedence over the notion of a fair trial, seen as the perpetrators' right to be treated respectfully regardless of the severity of the suspicions directed at them.

6. Almonacid Arellano et al. v. Chile Case, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006); Chumbipuma Aguirre et al. v. Peru Case, Inter-Am. Ct. H.R. (ser. C) No. 87 (Mar. 14, 2001) (both judgments declaring the respective defendant countries were internationally liable). *See also* Kolk & Kiselyiy v. Estonia, Eur. Ct. H.R. app. no. 23052/04 and 24018/04 (2006).

7. KAI AMBOS, A GENERAL PART OF INTERNATIONAL CRIMINAL LAW 33 (2005); *see also* George Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 60 (1999).

8. Jorg Arnold & Emily Silverman, *Regime Change, State Crime and Transitional Justice: A Criminal Law Retrospective Concentrating on Former Eastern Bloc Countries*, 6/2 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 140, 141 (1998).

out models of an unconditioned waiver of criminal law, they also discard proposals allowing for either a conditional waiver of attribution of criminal liability, for instance, a confession given before truth committees,[9] or an otherwise conditional mitigation of liability in the case of confession.

2.2 *The notion of "impunity" and the elements constituting the doctrine of the fight against impunity*

Etymologically, impunity simply means "lack of punishment" and hence bears no negative connotation. Nonetheless, the statements made in international courts define impunity as the "general lack of investigation, persecution, detainment, prosecution and sentencing of those who are liable for violating protected rights."[10] This definition gives the term "impunity" a clearly negative connotation. Furthermore, within the aforesaid case-law notion, the concept of impunity[11] refers to three circumstances: (1) the lack of any kind of legal intervention by the State in the facts (factual impunity),[12] (2) the explicit limitation of prosecution and punishment for those facts owing to exemption laws stemming from democratic parliaments (active legal impunity), and (3) non-annulment of said laws (legal impunity by omission).[13]

As a result, when developing the doctrine of the fight against impunity, it has been stated that violations of human rights are not eligible for amnesty, not subject to a statute of limitations, and cannot be pardoned. Nor indeed can they be governed by the double jeopardy interdiction (procedural *non bis in idem*, res judicata) or by the principle of non-retroactive application of unfavorable provisions.[14] I particularly find interesting the doctrine's effect on double jeopardy. It has been

9. *See* David Crocker, *Punishment, Reconciliation, and Democratic Deliberation*, 5 BUFF. CRIM. L. REV. 509, 514, 531 (2002).

10. *Almonacid*, Inter-Am. Ct. H.R., (ser. C) No. 154, marg. no. 111.

11. *See also* Jorge Viñuales, *Impunity: Elements for an Empirical Concept*, 25 LAW & INEQ. 115, 117 (2007).

12. This tends to occur when crimes are committed in the context of a political regime that causes them or, at least, blinds people as to the fact they are being committed.

13. Several countries have been in this situation following the passage of such provisions and have even decided to render them null and void.

14. *See, e.g.*, *Almonacid*, Inter-Am. Ct. H.R., (ser. C) No. 154 (judgment of the Inter-American Court of Human Rights dealing with established doctrine).

rejected as an absolute right, denying a binding effect in relation to res judicata when the latter is "fraudulent" or "apparent," or in other words when it: (1) adhered to the goal of relieving the perpetrator of criminal liability, (2) was not brought independently or impartially, and (3) was not intended to submit the individual to justice.[15] Nevertheless, the new doctrine on the scope of the double jeopardy principle goes further. It has been stated that a correct not guilty verdict loses the effect of res judicata when new facts or evidence subsequently emerge on the grounds that "the demands of justice, victims' rights, and the spirit of the American Convention trump the protection of double jeopardy."[16]

The issue to address is whether said restriction, or even eradication, of basic criminal law principles can be assumed. In my opinion, it is necessary to make some distinction at this point. Indeed, it is not the same to state that such crimes are not eligible for amnesty, not subject to a statute of limitations, and not subject to pardon, as it is to conclude that the principle of non-retroactive application of unfavorable provisions and the double jeopardy (res judicata) principle are not applicable in this field. With regard to the former, it should be pointed out that, strictly speaking, there is no right for crimes to be subject to a statute of limitations. The strongest argument against non-application of a statute of limitations[17] or the establishment of long statutes of limitations is the consideration that it is illegitimate to punish someone for crimes that took place a long time ago, when the individual and indeed society have changed substantially since then, because it harms human dignity.[18] However, the very doctrine allowing for a criminal statute of limitations founded on the notion that "time is the greatest healer" may be challenged by the fact that certain

15. *Id.* at 154; Rome Statute of the International Criminal Court, art. 20, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

16. *See Almonacid*, Inter-Am. Ct. H.R., (ser. C) No. 154 at 154. *See also* Plenary Council of the Constitutional Court of Colombia, C-554-01, May 30, 2001.

