05

RIDP *libri*

Francesco Mazzacuva,
Miren Odriozola Gurrutxaga,
Nicola Recchia,
Alessandra Santangelo *(Eds.)*

Criminal Justice in the Prism of Human Rights

(X AIDP International Symposium for Young Penalists,
Bologna, Italy, 27-28 October 2022)

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MAKLU

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SETTING THE SCENE

PREFACE

By Michele Caianiello[*]

It was a great pleasure, as Director of the Department of Legal Studies, to be able to host the 10th AIDP Symposium for Young Penalists, an initiative that, like few, so well represents the goals that our community of scholars intends to pursue over the next five years.

The Department of Legal Studies, in fact, has focused its lines of development on two directives. On the one hand, about the recent past, a strong push towards internationalisation, pursued in the five-year period 2018-2022, which has led to the establishment of a new course in Legal Studies, with a supranational and transnational imprint, all focused on the legal principles that, in the various branches of knowledge, constitute the common ground of the different national legal systems. On the other hand, regarding the next five-year period, 2023-2027, the pursuit of facilitating the various transitions that our societies are going through in the current period: a progressive digitalisation involving collective and institutional interaction; the growing dependence in decision-making and operational contexts on increasingly less transparent forms of artificial intelligence; a climate change of epochal proportions that makes it necessary to rethink development models.

The theme of the conference organised by the AIDP Young Penalists, as we can see, fully captures many of the aspects briefly described here. Respect for human rights, in fact, must be one of the cornerstones of the social transitions our world is going through. Ideally, the doctrine underlying human rights effectively represents the link between the old and the new generations of jurists, if we consider that it was elaborated from the period between the two wars of the 20th century, to develop after the end of WWII. Some institutions, which we appreciate today for their ability to produce rights based on fundamental principles - rather than specific legal national rules - such as the Council of Europe and the European Union, were originally conceived with the dual intention of emancipating themselves from the past and building the future. With reference to the first aspect, emancipation from the past, the founders had the intention of preventing, in the times that were to follow, the outbreak of new war conflicts, which had so devastated the European continent in the first half of the 20th century. Even before that, the founders' intention was to ensure that war would never again be an instrument for resolving international political issues, as had basically been the case in the ancient and modern worlds, if by this last word we mean what came out of the Peace of Westphalia at the end of the Thirty Years' War. Regarding the second, the construction of the future, the two European institutions should have favoured the

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approximation of the national systems of our Continent, up to a futuristic, perhaps never attainable, construction of a new federal supranational body.

These considerations make us realise just how topical the ideals and objectives underlying human rights are, even today, if we think that, once again, our land is being ravaged by a very serious war, conceived with a theoretical model that is well rooted in an era before the second half of the last century, when it was still thought that, every now and then, a war could be a good instrument to achieve some practical benefits.

We may not like it, but the phenomena that still criss-cross our globe, migratory crises, the digital transition, climate change, cannot be tackled by states as individuals: in order to have any chance of success, it is necessary for state communities to come together, putting together what they have in common, and getting rid, as if of too heavy a burden, which prevents them from taking flight, of many of the specific particularities that characterise their national legal rules. At the heart of the doctrine of human rights, perhaps, lies a process of partial exit from oneself, reminiscent of the old evangelical saying that, in order not to perish completely, it is necessary to lose at least a large part of oneself.

Naturally, this change that the doctrine of human rights promotes produces new tensions, which we have not yet managed to resolve. One of these concerns the role of jurists, in relation to that of legislators. The old saying that all it takes is one stroke of the legislator's pen and an entire legal library goes up in smoke is less and less true. Rather, the opposite seems to be true, namely that not even thousands of laws - conceived at the national level alone - are able to change phenomena that have a global dimension. Within this framework, it must be admitted that the doctrine of human rights has been developed and implemented mainly through doctrine and jurisprudence. The question that is easy to ask, in this sense, is how much longer this will be able to happen, now that the world seems to be traversed by strong localist and sovereigntist currents, for which the only path, like that of a disillusioned Candide at the end of his journey, is to return to cultivating his own garden, and nothing more.

The idea that drives our Department - which runs through the idea behind this conference - is that, however beautiful and ornate, no garden can encapsulate all the solicitations that our universe arouses in us. Even earlier, that no garden is protected enough to allow us to exclude what occurs immediately outside it. Rather, as another great thinker whose legacy will be the subject of study for a long time to come, Mireille Delmàs-Marty, indicates, the only road that seems viable is that of giving legal responsibility to the actors that exercise global power: non-economic actors (scientific actors, such as experts, civil actors, such as NGOs and international institutions) and economic actors. The objective is that the transformations taking place do not erase the reference point that must always represent the polar star of the jurist's compass, that of a progressive humanisation that favours the full development of the human person.

OPENING REMARKS

By Vittorio Manes[*]

When the prospect of holding an International Symposium of the Young Penalists of the AIDP on the current role of fundamental rights in criminal law at the Department of Legal Studies of the University of Bologna was broached, I did not hesitate to enthusiastically promote the organisation of such an initiative. Indeed, the "Bologna School" of Criminal Law, starting with the work of its founder Franco Bricola, is credited with the development of a 'constitutional model' of criminal law centred precisely on that search for superior boundaries to legislative power which has been further developed over time, also in a supranational perspective, through reference to human rights. During the Symposium, in fact, it clearly emerged how today fundamental rights constitute not only a 'compass' for the development of legal systems in a 'humanist' sense, taking up some cornerstones from the seminal reflection of Mireille Delmas-Marty, but also an important instrument of dialogue between scholars from different countries, as after all they constitute a privileged instrument of dialogue between the Courts participating in a relevant way in its development.

In this context, a privileged observatory is undoubtedly offered by the highly rights-sensitive domain of criminal law. From this observatory one can draw a substantially positive balance since, in a constant contamination and mutual nourishment, emerges an overall increase in the levels of protection. This contamination is clearly evident today in the jurisprudence of the constitutional courts, starting with the Italian one, which now increasingly interprets constitutional norms in accordance with the case law of supranational courts. Also, the decisions of the European Court of Human Rights have affirmed principles of considerable importance, not rarely openly innovative as a result of the constant 'evolutionary' interpretation of the rights enshrined in the European Convention, often precisely on the basis of the inputs coming from national jurisdictions. This is a sign of a "contamination" and a "mutual nourishment" that has come to full maturity, which sees in the "intrinsic generative capacity" and "perennial axiological excess" of fundamental rights such hermeneutic porosity and potentiality as to allow appropriate evolutions and constant advances. It should come as no surprise that the outcomes have often been, as we know, disruptive, even and especially in criminal matters. The innovative drive can be explained, first of all, by the different point of observation that the ECHR - with its rights-based approach - imposes, urging the 'rereading' of institutions, concepts, categories, and entire universes of problems: points of observation are in fact 'reality organisers', not only in the world of physics, so that changing the point of observation also changes the reality observed.

One example will suffice: the formal definition of crime that characterised the Italian penal system, like that of other countries, has been literally overturned by the

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substantive approach and the anti-formalistic notion of '*matière pénale*' accepted in the Strasbourg case-law, an autonomous notion aimed precisely at ensuring that criminal guarantees (right to a fair trial, principle of legality, but also ne bis in idem, etc.) enjoy a protection that is 'not illusory and abstract, but effective and concrete' (as in the constant refrain of the European Court of Human Rights). On this basis, the entire constellation of criminal guarantees has been reinterpreted in a rights-oriented key, according to a direction that - by overcoming the dichotomies close to many legal orders punishment/security measure, substantive law/procedural law, substantive criminal discipline/discipline of criminal execution - has made it possible to unmask at the domestic level, various and varied hypotheses of 'label fraud', to subject to *nullum crimen* as well as to the guarantees of *ne bis in idem* the 'hidden penalties' (i.e. sanctions that are essentially punitive, administrative, tax, disciplinary, etc.) and promises and promises to achieve further results in several still largely unexplored contexts (e.g. with regard to afflictive procedural rules).

It would certainly be reductive to glimpse only lights, and the result of an irenic, and perhaps naive, view of this process of constant contamination. Some of the fallout from the 'creative destructiveness' of European jurisprudence, in fact, has led to structural repercussions on the physiognomy of the system that risk triggering - and in some cases have already triggered - authentic 'rejection crises'. Decidedly problematic, for example, is the autonomous notion of 'law' open to encompassing - albeit only with a view to broadening guarantees - both legislative law and judge-made law, insofar as it is capable of undermining even fundamental postulates of constitutional legality. At the same time, authentic 'legal black holes' that threaten many graft problems have yet to be thoroughly explored: in this perspective, for example, it should not be forgotten that in the jurisprudence of the European Court of Human Rights, 'positive obligations' on the states are increasingly surfacing, which sometimes translate into specific 'obligations of criminal protection', with all the problems they generate when they are grafted onto a constitutional context, where the duties to criminalise (*Pönalisierungsgebote*) and their 'justiciability' have always been seen - justifiably - as barred by precise constitutional barriers.

In the European context, moreover, the aforesaid contamination is increasingly manifested also in the light of the role that is gradually being recognised to the Charter of Fundamental Rights of the EU (CFREU). Moreover, it received the same legal value as the Treaties and has therefore been transformed into written primary law, with all its list of rights and freedoms (and also of guarantees that are primarily referred to criminal law: Articles 47-50), which can therefore operate not only as an interpretative tool, but also as a new lever for the mechanism of non-application of national law in contrast with them. As for the European Convention, in fact, the contribution of originality, already undoubtedly significant, will obviously depend on the evolutionary interpretation that - also thanks to the "dialogue" with the national judges and to the instrument offered by the "preliminary reference" - the Court of Justice will be able to

offer with regard to individual rights, finalising every time the preceptive scope and specifying the axiological implications, as well as "e-nucleating" the sub-principles and corollaries that can be derived from the relevant individual provision. In fact, it is likely that the Charter's 'gravitational field' will tend to widen more and more, even in criminal matters: not only and not so much by virtue of 'generous' interpretations - especially by the Court of Luxembourg - of the principle according to which its provisions '[...] shall apply to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law' (Art. 51 CDFUE); but rather, because of the transversal and ubiquitous nature of the fundamental rights that are *naturaliter* jeopardised in the presence of criminal sanctions and/or in criminal proceedings, and because, above all, of acts of harmonisation that now concern fundamental guarantees that can hardly be reduced and circumscribed to the scope of EU law (the example is precisely Directive 2016/343 of the European Parliament and of the Council on the strengthening of the presumption of innocence and of the right to be present at trial in criminal proceedings); not to mention the 'pull' effect that the forthcoming operation of the European Public Prosecutor's Office (EPPO) might imply, fuelling an increasing reliance on the Charter and the interpretations of the Kirchberg court.

In this framework, the problem will therefore be that of the so-called overlapping protection and of the competition between the different Charters of Rights (Constitution, ECHR, CFREU) and the different interpretations, which are not always convergent or harmonious (as witnessed by the oscillations on the subject of *ne bis in idem*) and which may therefore prelude to unequal applications, especially among common judges, where they may be offered - as we have seen - a truly remarkable range of different options. Even in the face of this further challenge opened up by the "integrated system of protections" in the field of fundamental rights, some tools for managing and resolving possible conflicts seem to be offered by certain systematic clauses, which always recognise pre-eminence to the higher standard of protection that may be recognised at domestic level (by virtue of the "principle of advantageousness" or *Günstigkeitsprinzip*: Art. 53 ECHR and Art. 53 CFREU), and above all - in terms of method - are represented by a guideline already indicated some time ago by the Italian Constitutional Court when it affirmed - in a case which, in relation to the ECHR, involved a delicate balancing of conflicting fundamental rights and values - that "[. ... the comparison between the conventional protection and the constitutional protection of fundamental rights must be carried out aiming at the maximum expansion of the guarantees, also through the development of the potentialities inherent in the constitutional norms having as their object the same rights" (judgment no. 317 of 2009).

Ultimately, the *vis abtractiva* of multilevel dynamics is now perceived as a central factor in the process that characterises the evolution of fundamental guarantees in criminal matters, even irrespective of the hierarchies of the legal system: the 'quiet strength' of the principles drafted in the multilevel network, in fact, has imposed itself thanks to the

authoritativeness of the proposed contents, much more than through a precise hierarchical bindingness recognised to the various sources in the relative legal order or in the constitutional frame of the individual member state. In the criminal area, the prominence of these dynamics, and of the centripetal force of the principles, appears loaded with further consequences, because a more blasé dogmatics seems to be asserting itself: it tones down its sensitivity to differences, or perhaps a meta-dogmatics oriented and functionalised above all to the new dimension of the principles, and distilled, little by little, in the case law of the European Courts. The concepts, the categories - the 'autonomous notions' - that have gradually been developed are more and more vascular in the system: and the common judges - including the Italian judges - in spite of their 'praxeomorphic' habit, inclined to habitual schemes and sedimented paradigms of current use, are increasingly demonstrating their sensitivity for a dialogue that calls them to play a leading role in the laboratory opened for the reconstruction of the 'system'.

Certainly in the European legal building site the reconstructive material is now infinite, and is renewed daily in the hands of the jurist: the latter, like Lévi-Strauss's bricoleur, 'must perform a large number of differentiated tasks, but unlike the engineer, he does not subordinate them to the possession of raw materials and tools, conceived and procured expressly for the realisation of his project'; rather, he handles an ever-new set of tools and materials, a 'prototypical' toolkit that often seems to bear no relation to the project of the moment, and that is made up of residues of previous constructions and destructions, which 'have served' and which 'may still serve for the same use, or for a different use if their primitive functioning is barely modified'. If this is the case, learning how to manage these apparently prodigious instruments, avoiding selective or manipulative distortions, is therefore the challenge that awaits us.

CRIMINAL JUSTICE IN THE PRISM OF HUMAN RIGHTS: AN INTRODUCTION TO THE X AIDP SYMPOSIUM FOR YOUNG PENALISTS

By Francesco Mazzacuva[*], *Miren Odriozola Gurrutxaga*[*], *Nicola Recchia*[*] *and Alessandra Santangelo*[*]

This volume of the RIDP Libri series builds upon the contributions to the X AIDP Symposium for Young Penalists, which was held on 27 and 28 October 2022 at the Department of Legal Studies of the University of Bologna. During five panels moderated by experts, young academics from eleven different countries discussed the current role of fundamental rights in criminal justice systems. Therefore, this volume is divided into two five corresponding to the aforementioned panels.

