Furthering the fight against impunity in Latin America: the contributions of the Inter-American Court of Human Rights to domestic accountability processes

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4 Critiques of the fight against impunity and the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations

1 Introduction

The previous chapters have taken a detailed look at the jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish human rights violations, and situated it as both a response to the regional context from which it emerged and as part of a broader international fight against impunity. As a protagonist in that international movement, the IACtHR has pushed the boundaries of international human rights law with the aim of protecting both individual victims and society from structural impunity and further human rights violations. The Court's case law on the obligation to investigate, prosecute and punish, particularly its judgments in the case of *Velásquez Rodríguez* and *Barrios Altos*, have been praised by those supportive of the fight against impunity as representing important advancements towards a stronger protection and enforcement of international human rights. Others, however, have been far less favorable in their assessment of the same case law. This chapter will provide an overview of the most important critiques levelled against the IACtHR's jurisprudence and against the international movement against impunity more generally.

Some of the most outspoken critics of the IACtHR have questioned its interpretation methods and its universalist approach to international human rights law. In this vein, the IACtHR has been criticized for being overly activist and for not respecting the sovereignty of the states under its jurisdiction.[1] While such critiques are both interesting and important, they are somewhat separate from the focus of this study and will, therefore not be analyzed in detail. Instead, this chapter will focus on those critiques which relate specifically to the IACtHR's dedication to the fight against impunity and its implications for the protection of human rights – particularly those of the accused in criminal proceedings – in the region under its jurisdiction.

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1 *See for example* G.L. Neuman, 'Import, export and regional consent in the Inter-American Court of Human Rights', (2008) 19(1) *European Journal of International Law* 101-123; E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and anti-democratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695 and R. Gargarella, 'La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman' (2015) 2 *Revista LatinoAmericana de Derecho Internacional*, available at < http://www.revistaladi.com.ar/numero2-gargarella/>, last checked: 25-09-2018..

Such critiques, it should be noted, are part of a wider debate about the proper relationship between human rights law and (international) criminal law. The starting point of this debate is the idea that the international movement against impunity has turned the traditional relationship between human rights law and criminal law on its head.[2] Whereas human rights have previously been thought of as a 'shield' protecting the individual from the overzealous application of the state's punitive powers, the struggle against impunity has turned them into a 'sword' for some individuals (victims) to wield against other individuals (those accused of human rights violations) by activating the state's punitive powers.[3] Because the critiques described in this chapter are part of a larger debate, not all of them have been directed exclusively against the IACtHR and its case law. However, even when these critiques take aim at other participants in the fight against impunity – including NGOs and the International Criminal Court – their logic can easily be extended to the IACtHR as well.

This chapter will discuss four of the main arguments which have been leveled against the fight against impunity and the IACtHR's role in it. Section 2 discusses the argument that the emergence of the fight against impunity has brought about a considerable shift in the focus of human rights activism, which has not been properly acknowledged or debated. Section 3 examines the argument that this shift affects the way human rights violations are understood and, more to the point, which human rights violations are important to the international community and which are not. Section 4 delves into the concern that the fight against impunity undermines respect for the rights of the accused. Finally, section 5 will analyze the meta-argument that the IACtHR's embrace of the fight against impunity leads to alignment with, and endorsement of, the state's repressive apparatus

2 *See for example* D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), p. 493.

3 *See* F. Tulkens, 'The paradoxical relationship between criminal law and human rights', 9 *JICJ* (2011), 577-595. Tulkens credits ICC judge Christine van den Wyngaert for the metaphor. However, the metaphor seems to have been around for decades and was used originally in relation to the Fourteenth Amendment to the U.S. Constitution. Zechariah Chaffee credits Justice Robert Jackson for introducing it and Robert K. Carr for developing it further, to the effect that: "The shield . . . is a negative safeguard. It enables a person whose freedom is endangered to invoke the Constitution by requesting a federal court to invalidate the state action that is endangering his rights. The sword is a positive weapon wielded by the federal government, which takes the initiative in protecting helpless individuals by bringing criminal charges against persons who are encroaching upon their rights." Z. Chaffee, 'Safeguarding fundamental human rights', (1959) 27(4) *George Washington Law Review* 519-539, pp. 525-526.