17. This argument can be defended from the standpoint of absolute justice. *See* PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 58 (2006).

18. CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 182-83 (1996) [hereinafter NINO, RADICAL EVIL].

wounds never heal.[19] All in all, an analysis of the perpetrator and social evolution unavoidably shows that there is a point at which the present becomes the past[20] and should not be subject to intervention by the court in criminal proceedings. The issue concerns how to determine the point at which the events have indeed "faded into the past."[21] Given that at this juncture it is important to introduce degree considerations, intermediate solutions may be justified in many cases.

What has been explained above can also serve to distinguish between eligibility for amnesty and for pardon. It is widely known that there is a major difference between pardon and amnesty. Pardon applies to an individual who has already been sentenced and there is, therefore, a reason for the disappearance of criminal liability. On the other hand, amnesty takes place prior to criminal proceedings, where it blocks a statement regarding said liability.[22] This distinction constitutes grounds for rejecting amnesty and accepting the possibility of a pardon instead. In the latter case, the existence of a wrongful, blameful action on the part of the perpetrator and the recognition of the injured party's victim status can be wholly determined by the verdict, even if enforcement of the penalty imposed is finally dispensed with.

As mentioned above, the issue of the championed irrelevance of the principle of "non-retroactive application of unfavorable provisions" is rather more significant. Generally speaking, a distinction should also be made, even if merely for analytical purposes, between the effect of said principle when indirectly applied to an exempting provision such as an amnesty law, and the effect brought about when the principle has a direct bearing

19. *See* RAMON RAGUÉS I. VALLÈS, LA PRESCRIPCIÓN PENAL: FUNDAMENTO Y APLICACIÓN 91 (2004) (on the possible justifications for establishing that certain crimes may not be subject to a statute of limitations, that is, for prolonging the persecution of such crimes until the death of the alleged perpetrator).

20. Thomas Vormbaum, *Mord sollte wieder verjähren*, *in* FESTSCHRIFT FESTSCHRIFT FÜR GÜNTER BEMMANN 481, 498 (Joachim Schulz & Michael Damnitz eds., 1997).

21. *See* REGINA BLÜMMEL, DER OPFERASPEKT BEI DER STRAFRECHTLICHEN VERGANGENHEITSBEWÄLTIGUNG 263 (2002) (stating the opposite proposition that peace with the victim should be sought, though I believe that doing so should not be left up to the latter).

22. *See* Carlos Pérez del Valle, *Amnistía, Constitución y Justicia Material*, 61 REDC 187, 197 (2001).

on a severe law such as that which subsequently extends the statutes of limitations on certain crimes to the point that, effectively, a statute of limitations cannot be applied.

First, the bearing of this principle with respect to amnesty laws must be taken into consideration.[23] If such favorable provisions, which were preceded and followed by an unfavorable provision (the one provision that failed to acknowledge those amnesty laws and the one provision invalidating them, respectively), are in fact declared to be null and void, it cannot be stated that the principle of non-retroactive application has been breached if a punishment is ultimately issued. Even so, in order to declare a favorable interim provision as null and void, its material legitimacy must be challenged, a result which shall stem from a judicial, not legal or constitutional, provision.[24]

From this standpoint, exempting provisions which bear democratic legitimacy is an entirely different matter altogether.[25] In the case of such provisions, it becomes unfeasible to apply the reasoning associated with annulment.[26] It is also impossible to overlook the consequences of non-retroactive application of unfavorable provisions, unless the exempting democratic law breaches the provisions of an international treaty that has been ratified by a state beforehand (and was once again null and void for that very reason). Aside from the latter eventuality, overlooking the consequences of the principle of non-retroactive application of unfavorable provisions may only be upheld according to the viewpoint of those who believe that principles generally acknowledged in international law meet the requirements established by the legality principle in criminal law[27] and, likewise, that one such principle is the an-

23. *See, e.g.*, NINO, RADICAL EVIL, *supra* note 18, at 158; NORBERT CAMPAGNA, STRAFRECHT UND UNBESTRAFTE STRAFTATEN 135-37 (2007).

24. This is a standpoint upheld by Nino, in the case of provisions passed without democratic legitimacy. However, this would entail adopting an outsider's standpoint, which cannot be backed up in terms of positivist viewpoints of legal certainty. *See* NINO, RADICAL EVIL, *supra* note 18, at 163; WOLFGANG NAUCKE, DIE STRAFJURISTISCHE, *supra* note 5, at 55 (putting forward weaker reasoning).