General Trends of Human Rights in Criminal Justice

The introductory session was devoted to some general trends emerging today in the evolution of the relationship between fundamental rights and criminal justice systems. These trends usually take shape in the dialogue between the Courts, following those paths of 'contamination' that Vittorio Manes highlighted in his preface to this volume, in which some of the risks associated with this phenomenon are also pointed out. In his contribution, for instance, Mattia Pinto notes that the advancement of human rights has resulted in the discursive construction of global forms of crime and justice, warning that in this framework penality may escape the constitutional and political constraints that apply when the power to punish is based on constitutional sovereignty. In this context, as is well known, one of the most controversial issues is represented by the development of positive obligations of criminal protection, that have arisen in the case law of the European Court of Human Rights and the Inter-American Court, with all the

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problems of legitimacy that such obligations pose, punctually highlighted in Olimpia Barresi's contribution. The capacity of fundamental rights to evolve, however, appears far from exhausted, as shown by the recent transfiguration of the guarantee enshrined in Article 18 ECHR, on which Jakob Hajszan's contribution dwells in depth, again examining some critical profiles related to this dynamic. Of course, fundamental rights must inevitably be confronted with contemporary challenges: it is well known, for instance, that the implementation of the use of AI can jeopardise criminal law guarantees, as pointed out specifically with regard to the medical sector by Bartolomé Torralbo Muñoz in his contribution.

Gender-Based Violence and Human Rights

The second part deals with a topic that is as complex as central to the development of fundamental rights at the international level. The demands for protection against gender-based violence, in fact, intersect some essential aspects of the interaction between punitive matters and multilevel normative systems, engaging the actors on the supranational scene in a complex debate that is still in progress. The problems that ECHR duties to criminalise, both positive and negative, raise in relation to *nullum crimen*, the principle of *extrema ratio* and the fair trial are well known. In this sense, Sofia Braschi's paper starts from those international duties, in order to analyse the degree of implementation achieved at the national level in the fight against the various forms of gender-based violence and domestic violence. More in detail, a first part of the work focuses on the jurisprudence of the Strasbourg Court in relation to the priority recognised to gender violence by national legislative reforms (the so-called Codice Rosso). On the contrary, the Istanbul Convention is examined regarding the substantive innovations of Law No. 69 of 2019, emphasising in this different perspective the effects, direct and indirect effects of the duties to criminalise. The question remains, therefore, whether criminal law represents the most effective tool to neutralise gender-based violence and ensure maximum protection for victims of offence and discrimination.

In this sense, it is quite emblematic the case of forced marriages, a culturally oriented offence that has witnessed a regulatory and hermeneutic course of particular interest. Hence, sanctioning conducts that, though rooted in rather deep cultural traditions, offend the fundamental freedoms of the individual and, especially, of women receives significant support at an international level, strongly conditioning the sanctioning model that follows on the domestic dimension. This theme involves the so-called 'multiculturalist challenge' that is the focus of Giordana Pepè's contribution. Some crimes, it is observed, refer to cultural matrices far from the prohibition of gender-based discrimination and the canon of substantial equality that inspire the Constitutional model. Nevertheless, the direction traced by the Istanbul Convention represents the widespread choice to deploy the penal instrument to ensure adequate levels of protection to women's self-determination and psycho-physical integrity. According to the author, the offence of forced marriage requires us to reflect not only

on the efficacy of traditional penal categories as for the goal of protecting victims, but also, in broader terms, on the function of punitive sanctions in a promotional key.

Examining the international duties to criminalise placed in a sort of top-down relationship with states, however, one should not overlook the demands coming from below and testifying - in a historical perspective - to the evolution of the widespread perception in certain social groups regarding the function and limits of criminalisation. This opposite and symmetrical perspective inspires the third contribution by Bruna Diniz, focused on the analysis of the drives towards criminalisation that animate a large part of the feminist movements in the Brazilian context. Recognising the need to ensure punishments a subsidiary nature, the central role played by the protection of women in contemporary society has led relevant sections of civil society to defend the punitive tools, the only ones which seems in a position to protect such important values with reasonable effectiveness. In this context, the analysis is conducted from an evolutionary perspective following the historical-dialectical materialism method. In conclusion, the emphasis on criminal offences represents a proper reaction to the proven ineffectiveness and weakness of alternative strategies, previously advocated by feminist movements as forms of counteracting gender-based violence.

Criminal Law, Immigration and Modern Slavery

The third segment of this volume, titled "Criminal Law, Immigration, and Modern Slavery," undertakes an examination of a contemporary issue of great significance—the intricate confluence of criminal law and immigration law. This convergence has given rise to the term "crimmigration," denoting the challenge inherent in demarcating distinct boundaries between conventional criminal law and its established modes of intervention, on the one hand, and the tools employed in regulating migration dynamics, on the other. This complex interplay is well-illustrated through the contribution of Filomena Pisconti. In her contribution, she meticulously charts the manifold forms of detention applicable to migrants, particularly within the framework of the Italian legal system. The author engages in a nuanced reflection on the viability of distinguishing these form of detentions from traditional punitive incarcerations. This discernment hinges primarily on the extensive evolution of the concept of punishment within the jurisprudence of the European Court of Human Rights and the ensuing doctrinal discourse. This endeavor extends beyond theoretical realms, as the classification of measures as either criminal or non-criminal carries profound implications for the application of strongly differentiated guarantees.

The intertwinement of criminal justice and immigration law also finds manifest expression in Sara Taverriti's focused exploration, centering on access to justice for victims of crime lacking legal residency in their host country. This marginalized cohort is effectively precluded from seeking redress for the injustices they suffer, as they avert any engagement with the state's enforcement machinery, given the fear of incurring penal sanctions or, more direly, deportation due to their irregular status. This

contribution unveils some approaches deployed across different jurisdictions to address this problem, illuminating their merits and limitations. Ultimately, it explores the possibility that a solution could emerge from an expansive interpretation of the principle of nemo tenetur se detegere—a principle historically conceived for the accused, yet here coming to help for the victim.

Intimately linked to the migration phenomenon is the lamentable issue of modern slavery, explored in João Victor Gianecchini's closing contribution. It is in fact a criminal phenomenon that very often sees migrants as victims. The author's examination of modern slavery is grounded mainly in the Brazilian legal context and its corresponding legal offence. Immediately, however, the analysis becomes more general and goes on to examine the criminological constants of this problem and its diffusion also at a supranational level. Furthermore, the discourse encompasses policy considerations on how criminal law may serve as an instrument in countering this issue; considerations that are of course relevant well beyond the Brazilian legal system.

Freedom of Expression and Criminal Law

The fourth part of the volume on 'Freedom of Expression and Criminal Law' ostensibly revisits a quintessential theme in criminal law discourse—the interplay between criminal intervention, the safeguarding of diverse public interests or fundamental rights, and the individual's right to free expression. This exploration, however, unfolds within a novel context, as underscored in both contributions, characterized by the rise of digital communication and social media. Thus, new problems arise or perhaps old problems now present themselves in renewed guise and bring with them renewed social implications. This holds true for both Athina Sachoulidou's initial contribution, which navigates the intricate interrelationship among crime, criminal justice, and mass media, and Ezgi Çırak's subsequent inquiry into the proliferation of disinformation. In their dissection of the intricate balance necessitated between divergent fundamental rights, both scholars draw upon not only the experiences of various national legal frameworks (from Germany and Greece to Turkey) but also the jurisprudence of the European Court of Human Rights, a pivotal reference in this domain.

Human Rights and Criminal Law Enforcement in European and International Perspective

The last part of the volume analyses from a European and international perspective the connection between human rights and Criminal Law enforcement, dealing with various subjects, ranging from the “Crisis of EU’s Mutual Trust” to others related to prison law, pre-trial detention and interim release of prosecuted individuals. With regard to the first topic, Michał Wawrzyńczak refers to “the process of Rule-of-Law backsliding” that has been observed for several years in some EU countries and the breakdown of trust among its members, highlighting their vital implications for European cooperation in criminal matters in the AFSJ. The paper identifies and

analyses various layers of the crisis of mutual trust in the EU through the prism of the ECJ and the ECtHR case law on the issues related to the Rule of Law and mutual trust, as well as the judgments of domestic courts refusing to execute the EAW due to doubts regarding the legitimacy of the other Member State's judiciary.

The connection between human rights and Criminal Law enforcement is also studied from a European perspective in the paper of Christos Papachristopoulos, who focuses on the debate concerning the possible adoption of a European Prison Charter as a legally binding document that would harmonize broad aspects of prison law at EU level. After examining the contents and justifications behind a European Prison Charter, the paper summarises the legitimacy concerns that the adoption of such a Charter would raise, taking into consideration both domestic arguments on the political will and capacity constraints and EU-centred arguments on the instrumentalization of prisons. Finally, the author presents a number of submissions that would allow the EU proposed action to become reality.

Closely related to prison law, important human rights issues are raised during pre-trial detention. In this sense, Dawid Marko analyses, from a comparative and European perspective, the use of remote hearings in the case of the participation of the suspect in incidental proceedings on remand in detention at the pre-trial stage of the criminal proceedings. With the aim of determining the optimal scope for the use of remote detention hearings, the author studies first the similarities and differences between the regulation of such hearings by selected jurisdictions, and it identifies the existence of certain threats to *habeas corpus*. It then analyses the guidelines on the use of videoconferencing in criminal matters formulated in ECHR case law applied to pre-trial detention hearings and the most important legal and rights-related challenges with regard to the right to effective participation in hearing and the right to effective legal representation.

Also concerning pre-trial detention, Aze Kerte Amoulgam examines, from an international perspective, the current state of ICC law and its interpretation by the case law of the ICC with regard to the right to interim release of persons prosecuted for charges of serious international crimes. The paper analyses in various sections the difficulties and obstacles that arise at different stages: not only at the time of the limitation of liberty –highlighting the triumph of the arrest warrant over the summons to appear–, and at the request for provisional release –among others, the level of proof and its mode of administration, and the systematic consideration of the seriousness of the crimes and the heavy penalty incurred as flight factors–; but also at the time of the reparation of the violation of the right to liberty, mainly due to the requirement of grave and manifest miscarriage of justice.

GENERAL TRENDS OF HUMAN RIGHTS IN CRIMINAL JUSTICE

RIGHTS-DRIVEN GLOBAL PENALITY

By Mattia Pinto[*]

Abstract

This paper examines and evaluates the role of human rights in enhancing and expanding penal powers across the globe. It discusses various aspects of this phenomenon, such as the exercise of extraterritorial jurisdiction by national courts to prosecute human rights violations, the establishment of international courts and tribunals, and the imposition of penal obligations on states by international human rights bodies. The paper argues that the advancement of human rights has resulted in the discursive construction of global forms of crime and justice. In this discursive framework, certain wrongdoings that are considered to be of universal concern automatically trigger calls for criminalisation and punishment, regardless of context, consequences or feasibility. However, as the paper contends, when penality operates globally under the banner of human rights, it may escape the constitutional and political constraints that apply when the power to punish is based on constitutional sovereignty. It may also become a tool for powerful countries to exert coercion beyond their borders.

1 Introduction

Human rights became the dominant moral language of international politics in the late 1970s.[1] Since then, appeals to human rights have increasingly been used to enlarge the reach of penal powers around the world. This expansion has entailed the creation of international criminal tribunals, the institution of criminal proceedings against human rights violators and the introduction of new human rights-based offences. The use of human rights to strengthen penality also occurs at the level of discourse. In particular, the twin assumptions that effective human rights protection requires criminal accountability and that impunity causes further human rights violations have become essential parts of the ways we generally think and speak about human rights.

The embrace of penality by human rights – what Karen Engle calls the 'turn to criminal law in human rights'[2] – has been subject to growing attention in recent years. This development has generally been welcomed as largely uncontroversial among legal practitioners, human rights advocates and many scholars. In some circumstances, for instance when gross abuses are committed, the assumption that human rights require criminalisation and punishment has been internalised to the point that it is deemed self-evident. Individual criminal accountability is viewed as an essential element of human rights protection: it would provide redress for victims of abuses, prevent future

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[1] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

[2] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069.

violations through deterrence and affirm respect for human rights law and values.[3] For Kathryn Sikkink, for example, this 'new' trend of holding perpetrators of serious human rights violations criminally accountable fostered a 'justice cascade' and led to an improvement in human rights and democracy, because the occurrence of prosecutions has reduced the general level of repression.[4] Recently, however, a growing body of critical scholarship has questioned the pursuit of human rights protection through criminalisation and punishment.[5] Engle, in particular, has identified four main concerns regarding the embrace of criminal law in human rights.[6] She argues that criminal law individualises and decontextualises abuses;[7] it displaces conceptions of economic harms and related remedies;[8] it demands alignment with the carceral state;[9] and it distorts how historical materials are collected and history is narrated.[10]

Building upon this line of critical studies, this paper delves into how human rights have contributed to strengthening and expanding penal powers around the world. It both illustrates and questions this trend. Section II explores different aspects of this development, such as the use of extraterritorial jurisdiction to prosecute human rights abuses in national courts, the creation of international courts and tribunals, and the imposition of penal obligations on states by international human rights bodies. Section III argues that the promotion of human rights has led to the discursive construction of distinctly *global* forms of crime and justice.[11] Within this discursive schema, certain wrongdoings deemed to be of universal concern automatically elicit demands for criminalization and punishment, irrespective of context, implications or feasibility. Section IV highlights the adverse implications of a global penality that is normatively grounded in human rights rather than on a political order. This foundation runs the risk of casting an aura of inevitability around the operation of criminal law, thereby precluding alternative, non-punitive responses to human rights violations. Moreover, human rights may end up justifying the dissemination and expansion of punitive responses around the globe, rather than moderating state penal policies. Ultimately, the

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[3] Christoph JM Safferling, 'Can Criminal Prosecution Be the Answer to Massive Human Rights Violations?' (2004) 5 German Law Journal 1469, 1482.

[4] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton 2011).

[5] see, eg, Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; Engle (n 2); Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Human Rights Quarterly 729.

[6] Engle (n 2).

[7] ibid 1120–1122.

[8] ibid 1122–1124.

[9] ibid 1124–1126.

[10] ibid 1126–1127.

[11] The discussion in sections III and IV also appear in Mattia Pinto, 'Human Rights as Penal Drivers across the World' in Micheál Ó Floinn and others (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart Publishing 2023) (but with specific reference to the issue of extraterritorial criminal jurisdiction).

paper argues that a global, human rights-driven penality does not necessarily enhance human rights protection, but instead can be used by powerful countries to act coercively beyond their territorial boundaries.

2 Trends

2.1 Extraterritorial Jurisdiction

During the 1970s, many political refugees from authoritarian regimes in Eastern and Southern Europe and South America fled to Western Europe and North America. It was evident that domestic laws and institutions were inadequate in addressing the systematic human rights abuses that these exiles experienced, particularly when such abuses were used to sustain a totalitarian regime. With no international criminal court, the concept of universal jurisdiction was employed as a solution. Universal jurisdiction refers to the authority of a state to exercise its criminal jurisdiction over crimes regardless of the place of commission or any link to nationality. It was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),[12] adopted in 1984, that marked the turn to universal jurisdiction as a means of addressing human rights violations.[13] Under Articles 5–7, states parties must submit any case involving acts of torture to their competent authorities for the purpose of prosecution, without any regard for the place of commission of the acts, if suspects are in their territory and are not extradited. These provisions lay down the legal principle of *aut dedere aut judicare* (a duty to extradite or prosecute), the purpose of which is to ensure that no safe haven from criminal prosecution is granted to perpetrators of torture.