2 The 'turn to criminal law' and the diversion of the human rights movement

The first critique is based on the perception that human rights institutions' (and activists') embrace of the fight against impunity in the 1980s and 1990s, brought about a serious shift in the focus and direction of the human rights movement itself. On the one hand, this shift affects the tools employed by human rights activists and institutions in order to achieve human rights protection. According to Engle, Miller and Davis:

> "[w]hereas in an earlier era, criminal punishment had been considered one tool among many, it has gradually become the preferred and often unquestioned method not only for attempting to end human rights violations, but for promoting sustainable peace and fostering justice. The new emphasis on anti-impunity represents a fundamental change in the positions and priorities of those involved in human rights as well as transitional justice […]. With this shift, it has become almost unquestionable common sense that criminal punishment is a legal, political, and pragmatic imperative for addressing human rights violations."[4]

According to these authors, the movement against impunity thus understands criminal law as the most important tool for the protection of human rights. This notion is paradoxical, they point out, given the traditional focus of their field of law in relation to the criminal process. [5] Before the 1980s, criminal law was understood by most human rights lawyers as the state's main tool for the *violation* of individual rights, and the role of human rights law in relation to the criminal justice system was understood to be one of moderation and restraint.

Likewise, it has been noted that the fight against impunity and the 'turn to criminal law' affect the issues with which the human rights movement concerns itself. Françoise Tulkens, for example, relates the turn to criminal law to the "transition from a 'political conception of human rights', which favoured the defence of pro-democratic institutions and of the individual as a citizen participating in the political regime', to an 'individualistic conception of human rights', which in turn favoured the defence of 'individualistic values, the person and private property', entailing a 'radical reversal of

4 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p.1.

5 Idem and K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 17. See also F. Tulkens, 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), p. 420-422.

priorities'."[6] Engle, Miller and Davis, meanwhile, criticize the anti-impunity movement for focusing its attentions exclusively on acts of physical violence, while ignoring structural and economic inequality.[7] Likewise, Sarah Nouwens argues that by "[m]onopolizing the definition of injustice" the anti-impunity movement "quells advocacy to address less visible but more structural wrongs that have not been criminalized, for instance humiliating poverty and extreme inequality, the causes of which are located in the structure of the same international community in whose name 'international justice' is performed."[8]

A concrete example of how the fight against impunity has narrowed the focus and the toolbox of the human rights movement, can be found in the development of the debate on transitional justice and, particularly, the legality of amnesty provisions during political transitions. As noted by Karen Engle, as recently as the 1990s many human rights lawyers considered amnesty provisions to be not only perfectly legal, but even preferable to criminal prosecutions during times of transition. In her words:

> "the issue of whether truth commissions, international criminal institutions, or even amnesties offer the greatest promise for responding to mass atrocities was seriously debated among human rights advocates […] In what were often referred to as the "truth versus justice" and "peace versus justice" debates, "justice referred to criminal justice, and many considered that truth and peace might be incompatible with criminal punishment […]"[9]

Since then, the human rights movement has changed is attitude on transitional justice to such an extent, that "[t]oday, few human rights NGOs, courts, or scholars defend the legality of amnesties[…]."[10] The IACtHR's case law, particularly the *Barrios Altos* judgment, has played an impor-

6 F. Tulkens, 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595, p. 594, citing P. Poncela and P. Lascoumes.

7 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 6. *See also* K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 46, noting that "The turn to criminal law in his context arguably perpetuates biases against economic restructuring already inherent in the human rights framework. […] Given that neoliberalism depends upon and reinforces criminal law, in part to protect private property rights, the cards are stacked against any attempt to use criminal law to challenge neoliberalism. The aim of advocates is therefore to prevent excesses, rather than to restructure."

8 S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), p. 344.

9 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 25.

10 Idem, p. 24.

tant role in bringing about this change of heart.[11] According to some critical scholars, this strong rejection of amnesties is "more self-limiting than helpful",[12] because it "refuses to engage with the complex issues related to the implementation of human rights protection in concrete situations of regime change", and instead imposes an "inflexible, one-size-fits-all approach".[13] By limiting the debate to criminal justice only and removing amnesties from the human rights toolbox, the movement against impunity has not only narrowed and impoverished the debate on human rights, but also made it more difficult for states to reach a negotiated end to armed conflict.[14]

While the fight against impunity is thus a recent development and represents a paradoxical shift in the human rights movement's relation to criminal justice, this shift "has taken place with little systematic deliberation about the aims of criminal law or about its pitfalls".[15] In this context, critical scholars have noted the tendency of lawyers and activists to resort to a number of 'deflective' rhetorical strategies when pressed to explain their reliance on criminal law as a form of human rights protection.[16] Criminal prosecu-

11 Idem, pp. 28-36.

12 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 284.

13 F. Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the Inter-American view on amnesty and the Brazilian case', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 186 and 205. In contrast, Fernandes Carvalho Veçoso sees amnesty laws as more contextually grounded tools, which take into account the full spectrum of interests at stake in the political transition and, thereby, "may allow a different discussion about human rights, as a discourse that may open space for political struggles".

14 *See for example* F. Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the Inter-American view on amnesty and the Brazilian case', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016) and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 428-432 and 440-441.

15 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 17.