25. PASTOR, *supra* note 1, at 188.

26. NINO, RADICAL EVIL, *supra* note 18, at 164 (accepting the need to dispense with the sanction from the standpoint of punishment that is not retributivist, but rather reasonable; nonetheless, the issue seems to transcend reasonableness and concerns legal certainty and legitimacy of the *ius puniendi*).

27. Rome Statute, *supra* note 15, at arts. 21(1)(b), 22(3).

nulment of exempting provisions whenever a violation of human rights takes place, even if they are democratic and do not constitute a breach of an international treaty.

In relation to the statute of limitations, one opinion maintains that an extension of such period, or even a statement whereby a statute of limitations may not be applied once a crime has been committed, does not pose legality problems. The reason put forward is that the protection awarded by the principle of non-retroactive application of unfavorable provisions only covers elements regarding the definition of the crime and not the requirements for its prosecution. Moreover, it is alleged that this retroactive extension of statutes of limitations would account for the fact that it was impossible to prosecute crimes during a certain period, which constitutes adequate grounds for suspending statutes of limitations as they elapse.[28] As stated, strictly speaking there is clearly no entitlement to a statute of limitations for crimes. Nonetheless, once it has been established, it would be difficult to deny that regulation of statutes of limitations would constitute a safeguard for the perpetrator. Accordingly, retroactive extension of statutes of limitations would not be acceptable.

We come at last to the problem of the deprivation of blocking effects to final judicial resolutions. There is once again a need to establish a distinction. In the event of a "fraudulent" or "apparent" res judicata, it can be stated that the resolutions are consciously illegal or, in any event, infringe procedural provisions and should thereby be considered null and void. Consequently, a new prosecution would not breach the principle of *non bis in idem*. Nonetheless, this reasoning lacks all value in the case of correct resolutions, whereby it emerges that new facts or evidence have arisen. If this applies, it can merely be confirmed that there has been a breach of the principle *non bis in idem*, linked to the stability of judgments and, thereby, to effective judicial protection as well.

2.3. *The purpose of the doctrine against impunity*

The purposes for fighting impunity for crimes against humanity initially show some degree of formalism. Indeed, na-

28. NINO, RADICAL EVIL, *supra* note 18, at 182-83.

tional constitutional courts declare that States must combat impunity in order to fulfill their international duties.[29] However, this must refer to ulterior grounds: why is it that situations of impunity (non-persecution for punishable acts; enactment of exempting laws; or especially non-annulment of the latter) breach international conventions on human rights?[30] This is the juncture at which material reasons emerge. The Inter-American Court of Human Rights refers to the "victim's right to justice," which is tied to their right to "the investigation, identification and trial of the responsible individuals." The Court also refers to a "right to the truth," which is an integral part of the "right of the victim and his/her relatives to be given clarification from the competent bodies of the State as to the wrongful acts committed and the liable individuals by means of the investigation and trial envisaged in articles 8 and 25 of the Convention."[31] For this very reason, it is deemed that exempting provisions would give rise to a defenselessness on the part of the victim.

The first striking aspect of the foregoing argument is that it does not contemplate deterrence of potential perpetrators or the trust of potential victims. The duty to punish—rejecting impunity—is affirmed on the basis of victims' "current" or "effective" rights. The issue in these cases, therefore, is whether consideration shall be given to a retributivist basis of the punishment. We will address this matter in the second part of this paper. For now, it is sufficient to merely state for the record that, by and large, doctrines on retribution have not been crafted with the crime victim in mind; rather, they have been developed on the basis of the link between the act carried out by the perpetra-

29. In the case of resolutions issued by the Inter-American Court, such impunity breaches article 18 of the American Declaration of the Rights and Duties of Man, and also articles 1, 8 and 25 of the American Convention on Human Rights. *See* Ninth International Conference of American States, American Declaration of the Rights and Duties of Man art. 18, April, 1948, O.A.S.T.S. XXX; Organization of American States, American Convention on Human Rights arts. 1, 8, 25, July 18, 1978, O.A.S.T.S. 36, 1144 U.N.T.S. 123.

30. *See* PASTOR, *supra* note 1, at 187 (stating that, in principle, issuing punishment and failing to do so are part of the "possible world" of penal power).

31. *Almonacid*, Inter-Am. Ct. H.R., (ser. C) No. 154 at 150 (reiterating a well-established doctrine, the judgment in this case underlines that the State has an obligation to achieve the truth through judicial proceedings).

tor and the applicable rule.[32] It is worth highlighting at this juncture that the foregoing paragraph mentions several intermingled rights, the existence and scope of which should initially be distinguished; for instance, the right to the truth, the right to a trial, the right to justice, and the right to punishment.