The Torture Convention represents a watershed in the promotion of criminal law for the purpose of human rights protection. Since this convention, several other treaties have sought to make prosecution of gross human rights violations legally obligatory.[14] While many of them do not contain provisions for universal jurisdiction, some do. These include the Inter-American Convention to Prevent and Punish Torture (1985),[15] the Inter-American Convention on Forced Disappearance of Persons (1994),[16] the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)[17] and the International Convention

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1465 UNTS 85).

[13] Manfred Nowak, Moritz Birk and Giuliana Monina, 'Introduction' in Manfred Nowak, Moritz Birk and Giuliana Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd edn, Oxford University Press 2019) 3–4.

[14] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 449, 499.

[15] Inter-American Convention to Prevent and Punish Torture 1985 (OASTS 67) art 12.

[16] Inter-American Convention on Forced Disappearance of Persons 1994 (OASTS 60) art 4.

[17] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (2171 UNTS 227) art 4.

for the Protection of All Persons from Enforced Disappearances (2006).[18] All these treaties *oblige* states parties to assert universal jurisdiction if they do not extradite suspects who are present in their territory. In addition, it is also generally agreed that international customary law *allows* the use of universal jurisdiction with regard to crimes considered particularly heinous by the international community, such as crimes against humanity and genocide.[19] Although national legislation enabling universal jurisdiction for atrocity crimes is technically not the result of human rights law, it is undisputed that it serves to some extent a human rights cause.[20]

In practice, universal jurisdiction for human rights abuses remained a dead letter until the late 1990s. However, with the turn of the century, individual criminal accountability by reference to human rights gained momentum and several states began prosecuting foreign perpetrators for abuses committed abroad.[21] The general perception was that a 'new age of accountability' was replacing an 'old era of impunity'.[22] The arrest of Chilean dictator Augusto Pinochet in London, following a Spanish extradition warrant for torture and human rights violations, is viewed by many as a turning point.[23] For Noemi Roht-Arriaza, this event represented the most significant step towards global accountability for leaders who committed gross abuses.[24] In recent years, human rights obligations have been invoked in the prosecution and punishment of individuals responsible for mass abuses. The Pinochet case gave practical effect to the Torture Convention and revitalised universal jurisdiction for human rights abuses. Despite criticism,[25] universal jurisdiction today appears to be a common jurisdictional basis for preventing impunity for human rights abuses, especially for mid-level perpetrators.[26] A 2021 study shows that universal jurisdiction has been endorsed by 109 states and that the number of prosecutions is growing, with eighteen prosecuting countries and about sixty cases in 2020.[27]

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[18] International Convention for the Protection of All Persons from Enforced Disappearances 2006 (2716 UNTS 3) art 9.

[19] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 117–118.

[20] Andrew Clapham, 'Human Rights and International Criminal Law' in William A Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016).

[21] Sikkink (n 4).

[22] Ban Ki-moon, 'At ICC Review Conference, Ban Declares End to "Era of Impunity"' (*UN News*, 31 May 2010) <news.un.org/en/story/2010/05/340252> accessed 11 July 2023.

[23] Sikkink (n 4).

[24] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2005).

[25] Luc Reydams, 'The Rise and Fall of Universal Jurisdiction' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011).

[26] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 European Journal of International Law 779.

[27] Sandrine Lefranc, 'A Tale of Many Jurisdictions: How Universal Jurisdiction Is Creating a Transnational Judicial Space' (2021) 48 Journal of Law and Society 573, 576.

In addition to universal jurisdiction, states have increasingly used other jurisdictional bases to prosecute human rights abuses committed abroad. Foreign trials through passive personality jurisdiction[28] have been conducted since the 1990s for human rights violations in Latin America.[29] Several activists, unable to have investigations launched in their own countries, have strategically pressured prosecutors in Spain, Italy and France to start criminal proceedings against violations that occurred in Argentina, Chile or Uruguay against citizens with Spanish, Italian or French passports.[30] Passive personality also appears to provide the basis of many criminal proceedings involving senior African officials before European courts.[31] Active personality[32] is also widely used. According to Frédéric Mégret, when it comes to the gravest international crimes, 'active nationality jurisdiction does more work, in the background, than the aesthetically striking, but practically exceptional, principle of universal jurisdiction'.[33] All the treaties containing *aut dedere aut judicare* provisions in fact enable states parties to establish their jurisdiction when the defendant is one of their nationals.[34] In addition, a number of scholars believe that when universal jurisdiction is not available, there is a self-standing human rights obligation to assert active personality jurisdiction, even absent a specific treaty provision to that effect.[35] The assumption is that if a state fails to investigate violations which have occurred in its territory, other states involved through their nationals are encouraged, if not mandated, to conduct the prosecutions themselves.

2.2 International Criminal Law

The history of international criminal tribunals is often celebrated as a triumphant story of human rights protection. However, international criminal law has not always been concerned with human rights. For instance, the Nuremberg Trials focused mainly on

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[28] Passive personality refers to the jurisdiction over an act committed abroad where the victim is a national of the prosecuting state.

[29] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44 Journal of Peace Research 427.

[30] Francesca Lessa, 'Operation Condor on Trial: Justice for Transnational Human Rights Crimes in South America' (2019) 51 Journal of Latin American Studies 409, 435.

[31] Louise Arimatsu, 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' (Chatham House 2010) Briefing Paper IL BP 2010/01 <www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp0410arimatsu.pdf > accessed 11 July 2023.

[32] Active personality is the exercise of criminal jurisdiction by states over their nationals for crimes committed abroad.

[33] Frédéric Mégret, '"Do Not Do Abroad What You Would Not Do at Home?": An Exploration of the Rationales for Extraterritorial Criminal Jurisdiction over a State's Nationals' (2019) 57 Canadian Yearbook of International Law 1, 38.

[34] See, eg, Torture Convention art 5(1)(b); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art 4(2)(a); International Convention for the Protection of All Persons from Enforced Disappearances art 9(1)(b).

[35] Mégret (n 33) 33.

aggression, while the Holocaust and other atrocities remained secondary.[36] Only in the 1990s did international criminal adjudication become part of the human rights agenda and shifted its attention to accountability for human rights violations.[37] In 1993, the atrocities in the Balkans prompted the United Nations Security Council (UNSC) to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).[38] The following year, the UNSC created the International Criminal Tribunals for Rwanda (ICTR) in response to the genocide and other atrocities committed in the country.[39] Though these acts were primarily violations of the Geneva and Genocide Conventions, they were also regarded as human rights violations due to their universal moral repugnance. The ICTY and ICTR exercised direct criminal jurisdiction over the international crimes committed in the former Yugoslavia and Rwanda until their functions were transferred to the International Residual Mechanism for Criminal Tribunals between 2015 and 2017.

The institutionalisation of the *ad hoc* tribunals led to the creation of a permanent international criminal court. The Rome Statute was adopted in 1998 and entered into force in 2002.[40] The ICC was hailed as 'a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law'.[41] Since then, the Court has been considered the cornerstone of a broad human rights agenda: the 'fight against impunity'. The connection between human rights and international criminal law is hardly disputed, as scholars, practitioners and non-governmental organisations (NGOs) overwhelmingly concur that human rights are sources and *raisons d'être* of international criminal justice.[42] The ICC appears to fulfil a dual human rights mandate by promoting fair trial and high standards of detention as models for national systems and utilising the preventive, retributive and expressive functions of criminal sentences to advance human rights standards.

The fight against impunity in international criminal law extends beyond prosecution in international fora. International criminal law also aims to penetrate the domestic level by promoting national prosecution and the implementation of penal mechanisms for

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[36] Samuel Moyn, 'From Aggression to Atrocity Rethinking the History of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

[37] ibid.

[38] UNSC Res 827 1993.

[39] UNSC Res 955 1994.

[40] Rome Statute of the International Criminal Court 1998 (A/CONF183/9) (So far, 123 states have ratified the Rome Statute and accepted the jurisdiction of the ICC over war crimes, crimes against humanity and genocide, while 45 have also accepted the jurisdiction of the Court over the crime of aggression).

[41] Kofi Annan, 'Secretary-General Says Establishment of International Criminal Court Is Gift of Hope to Future Generations | Meetings Coverage and Press Releases' (1998) <www.un.org/press/en/1998/19980720.sgsm6643.html> accessed 11 July 2023.

[42] Kjersti Lohne, 'NGOs for International Justice - Criminal or Victims' Justice?' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press 2018).

serious human rights violations. The ICC's jurisdiction, for instance, is based on the principle of complementarity.[43] On the one hand, the Court has jurisdiction over international crimes when states are unwilling or unable to prosecute.[44] On the other, states are compelled to conduct effective criminal investigations and trials if they wish to avoid the intervention of the ICC (positive complementarity).[45] In this way, complementarity fosters 'heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out'.[46]

The creation of international criminal institutions is often an attempt to lift the obligations to punish human rights violations out of the politics and injustice associated with the national sphere.[47] International bodies supposedly provide a neutral and apolitical response to chaotic local politics and administer criminal justice in external settings through universal rules and procedures.[48] They are opposed to domestic political powers, which are seen as incapable of managing complex social problems, including the protection of human rights.[49] The assumption of the inadequacy of domestic justice has long remained unchallenged, especially throughout the 1990s. However, in more recent years, critiques and limitations of trials on the international stage have led to the creation of hybrid criminal tribunals that integrate both domestic and international structures.[50] Examples of these institutions include the Sierra Leone Special Court, the Extraordinary Chambers in the Courts of Cambodia, the Kosovo Specialist Chambers and Specialist Prosecutor's Office, the Special Tribunal for Lebanon and the Extraordinary African Chamber.[51]

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[43] Carsten Stahn and Mohamed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011).

[44] Rome Statute arts 1, 17.

[45] ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Complementarity. Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (International Criminal Court 2010) ICC-ASP/8/51 para 16 <asp.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf> accessed 11 July 2023.

[46] Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 143.

[47] Nesam McMillan, 'Imagining the International: The Constitution of the International as a Site of Crime, Justice and Community' (2016) 25 Social & Legal Studies 163, 166.

[48] Zinaida Miller, 'Anti-Impunity Politics in Post-Genocide Rwanda' in Karen Engle, Zinaida Miller and Dennis M Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 150–151.

[49] ibid 159–162.

[50] Frédéric Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 Cornell International Law Journal 725.

[51] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 197–210.

2.3 Penal Obligations by Human Rights Bodies

During the last three decades, the Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), the UN Human Rights Committee (UNHRC) and other human rights bodies have interpreted their mandates to monitor compliance with international conventions as to enable the imposition of obligations on states in criminal matters.[52] These institutions increasingly rely upon human rights law to supervise national prosecutions and order states to ensure criminal accountability at the domestic level.[53] These bodies are not criminal courts and cannot find individual responsibility. Nevertheless, they influence how national systems exercise criminal jurisdiction over serious human rights violations and intervene when states appear unable or unwilling to act as required.

In the context of the Organisation of American States (OAS), the first IACtHR decision in a contentious case, *Velàsquez Rodríguez v Honduras* (1988), is also the leading case of the Court's invocation of criminal accountability.[54] The IACtHR ruled that states have a dual duty to refrain from violations and to prevent, investigate and punish them, even if state authorities are not directly involved in the abuse.[55] Although, in that case, the IACtHR did not order Honduras to adopt penal measures as a remedy, in the mid-1990s it started prescribing such measures, instructing states to effectively prosecute and punish individual perpetrators.[56] Today, the IACtHR considers the failure to deploy criminal sanctions as a violation of human rights per se, and in cases of torture and enforced disappearance, the duty to punish has even attained the status of *jus cogens*.[57]

The ECtHR has also developed a body of case law on state obligations in criminal matters.[58] The seminal case is *X and Y v Netherlands* (1985), where the Court held that the 'effective deterrence' for protecting sexual integrity 'can be achieved only by criminal-law provisions'.[59] Following this decision, the state's obligation to criminalise human rights abuses has also been restated with respect to the right to life,[60] torture

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[52] Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht Journal of International and European Law 161; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009).

[53] Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 7 American Journal of International Law 1.

[54] *Velásquez Rodríguez v Honduras* [1988] Series C No 4 (Inter-American Court of Human Rights).

[55] ibid 166.

[56] *Caballero-Delgado and Santana v Colombia* [1995] Series C No 22 (Inter-American Court of Human Rights) [72(5)].

[57] *Goiburú et al v Paraguay* [2006] Series C No 153 (Inter-American Court of Human Rights) [84].

[58] Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).

[59] *X and Y v Netherlands* [1985] App No 8978/80 (European Court of Human Rights) [27].

[60] *Kiliç v Turkey* [2000] App No 22492/93 (European Court of Human Rights) [62].

and other ill-treatment,[61] forced labour and human trafficking.[62] Additionally, the ECtHR orders states to enforce their criminal law through 'thorough and effective investigation capable of leading to the identification and punishment of those responsible'.[63] The UNHRC has also developed similar case law on the duty to prosecute human rights violations, including arbitrary killing, enforced disappearance, torture and ill-treatment, sexual and domestic violence and human trafficking.[64] The UN Committee Against Torture is another body that has consistently ordered states to investigate and punish acts of torture and ill-treatment.[65] Finally, it is worth noting the ongoing equip the African Court on Human and Peoples' Rights with a fully-fledged criminal jurisdiction through the Malabo Protocol.[66]

The case law on state obligations in criminal matters has had a significant impact on domestic legal systems. Pursuant to human rights bodies' decisions, states have started new criminal investigations and prosecutions, overturned amnesties, introduced new offences and created new institutions to facilitate criminal accountability.[67] For instance, in *Simón, Julio Héctor y Otros* (2005), the Argentinian Supreme Court relied on the IACtHR case law to exclude the application of amnesty, statutory limitations and the principle of non-retroactivity.[68] Italy introduced the crime of torture in the Italian Criminal Code following an ECtHR decision,[69] and in the United Kingdom, the adoption of the Modern Slavery Act 2015 was influenced by ECtHR case law on state obligations to criminalize labour exploitation.[70]

3 The Discursive Construction of Global Crime and Justice

As we have seen in the previous section, in the last few decades, human rights have not only made criminal law one of the main instruments for their promotion but have also allowed it to move across and beyond borders. The use of human rights to trigger the application of criminal law transcends national borders because of potential detachments between the sites where proceedings are held, the nationality of the victims and offenders, and the location of the wrongdoings. It also transcends national

[61] *MC v Bulgaria* [2003] App No 39272/98 (European Court of Human Rights) [174].
[62] *Rantsev v Cyprus and Russia* [2010] App No 25965/04 (European Court of Human Rights) [258].
[63] *Kaya v Turkey* [1998] App Nos 158/1996/777/978 (European Court of Human Rights) [107].
[64] UNHRC, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (UN Human Rights Committee 2004) CCPR/C/21/Rev.1/Add. 13 para 18.
[65] *Communication No 353/2008 (decision on Ukraine)* [2011] CAT/C/47/D/353/2008 (UN Committee against Torture).
[66] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of "Regional Complementarity"' (2019) 17 Journal of International Criminal Justice 1005.
[67] Huneeus (n 53) 2.
[68] *Simón, Julio Héctor y Otros* [2005] Supreme Court of Argentina 17.768, S1767XXXVIII.
[69] Domenico Carolei, 'Cestaro v. Italy: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem' (2017) 17 International Criminal Law Review 567.
[70] Mattia Pinto, 'Sowing a "Culture of Conviction": What Shall Domestic Criminal Justice Systems Reap from Coercive Human Rights?' in Lavrysen and Mavronicola (n 58).