16 *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 68-94. Moyn identifies four deflective strategies employed to employed to prevent/deflect any inquiry into the justification of anti-impunity: promotion (the idea that accountability is a moral achievement that needs no defense), professionalism (the idea that international institutions involved in the fight against impunity provide "vocational experience" for lawyers), preservation (the idea that questioning anti-impunity weakens the already beleaguered international criminal courts) and 'victim's justice' (the idea that the application of criminal justice is the only way to provide meaningful reparation to victims of human rights violations). *See also* S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), pp. 327-351.

tions are, for example, often presented as necessary for the prevention of further human rights violations.[17] But most of all, critical scholars note, questions about the rationale for applying criminal justice are deflected by reference to 'the victims', a concept which refers not to individual persons but to "one monolithic category", which has become the "alfa and omega" of the movement against impunity.[18] And victims, it is assumed, invariably want criminal prosecution and punishment. This has led some to conclude that the necessity of applying criminal law in response to grave human rights violations has become a dogma, or even a form of "secular faith", the foundations of which are no longer seriously questioned.[19] Thus, any real debate about the necessity and utility of criminal trials in response to human rights violations and of possible alternatives to criminal prosecution becomes impossible.

What the 'deflective' strategies described here have in common, is that they rely on a denial of the political aspects inherent in the fight against impunity and in the human rights movement more broadly. Engle, Miller and Davis note that "anti-impunity discourse is often deployed in an attempt to construct a bulwark of law against politics, insisting that it can protect the former from the latter".[20] According to these critics, activists and institutions involved in the fight against impunity seek to present both the norms circumscribing criminal behavior[21] and their own work in applying those norms[22] as perfectly a-political. However, critics believe that this conception of the fight against impunity as an a-political undertaking obscures the "politics of selectivity" inherent in the selection of both the

17 *See* Immi Tallgren, 'The sensibility and sense of international criminal law', (2002) 13(3) *EJIL* 561-595.

18 S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), p. 340. See also *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 85-87.

19 *See* S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) The Cambridge companion to international law (Cambridge University Press, 2012), p. 343. *See also* Immi Tallgren, 'The sensibility and sense of international criminal law', (2002) 13(3) *EJIL* 561-595, p. 593.

20 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 5.

21 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 5-6, paraphrasing the reasoning offered for the a-political nature of international crimes and/or grave human rights violations by saying that "some acts are so violent and atrocious as to reach beyond politics" and that "amnesties, at least for certain crimes, are prohibited regardless of the trade-offs in a particular context"

22 *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 76, summarizing one of the deflective strategies used by activists and institutions involved in the fight agaist impunity as the idea that accountability is a "moral achievement *in spite* of and *against* politics" and that "interferences with anti-impunity […] are politics, but the Court [the ICC, HB] has none".

behaviors and the concrete cases to be prosecuted.[23] In the end, applying criminal justice is necessarily an act of power. Critics worry that presenting the fight against impunity as an a-political exercise and refusing to engage in critical debate about its object and purpose obscures the "hegemonic" tendencies of the movement itself,[24] while also blinding it to the possibility of abuse by politically savvy domestic operators, who seek to manipulate the movement for their own political gain.[25]

3 Individualization and decontextualization of human rights violations

In close connection to the previous point, critics have noted that the human rights movement's reliance on criminal trials to address grave and complex human rights violations affects its very understanding of such violations and their causes. According to Immi Tallgren, the focus on individual responsibility, which is inherent in the criminal process "reduces the perspective of the phenomenon to make it easier for the eye. Thereby, it reduces the complexity and scale of multiple responsibilities to a mere background."[26] Thus, in order to fit the mold of the criminal trial, human rights violations are *individualized* and, thereby, *decontextualized*. Karen Engle notes that this individualized and decontextualized view of human rights violations "affects the human rights movement's understanding of the world and it affects its strategies and ability to attend to underlying structural causes of human rights violations", because "[i]n obscuring state responsibility, it misses the ways in which bureaucracy functions – even through individual actors – to perpetuate human rights violations".[27]

Critics have further observed that the anti-impunity movement has placed on lawyers and judges "the heavy burden of narrating history through

23 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 7-8, noting that "[o]ne way that law functions as politics is by calling our attention to some things while distracting us from others, including the productive or distributive nature of law itself.".

24 *See* M. Koskenniemi, 'International law and hegemony: a reconfiguration' (2004) 17(2) *Cambridge Review of International Affairs* 197-218, p. 210 and S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), p. 341.

25 *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 87-88 and K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 47-48.