It would be difficult to deny that there is a right for victims and their relatives to discover the truth.[33] The difficulty lies in maintaining that said right can (and must) be met through criminal proceedings.[34] In fact, criminal procedure reconstructions of events in the past do not seek to reveal the truth about what took place; rather, they merely lay the foundations for attributing liability. Consequently, critics are correct when they argue that the truth stemming from attribution of blame is somewhat restricted.[35] Even the truth drawn at truth commissions is shrouded in significant restrictions, which can only be overcome by means of open dialogue between honest, informed interlocutors.[36]

The circumstances surrounding the right to justice are somewhat different. Indeed, it seems that the natural setting for the aims of justice is the trial. Thereby, the right to justice encompasses a right to a trial. However, the very meaning of a "right to justice" and how it can be met are two aspects that are by no means obvious. One possibility is that the expression is used to refer quite simply to the aims of whomever deem themselves to be victims, whereby they wish for that circumstance to be declared in an objective, public manner. In order to address this objective, the institution of blame arises first and foremost. It has already been suggested that doubt can be cast over the notion of selective blame since it brings about a simplification of complex situations. Laying the blame at someone's door for an act entails holding others free from all blame for said act, which

32. *See* Fletcher, *supra* note 7, at 54 (referring to the reinstatement of the breached rule, deprivation of the unlawful advantage the perpetrator has gained, etc.).

33. CAMPAGNA, *supra* note 23, at 154.

34. This is paramount. *See* DANIEL PASTOR, ¿VERDAD, HISTORIA Y MEMORIA A TRAVÉS DE LA JUSTICIA PENAL? 35 (2007) (unpublished manuscript, on file with the author).

35. *See* Jaime Malamud Goti, *What's Good and Bad About Blame and Victims*, 9 LEWIS & CLARK L. REV. 629, 641 (2005).

36. *Id.* at 646.

may not be entirely fair.[37] Nonetheless, the foregoing drawback is in all likelihood outweighed by the moral benefits that proceedings offer when it comes to an expression of blame. By laying blame at the perpetrator's door, the party affected by the actions of the former is established as the "victim," whereby the dignity and equality of the latter are reinstated.[38]

The issue to address is what the statement of a right to punishment adds to the above, in the sense of inflicting harm. It would appear that it has to do with the particular expressive value that the perpetrator's suffering of pain provides in the re-establishment of the victim's original position in cases of a breach of human rights. However, it is difficult not to observe in that process an aim to rationalize (or conceal) a pure desire for revenge. As this should be dealt with in general terms, it is worth at this point to refer the reader to the second part of this paper.

2.4. *Balance*

In spite of what has been indicated, the doctrines of fight against impunity encounter very little opposition. It has been occasionally stated that the development of a social conscience with respect to violations of human rights depends more on the exposure and condemnation of such breaches, rather than on the number of individuals effectively punished for them.[39] Even in this latter case, on the whole, this opposition is mostly a strategic move. It is for this very reason that it has been pointed out that imposing a responsibility on States (internationally) to prosecute and sentence breaches of human rights, which occurred during a previous political regime, would be a far too difficult a burden for governments who have to tackle the difficulties entailed by re-establishing democracy. Hence, this viewpoint does not stand against one international (or foreign) jurisdiction intending to take on a fight against impunity

37. *Id.* at 634, 641. *But see* Crocker, *supra* note 9, at 521 (maintaining that exclusion of collective liability through compensation is precisely the only factor that can put an end to the cycle of revenge).

38. *See* Goti, *supra* note 35, at 636, 639-40.

39. Carlos Santiago Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2630 (1991).

by rejecting amnesties or statutes of limitations.[40] The proposal is thus for the international community to assume active protection of human rights by providing (possibly unrestricted) punishment of violations thereof.

The most striking exception to this state of affairs is illustrated in the study conducted by Daniel R. Pastor on international criminal jurisdiction. It highlights how the ideology of the fight against impunity (which he denotes as the "infinite punishment" doctrine) is covered by courts, which, like the International Criminal Court, act as *prima ratio* in the international legal system and are predestined to convict.[41] It also addresses how this causes a major decay in criminal law founding principles and how there is a risk that certain aspects of the fight against impunity end up being extrapolated to encompass criminal law as a whole. We will address this latter aspect below.

III. Permanent Aspects

It would be wrong to state that doctrines against impunity only represent an exceptional law directed to combat an exceptional type of criminality.[42] They have a far greater scope, encompassing crimes other than those associated with state or state-related criminality; in particular terrorism, and more generally crimes against life. Indeed, there is no particular reason to believe that the notion—and its implications—may not be applicable to other serious crimes in internal laws.[43] When amnesty laws are rejected based on the argument that they constitute *ad hoc* legislation and that they entail prolongation of impunity, valid statements are made with respect to amnesty as a whole. Stating that amnesty or similar laws lead to defenselessness on the part of victims and their relatives, who would be denied the right to seek justice via effective means,

40. *Id.* at 2639. *See also* NINO, RADICAL EVIL, *supra* note 18, at 149, 186 (reiterating previous point and expanding it to encompass cases of terrorism and drug trafficking).