boundaries because of the widespread belief that the universal conception of human rights mandates global justice – generally translated as the need for criminal accountability regardless of the context, implications and practicability.[71]

Since the 1970s, the rise of human rights has led to the emergence of a supposedly global sensibility for certain values deemed universal – in terms of their nature (as concerning every human being) and prescribed recognition (their being non-negotiable). In the most serious cases, conduct that infringes these values has been read in terms of legally proscribed crime rather than simply injustices and wrongdoings.[72] However, this is not ordinary crime: given the universality of the breached values, crime against human rights is discursively produced as *global* crime. Unlike transnational organised crime or cybercrime, for example, where it is the conduct that is supposedly of global reach, here it is the norm that is of global concern.[73] Yet rather than being conceived as a product of human rights sensibilities and institutions, global crime is seen to pre-exist the former and authorise the existence of the latter.[74] The story goes that human rights violations were left unaddressed for centuries because they hid behind the shield of state sovereignty.[75] They were the most serious crimes but were not punished as no system of justice to prosecute them existed. This system – the story continues – was first created in 1945, then halted, but resumed in the early 1990s. Since then, the international community has managed to penetrate 'that powerful and historically impervious fortress – state sovereignty – to reach out to all those who live within the fortress'.[76]

Insofar as human rights abuses are framed as global crime, the most appropriate response to advance the human rights regime appears to be a system of global criminal justice – albeit still dependent to a very large extent on the coercive and legal machinery of (some) states – rather than large-scale redistribution or a profound transformation of society.[77] Criminal law and legal processes that can penetrate the borders and the boundaries of territorial sovereignty are positioned as best able to defend human rights values wherever and whenever they are threatened. This has led to the *de facto* creation of a decentralised system of global criminal justice.[78] As seen in

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[71] Leigh A Payne, 'The Justice Paradox? Transnational Legal Orders and Accountability for Past Human Rights Violations' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 440–441.

[72] McMillan (n 47) 165.

[73] ibid.

[74] Similarly, in the context of international criminal law, ibid 168.

[75] Antonio Cassese, 'Reflections on International Criminal Justice' (2011) 9 Journal of International Criminal Justice 271, 272.

[76] ibid 273.

[77] Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press 2011) 1.

[78] Joachim J Savelsberg, 'The Anti-Impunity Transnational Legal Order for Human Rights: Formation, Institutionalization, Consequences, and the Case of Darfur' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 208.

section II, it comprises national courts exercising extraterritorial jurisdiction; *ad hoc* international and hybrid tribunals; a permanent international court; and human rights bodies which order states to undertake criminal prosecutions. Altogether, these institutions – and the individuals, NGOs and trans-governmental networks that push them to act – promote a global norm of criminal accountability for human rights violations. This system is not completely settled. As Leigh Payne has observed, '[a]lthough the duty to prosecute gross violations of human rights seems to be a clear mandate in international law, its application soon reveals its ambiguity'.[79] Trials for human rights violations are held at the national and supranational levels, yet most perpetrators do not face prosecution. Nonetheless, the fact that impunity for human rights abuses is still widespread around the world seems to be related to a deficiency in effectiveness or power politics and less to an (open) rejection of the underlying norms and values.

The creation of a global system of crime and justice has not simply facilitated global penality. It is arguably affecting the normative foundations of criminalisation, albeit mainly for those crimes which are serious human rights violations. Conventionally, criminalisation emanates from sovereign statehood and is based on the idea that the state has a monopoly over the legitimate use of violence.[80] This perspective is challenged when it comes to the global system of crime and justice founded on human rights values. Rather than resting on sovereignty, the right to punish may be said to derive from the global commitment to protect 'universal, indivisible and interculturally recognised human rights'.[81] This commitment, in turn, enables states to exercise penal functions to uphold and defend universal values not only on their territory but also abroad. It also gives normative legitimacy to international courts and tribunals to adjudicate in place of national courts.[82] In the words of Mégret, here 'international law comes first and, looking downward as it were, mandates that the criminal law be used for … the protection of basic human rights'.[83]

In a context where the principle of sovereignty is subordinated to that of humanity and human rights,[84] all states can be seen as having the same right to criminally adjudicate serious human rights abuses. They merely stand as proxies enforcing universal values

[79] Payne (n 71) 446.

[80] Max Weber, 'Politics as a Vocation' in Hans Heinrich Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1948) 78.

[81] Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293, 308.

[82] Luigi DA Corrias and Geoffrey M Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13 Journal of International Criminal Justice 97.

[83] Mégret (n 33) 40.

[84] Sam Adelman, 'Cosmopolitan Sovereignty' in Cecilia Bailliet and Katja Franko (eds), *Cosmopolitan Justice and its Discontents* (Routledge 2011) 11.

on behalf of the international community.[85] If priority is given to national institutions or otherwise, it is due to practical, rather than normative, considerations. For instance, proximity to crime may be an important factor for having domestic prosecutions, while the presence of the accused in another state or political pressures at the national level may be crucial in triggering the intervention of foreign or international courts.

4 The Limits of Value-Based Global Penality

The creation of a system of global penality in the last few decades has not been without controversy. With regard to extraterritorial prosecutions of human rights violations, realist scholars in international relations have criticised universal jurisdiction for interfering with transitions to democracy and peace,[86] or impinging upon other states' sovereignty.[87] Given the number of proceedings involving African leaders, some African governments have also argued that universal jurisdiction is a form of neo-colonialism.[88] The same criticism has also been directed towards international criminal adjudication and, in particular, the ICC.[89] Yet the large majority of international organisations, NGOs, practitioners and commentators working in the area of human rights strongly favour global penality as an effective means of responding to human rights violations. They have become accustomed to requiring penal action for human rights abuses without interrogating what is involved in this process. While a global, human rights-driven penality may appear as the 'the most civilized response' to human rights violations,[90] it is nonetheless important to critically reflect on the risks it may entail.

In political theory, criminalisation and punishment are among the most salient manifestations of state authority.[91] Criminal law contributes to one of the ultimate aims of the state, that is, the provision of security and order.[92] Accordingly, the questions of what, when and how much a state should criminalise and punish primarily invite political answers related to how a state has to fulfil its security obligations. The boundaries of crime and the form of sanctions vary in different states according to their

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[85] Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford University Press 2021) 3; McMillan (n 47).

[86] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 International Security 5.

[87] Henry Kissinger, 'The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny' (2001) 80 Foreign Affairs 86.

[88] Charles C Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 Criminal Law Forum 1.

[89] Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009).

[90] Cassese (n 75) 271.

[91] Lucia Zedner, 'Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20 Theoretical Criminology 3, 10.

[92] Thomas Hobbes, *Leviathan* (InteLex Corporation 1995); Cesare Beccaria, *Dei Delitti e Delle Pene* (Mursia 1973).

underlying political order. However, this construction staggers when criminalisation and punishment are made global endeavours. In the absence of a *world* state, the operation of global penality cannot rest on a political order. Rather, normative order is created by appeal to universal human rights values. Global, human rights-driven penality is grounded on a value-based order, which appears as universally recognised by, and adaptable to, all political contexts.[93] Here, the resort to criminal law is no longer a political *decision* but a moral *obligation*. It is not dependent upon the choices of a political community. Rather, criminalisation and punishment spring spontaneously and boundlessly from universal moral values. The more sorts of behaviours come to be regarded as serious human rights violations with the passage of time, the more penality grows and expands on the global stages. The fact, for instance, that environmental damage or business corruption have increasingly been considered human rights violations seems to have encouraged an expansion of their penalisation. Examples are the attempts to make 'ecocide' a crime subjected to international adjudications[94] or the efforts to prosecute the real import of bribery on an extraterritorial basis.[95]

Ironically, human rights-driven developments risk undermining sovereign protections based on the rule of law. In fact, a value-based global penality lacks the checks and balances of the democratic process that are present when criminal law is grounded in a constitutional political order. Its foundation on human rights would in theory require that penal power be exercised *humanely* and in line with international human rights standards.[96] Yet the theory is one thing; another matter is how international and domestic courts operate in practice. The danger, far from being hypothetical, is that they may embrace illiberal criminal doctrine to ensure the punishment of human rights violations at all costs.[97] Even if due process standards were consistently observed, the reins of this value-based penality would remain very much loosened. As a moral obligation, the prosecution of the gravest human rights abuses is required in every circumstance.[98] This means that amnesties, pardons or statutes of limitations are unacceptable if they cover genocide, war crimes, crimes against humanity (including disappearances) or torture.[99] Any approach that would even imply a laxity towards the responsibility of human rights violators is rejected as it would question the seriousness of the wrong committed and jeopardise the universality of the values breached.

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[93] Ambos (n 81) 309.

[94] Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime, Law and Social Change 251; 'Making Ecocide a Crime' (*Stop Ecocide International*) <www.stopecocide.earth/making-ecocide-a-crime> accessed 11 July 2023.

[95] Mégret (n 33) 35.

[96] Kjersti Lohne, 'Penal Welfarism "Gone Global"? Comparing International Criminal Justice to The Culture of Control' (2021) 23 Punishment & Society 3, 11.

[97] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 Leiden Journal of International Law 925; Pinto (n 52).

[98] Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 Oxford Journal of Legal Studies 451.

[99] Juan E Méndez, 'Foreword' in Francesca Lessa and Leigh A Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012) xxiii.

However, this assumption prevents important countervailing interests from being taken into account, even where they may militate against criminal prosecutions.[100] These may include political stability and peace, economic justice, reconciliation, the uncovering of historical truth and institutional reform.[101] The political community where human rights violations have occurred is also deprived of the opportunity to decide for itself how to deal with situations of serious wrongdoings – perhaps pursuing unconventional avenues to justice. For instance, in 1995, South Africa established a Truth and Reconciliation Commission (TRC), whose purpose was, amongst others, to grant amnesty and waive criminal and civil liability for those who disclosed their wrongdoings during the apartheid period, if associated with a political objective.[102] Yet, the South African TRC experience is no longer regarded as a legitimate model of justice. According to Juan Méndez, today the South African-style 'conditional amnesty' would be unacceptable if it covered the gravest human rights abuses.[103]

In addition, criminal law, albeit grounded in human rights in normative terms, is not deprived of its penal character, notably its reliance on police control and incarceration as well as its potential to be enforced disproportionately and arbitrarily. While criminal prescription and adjudication can become global, criminal enforcement is always very much rooted in the state system.[104] Both international and national courts rely on states' police forces to identify and arrest alleged human rights violators. If their trials conclude with a guilty verdict, they need prisons where those convicted and sentenced can be sent. The context of discriminatory criminalisation, police brutality, harsh prison conditions and mass incarceration across many regions of the world would be expected to advise reflexivity and caution in invocations of global penality. However, the human rights discourse tends to move concerns about the inequality, prejudice and violence that stem from penality into the shadows. When justified in human rights terms, prosecutions and trials are generally portrayed as humanitarian, rather than punitive, endeavours. In other words, human rights run the risk of conferring legitimacy to punitiveness by covering it up with a moral gloss. Led by the human rights discourse, penality arrives in a progressive and enlightened guise and is easily welcomed into the system, raising only minor criticism. While human rights actors have generally condemned overreliance on criminal justice led by populist rhetoric, such an expansion is instead demanded when criminal law is used in the name of human rights. The same individuals who criticise harsh prison conditions and over-criminalisation in the context of 'tough-on-crime' policies gladly accept extensive penal control to promote universal values around the world.

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[100] Carlos S Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 The Yale Law Journal 2619.

[101] Jackson (n 98) 17.

[102] SA Promotion of National Unity and Reconciliation Act 1995.

[103] Méndez (n 99) xxiii.

[104] Kjersti Lohne, 'Penal Humanitarianism beyond the Nation State: An Analysis of International Criminal Justice' (2020) 24 Theoretical Criminology 145, 154.

In so doing – and this is what is more concerning – human rights become a key vehicle both for the transnationalisation of punitive projects and for lending some states the opportunity to expand their coercive power beyond their borders.[105] Recent criminological contributions have shown how penal power already travels across national borders and geographic regions, especially from the Global North to the Global South.[106] Western intervention into southern countries' penal sectors is justified on humanitarian grounds and usually takes the form of 'penal aid' aimed at state-building efforts and migration control.[107] Global penality in the name of human rights may be seen as another example of this trend – a trend towards 'the expansion of sovereign power over familiar, racialized, subjects and places', with the aim of 'reasserting control, or at the very least, reimagining it, in places where' Western states once ruled.[108] Far from promoting social justice in every region of the world, human rights-driven global penality ultimately risks perpetuating unequal global power structures.

5 Conclusion

Human rights are a driving force of penality across the world. They are at the basis of the use of extraterritorial criminal jurisdiction to ensure that perpetrators of the most serious human rights abuses do not escape justice. Human rights considerations have also underpinned the institution of international and hybrid criminal tribunals, which appear as the cornerstones of the 'fight against impunity'. Human rights bodies have also imposed positive obligations in criminal matters. Pursuant to these bodies' decisions, states have introduced new offences, started new investigations, overturned amnesties and created new institutions to facilitate prosecution. Human rights do not merely foster penal power across the world, they also discursively produce the idea of *global* crime – namely crime against human rights values – which naturally requires a decentralised system of *global* justice to address it. In this context, criminalisation no longer appears to emanate from sovereignty, but from the values of the international community. However, a global, human rights-driven penality is not necessarily more benign and less problematic. Penality, whatever its source of legitimacy, ultimately remains the exercise of the state's coercive power. Yet, when penality operates globally in the name of human rights, it may run free of the constitutional and political constraints that are present when the power to punish finds its foundations in constitutional sovereignty. Penality may also become a tool for expanding the coercive

[105] Similarly, in relation to crimes against humanity, Graf (n 85) 3.
[106] Mary Bosworth, 'Penal Humanitarianism? Sovereign Power in an Era of Mass Migration' (2017) 20 New Criminal Law Review 39; Eva Magdalena Stambøl, 'Neo-Colonial Penality? Travelling Penal Power and Contingent Sovereignty' (2021) 23 Punishment & Society 536.
[107] Kara Brisson-Boivin and Daniel O'Connor, 'The Rule of Law, Security-Development and Penal Aid: The Case of Detention in Haiti' (2013) 15 Punishment & Society 515; Bosworth (n 106).
[108] Bosworth (n 106) 15.

power of states – in particular, of certain states – beyond their borders that is readily welcomed into the system, raising only minor criticism.