26 Immi Tallgren, 'The sensibility and sense of international criminal law', (2002) 13(3) EJIL 561-595, p. 594.

27 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 44.

trials and judicial opinions".[28] At the same time, however, the inherent individualization and decontextualization make criminal trials an inadequate tool for fulfilling this important truth-finding function. In the words of Karen Engle, the "refusal to take into account context […] distorts the very search for "truth" on which human rights advocates base their defense of the trials".[29] Likewise, Martti Koskenniemi observes that "the truth is not necessarily served by an individual focus", because "the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects."[30] Therefore, he believes that criminal trials may obscure, rather than reveal, historical truth "by exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created".[31]

Finally, Koskenniemi notes that this distortion of historical truth is not neutral or coincidental, not simply the result of the technical exercise of applying criminal procedure to a complex case. Rather, the selective emphasis on some aspects of the larger context over others serves to canonize the version of history that best suits those who possess the power to conduct criminal trials. According to Koskenniemi:

> "criminal law itself always consolidates some hegemonic narrative, some understanding of the political conflict which is a part of that conflict itself […] To focus on individual guilt instead of say, economic, political or military structures, is to leave invisible, and thus to underwrite, the story those structures have produced by pointing at a scapegoat."[32]

In short, scholars critical of the fight against impunity, and the IACtHR's role in it, believe that the human rights movement's unreflective turn to 'anti-impunity' has weakened the human rights movement in several ways. 'Deflective rhetorical strategies' employed to justify this turn seek to depoliticize the fight against impunity and thereby blind activists and international institutions to the political aspects of their work. This depolitization also contributes to a narrowing of the human rights agenda, which is now focused mostly on physical violence and disregards other types of violations, especially those of economic and social rights. Finally, the individualization and decontextualization inherent in criminal trials affects

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28 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 9.

29 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 44.

30 M. Koskenniemi, 'Between impunity and show trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1-35, pp. 13-14.

31 Idem, p. 15.

32 M. Koskenniemi, 'International law and hegemony: a reconfiguration' (2004) 17(2) *Cambridge Review of International Affairs* 197-218, p. 210.

human rights advocates' understanding of the nature and causes of grave and complex human rights violations and undermines the utility of such trials as tools for establishing historical truth.

4 The fight against impunity as a threat to the rights of the accused

A third strand of scholarly criticism of the fight against impunity, and of the obligation to investigate, prosecute and punish human rights violations developed by the IACtHR, concerns the possibility that this movement might undermine some of the most fundamental principles underlying modern, liberal systems of criminal law, particularly those ensuring the protection of the rights of the accused from the repressive powers of the state. In the words of Mégret and Calderón, "there is a risk that the more repressive strand in human rights law may today encroach excessively on the concern with limiting states' and the international community's ambition to wield a repressive stick".[33]

Some scholars have addressed this critique primarily at the practice of international criminal tribunals and their use of interpretative techniques favoring the prosecution. Darryl Robinson, for example, has expressed concern about the emergence of 'illiberal doctrines' in the case law of those tribunals, without serious discussion or objection from academia and civil society, as a result of the application of "familiar and cherished assumptions and techniques" from the human rights field.[34] According to Robinson, the differences in focus and orientation between human rights law and criminal law mean that principles which are considered liberal in human rights proceedings, can have illiberal effects when applied in the context of a criminal trial. Thus, he observes,

> "[m]any traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are amongst the most strident pro-prosecution voices, arguing for broad definitions and modes of liability and for narrow defences, in order to secure convictions and thereby fulfil the victim's right to justice".[35]

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33 F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), p. 438.

34 D. Robinson, 'The identity crisis of International Criminal Law' (2008) 21(4) *LJIL* 925-963, pp. 930-931.

35 Idem, p. 931. Further on in the same article Robinson describes three concrete problems which have arisen as a result of this collision between human rights liberalism and the reality of the criminal trial, the first of which he calls 'victim-oriented teleological reasoning which, he says, "conflates the 'general justifying aim' of the criminal law system as a whole – which may be a utilitarian aim of protecting society – with the question of whether it is justified to puish a particular individual for a particular crime." Idem, pp. 933-946.

However, the critique that the victim-centered orientation of the fight against impunity threatens to undermine the protection of the right of the accused has by no means been limited to the practice of international criminal courts. The same worry has been voiced in relation to the jurisprudence of human rights courts. In this context, Françoise Tulkens, has noted that the in recent years the balance between the protection of the human rights of the accused and those of the victim has been turned on its head, and that human rights activists and human rights courts have played an important role in this development. In her words:

> "it is not simply a question of noting the legitimate existence of the other side of the balance [the victim's side, HB]; we should consider whether taking that other side into account does not frequently result nowadays in our forgetting that there are two sides to the balance and upsetting the necessary equilibrium between them. In this respect, it has been possible to speak of a 'turnaround in human rights', or a Copernican revolution, and to refer to the undermining of the 'shield' function and the extension of the 'sword' function of criminal law."[36]

Several Latin American scholars have expressed similar concerns with specific regard to the jurisprudence of the IACtHR and its endorsement of the victim's right to justice.[37] Felipe Basch, for example, has expressed concern that the IACtHR's case law on the duty to prosecute – or, as he labels it: the duty to punish[38] – challenges "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".[39] Specifically, concerns have been raised about the IACtHR's doctrines regarding the state's obligation to remove legal obstacles maintaining impunity, including its limitation of

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36 F. Tulkens, 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595, p. 593.