41. *See* PASTOR, *supra* note 1, at 75, 129, 175.

42. However, sometimes reasoning put forward for the need for 'historical justice' following a change of political regime can lead to the establishment of exceptions to the general principles of criminal law in terms that could not be applied to all crimes as a whole.

43. *See* PASTOR, *supra* note 1, at 176 (addressing the "metastasis effect").

once again picks up on an argument that may be applied generally and would therefore apply to amnesty that would favor members of a terrorist organization, a statute of limitations on crimes committed by a serial killer, or a pardon for any serious common crime.[44] In other words, based on such laws it can be maintained that serious violent crimes shall not be eligible for amnesty, pardoned, or subject to a statute of limitations. This is clearly illustrated by the difficulties entailed when attempting to define the statute of limitations for murder and at the same time stating that genocide may not be subject to a statute of limitations.[45] Nonetheless, neither the statute of limitations, nor the pardon or even amnesty[46] necessarily lead to a second victimization which would make them unacceptable from the standpoint of victims' dignity.[47]

In any event, one only needs to examine political dialectics, the discourse put forward by victims' associations and the media, in order to notice the omnipresence of notions associated with the fight against impunity doctrine. This makes it possible to state that its terms mark a trend of evolution in criminal law at the turn of the 21st century. This trend (as with its manifestation which it intimately tied to the repression of crimes against humanity) is at least partly related to the established foundation of criminal law, whereby it revolves around the victims of crimes. This trend also encompasses the governing criteria relating to the existence of a (presumed) right of the victim—especially the victim of a violent crime—for the perpetrator to be punished.

As we have seen, the core element of doctrines against impunity in criminal law involves "delivering justice to victims" by prosecuting and punishing perpetrators. As a result, these doctrines stand against all those law principles and institutions which, as an expression of some degree of focus in criminal law on the perpetrator or on society in general, lead to either the

44. *See* Viñuales, *supra* note 11, at 126, 134 n.60.

45. *See* Vormbaum, *supra* note 20, at 500 n.96.

46. *See, e.g.*, Pérez del Valle, *supra* note 22, at 203 (maintaining that the opportunity for amnesty based on a distributive perspective, provided it is fair, does not constitute a breach of the international responsibilities taken on by the State, nor does it affect trust in the fact that the requirements of law in achieving common good would still be valid).

47. CAMPAGNA, *supra* note 23, at 159.

eradication of criminal liability for said perpetrator or a waiver of enforcement of the penalty. Given a wrongful and blameful act, arguments that may lead to the conclusion that it does not meet the crime definition—and, indeed, these are most of the arguments giving rise to the exemption from punishment—are rejected inasmuch as they constitute hurdles when it comes to delivering the justice that victims seek and deserve. Arguments that would lead to the reduction of the sentence to be effectively served are equally rejected.

The issue that remains open, however, is whether delivery of justice to the victim requires the perpetrator to effectively be punished in all cases. Along these lines, it is not easy to maintain that the victim or society has a legitimate claim for punishment that is absolute in nature. As mentioned, victims and society have a right to the reinstatement of dignity and the social bonds put at stake by the crime, respectively.[48] However, one must consider whether this is not inherent to declaring the perpetrator's blame (and the respective declaration whereby the victim is identified as the party affected by said perpetrator).[49] Inasmuch as a victim's dignity can be reinstated—giving said party the acknowledgment due—by inflicting the least degree of harm possible on the perpetrator, it seems that this is a goal that the criminal law system should indeed focus on achieving.[50]

It is my view that the situation will not change significantly if the problem is tackled by overlooking the victim's viewpoint and incorporating the logic of positive general prevention. It is widely known—disregarding the nuances that are characteristic of the numerous variants of the doctrine—that this theory identifies the penalty as a communicative message stating that society continues to place its trust in the breached rule, imposing harm on the perpetrator.[51] In actual fact, this line of rea-

48. *Id.* at 66-67.

49. Crocker, *supra* note 9, at 519 (Crocker accepted this and stated "the trial affirms the dignity of the victim.").

50. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 124 (1990).