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THE CONTROVERSIAL FRAMING OF THE POSITIVE OBLIGATIONS OF CRIMINAL PROTECTION: THE RIGHT TO TRUTH IN THE SILENT DIALOGUE BETWEEN TWO COURTS

By Olimpia Barresi[*]

Abstract

This paper aims to provide an account of the positive obligations of criminal protection that have arisen in the case law of the European Court of Human Rights and the Inter-American Court. Through a historical overview of the emergence of such obligations, the analysis will attempt to outline how positive obligations are intended to act as a restrain to ensure the effectiveness of fundamental rights, particularly the right to life and other core rights. This contribution means to critically assess the legitimacy of positive obligations, their scope, and their capacity to affect the criminal justice system. Emphasis will be placed on the development of a new right, namely the right to truth, in an attempt to understand how it has emerged as a counter narrative to the prosecution of past crimes against humanity beyond statutory limitation.

1 Introduction: positive obligations of criminal protection

Over the past fifty years, the criminal law system has witnessed a remakable opening thanks to the emergence of supranational sources.[1]

This paper traces the genesis and characteristics of the positive obligations of criminal protection as emerged from the European and Interamerican Court of human rights; it also focuses on the development of a new right, the *right to truth*, and on the problems that have arisen from this, with regard to the issue of legal impunity; lastly, it assesses the possible remedies that do not involve the imposition of obligations on states, but that involve alternative solutions.

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[1] Punitive obligations deriving from the recognised (and indirect) criminal competence of the EU, obligations deriving from the reading of the Constitution, and, finally, obligations deriving as a category recognised by the jurisprudence of the ECHR have recently emerged. See Petra Velten, 'Diritto penale europeo', [2006] Criminalia 126. In Italy, the debate was concentrated and sharpened between the '70s and '80s with the censures of constitutional illegitimacy in malam partem on the Merli Law and later, on the abortion law. Therefore, the debate on the positive obligations of penal protection, which originally developed within the Italian constitutional framework, in time began to enter and make its way also into the legal space of the European Union, thus influencing the domestic legislator's discretion on punitive choices. Clearly, one considers how the debate on obligations deriving from the ECHR is the one that has posed the greater number of problems, as issues different from those developed at the domestic constitutional level have arisen.

For methodological purposes, this paper chooses to compare two distinct regional legal entities, the European and the Inter-American Court, which, over a lengthy period of time, seem to have confronted silently on the approach to the phenomenon of serious violations of fundamental rights. By this, generating new reflections on the role of criminal law.[2]

The paper outlines the general pattern of positive obligations deriving from Art. 2 ECHR,[2] with a focus on the rights to life, and the development of these in the context of specific categories of crimes committed by a State in the case of a serious violation of human rights.[3] The main objective is precisely to highlight the progressive development in the case law of the two supranational human rights Courts that, in various aspects, have affected the wide and (for a long time) 'untouchable' sphere of criminal discretion of countries. In particular, how the emergence and acknowledgement of a need for 'justice and truth' has confronted – on the part of the two Courts – demands for a justice system, which is able to surmount situations of impunity and restore the guarantees States must ensure to protect certain basic rights, relying on the instruments of the law and on criminal sanction.[4]

2 A brief *excursus*: the progressive recognition of positive obligations in the jurisprudence of supranational Courts

Criminal law, as a whole, can have two different functions with respect to the protection of fundamental rights.[5] On the one hand, the more traditional task consists

[2] Credit is due to the first McCann v. the United Kingdom decision, which is of fundamental importance because for the first time, it enshrines the existence of positive obligations implicit in the duty to protect the right to life under Article 2 ECHR. In fact, this ruling had on the one hand, established an obligation relating to the manner in which police operations are conducted and, on the other hand, a positive obligation, of a more strictly procedural nature, to conduct an effective investigation.

[3] Valeria Scalia, 'Una proposta di ricostruzione degli obblighi positivi di tutela penale nella giurisprudenza della Corte europea dei diritti dell'uomo. L'esempio degli obblighi di protezione del diritto alla vita' I (2020) Archivio penale 3.

[4] In these two contexts, it is precisely the reflection on the impact on the 'arbitrariness of what and whether to punish' that has led to the idea that, when faced with requests for 'incrimination' of a supranational matrix, there is a risk of transforming the national legislator from 'creator and author' into a mere 'executor' of criminal policy options not directly linked to the democratic body, but to a third party, also having direct repercussions on the constitutional guarantee of the reservation of the law. Indeed, 'the break with the age-old illunistic tradition in the penal field suggests a deeper reflection on the axiological dimension and the political component of criminal law, when it is influenced by the penalisation indications of constitutional and supranational origin', see Caterina Paonessa (n 3).

[5] On this point, see Domenico Pulitanò, 'Diritti umani e diritto penale', in Carlo Meccarelli, Massimo Palchetti and Paolo Sotis (eds.), *Il lato oscuro dei diritti umani* (Dikinson 2014) 81; Ombretta Di Giovine, 'Diritti insaziabili e giurisprudenza nel sistema penale', in Carlo Meccarelli, Massimo Palchetti and Paolo Sotis (eds.), *Il lato oscuro dei diritti umani* (Dykinson 2014) 263; Stefano Manacorda, '"Dovere di punire"? Gli Obblighi di tutela penale nell'era dell'internazionalizzazione del diritto', in Carlo Meccarelli, Massimo Palchetti Paolo Sotis (eds.), *Il lato oscuro dei diritti umani* (Dykinson 2014) 307.

in having criminal law act as a limit to punitive intervention;[6] on the other hand, a balance must be struck between the requirements of crime prevention and repression and the respect of fundamental individual rights.[7] The debate on the use of criminal law in the field of human rights has based its analysis on the conduct of the states and how effectively they are able to guarantee beneficial protection of these rights and integrity of the subjective legal situations covered by the ECHR.[8]

At supranational level there has been a growing need to guarantee a kind of special protection to certain rights deemed 'fundamental' (so called *core rights)*. The point was the recognition of clear positive obligations by states to protect themselves in the prevention and repression of certain rights. In the perspective of a criminal law 'servant' with respect to the protection of fundamental rights, the idea that has been emerging at a supranational level is that of a two faced instrument of criminal law capable of repressing (as *ius terribile*) but at the same time ensuring, as effectively as possible, the protection of certain legal assets. All this has undoubtedly clashed, since the origins of a debate still very heated, with some underlying legal principles, including the difficulty and the limits always placed on dialogue and the possible intrusion into the criminal field of each local legal system.

The interpretation and the 'legal' recognition based on it that looked at fundamental rights as something in need of enhanced protection, was engendered by and descended directly from art. 1 ECHR and, in parallel, from art. 1 of the CADH.[9] It was thus held that the principle that certain rights and freedoms of the human being must be respected by states in a twofold sense descends from Art. 1 ECHR interpreted as an open clause: it is imperative to provide certain measures to be adopted concerning what and how much to punish but, at the same time, to provide measures aimed at controlling repressive actions of state intervention.

The supranational debate on positive obligations of criminal protection started in parallel with the emergence of the position taken by both the Court of Strasbourg and

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[6] On this point, refer to the doctoral thesis by Serena Ucci, L'anticipazione della tutela tra opzioni di politica criminale e *ratio* di tutela. Limiti ad un uso simbolico del diritto penale (University of Naples 2017).

[7] In Italy, the debate has centred on reflection around the principle of damage as an idea of necessary protection according to a criterion of the 'ethical minimum', with regard to damage done or occurring to certain goods considered to be very fundamental, such as life, physical integrity and personal freedom. Clearly, "the questions of legitimacy of the ECHR system, and of the European Court of Human Rights, to provide positive obligations of criminal protection binding on national legislators must also be assessed taking into account the risk of crystallising judgements of moral or ethical disvalue prevailing (or widely prevailing) in a given historical moment and in a certain geographical area, with the consequence of being able to trigger, if not adequately controlled and rationalised, processes of criminal stigmatisation of human conduct considered deviant from the dominant morality", Valeria Scalia (n 5) 8.

[8] See Caterina Paonessa (n 3) 52.

[9] This is the abbreviation used for the Convenciòn Americana de Derechos Humanos.

the Inter-American Court which gradually conducted an assessment on the protection of certain legal assets. The case-law of both courts has recognised specific incriminating obligations binding on the member states. At first, the debate focused on two obligations: the protection of the right to life and the protection of the right to physical and mental integrity of individuals. Namely, the Court set up a "range of values" in which the above-mentioned rights are at the top of the list for the crucial role they have.

To sum up, the developments and the attention paid to situations of impunity, which have taken place in certain geographical contexts, must be traced back to a particular direction taken, in first place, by the Inter-American Court, which has been confronted with criminal justice, at some times, ineffective in ensuring adequate repression and forms of prevention in cases of serious and systematic violation of human rights.

3 A *new face* of criminal law: the impact of criminalisation obligations on discretionary choices

The peculiarity of the obligations coming from the supranational sources involves all the articulations of state power, as legislative, executive, and judicial power must all provide the efficient fulfilment of these obligations. Consequently, and this is the most relevant and delicate point, recognising them would require national legislatures to adopt real incriminating norms whenever the supranational Courts deem this to be the only suitable remedy to guarantee effective protection of the rights and freedoms protected by the Convention.

The case law evolution and the path taken by the supranational Courts has led to some reflections on the criminal law seen as a necessary factor for the protection of human rights', in both a preventive and repressive function[10] with respect to their violation. At the same time, it considers punitive intervention as one of the positive benefits that States are internationally bound to guarantee.[11]

[10] Vittorio Manes, 'Introduzione. La lunga marcia della Convenzione europea ed i nuovi vincoli per l'ordinamento (e per il giudice) penale interno', in Vittorio Manes and Vladimiro Zagrebelsky, *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano* (Giuffrè 2011) 49. On this point, see also, Stefano Manacorda, '"Dovere di punire"? Gli Obblighi di tutela penale nell'era dell'internazionalizzazione del diritto' in Alfonso Maria Stile, Manacorda and Vincenzo Mongillo (eds.), *I principi fondamentali del diritto penale tra tradizioni nazionali e prospettive sovranazionali* (Edizioni Scientifiche Italiane 2015) 107, which excludes the existence of both a 'duty to punish', with no right of reply on the part of the states, and a 'right to punish', to which the victims of crimes are entitled *vis-à-vis* the state, also emphasising, on the one hand, the resilience of the major principles of criminal law, and, on the other, a certain over-valuation and extension of the category of obligations of criminal protection, without, however, having any real impact on questions of the separation of powers or individual guarantees.

[11] Francesco Bestagno, 'Diritti umani e impunità. Obblighi positivi degli Stati in materia penale' (Aseri 2003).

The resulting situation of impunity is thus considered to be the result of the States' non observance of the obligation to investigate serious human rights violations and of the omission to prosecute their perpetrators and provide effective remedies[12] or just reparation to victims. Moreover, with a view to the future, from these obligations derives the duty to provide for appropriate and adequate measures to prevent the reappearance of the violations that have occured.

The description of obligations in the preceding paragraphs, shows that the norms which are explicitly dedicated to the rights that the State must respect in the exercise of punitive power mainly establish obligations of a negative kind, as they design limits to the freedom of state action in order to protect individuals from possible abuse of power.[13]

4 The emergence of the *right to truth*: its characteristics and dual significance

4.1 A brief overview on the origin of the right to truth in contexts of impunity

It is by now clear that a reflection on the positive obligations of criminal protection has led to rethink some types of 'new rights' that have emerged in certain contexts.[14] One which expressly comes to the for in this context is the *right to truth*, which has opposed and acted as a counterbalance to substantive and procedural guarantees.

The origin of the *right to truth* traces back to the right, under international humanitarian law, of families to know the fate of their relatives. The enforced disappearance of individuals and other serious violations of human rights gave rise to a broader interpretation of the concept of the right to receive information on missing persons and

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[12] It is no coincidence that the main aspects of criminal law covered by the Convention concern individual guarantees against the action of state authority. On this point and on the consideration that criminal law and 'human rights law' seem to be inspired by apparently opposing logics, see Regis De Gouttes, 'Droit penal et droits de l'homme' [2000] Reveu Science Criminelle 133; and also Stefan Trechsel, 'La Convenzione europea dei diritti dell'uomo e il sistema penale' (1997) RIDU 231.

[13] On this point, it should be noted that in many cases the distinction between negative and positive obligations does not appear so much emphasized, but more nuanced, as for example in the case of Art. 6.1 of the ECHR on the one hand prohibiting proceedings that do not meet the standard of fairness prescribed by the very norm, on the other hand implicitly binding the contracting states to equip themselves with a structure capable of guaranteeing this standard and to examine the merits of the proceedings themselves fairly.

[14] One can see how, even outside the directly legal and procedural sphere, a kind of '*right to truth*' had emerged in parallel with the investigative and judicial proceedings. Indeed, in the last years of the Argentinean dictatorship, in particular, in the year of transition that led to the establishment of a democratic regime under President Alfonsìn, a *Truth Commission* (CONADEP, Comicion Nacional sobre desaparecioò de personas) was created with the main task of collecting as much data as possible on facts, testimonies and evidence about events that occurred during the years of the military dictatorship. At the end of its data-gathering work, the Commission issued a Report, later published under the name '*Nunca Mas*', which became the slogan in the following years.

allowed for the specification and recognition of a right, the *right to truth*. However, despite the evolution of a more specific case law on the merits of this right, it is still difficult to identify its precise legal nature in international law.

In the face of certain events, it was precisely the terrain of impunity that was fertile ground for the development of this new right. This clarifies why both Courts have focused on defining the circumstances in which the non-intervention or non-inference of the State can be justified. In the attempt to respect the margin of appreciation reserved to a State, they have tried to find a balance between the interest of the individual and the general interest of society. Indeed, both Courts have been confronted with several cases of serious violations of fundamental rights. It is precisely the Inter-American Court that offers the first examples of decisions pronounced by an international judicial body, in which, at last the procedures by which the sate may exercise its power in criminal matters are subjected to a 'stringent review'"[15] and are, moreover, sworn to be incompatible and, thus, conflicting with the positive obligations implicitly deriving from the Convention.[16]

It can then be stated that the *right to truth*,[17] has two dimensions, being both an individual and a collective right.[18] On the one hand, the victim has the right to know the truth about the violations that have affected him or her and, on the other hand, in a common perspective, the *right to truth* is also seen as an antidote; indeed, by allowing

[15] Again, Francesco Bestagno (n 18) 45.

[16] Clearly, it seems useful to reiterate that the jurisprudence that took shape during those years was formed in a context in which there was an increasing number of positions emphasising the importance of adequate recourse by states to the powers connected with the administration of criminal justice. It is no coincidence that, within the framework of the United Nations, there have been a series of reports by the Human Rights Committee that mainly concerned cases of serious violations of fundamental rights (in cases of torture, enforced disappearances) in which the authorities of the states concerned had not fully reconstructed the facts and responsibilities. See some of these reports for a more in-depth analysis on this subject: Muyo v. Giamaica, 19th October 1993, n. 321/1988, Muteba v. Democratic Republic of Congo, 24th July 1984, n. 124/1982.