37 *See for example* D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114; F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229; J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884; and E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695.

38 *See* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229. Basch is not the only scholar to reframe the duty to prosecute in this way. Jesus-Maria Silva Sanchez similarly reframes the victim's right to justice as the 'victim's right for the perpetrator to be punished'. *See* J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884.

39 F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 216.

the operation of provisions on prescription,[40] its "cavalier attitude towards *non bis in idem*"[41] and its approach to the principle of legality in cases of enforced disappearance.[42]

While several of these critical scholars recognize that the rights of victims and those of the accuses are not mutually exclusive, they have expressed concern that the broad language in which the Court has framed its jurisprudence may lead to negative consequences for the latter.[43] Daniel Pastor takes an even stronger stance, and warns that the road taken by the IACtHR through its jurisprudence on the duty to prosecute and the victim's right to justice will eventually lead to a complete abolition of any meaningful protection of the rights of the accused.[44] In Pastor's reasoning, the modern, liberal system of criminal justice has not been developed to protect the interests of the victims of criminal acts. In fact, it does not recognize victims as bearers of human rights in the context of criminal proceedings.[45] In the words of Pastor:

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40 *See for example* F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 432-436.

41 Idem, p. 437. *See also* M. Zili, F. Girão Monteconrado and M.T. Rocha de Assis Moura, 'Ne bis in idem e coisa julgada fraudulenta – a posição da Corte Interamericana de Direitos Humanos', in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II* (Konrad Adenauer Stiftung, 2011), pp. 406-409 and D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II* (Konrad Adenauer Stiftung, 2011), p. 499.

42 *See for example* J.L. Guzmán Dalbora, 'El principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 187-189.

43 *See* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 213 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 438-440.

44 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), pp. 505-506.

45 *See also* J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884, p. 879, arguing that "public criminal law has historically intended to neutralize the victim".

> "The [Inter-American, HB] Court has developed a monolithical jurisprudence according to which international crimes, but also other "grave violations of human rights", should be punished by the competent States without consideration of certain legal limitations. […] In this way, it has developed a penal ideology which, in the case of international crimes (and other grave violations of human rights) takes into account exclusively the good reasons for [applying, HB] criminal justice, the valid expectations of those affected that the punishment of those responsible will be achieved (the *victim's perspective*) but which consistently undervalues the human rights of the accused […] But this ideology, which may be valid in itself, ignores the fact that human rights were not created to serve the victim of a crime; this is not its purpose and, as a result, the victim is not mentioned even once in the catalogues of these rights, an elemental fact which reminds us that the aspects of the criminal law which make reparation to the victim (investigation, prosecution, punishment) *are public function*s and that in the area of criminal law, the only addressee of human rights is the accused."[46] [Translation by the author]

Moreover, Pastor argues that it impossible under the current criminal law system to protect both the rights of the accused and those of the victim, because "each right awarded to the victim necessarily implies to suppress a right of the accused".[47] Given this absolute contradiction between the rights of the accused and the rights of victim, Pastor considers that the rights of the accused should prevail, no matter the nature of their crime or their position in society or in the state apparatus. After all:

> "once he has transformed into the suspect of a crime, he is the one who faces the punitive power of the State, while the victim only faces individuals, even when those individuals, when committing the crime, were abusing state powers or utilizing other state apparatuses. What is decisive is that they are now defendants and that the fundamental rights, both under material and procedural criminal law, can only work in one direction, in such a way that it is not possible for constitutional law to have as its mission to prevent the abuse of punitive power and, at the same time, insist on the obligation to prosecute and punish crimes."[48] [Translation by the author]

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46 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), pp. 492-494.

47 Idem, pp. 500-502. *See also* E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695, pp. 681-684, arguing that the IACtHR is developing an (unwritten) "statute of the victim", based on the victim's "super-right to justice", which stands in opposition to the "statute of the accused" which is enshrined in the ACHR.