51. *See* Marcelo A. Sancinetti, *Las Leyes Argentinas de Impunidad y El Artículo 29 de la Constitución de la Nación Argentina*, *in* 1 DOGMÁTICA Y LEY PENAL: LIBRO HOMENAJE A ENRIQUE BACIGALUPO 811, 814 (Jacobo López & Miguel Bajo eds., 2004).

soning merely forms a convincing basis for the need for a crime—indeed, any crime—to be superseded by a penal reaction. This penal communication "at the expense of the perpetrator,"[52] however, does not have to inflict harm on the perpetrator through the enforcement of a penalty. Accordingly, I believe that it cannot be deduced from this punishment theory that "a lack of punishment for a breach of human rights is in itself an abuse of human rights."[53] The same would apply to any other serious crime and, even so, it does not seem that, generally speaking, any provision exempting the blameful perpetrator from liability can be considered unfair. By the same token, one cannot conclude without the inclusion of further premises that "in the face of certain kinds of crimes, social order cannot allow for pardon."[54] Indeed, it would be necessary to draw the same conclusion for other serious crimes. Consequently, the need for "penal harm" is not tied to the need for an ideal confirmation that the rule still holds. Rather, it relates to the requirement that the law provide actual and potential victims with cognitive safety. It is this aspect, and not the previous one, that we should examine in greater detail.

According to the idealistic standpoint that is shared by positive general prevention theorists, one can perfectly maintain that a pardon—inasmuch as it recognizes the wrongfulness of the act and the culpability of the perpetrator[55] whilst also eradicating both—is a functional equivalent to the penalty. With good reason it has been mentioned that this constitutes "the highest expression of reciprocal acknowledgment."[56] However, one does not need to be party to this philosophical standpoint in

52. Clearly I am not suggesting by this that under application of the Full Stop Law and the Law of Due Obedience that the elements of this penal disclosure–which, besides necessary–were present.

53. Sancinetti, *supra* note 51, at 815.

54. *Id.*

55. For an expression in terms of likelihood, see CARL LUDWIG VON BAR, GESCHICHTE DES DEUTSCHEN STRAFRECHTS UND DER STRAFRECHTSTHEORIEN, 312 (Scientia Verlag 2d prtg. 1992) (1882) (describing how legal rights are expressions of society's morals).

56. *See* GEORG W. F. HEGEL, PHÄNOMENOLOGIE DES GEISTES 493 (1986) (1806) (the "Verzeihung" constitutes the "höchste Stufe der wechselseitigen Anerkennung"). *See also* Kurt Seelman, *Ebenen der Zurechnun*, *in* ZURECHNUNG ALS OPERATIONALISIERUNG VON VERANTWORTUNG 85, 91 (Mattias Kaufmann & Joachim Renzikowski eds., 2004) (quoting GEORG W. H. HEGEL, PHÄNOMENOLOGIE DES GEISTES 493 (1806) (1986)).

order to support the fact that, just as with punishment, pardon can also bring the seemingly irreversible blame to an end.[57]

IV. The Doctrine of the "Victim's Right for the Perpetrator to be Punished"

4.1. *Introduction: Victims' rights and the responsibilities of states*

Neither constitutions nor penal codes make specific reference to a presumed 'right of the victim for the perpetrator to be effectively punished' for the wrongful blameful act committed against the former. As a result, the issue may only be tied to the presumed existence of a 'responsibility on the part of the State' to punish certain crimes. A breach of this duty may entail the State becoming liable on an international scale. As mentioned, the doctrine of a fight against impunity is founded on the fact that international instruments for human rights protection base themselves substantially on the existence of such a duty when declaring that certain serious breaches of these instruments are neither eligible for amnesty nor subject to a statute of limitations. However, attempts have already been made to highlight the fact that the basis of this international responsibility to hand down effective punishments for certain crimes,[58] presumably addressing victims' entitlements, are not strong enough. The following paragraphs strive to examine this aspect in greater depth, addressing the terms of the doctrine of the 'victim's right for the perpetrator to be punished.'

4.2. *Victim's right for the perpetrator to be punished*

Stating that victims have a right to ensure the perpetrator is punished initially seems to be an attitude of criminal law that smacks of 'an eye for an eye,' whereby private revenge bears a clear implication of satisfaction. On the other hand, public criminal law has historically intended to neutralize the victim. Indeed, it is common knowledge that in recent decades, owing to the boom in victimology, the role of the victim in a criminal law

57. Jaime Malamud Goti, *Emma Zunz, Punishment and Sentiments*, 22 QUINNIPIAC L. REV. 45, 58 n.28 (2003) [hereinafter Goti, *Emma Zunz*].

58. This is clearly only possible in the context of a new approach to the notion of sovereignty.

monopolized by the State re-emerged. Nonetheless, no one could envisage that in this context the notion that victims have a right for the perpetrator to be punished would re-emerge with substantial force. Indeed, everything points to the fact that the individual responsible for said re-emergence was Jan Philipp Reemtsma, a wealthy German intellectual, who was taken hostage in 1996.