[17] Clearly, one of the major problems associated with the emergence of such a right is that despite the fact that the existence and importance of the *right to truth* is already widely recognised and individualised, it is still difficult to delineate its exact legal boundaries in international law. This is because the *right to truth* is not contained per se in regional treaties or conventions, i.e. it has not been enucleated as a clear and binding norm in an international treaty or convention.

[18] In the decision of the Federal Chamber of Buenos Aires, in the Mignone case, on 20th April 1995, the Court stated that the *right to truth* 'represents one of the specific and immediate aims of the penal process'. It is recalled that since 1995, several parallel criminal proceedings had been opened in Buenos Aires with the aim of ascertaining the facts of the case in order to ascertain the historical truth. Thus on this point, see Daniel Pastor, 'Processi penali solo per conoscere la verità? L'esperienza argentina', in Emanuela Fronza and Gabriele Fornasari (eds.), *Il superamento del passato e il superamento del presente. La punizione delle violazioni sistematiche dei diritti umani nell'esperienza argentina e colombiana,* (Quaderni di dipartimento 2009).

the acquisition of knowledge about the facts that have happened, it allows for the creation of a social awareness so that the same events will not be repeated.[19]

4.2 Comparing the jurisprudence of the European Cour and the Inter-American Court of Human rights

Over the last fifty years, the jurisprudence of the two supranational Courts[20] has had to deal with a 'newly minted' matter that brought to the surface the existence and indirect recognition of rights that have been balanced against certain pivotal institutions of criminal law, such as the statute of limitations and also against the actual need to punish after a considerable period of time.

In particular, the two Courts have been in a *silent dialogue* on the matter that highlighted the urgency of civil society to confront the need for justice claimed for in the name of the right to truth.[21]

It should be noted from the outset that it is precisely with regard to the emergence of this right that the Inter-American Court has played a fundamentally important role,

[19] For this reason, it has been used to challenge the validity of laws granting amnesty tout court to protect those who have violated human rights under international law, and to encourage governments to be more accountable and transparent.

[20] The mechanism for the protection of fundamental rights provided by the American Convention on Human Rights has many things in common with the corresponding mechanism of the European Court; in particular, it is based on the work of the Inter-American Commission on Human Rights and the Inter-American Court, which only operates within the scope of the Convention itself. On the Inter-American system of protection, see Claudio Zanghi, 'La Convenzione interamericana dei diritti dell'uomo' (1970) La Com. Int. 266.

[21] In particular, there are many decisions on the subject, in which the Strasbourg Court, e.g., in Russia v. Turkey, used the 'cover' of Art. 3 ECHR to condemn states in cases of disappearances of persons subject to limitations of liberty. In fact, in this respect, the Court recognised that the phenomenon of enforced disappearance represents inhuman treatment for the relatives of the disappeared person (a kind of 'indirect torture'), precisely because they cannot know what has happened to the relatives. This first acknowledgement finds its origin in the late 1990s, in the case Kurt v. Turkey in which the applicant, the mother of the person complained about the total silence on the part of the authorities following the disappearance of her son held in custody. Confronted with several nigh- denials of the requested information, the mother complained that she had suffered a violation of Art. 3 ECHR precisely because of the deliberate and prolonged suffering caused by the authorities' reticence. In this deicision, the Court takes a first step forward in the matter by stating that the mistreatment or distress (and states of mind of suffering suffered) in order to fall within Art. 3 must in any case reach a minimum level of severity (the so-called 'minimum of severity'). This is therefore a case that ended with the conduct of the state against which he had appealed and the first time for the Court to have identified the exceeding of the minimum level of severity, caused by the moral suffering suffered by the relatives of the victims in cases of enforced disappearance. The element of peculiarity that is recognised in the Kurt case also consists in the fact that the Court took into consideration another norm, in particular Art. 3 ECHR in recognising the mother of the arrested young man as a victim and had qualified the omertous attitude of the state organs in the face of her repeated requests for information. The Court, in particular, recognised that this attitude on the part of the authorities was capable of causing moral suffering of such an intensity as to fall within the scope of Article 3 ECHR.

starting from the leading case *Barrios Altos v. Peru*.[22] It is no coincidence that, precisely by intervening on the legitimacy of the rules of amnesty and pardon, it revolves its reasoning around the need to overcome the risk of impunity as it prevented 'victims and their close relatives from knowing the truth and receiving the corresponding reparation'. It is precisely in this decision that the Court reveals the existence of the *right to truth* and its double dimension. This first case then opens the way for the Court itself to question the other 'self-amnesty' laws and their compatibility with the rights protected by the Convention; they present margins that lead to considering them as having no juridical effect and incapable of hindering the course of investigations aimed at ascertaining and punishing those responsible.[23] At the same time, as already mentioned, the European Convention on Human Rights is also marked by a 'liberal' conception that identifies 'the essential function of the international protection of individual rights in the protection of the individual from possible restrictions by public power'.[24] It is no coincidence, therefore, that in the jusisprudence of the Strasbourg Court, one can immediately identify the need to meet as basic objective that of surrounding the recourse of the State to its powers with appropriate constraints by establishing specific duties of abstention with respect to the sphere of individual rights.[25]

It should be emphasized that the jurisprudential line that is hinged on the development and recognition of positive (procedural) obligations has also represented, not only for the Inter-American Court, but also for the European Court, the reference model for

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[22] In this regard, we recall the leading case Barrios Altos v. Peru, 14th March 2021. In this decision, the Peruvian amnesty laws that had been enacted after the fall of the dictatorship were put before the court. They were declared inadmissible because, together with the measures and laws adopted that had led to the statute of limitations for certain crimes, they aimed to prevent the investigation and punishment of those responsible for serious human rights violations.

[23] This precise position of the Court was gradually consolidated in the jurisprudence of the Idu Court and then confirmed by a related case in which the Court was called upon to verify whether an acquittal under an amnesty law could determine the prohibition of double jeopardy for the perpetrator who, after having been acquitted, was again subject to criminal proceedings. This is the case of Inter-American Cour of human rights, La Cantuta v. Peru, 9th November 2006. In another subsequent case, it further specified that in international law, the obligation to investigate human rights violations is precisely one of the positive measures that states should adopt in order to guarantee the rights recognised in the Convention, constituting precisely 'an obligation of means rather than of results, which the state must assume as a legal obligation and not as a mere formality predestined to be ineffective and dependent on the procedural initiative of the victims or their close relatives or on the presentation of evidence by private individuals'.

[24] Francesco Bestagno, (n 18) 23.

[25] One of the decisions that most dealt with and outlined positive obligations is the judgment X and Y v. Netherlands, Series A no. 91, § 23, of 26th March 1985. In this case, the European Court was confronted with a substantial situation of impunity that 'covered' the alleged perpetrator of a particularly serious sexual abuse. In this regard, the Court recalled its duty to refrain from reviewing the interpretation of domestic law provided by national courts. Thus on the decision see Cristina Campiglio, La tutela internazionale del fanciullo da nuove forme di violenza' (1996) Rivista internazionale dei diritti dell'uomo 543.

dealing with the dramatic situation of cases of forced disappearance of individuals.[26] Another peculiarity is to be found by comparing the results of the two Courts. While the Inter-American jurisprudence was primarily focused on the general obligation of guarantees, which led it to affirm the existence of such obligations with regard to any fundamental right guaranteed by the Inter-American Convention, the European Court seems to value more the specificity and autonomy of the positive obligations arising from the ECHR.

Clearly, in both cases, it is possible to observe that the use of positive obligations in criminal cases would appear to be functional in order to overcome the difficulty in asserting responsibility for certain substantial violations of human rights in contexts of generalised impunity.

4.2.1 A closer look: forced disappearances and the 'silence of dictatorship' years

It is imperative to make clear that the two supranational courts have dealt with this phenomenon in different ways and at different times. Clearly, the European Court[27] has 'drawn on' numerous points dealt with by the Inter-American Court in elaborating and ensuring the recognition of precise obligations of a substantive and procedural nature following the formal acknowledgement of the violation of protection of the right to life[28] by state authorities.

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[26] It should be noted, however, that the European Court of Human Rights began to come to terms with the occurrence of this phenomenon since Turkey's accession to the European Convention. In fact, until then, only an international practice had been introduced by supervisory bodies operating in different convention areas. In fact, both the Inter-American Court and the United Nations Committee for Human Rights had already recognised the phenomenon known as the 'desaparecidos' in Latin America as a violation of 'pactual' obligations to guarantee and protect the right to life and, in parallel, the right not to be tortured. It was a kind of alleged violation that was explained by the court of this right: in cases where the discovery of a person and his body is prevented, it is thus not possible to directly ascertain either death, the manner of death or the infliction of torture.

[27] It can be seen that it was only at a stage following the judgment in Kurt v. Turkey that the European Court had come to regard enforced disappearance as a violation of the right to life under Article 2 ECHR. The scheme that had been put in place consisted of the fact that even in this 'presumptive' case it was considered that it was up to the state authorities to ascertain the facts directly and therefore considered that the inability or unwillingness of the government called upon to answer and provide explanations as to the fate of a person who had appeared or was being detained entailed a reasonable presumption of the death of the detainee and of the imputability of the death itself to the state authorities. This is the direction taken and followed by subsequent decisions, Cakici v. Turkey, 8th July 1998, Recueil, 1999 IV and also Timurtas v. Turkey 13th June 2000, Recuel, 2000-VI.

[28] Thus, although the European Court was later confronted with this phenomenon, it was not until the Jurt v. Tuchia decision of 25th May 1998, in Recueil, 1998-III. This case represented the first time the European Court was confronted with a phenomenon of enforced disappearance (it concerned the Kurdish question). On this occasion, the Strasbourg judges opted for a different solution to previous international practice. On this occasion, the Court showed a rather cautious attitude, reiterating its orientation to deny that the violation complained of by the appellant could be attributed to Turkey in

For this reason and for systematic reasons, we have chosen to focus our attention on the peculiar painful events that occurred in Latin America during the military dictatorships, between the 1970s and 1980s .

In those years, several violations of human rights were perpetrated, as state authorities resorted to torture and forced disappearances.[29] Following the transitional period that led to a re-establishment of the democratic order, the need arose in some states to bring cases before the supranational Court of Human Rights in order to ask for transparency and to be able to carry out a kind of 'trial of history', which had been limited until then due to the enactment of various amnesty and pardon regulations that did not allow the facts committed to be investigated. It is in this context that the Inter-American Court, called upon to decide and assess the legitimacy of these laws and the impact of the fundamental rights expressed in the charter, intervenes. Specifically, a key role was played by the Inter-American Commission of human rights[30], which included various members of the Organisation of American States. In several reports, the Commission emphasised and reiterated the existence of specific positive obligations deriving directly from Article 1 of the Convention.[31] The strongest stance was the one that emerged from the reports drawn up in a clear negative judgement on the laws that established amnesties for crimes committed by organs of military regimes, which precluded the possibility of judging and punishing the military authority's criminal conduct.

It was precisely the general climate of impunity that subsequently arose with the period of democratic transition that made it all the more necessary to interpret the scope and content of the obligations arising from the Convention. The peculiarity and the ultimate point to which the Court went in recognising specific violations of the Convention by States was to consolidate the 'double face' of the positive obligations arising from Article 1 (and 1.1.) of the Convention. In fact, it ruled that there was a double violation from a substantive and procedural point of view in failing to protect fundamental rights and not conducting subsequent investigations to identify the perpetrators and their subsequent punishment. In particular, the Court of San Josè, on that first occasion, probably misread Article 1.1 of the Convention, which seemed

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the 'numerous Kurdish cases' and, moreover, that they gave rise to an 'official practice' of enforced disappearances of detained persons.

[29] On this point, Emanuela Fronza, Percorsi giurisprudenziali in tema di gravi violazioni dei diriti umani. Materiali dal laboratorio dell'America Latina, Emanuela Fronza and Gabriele Fornasari (eds.), *Il superamento del passato e il superamento del presente. La punizione delle violazioni sistematiche dei diritti umani nell'esperienza argentina e colombiana,* (Quaderni di dipartimento 2009).

[30] It is a body that is part of the human rights mechanisms that has more opportunities than the Inter-American Court to be able to formulate more general considerations, not necessarily related to individual cases; it can in fact draw up general reports on the human rights situation in the OAS member states.

[31] In particular, the American Convention on Human Rights was stipulated and signed in San Josè on 22th November 1969 and entered into force on 18th July 1978.

almost inspired by a 'negative' conception of the protection of human rights, as *restriccion al ejercicio del poder estatal*, considering the existence of inviolable individual spheres by the State in the exercise of its public function. Always relying on the same provision, the Court,[32] in parallel, asserted the existence of positive obligations of States to put in place measures to create and generate a favourable context for the exercise of human rights, through a kind of extensive interpretation of Article 1.1.

From these provisions, the Court has recognised a twofold duty to Sates: on an abstract level, they must conform their legal systems to the requirements of the protection of rights; concretely, they must adopt measures that allow the exercise of these rights and, in the event of any violation of the latter, they must prosecute those responsible. [33] What certainly emerges from this perspective, are two functions that inter-American jurisprudence accords to the repression of individual conduct detrimental to fundamental rights: the preventive function (both special and general) and the reparative function of the moral damage suffered by victims.[34]

4.2.2 *The situation in Argentina: from juicios por la verdad to trials 'out of time'. A difficult balance between the right to truth and criminal and procedural guarantees*

It is necessary to take note of the peculiarity of the Argentine situation. Indeed, on the one hand, in the context of impunity covered by amnesty and pardon laws, it gave rise to the distinct phenomenon of 'trials without conviction' (the so-called *juicios por la verdad)* and, on the other hand, it was one of the countries that, more than thirty years later, reopened real trials with real convictions for crimes committed during the years of the military dictatorship.

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[32] A peculiarity of the Court's position specifically with regard to cases of enforced disappearance is precisely the recognition of an additional obligation on states to 'continue their efforts to locate the remains of victims and hand them over to their relatives'. This is because it is considered that precisely the obligation to find the body of the victims would serve the purpose of putting an end to the moral suffering of the relatives and therefore performs a more limited function than the obligation to identify and penalise those responsible.

[33] It is precisely this interpretation that has since been consolidated in the practice of the control organs of the American Convention.

[34] Precisely the established situation of impunity following serious human rights violations "propicia la repeticioò cronica de las violaciones de derechos humanos y la total indefension de las victimas y sus familiares". On this point, see the interesting § 173 of the Paniagua Morales v. Guatemala decision. It represents a fundamental juncture in the jurisprudence of the Inter-American Court as it provides a clear description of the concept of impunity and of the risks and effects that reverberate for the victims, consolidating, at the same time, the risk of possible reiteration in the future. On this point, see Massimo Scalabrino, Vittime e risarcimento del danno: l'esperienza della Corte interamericana dei diritti dell'uomo' (2002) Com. St. 1011.