48 D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114, para. 3.1.

For Pastor, continuing on the road taken by the IACtHR through its protection of the victim's right to justice would be to return to a pre-modern system of criminal law, based on the right of the victim to have revenge and the state's unchecked obligation to provide that revenge for the victim.[49]

5 The fight against impunity as alignment with the state's repressive powers

Perhaps the most cutting critique of the fight against impunity, and one that seems to cut across the other arguments which have been discussed thus far in this chapter, is that it leads activists and human rights institutions to align themselves with the state and its repressive apparatus. That is to say: to align themselves with the very thing the human rights movement has traditionally defined itself in opposition against. Karen Engle, for example, has been very explicit in articulating this critique, which she directs primarily at domestic human rights activists. In her words:

> "When local human rights NGOs spend time and resources promoting prosecutions, they often align themselves with the state. From feminists advocating for the enforcement of anti-trafficking legislation to indigenous groups helping to strategize and participate in the prosecution of former military leaders who targeted them for extermination, human rights advocates are often dependent upon the very police, prosecutorial and even adjudicatory apparatuses of which they have long had reason to be suspicious."[50]

This alignment with the 'adversary', Engle implies, should in itself be enough to give any human rights activist pause. However, it is not (only) deemed wrong on principle. Critics have pointed to two particular and concrete negative effect that this alignment may have. Firstly, Engle has pointed out that alignment with the "carceral state" on certain issues "cannot help but affect" the ability of human rights activists to, at the same time, "mount a serious criticism of mass and brutal incarceration and the biases we see in nearly every penal system in the world".[51] Thus, alignment with the state's repressive apparatus may lead human rights activists and, by extension of that logic, the IACtHR, to 'go soft' on that apparatus and neglect to fulfill their primary function of calling out its abuses.

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49 Idem, para. 4. *See also* E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695, p. 695 and J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884, p. 879.

50 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 47.

51 Idem, p. 48.

Secondly, critics have noted that the alignment of human rights activists and institutions with their repressive apparatus may embolden states in using it, and may thereby lead to further abuses. According to Engle, anti-impunity advocacy sometimes "encourages states to overreach in their investigations, prosecutions, and punishments", by creating a "culture of 'results' that could have catastrophic consequences for the rights soundness of the criminal justice system".[52] Likewise, but directed specifically at the jurisprudence of the IACtHR, some scholars have expressed concern over its promotion of the victim's right to justice, which includes, it is feared, their "right to punishment".[53] Such a right, "if touted a little too freely may encourage a sort of "culture of conviction" in which […] it becomes harder to constrain the state's repressive urges".[54] Pastor, even more outspoken in his critique of the IACtHR, believes that:

> "The judgments of the Inter-American system, by ordering the State's obligation to investigate, prosecute and punish […] have given the punitive power what it most desires: not only a reason to punish, but the order to punish. Any student of the lessons of the history of punitive power knows that this is tantamount to saying that, in order to protect the security of its inhabitants, the guardian must hand the keys of the house over to the robbers. Under the pretext of tending to the legitimate rights of victims, the judgments of the Inter-American system for the protection of human rights has only invented leaking dikes to the punitive power of the State. That these are dressed as "obligations" of the State, which are the flipside of the "rights" of victims, is child's play: to the executioner it does not matter whether his act is deemed an obligation or a right, as long as the consequence is that it provides him with the absolute freedom to do what he likes most: to cut off heads."[55] [Translation by the author]

Such warnings not to feed the repressive appetites of the state have to be understood against the background of certain developments taking place in the late 1990s and early 2000s – just as the IACtHR's jurisprudence on the duty to prosecute was accelerating – that indeed show a worrying tendency

52 Idem, p. 47.

53 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009) pp. 280-285 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 438-439.

54 F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 438-439.

55 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), p. 501.

on the part of states to seek to free themselves of the restrictions on their punitive powers. On the global level, the 'war on terror' initiated by the U.S. after September 11th 2001 led even the most established rule-of-law states to resort to legal maneuvering in order to avoid having to provide the usual legal protections to those accused of terrorism.[56] Regionally, Latin American governments had been invoking the fight against organized crime, particularly drug cartels, to gradually relax the limitations on their repressive powers. Several countries have adopted far-reaching law and order policies, known as '*mano dura*' ('firm hand') in Latin America, eliminating certain rights and protections of those accused of participation in criminal organizations.[57] Critical scholars have classified such developments as expressions of a 'neo-punitivist' perspective on the part of the governments of the region, meaning "the messianic belief that punitive power can and must reach all corners of social life".[58]

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56 Felipe Basch explicitly questioned whether the IACtHR's doctrine of the duty to prosecute could be used to justify the excesses committed by the U.S. in the context of the war on terror. *See* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 221, fn. 98, saying: "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 Aby 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?"

57 Daniel Pastor explicitly links the development of such laws to the jurisprudence of the IACtHR on the duty to prosecute and the victim's right to justice. *See* D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), p. 485, saying: "Thus [through the IACtHR's judgments in cases of grave human rights violations, HB], the victim's right to an investigation of the facts has appeared on the scene, their right to the truth, […] to have the guilty party convicted quickly and to have no circumstance stand in the way of the realization of the proceedings and of the application of the appropriate punishment. All of this may even be welcomed, especially since it implies in almost all cases that justice is done in respect of the most severe crimes which have historically been relegated to the most perverse impunity, but it is clear that it has nothing to do with the *ideología penal* which justifies the origins and the existence of the human rights in the face of repressive state apparatuses [the understanding that human rights exist to protect those accused of crimes, HB], as a result of which these judgments have imposed a punitive power of "mano dura" or "zero tolerance", which is incompatible with all systems of fundamental human rights, whether national or international."