After telling of his experience as a hostage in the book *Im Keller*,[59] in a short space of time Reemtsma published two further texts detailing his viewpoint.[60] On the basis of the desire for revenge (or resentment) the victim feels towards his perpetrator, he states that public criminal law must not be instrumentalized to this end.[61] Nonetheless, he warns that there is still something that it can and should do: specifically, prevent the continuation of moral damage sustained by the victim. If it is not declared that the events should not have occurred, said damage shall persist. Indeed, this does not mean that the procedural intervention shall suffice in order to eradicate the victim's subjective trauma caused by the act carried out; however, it does at least hinder objective continuation of moral damage.[62] The process for laying charges demonstrates to the victim that said individual was in no way responsible for the act committed, and that said individual has not suffered on account of a natural occurrence or swing to chance, but rather due to the blamefulness of a perpetrator.[63] When the latter is punished, the victim thus achieves reintegration back into society.[64]

This is similar to the approach laid down by Fletcher, who states that once carried out, a crime prolongs its effects creating a situation whereby the perpetrator exercises dominance over the victim.[65] It is also similar to the approach of K. Günther, for whom the most decisive aspects are the permanent pain and

59. JAN PHILIPP REEMTSMA, IM KELLER (1997).

60. REEMTSMA, *supra* note 3; WINFRIED HASSEMER & JAN PHILIPP REEMTSMA, VERBRECHENSOPFER: GESETZ UND GERECHTIGKEIT 112 (2002).

61. HASSEMER & REEMTSMA, *supra* note 60, at 122.

62. REEMTSMA, *supra* note 3, at 27; HASSEMER & REEMTSMA, *supra* note 60, at 131-34; *see also* Günter Jerouscheck, *Straftat und Traumatisierung: Überlegungen zu Unrecht, Schuld und Rehabilitierung der Strafe aus viktimologischer Perspektive*, 55 JZ 185, 193 (2000).

63. HASSEMER & REEMTSMA, *supra* note 60, at 161.

64. REEMTSMA, *supra* note 3, at 24, 26-27.

65. Fletcher, *supra* note 7, at 57.

humiliation to the victim caused by the crime.[66] For all of them, the role of punishment is to reinstate the equality between the perpetrator and the victim that had been upset by the crime.[67] According to Reemtsma, this would fit in perfectly with the theory that favors the reinforcement of the breached rule as a variant for positive general prevention: the victim's interest would account for the subjective factor.[68] Indeed, Fletcher states that his is similar to Hegelian reasoning, the only difference being that where the latter places the rule, the former places the victim.[69] On the other hand, for Günther this goes beyond retribution and prevention, according to the manner in which they have traditionally been conceived.[70]

An issue that remains is whether reintegration into society, the annulment of dominance or compensation for the humiliation that the victim has undergone,[71] specifically requires the perpetrator to be excluded and subjected to harm (enforcement of punishment) rather than being publicly declared as blameworthy.[72] There is no consensus along these lines. While the approaches advanced by some suggest that a declaration of guilt provides sufficient compensatory means,[73] others call for "penal harm" (effective punishment), deeming that it is the only method that provides a material explanation of the notion we

66. Klaus Günther, *Die symbolisch-expressive Bedeutung der Strafe*, *in* FESTSCHRIFT FÜR KLAUS LÜDERESSEN 205, 207 (Michael Baurmann et al. eds., 2002); *see also* Goti, *Emma Zunz*, *supra* note 57, at 54 (highlighting this emotional factor by positing that the penalty plays the role of putting an end to the victim's feelings of inferiority, humiliation, and shame).

67. If the State fails to do so, not fulfilling its duty to hand down punishment, it is allowing for continuation of the situation of dominance (impunity) and becomes an accessory to it. *See* Fletcher, *supra* note 7, at 61.

68. HASSEMER & REEMTSMA, *supra* note 60, at 137.

69. Fletcher, *supra* note 7, at 58.

70. *See* Cornelius Prittwitz, *The Resurrection of the Victim in Penal Theory*, 3 BUFF. CRIM. L. REV. 109, 125 (1999) (interpreting Reemtsma, *supra* note 3, Prittwitz formulates it as a theory of positive special prevention, focused on the victim).

71. *See id.* at 128 (stating, in more general terms, the positive effect of punishment on the victim).

72. *See* Klaus Lüderessen, *Der öffentliche Strafanspruch im demokratischen Zeitalter–Von der Staatsräson über das Gemeinwohl zum Opfer?*, *in* STRAFRECHTSPROBLEME AN DER JAHRTAUSENDWENDE 63, 63 (Cornelius Prittwitz & Ioanis Manoledakis eds., 2000) (discussing whether a victim can experience satisfaction through punishment by the state).