First of all, the Inter-American Court, which had to confront and scrutinise the legitimacy of the *juicios por la verdad*,[35] took a very strong position. Indeed, it confirmed the validity of these proceedings, which began throughout the country following forms and modalities that were not entirely homogenous. The peculiarity of these proceedings, which were not regulated by any form of legislation, was that they placed the victims of these crimes and their families at the centre of everything, through the collection of testimonies, evidence and interrogations.[36] So doing, the Inter-American Court played a leading role in the turning point in the relationship between criminal law and the transition process in Argentina.[37] In fact, with a number of important sentences, which later conditioned choices made by many Latin American countries, it imposed the prevalence of the humanitarian principles of international law over the principles of domestic legislation and consequently, with the choice of the primitive recourse to the criminal law lever, allowed the people to start moving away from the past.[38]

It is exactly Argentina that, faced with situations of impunity perpetrated for almost thirty years, decided to reopen trials against the *junta militar* for acts committed between 1973 and 1983. Well, one might wonder why so much time passed in between.

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[35] Please refer to the Lapacó case of 13th August 1998. The court, in a report 21/00 of 29th February 2000, gave its approval for the institution of this type of proceedings, by virtue of the higher principle of the *right to truth*.

[36] Clearly, as will be seen in the concluding paragraphs, there was no shortage of criticism of the establishment and validity of these proceedings on the part of the doctrine: on the one hand, they were seen as a 'cover' to be able to gather evidence in order to be able to open real proceedings when this would (perhaps) be possible in the future. The problem arose for those proceedings (some of which are still in force) that started as soon as the laws that determined an almost absolute form of unfeasibility and impunity came to an end. Indeed, the most important problems concerned the regime of evidence gathered in those 'sham trials' that could not be used in the trials that followed, both because it would have been evidence acquired without cross-examination and because it was testimony made possible with the guarantee that it would not be used in court. On this point, reference is made to alternatives proposed and very well explained by Daniel Pastor, (n 27) 159.

[37] Actually, in the Argentine case the Inter-American Court went even further. Firstly, to briefly describe the succession of historical stages that led to the reopening of the pro-cesses, it is necessary to recall that in 2001 Judge Cavallo, confronting the *Ley de obediencia debida y De punto final*, declared them unconstitutional. At the same time, since this decision was only relevant in the concrete case, it was necessary for the Supreme Court to intervene, which declared both regulations unconstitutional only on 14th June 2005. It is worth noting the strong and clear position of strong interference that the Inter-American Court took in the Bulacio v. Argentina, 18th September 2003 by declaring the statute of limitations for serious human rights violations to be prohibited.

[38] The impetus behind this path and direction taken by the Inter-American Court started as early as the late 1980s. The case that opened the door to this new direction taken by the Inter-American Court was the Velasquez Rodriguez v. Honduras case of 29th July 1988. On this occasion, the Inter-American Court took a clear position stating that the Defendant State had not fulfilled its obligation to prosecute and punish serious violations of human rights, as derived directly from Art. 1 of the CIHD. Indeed, precisely because the judgments had concluded with an acquittal, the provision was considered violated in both material and procedural terms.

The point is that, to move on towards re-establishing democracy, it had been decided to 'cover up' through pardon laws and impunity the acts committed during the years of the military dictatorship.[39] Clearly, Argentina appears to be an example and a test case to demonstrate that the instrument of criminal law is anachronistic and has been quite abused of. Indeed, in almost all Latin American countries, especially after the *Barrios Altos* decision, the question arose as to what kind of law was to be followed.[40]

Therefore, while, the choice not to use the instrument of criminal law had perhaps, at first, seemed necessary to favour a full re-establishment of the democratic order, subsequently, the choice to intervene, almost thirty years after the end of the military dictatorships, appears to be perhaps risky but it also seems to place on the foreground a criminal law which no longer places itself in the preventive perspective (so to prevent such facts from happening again), but rather in the retributive perspective of wanting to punish in order to punish.

5 Open questions: enforcability and justiciability in the event of non-performance

The acknowledged violation of positive obligations of penal protection by the contracting states in the South American context have consisted in the omission of prevention and repression of violations of fundamental rights, such as the right to life and personal integrity, which means a violation of the Inter-American Convention. There is the need to understand which is the legal basis for recognising a violation of these obligations. The Inter-American Court has taken a first step in recognizing that the establishment of state responsibility is based precisely on the connection made at the interpretative level between the general obligation established by Article 1.1 and the specific provisions of the American Convention devoted to individual substantive rights.[41] It is, therefore, precisely on the basis of this interpretive approach that the Inter-American jurisprudence then recognizes the existence of positive obligations in criminal matters; the difference between the South American[42] and European approach

[39] Thus, on this point, reference is made to the *Ley de obediencia debida y de Punto final*, and afterwards to the pardon provisions. In 2003, the two laws were initially declared null and void until 2005, when both were declared unconstitutional.

[40] In Argentina, but also in Uruguay and Chile, criminal trials against the military of the dictatorship have resumed. As already mentioned, in Brazil, there is a stalemate - at the moment - because there has been a ruling by the IACHR that obliges this country, seeking to affirm a sort of 'hierarchical superiority' between the Constitution and the American Convention on Human Rights.

[41] In particular, the right to life and the consequent prohibition of torture and other inhuman treatment, which find their express recognition in Articles 4 and 5 of the Convention, undoubtedly come to the fore.

[42] In particular, the Inter-American Court powerfully recognises the existence of such obligations in relation to any breach of the Convention, thus maintaining a broader and less selective approach than the jurisprudence of the European Court, which instead configures obligations only in relation to specific treaty provisions.

in this matter consists precisely in the different 'selective' approach adopted by the two Courts.[43]

With regard to the question of the effectiveness of these obligations and their subsequent binding nature, it emerges, from the outset, that both courts have not dealt with the matter in a consistent and linear manner; they seem to have neglected to recognize and establish the instruments for the effectiveness, legality and control of the instruments, leaving the question of non-respect of the obligation itself open. The system of direct attribution to the state in which the various human rights violations took place, leads to reasoning that if based on mere acquiescence and negligence on the part of the state itself to act on a given situation, it does not work as a criterion of responsibility. To overcome this problem, it has been attempted to recognise the principle, whereby, even in the absence of identification of individual perpetrators of acts violating fundamental rights, the mere demonstration of 'acquiescence' or 'support' granted by state organs to the perpetrators themselves would be sufficient, thus enabling the state then to be directly charged with the violation of the Convention.[44]

With regard to the mechanisms of protection, it can be seen how in fact the Court refers in the abstract to the wording of Article 63[45] of the American Convention to which the measures of various kinds that can be ordered by the Court are referred.[46] In particular, these are mechanisms and measures similar to those dictated by the European Court: compensation of a pecuniary nature for the benefit of the victim's relatives. The idea

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[43] A main difference that emerges from the different approach between the two Courts lies in the fact that in the Inter-American jurisprudence the need and necessity to offer a clear distinction between violations of the substantive and procedural content of the provisions of the American Convention, to which instead the European Court has tried to draw a distinction, devoting ample space.

[44] Not surprisingly, on this point, it was expressed in a decision already cited in No. 91 of the Paniagua Morales judgment in which the Court held that: "para establecer que se ha producido una violación de los derechos consagrados en la Convención, no se requiere determinar, como ocurre en el derecho penal interno, la culpabilidad de sus autores o su intencionalidad y tampoco es preciso identificar individualmente a los agentes a los cuales se atribuye los hechos violatorios. Es suficiente la demonstración de que ha habido apoyo o tolerancia del poder público en la infracción de los derechos reconocidos en la Convención". Moreover, this same position is later referred to by Villagran Morales et al. decision, which is also known as *Ninos de la calle*. The reference is found, in particular, in § 75.

[45] Indeed, the recourse in the jurisprudence of the two supranational Courts to the notion of positive obligations (which has been extended over time to more and more cases) would seem to increase the interest in the question of the scope and effects of judgments establishing the violation of such obligations. Probably, this is precisely the nerve point that leads the Court to refrain from providing a more complete and general theory on positive obligations of protection. What is not entirely clear is how the Inter-American Court runs the risk of overlapping the two substantive and procedural levels, imposing an obligation to prosecute perpetrators through criminal proceedings as a sort of 'form of reparation' descended from Article 63.

[46] For a more detailed discussion of the powers attributed to the Inter-American Court by the rule, see Pasquale Pirrone, 'Sui poteri della Corte interamericana in materia di responsabilità per violazione dei diritti dell'uomo' (1995) Rivista Diritto Internazionale 940.

was that 'reparation in a specific form' in the event of violations and injuries to the right to life was not feasible in practice, as it could not restore the pre-existing situation.[47]

6 The *right to truth* and the double front: from non-impunity to the duty to prosecute the criminal offences

The peculiarity of the described contexts leads one to question the nature of the contexts of impunity. In particular, while, on the one hand, we are confronted with material conduct, which is of an instantaneous nature, despite being perpetrated for a long time, on the other hand, the violation of the obligation to guarantee 'procedural protection' entails an offence that lasts over time, which derives precisely from inaction that is protracted and therefore constitutes a continuing offence. The need to subsume such conduct by providing this qualification takes on particular relevance in relation to the breach of positive obligations and the related category of torts of omission. Indeed, the breach of obligations of doing would appear to take the form of an abstention that is prolonged in time, rather than an omission 'with instantaneous execution'. Indeed, it may be noted that exactly in relation to the hypothesis of a tort of omission, the obligation to protect, which prescribes the performance of adequate investigative activities, appears to be reconstructed in case law with characteristics that are capable of configuring a tort of duration. In addition, and concurrently, another peculiarity of this tort consists precisely in the persistence of its effects over time, since the inadequate procedural protection is likely to cause the injured parties to suffer moral damage, the production of which lasts over time, in parallel with the permanance of the condition of uncertainty regarding the events that have affected the victims and the individual responsibilities. Thus, the omission of positive obligation may contribute to generate a context of impunity and therefore limit the effectiveness of the protection offered to fundamental rights by criminal law.

6.1 The possible conflicts with the principle of non-retroactivity and substantive guarantees

In the context of this analysis, the question of the use of penal law imposing obligations on national legislators calls for reflection on whether it clashes with guarantees posed at the basis of the system.

From a reading of the position taken by the Inter-American Court, it would appear that guarantees posed at the basis of criminal law institutions have been bypassed. First of all, institutions such the statute of limitation *per se* have not only been omitted, but have also been deprived of their primary purpose. Moreover, the crimes charged against those institutions at a later date were recognised as crimes against humanity

[47] Since the decision that opened as a leading case to reflection on the nature of such obligations, it can be seen how a broad use of injunctive powers with regard to the adoption of specific judicial measures in the criminal sphere, which is then qualified as an obligation of reparation arising precisely from the violation of the American Convention, has been initiated in subsequent decisions.

(imprescriptible), but this did not, however, lead - and here we come to the second point of criticism - to being able to retroactively apply this recognition, which clearly affected the position of the accused. In addition, in the light of the reflection on the punishment and conseqeuently on the sentence, it is necessary to consider wether criminal law may be useful and compliant with such cases when it must impose the punishment thirty years later. So, the question is: what is the function of punishment if it is unable to detach itself from a purely punitive perspective.

In conclusion, the issue of non-retroactivity mostly arises in those cases where such a guarantee, when included in international norms, would seem to leave a field open to retroactivity, the viability of which (as we have seen in Latin American contexts) is determined on the basis of ethical-political decisions.

6.2 Collateral risks of 'truth-trials': crystallising prevailing moral or ethical value judgements

On the long run, the considerable increase in the number of judgements touching on the subject matter dealt with in this work might, on one hand seem to mark the failure to presecute subjects that could be charged with certain human rights violations and, at the same time, set the use of the instrument of the "criminal trial" as the only possible remedy, which, however, could turn out to appear as a bare spectacularization of the "trial of history". [48]

Indeed, among the so-called 'side effects' of this sort of 'trial of history' there is the difficulty, first and foremost, of coming up against situations in which it is strenuous and even, very often impossible to reconstruct the facts alleged by the plaintiff as they exactly happened and, at the same time, to ascertain individual responsibilities. This is because in many cases a considerable amount of time has already passed and in others the evidence may have been lost also due to negligence in the previous investigative activities carried out by the state.[49]

By analysing the qualification of torts of duration, it seems that it is always possible to consider the fulfilment of the obligation by reopening the investigation, both on the facts alleged by the plaintiff and on the obstructions and shortcomings related to the previous investigations. However, and precisely in this situation, and South America in this case serves as a scenario, one must inquire whether the stigmatisation of a sort of trial of history is indeed the most appropriate instrument to reach the final objective, which is indeed that of achieving a sort of truth trial and the necessary search for and conviction of those responsible, but at the same time, whether there is not a risk of crystallising ethical and value judgements that have little to do with a sort of restorative

[48] Vittorio Manes, *Giustizia mediatica* (Il Mulino 2022).

[49] However, the problem would appear to be surmountable since it would seem to be clear from the case law that it is a 'means' obligation that is concerned with the proper performance of investigative activities and not with the actual result of the ascertainment of individual liability.

or at least reparative solution that sets as its main objective the quest for truth in the trial, for society and for the victims and relatives.

7 Concluding remarks and possible alternative solutions: the role of 'restorative justice' and reconciliation commissions

By comparing the peculiar position of the Inter-American Court[50] with that of the European Court[51], this paper has highlighted the problem of the adequacy of penal intervention and the lack of an effective sanctioning response in relation to the most serious violations of fundamental rights. When questioning the role that criminal law has played in contrasting certain events in history, one must absolutely take into account the nature and peculiarities of 'transition' processes.[52]

It is no coincidence that, on several occasions, the Inter-American Court has reiterated that, precisely when situations of serious violations of human rights and, especially, enforced disappearances occur, only the ascertainment of what has happened, through state investigative powers, constitutes the appropriate way of satisfying the suffering suffered by the relatives.

The above statement sets the recognition of the fundamental importance of protection under criminal law in cases of violations of fundamental rights, because of the compensatory and satisfactory function that the identification and punishment of the perpetrators of such violations is likely to play. Alongside the establishment of reconciliation commissions, which aimed at bringing the victims closer to the perpetrators of such crimes, in the Argentinian context, an alternative solution was brought forward and that is the creation of the so-called *juicios por la verdad*, which had no criminal effects. These were real criminal proceedings initiated by the civil courts with the sole objective of shedding light on the facts that had occurred.

The final reflection focuses on the actual role that criminal law should play: whether it should be understood as a truly indispensable tool or as the only means of protection that the state can resort to in order to be able to offer complete and effective protection

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[50] As argued in great depth, see Ambos Kai, 'El marco juridico de la justicia de transicion', (Editorial Temis S. A. 2008), who reiterates the idea that within the concept of 'transitional justice' the term 'justice' cannot coincide with that of retributive justice, however one wishes to understand it, but also embraces the idea that it can also be conciliatory, of restoration of the community, and more generally any traditional conflict resolution mechanism, and cannot even forget the protection of the rights of the accused.