58 D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114, para. 1.

In academic circles, meanwhile, scholars were debating the merits of the concept of a 'criminal law of the enemy' (*Feindstrafrecht*), proposed by German legal scholar Günther Jakobs. Jakobs' theory[59] proposes the development of two separate systems of criminal law, one applying to 'citizens' or 'legal persons', and one applying to 'enemies'. The system of criminal law – if it can still be qualified as such – applicable to 'enemies' would be characterized by prevention, extensive criminalization and the limitation of procedural guarantees.[60] Jakobs characterizes as 'enemies' those individuals who have "permanently turned away from the law" in one of three ways: through their disposition (i.e. sexual offenders), through their 'employment' (i.e. drug traffickers), or, most importantly, through their participation in a criminal organization (i.e. members of terrorist organizations or organized crime groups).[61] Unsurprisingly, this concept of a 'criminal law of the enemy' sparked an intense debate among legal scholars, both in Europe and in Latin America. In Latin America, this debate carried a particular urgency, as the concept of a 'criminal law of the enemy' was seen to give academic legitimacy to the worst punitivist tendencies of the regions' governments.

Against this background, the jurisprudence on the duty to prosecute has been interpreted by some critical scholars as embodying not only an alignment of the IACtHR and the IACmHR with the state, but also with the state's punitivist, '*mano dura*' policies, and even as promoting a form of 'criminal law of the enemy'.[62] Felipe Basch, for example, has argued that,

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59 Frank Saliger explains that Jakobs introduced the term "criminal law of the enemy" in 1985 as a descriptive term, meant to reflect – and perhaps even to criticize – the growing tendency of the German legislator to criminalize inchoate acts and even *attempts* to participate in the preparation of certain crimes. It was not until many years later, around the turn of the century, that Jakobs started using the term *Feindstrafrecht* as a normative rather than a descriptive turn. However, Saliger also notes that Jakobs himself, being a "*Hegelianer* and, therefore, a holist" does not concern himself with this distinction between the descriptive and the normative aspects of his concept. *See* F. Saliger, 'Feindstrafrecht: kritisches oder totalitäres Strafrechtskonzept?', (2006) 61(15/16) *JuristenZeitung* 756-762, p. 757.

60 Idem, p. 758.

61 Idem.

62 *See for example* D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114; F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229 and D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011); and E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695.

as a result of the IACtHR's jurisprudence on the duty to prosecute, "two categories of defendants" will have to face justice in the countries under its jurisdiction: those accused of crimes constituting a breach of the ACHR and those accused of other, 'normal' crimes. And "[w]hile the latter group would enjoy the full exercise of their right to a defense and every other guaranty [sic] under the due process of law, the former would not".[63] Basch' main concern with the duty to prosecute does not seem to be the IACtHR's case law itself, but its potential for abuse by repressive governments. Thus, he warns that the duty to prosecute is stated in such broad terms that it "is applicable not only for state crimes, but also for common crimes" and can therefore easily be abused by governments as a "free ride to combat crime".[64]

Daniel Pastor, on the other hand, worries that the IACtHR's case law itself willingly creates a category of defendants that should be considered an 'enemy' and has to be punished at all costs. In his words:

> "The metamorphosis happens when the Inter-American system is confronted with cases of international crimes or other grave violations of human rights. Here, it seems as if the Inter-American system changes its constitution, as the extensive and express rights of the accused are devaluated and overtaken by the rights of the victims […]"[65]

According to Pastor, those accused of grave human rights violations are thus the new 'enemy' under the IACtHR's case law and, therefore, undeserving of protection of their procedural rights. Their enemy status is exacerbated by the elevated status of their 'opponents' – victims of grave human rights violations and human rights defenders – and of the rules they are accused of breaking. Human rights are, after all, recognized as universally

63 F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 218.

64 Idem, p. 221. It should be noted that Basch' warning was written before the IACtHR adjusted its course and made the most invasive aspects of the duty to prosecute doctrine applicable only to grave human rights violations, i.e. extrajudicial executions, enforced disappearance and torture, as discussed above in Chapter 2, Section 4.