73. *See* Günther, *supra* note 66, at 219.

wish to convey in our social setting.[74] This point runs counter to the stance held by some who maintain that the sole objective that victims can pursue must be channeled through civil and legal procedures that address said victim's needs more closely, and likewise the procedures of social protection laws.[75]

Those who demand effective punishment of perpetrators as a factor that is paramount to ensuring criminal law is focused on the victim, can indeed openly talk of a right of the victim for the perpetrator to be punished. In actual fact, they are stating that effective punishment becomes legitimate even though there are no preventive grounds for its imposition. Indeed, this would cause the State's right to impose it (a genuine *ius puniendi*) to fade. The victim's right for the perpetrator to be punished would thus become a right of the victim versus the State, which would result in responsibility on the part of the latter. On the other hand, the remaining perspectives should simply address the victim's interest in a trial being followed in order to establish the perpetrator's blame. Nevertheless, this is also a significant factor. On this basis it can be stated that the victim is drawn into a situation of competition with the perpetrator when it comes to determining the scope of criminal law principles, since they could no longer be unilaterally deemed as providing assurance for the latter, but also for the former.[76]

4.3. *Final clarifications on the notion of "victim" and his/her "rights"*

When confronted with the discourse on a victim's right to the truth, to proceedings or to punishment, the first striking element is resorting to the very term "victim." In standard language, one talks of victims even before proceedings have been brought—and indeed a declaration has been issued—as to the existence of at least a wrongful (and beyond a doubt, blameful) act. In legal terms, this is nonsensical. Before a wrongful (and

74. Tatjana Hörnle, *Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht*, JURISTENZEITUNG [JZ] 950, 956 (2006).

75. *See* Klaus Lüderssen, *Opfer im Zwielicht*, *in* FESTSCHRIFT FÜR HANS JOACHIM HIRSCH 879, 889 (Thomas Weigend & Georg Küpper eds., 1999) (putting forth the paradigmatic view).

76. *See* Knut Amelung, *Auf der Rückseite der Strafnorm: Opfer und Normvertrauen in der strafrechtlichen Argumentation*, *in* MENSCHENGERECHTES STRAFRECHT: FESTSCHRIFT FÜR ALBIN ESER 3, 6 (Jörg Arnold et al. eds., 2005).

beyond a doubt, blameful) act is ascertained, there cannot be a victim; rather, at the very most, one can talk of an "alleged" victim.[77] In effect, one does not become a victim (in the sense of the criminal law) on account of suffering harm,[78] but rather due to having suffered unlawful damage, which can only be determined during proceedings.[79] It may also be considered that the injuries caused by non-blameful parties do not, strictly speaking, give rise to victims (as subjects whose dignity has been affected by the crime). In any event, this clarification is significant because it highlights the fact that what is sometimes laid down as a right for victims would merely constitute a right for alleged victims. It likewise underlines the fact that victims rights can only be referred to with respect to rulings passed subsequent to it being declared that the act was unlawful. Most importantly, it would be prejudicial to talk of victims prior to (or during) the process.

The alleged victim, who is bestowed the right to an action, clearly has an interest in a trial being held to establish the perpetrator's blame, and also, if a wrongful blameful act is ascertained in addition to the other circumstances for the imposition of a penalty, said victim has an interest in punishment taking place. The purpose of his or her right is thus for the legal rules that regulate the exercise of *ius puniendi* to be applied by the State. For this reason, the victim also has a right to appeal. However, this right for the law to be applied cannot be equated with a material right for punishment which would be beyond such laws.

The theory of criminal law focused on the victim is not retributivist[80] or preventive in nature, at least not in the traditional sense. Accordingly, it can be deemed as restorative and providing balance or equality. It does not focus on the past or the future, but rather on the present. The trial and sentence seek to put an end to the victim's situation of dominance, humiliation, or subordination, by reinstating said individual's origi-

77. *Contra* Fletcher, *Justice and Fairness*, *supra* note 5, at 549.

78. *See id.* (acknowledging this assertion).

79. Detlef Krauß, *Täter und Opfer im Rechtsstaat*, *in* FESTSCHRIFT FÜR KLAUS LÜDERESSEN 269, 271 (Michael Baurmann et al. eds., 2002) (arguing from the standpoint of a presumption of innocence).

80. *See* Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999).

nal status. However, this means that the theory of criminal law focused on the victim is centered on neutralizing the permanent, moral damage that the victim continues to suffer as a result of the crime. This likewise implies that the core of said theory should be formed by symbolic and expressive (moral) responses: a declaration of blame and a guilty verdict.[81] The further infliction of penal harm on the perpetrator would only be justified when there are also preventive grounds for doing so (especially involving cognitive assurance). Furthermore, the imposition and enforcement of a penalty that is not related to the aforementioned grounds, and is justified on account of the victim's needs, would merely constitute institutional revenge hiding under the veil of apparent rationality.

81. *See* CAMPAGNA, *supra* note 23, at 13 (expressing a view shared by many scholars recently).