65 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011).

good.[66] But, Pastor warns, the moral appeal of human rights defenders and victims of human rights violations should not blind us to the fact that those accused of grave human rights violations are still human beings – vulnerable like any human being before the state's punitive powers – and that they should be protected accordingly. In his words:

> "If […] we would have to accept a special legal regimen for excellent victims and very unpopular accused, it would be better to not have any law. Luckily, this is not true in our current legal culture, which, through the law, establishes that each victim is a victim and that each accused is an accused. […] As Ferrajoli already said: the criminal law of a rule-of-law state does not distinguish between friends and enemies, but between guilty and innocent.
>
> So far, it could be said that this is all very obvious, and that no one is proposing to eradicate impunity and realize justice by violating the human rights of the accused […] But, in reality, when the objectives of criminal justice are so high-minded, as is the case with international crimes and other grave violations of human rights, it becomes difficult to maintain this balance and protect the accused from any violation of his rights."[67]

Thus, Pastor concludes, in order to protect the modern criminal law system, based on respect for the autonomy of the accused and protection of their rights, and to prevent the imposition of a 'criminal law of the enemy', the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish and the victim's rights to justice has to be rejected completely.[68]

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66 Pastor summarizes the (self-)perception of human rights, and human rights defenders, in the following way: "At the beginning of all things are these words: "human rights"; they sound good, so they have to be good. […] [W]hen someone presents themselves and says: "I work in human rights", there is no place for any ambiguity whatsoever: this person is someone admirable, honest, respectable, fair, solidary, concerned with the well-being of all, prepared to sacrifice himself to defend justice and the rights of others. In short, an exceptional and extraordinary being, the pride of their family and admired by both sexes. […]" D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114, para. 4. *See also* J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884, pp. 865-866, arguing that the doctrines regarding the fight against impunity are 'highly prominent in both academic and forensic circles, as well as in public opinion" and that this "good reputation is largely due to the specific field in which they have been formed – crimes against humanity […] and, lastly, to the source from which they have been drawn, international treates for the protection of human rights."

67 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), pp. 484-486.

68 Idem, pp. 505-506.

6 Conclusion

The Inter-American Court of Human Rights has been a protagonist in the international movement against impunity, which emerged in the late 1980s and has come to occupy an important place in international policy, scholarship and activism. While its core mission – to provide justice for the most serious violations of the most basic human rights – may seem uncontroversial, it has recently become the object of serious academic debate. And with it, so has the Inter-American jurisprudence discussed in the first two chapters of this study. This chapter has summarized four important critiques of both the IACtHR's case law on the obligation to investigate, prosecute and punish human rights violations and the international movement against impunity of which it is part.

Firstly, the argument that the unreflective turn to 'anti-impunity' on the part of many human rights lawyers has unduly narrowed the human rights agenda and limited their toolbox. Rather than considering criminal justice one tool for ensuring human rights protection among many, and a tool of last resort at that, human rights lawyers have come to see it as their most important tool. Similarly, where physical violence used to be one issue among the many to which human rights lawyers dedicated their attentions, it has now become their main focus. In response to critical questions, the proponents of the fight against impunity use deflective rhetorical strategies to justify their narrow focus on physical violence and criminal justice. In short, these deflective strategies seek to present the fight against impunity as a legalistic and a-political undertaking, which serves no interest other than justice. In doing so, they mask the politics at play in any application of criminal justice and leave themselves vulnerable to manipulation by more politically astute domestic operators.

Secondly, it has been argued that the individualization and decontextualization inherent in criminal prosecutions distorts our understanding of the underlying human rights violations. One of the goals the movement against impunity, and certainly of the IACtHR's jurisprudence, has set for itself, is to uncover and narrate historical truth through criminal proceedings. But, critics argue, in applying a criminal justice lens we risk concealing rather than exposing important parts of that truth. Moreover, through individualization of guilt criminal trials deflect attention away from the economic and political structures which underlie serious human rights violations, to focus it on a handful of scapegoats.

Thirdly, some scholars fear that the 'victim-centeredness' of the fight against impunity may undermine important principles of modern, liberal criminal justice, especially those protecting the rights of the accused. The IACtHR, with its strong emphasis on the victim's right to justice, has been a particular focus of such critiques. More specifically, the IACtHR's doctrines developed as part of the state's obligation to remove legal obstacles maintaining impunity – including the limitation of the principles of prescription and *ne bis in idem* and the Court's approach to the principle of legality in

relation to the crime of enforced disappearance – have criticized by Latin American criminal lawyers as potentially dangerous to the rights of the accused.

Finally, at the most basic level the apprehension many scholars have expressed towards the fight against impunity and the IACtHR's role in it, seems to stem from the perception that it entails an alignment with the state repressive apparatus – and desires. The IACtHR, it is said, legitimizes repressive action by the state through its emphasis on the obligation to investigate, prosecute and punish human rights violations. This, in turn, may lead to a 'culture of results', in which the state is driven to ever more repressive tactics in order to be seen to be tough on crime. In the end, it might even legitimize the creation of a 'criminal law of the enemy', in which those accused of serious human rights violations are treated as an entirely separate category of criminals, undeserving of the most basic fair trial guarantees.