[51] It would mean the possibility of an inference on the part of supranational sources and, in particular, of the Charters set up to protect human rights with the correlated capacity of the decisions of the Court set up to protect them to affect the legislative 'freedom' of individual systems and with the guarantees deriving from a principle of national legality that would be undermined.

[52] Some scholars have wisely noted that the idea of 'settling scores' with history is a theme that is a thousand years old, so on this point, Gabriele Fornasari, 'Giustizia di transizione e dirito penale' (Giuffrè 2013).

in the face of serious human rights violations. It is precisely in this field that one perceives the twofold need: on the one hand to respond to the urge to punish those who have committed very serious crimes and, at the same time, the 'hard realism' that leads one to consider that in 'coming to terms with the past' the use only of the instrument of conviction should not prevail.[53] Within this evaluation and choice, alternative solutions could be advocated that lie somewhere in between: situations of reconciliation or restorative justice.

In conclusion, a question remains, namely, whether it is unavoidable to renounce that set of individual guarantees that have represented a long-standing and hoped-for conquest for criminal law, despite the dramatic events in which human rights are seriously violated, and, consequently, in order to satisfy the demands of justice.

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MISUSE OF POWER AND ARTICLE 18 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

By Jakob Hajszan[*]

Abstract

The European Convention on Human Rights seeks to guarantee and defend the rights of individuals and to secure the rule of law and political freedoms. Selective prosecutions and the misuse of criminal proceedings by governments with autocratic tendencies therefore violate certain rights guaranteed by the Convention. However, in cases of serious infringements the state's actions may also violate a lesser-known guarantee: Art. 18 ECHR. This provision prohibits the restriction of Convention rights in pursuit of any purpose not prescribed in the ECHR itself. Over the last two decades, the interpretation and application of Art. 18 ECHR has changed significantly and shifted from regarding this guarantee as purely a provision with very high requirements to viewing it as an important tool to ensure political freedoms and the rule of law. This contribution shall give an overview of the aim and content of Art. 18 ECHR and present the development of the case law relating to this guarantee as well as address problems in the application of the concerned provision.

1 Introduction

The European Convention on Human Rights (ECHR or the Convention) was drafted in reaction to the events experienced in Europe during the first half of the 20th century. It is therefore based on a strong rejection of totalitarian forms of government and a decision to protect the rule of law and the rights of individuals. These core values can be endangered by criminal prosecutions pushed for by governments with autocratic tendencies that aim to silence critical voices or to hinder opposition politicians from participating in elections. In such cases, a rather unknown provision of the ECHR – the *prohibition of the abuse of power* in Art. 18 – may be infringed. This article limits the grounds for restricting the rights and freedoms guaranteed by the Convention to the purposes specified therein.

While Art. 18 ECHR played a minor role in the jurisprudence of the European Court of Human Rights (ECtHR or the Court) until the beginning of the 21st century, the number of violations found has increased in the last two decades. During this time the case law regarding Art. 18 ECHR has evolved in an unneglectable manner. Recent decisions have introduced changes regarding the burden of proof required to establish an infringement and addressed the question of how the court should decide if the restrictions pursue different purposes. However, even with the recent increase in the number of cases concerning Art. 18 ECHR, certain questions regarding its interpretation remain unanswered and controversial even within the Court.

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This contribution shall give an overview on the case law regarding Art. 18 ECHR and address problems in the application of the provision concerned. Firstly, the development and changes in the ECtHR's jurisprudence as well as recent developments will be examined. While it is generally accepted that Art. 18 ECHR can only be infringed in conjunction with another guarantee of the Convention, and that there can be a violation even if the respective right or freedom itself is legitimately restricted, the question wheter Art. 18 ECHR can also be violated in conjunction with absolute rights remains controversial. Therefore, this issue shall be closely examined with special attention to Art. 6 and Art. 7 ECHR and Art. 4 of Protocol No. 7, which play an important role in criminal proceedings. Subsequently, several controversial issues relating to Art. 18 ECHR, such as questions regarding the standard and burden of proof or the question of mixed purposes, should be discussed. Later, the consequences of Art. 18-judgments and the monitoring of the respondent's compliance with the Court's verdict will be presented.

2 Art. 18 ECHR: An Almost Unknown Provision

2.1 Role and content of Art. 18 ECHR

Art. 18 ECHR limits the reasons for restricting rights and freedoms guaranteed by the Convention and reiterates that such limitations can only be applied in pursue of purposes prescribed by the Convention itself. It therefore aims at preventing any kind of abuse; hollowing-out or undermining of the guarantees prescribed in the ECHR and thereby seeks to protect the rule of law itself.[1] Because of this aim, Art. 18 ECHR is regarded as an additional safeguard securing the protection and enjoyment of Convention rights and freedoms by individuals against restrictions applied by governments with authoritarian tendencies for ulterior, anti-democratic purposes.[2] Hence Art. 18 – in contrast to Art. 17, which aims to prevent the abusive reliance on Convention rights by individuals or groups[3] – protects individuals against misuse of power by governments.[4]

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[1] Helen Keller and Corina Heri, 'Selective Criminal Proceedings and Article 18 ECHR – The European Court of Human Rights' untapped Potential to Protect Democracy' (2016) 36 HRLJ 1, 2f; Engin Ciftci, 'Politische Motive im Recht: Verbot von "ulterior purposes" nach Art. 18 EMRK bei Einschränkung von Menschenrechten' in Kerstin von der Decken and Angelika Günzel (eds), *Staat – Religion – Recht: Festschrift für Gerhard Robbers zum 70. Geburtstag* (Nomos 2020) 798; Christiane Schmaltz, 'The European Court of Human Rights and Article 18' in Stephanie Schiedermair, Alexander Schwarz and Dominik Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Nomos 2022) 37.

[2] Martin Eibach, 'Case Note on Nemtsov v Russia with Particular Focus on the Misuse of State Power: The European Court of Human Rights at a Crossroads' (2016) 6 EuCLR 321, 325; Corina Heri, 'Loyalty, Subsidiarity, and Article 18: How the ECtHR deals with *Mala Fide* Limitations of Rights' (2020) 1 ECHR LR 25, 26, 28; Schmaltz (n 1) 37.

[3] Potentially also states, cf. Heri (n 2) 50 and Vassilis Tzevelkos, 'The United Kingdom's Presumption of Derogation from the ECHR Regarding Future Military Operations Overseas: Abuse of Rights, Articles 17 and 18 ECHR, and à la carte Human Rights Protection' (2017) 22 ARIEL 137, 162–163 with reference

Because of its function as an additional limitation and the fact that it can only be invoked in conjunction with other Convention rights,[5] Art. 18 was sometimes regarded as a merely auxiliary provision without any autonomous role.[6] However, Art. 18 ECHR does not restrict itself to clarifying the scope of restriction clauses, but explicitly prohibits states from applying restrictions to Convention rights in pursuit of goals not recognized by the Convention either expressly through those clauses or inherently.[7] It therefore – to a certain extent – enjoys an autonomous role, which is underlined by the circumstance that it can be violated even in cases where the respective right itself is not infringed.[8]

2.2 Development of the case law regarding Art. 18 ECHR

The first time Art. 18 ECHR was referenced by a Convention Organ was in the *De Becker* case in 1960[9] and the first detailed discussion regarding a claimed violation of Art. 18 ECHR was conducted in the report by the European Commission of Human Rights (ECmHR or the Commission) in *Kamma v Netherlands*, where a breach was denied.[10] The Court for the first time decided on a claim under Art. 18 ECHR in *Engel and Others v Netherlands*, but found no violation, as in the following cases until the early 20th century.[11] In addition, the Court has repeatedly refused to examine applications based

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to the so-called *Greek case* (*Denmark v Greece* App no 3321/67 and other cases [Sub-Commission Report, 4 October 1969]).

[4] Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9 GoJIL 109, 118, Heri (n 2) 49–50.

[5] E.g. *Gusinsky v Russia* App no 70276/01 (ECtHR, 19 May 2004) para 73; William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 624 and in detail Chapter 3.1.

[6] Pablo Santolaya, 'Limiting Restrictions on Rights. Art. 18 ECHR (A Generic Limit on Limits According to Purpose)' in Javier García Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Nijhoff 2012) 528; Schabas (n 5) 624.

[7] *Merabishvili v Georgia* [GC] App no 72508/13 (ECtHR, 28 November 2017) para 288; *Miroslava Todorova v Bulgaria* App no 40072/13 (ECtHR, 19 October 2021) para 192; *Juszczyszyn v Poland* App no 35599/20 (ECtHR, 6 October 2022) para 307; *Ugulava v Georgia* App no 5432/15 (ECtHR, 9 February 2023) para 120; Tzevelkos (n 3) 168; Heri (n 2) 33; Laura Redondo Saceda, 'Las Cláusulas de Restricción en el Convenio Europeo de Derechos Humanos' (2021) 47 TRC 469, 487; Schmaltz (n 1) 37–38; Helmut Satzger, *Internationales und Europäisches Strafrecht* (10th edn, Nomos 2022) § 11 para 117.

[8] *Todorova* (n 7) para 192; Jean-Pierre Marguénaud, 'Une nouvelle approche européenne en demi-teinte du détournement de pouvoir' [2018] RSC 183; Tan (n 4) 122; Schmaltz (n 1) 37–38.

[9] *De Becker v Belgium* App no 214/56 (Commission Report, 8 January 1960) para 271; cf. Keller and Heri (n 1) 3; Tzevelkos (n 3) 164.

[10] *Kamma v Netherlands* App no 4771/71 (Commission Report, 14 July 1974) 9; Başak Çalı and Kristina Hatas, 'History as an Afterthought: The (Re)discovery of Article 18 in the case law of the European Court of Human Rights' in Helmut Philipp Aust and Esra Demir-Gürsel (eds.) *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (Elgar 2021) preprint <ssrn.com/abstract=3677678> accessed 27 January 2023, 6.

[11] *Engel and others v Netherlands* App nos 5100/71 and others (ECtHR, 8 June 1976) para 93; Çalı and Hatas (n 10) 7; for other cases cf. Santolaya (n 6) 530ff; Keller and Heri (n 1) 3–4.

on Art. 18, considering its separate examination unnecessary.[12] In *Bonzano v France* the ECmHR and subsequently the ECtHR held that the authorities abused the possibility to instigate and execute deportation procedures and therefore misused their power but did not rule on the question whether Art. 18 ECHR was violated.[13]

It was not until 2004 that a claim under Art. 18 ECHR was examined exhaustively and the first breach of said provision was found.[14] However, the Court remained strict and its jurisprudence on Art. 18 ECHR over the next decade was characterised by a high standard and burden of proof.[15] In addition, the Court further limited the application of Art. 18 in cases where it had already found a violation of another Convention right.[16] This restrictive stance of the Court towards Art. 18 ECHR made it difficult to prove a breach of said provision and led to the rejection or non-examination of most claims.

The Court later consolidated, clarified, and developed its case law in the Grand Chamber judgment in *Merabishvili*[17] in 2017: This case, which concerned the pre-trial detention of a former Georgian Prime Minister, brought significant changes with respect to evidentiary issues and clarified the Court's approach in cases where the restrictions applied by the respondent state not only serve ulterior purposes but are also imposed in accordance with the Convention.[18] The Grand Chamber later confirmed those changes in *Navalnyy*[19] – where the Court issued indications on the execution of Art. 18-judgments for the first time[20] – and subsequently in *Selahattin Demirtaş (No 2)*.[21] Nevertheless, even after this applicant-friendly changes, until today the Court remains strict and sometimes refuses to examine alleged Art. 18 violations because they do not form a fundamental aspect of the case.

2.3 Recent developments

Besides an increasing number of judgments finding violations of Art. 18 ECHR, recent years have seen two important new developments. The first novelty was the initiation

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[12] *Engel* (n 11) para 93; *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986) para 61; Başak Çalı, 'Coping with crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35 Wisc JIL 237, 264.

[13] *Bonzano v France* App no 9990/82 (Commission report, 7 December 1984) paras 78–82; *Bonzano* (n 12) para 61; Çalı and Hatas (n 10) 9.

[14] *Gusinsky* (n 5); Helen Keller and Sebastian Bates, 'Article 18 in Historical Perspective and Contemporary Application' (2019) 39 HRLJ 2, 6; Çalı and Hatas (n 10) 13.

[15] Keller and Heri (n 1) 4; Heri (n 2) 30.

[16] E.g. *Nemtsov v Russia* App no 1774/11 (ECtHR, 31 July 2014) para 130; critical Eibach (n 2) 325ff; Tan (n 4) 122; Schmaltz (n 1) 50.

[17] *Merabishvili* [GC] (n 7).

[18] Cf. Heri (n 2) 30ff; Tan (n 4) 133ff and Chapters 3.1, 3.3 and 3.4.

[19] *Navalnyy v Russia* [GC] App nos 29580/12 and others (ECtHR, 15 November 2018).

[20] Heri (n 2) 34.

[21] *Selahattin Demirtaş v Turkey (No 2)* [GC] App no 14305/17 (ECtHR, 22 December 2020).

of two infringement proceedings[22] under Art. 46 (4) ECHR, the first in the history of the Court.[23] Both proceedings lead to a conviction of the respondent state for failing to execute a judgment finding a violation of Art. 18 ECHR.[24]

The second novelty are the first convictions of EU Member States for Art. 18-violations. Until recently, cases where the ECtHR found a violation of Art. 18 ECHR mostly involved the misuse of criminal investigations[25] as well as prosecution instruments, such as the freezing or seizure of assets and travel bans,[26] and – apart from some exceptions – were brought against the same three countries (Azerbaijan, Türkiye and Russia). However, in the last two years the Court found Art. 18-violations in EU Member States for the first time.[27] In contrast to earlier judgments, those cases did not involve allegations of misuse of criminal law against individuals or NGOs through investigations and subsequent prosecution. In said cases, the applicants, both judges criticising judicial reforms or challenging the lawfulness of the appointment of other judges nominated in politicised procedures, claimed a violation of Art. 18 ECHR because of disciplinary proceedings brought against them. In addition to the *Juszczyszyn*-case – as of July 2023 – there are several other claims of a violation of Art. 18 ECHR brought by Polish judges pending before the Court.[28] Those cases fall into a series of judgments by both the ECtHR[29] as well as the European Court of Justice[30] regarding judicial reforms and disciplinary proceedings against judges in Poland. In those cases, the Court underlined the importance of judicial independence as a prerequisite to the rule of law and stressed that it therefore has to be very attentive to

[22] *Ilgar Mammadov v Azerbaijan* [Art 46] App no 15172/13 (ECtHR, 29 May 2019); *Kavala v Türkiye* [Art 46] App no 28749/18 (ECtHR, 11 July 2022).

[23] Armin von Bogdandy and Laura Hering, 'Im Namen des Europäischen Clubs rechtsstaatlicher Demokraten' (2020) 75 JZ 53, 59; Başak Çalı, 'How Loud Do the Alarm Bells Toll? Execution of 'Article 18 Judgments' of the European Court of Human Rights' (2021) 2 ECHR LR 274, 289; Kanstantin Dzehtsiarou, 'Introductory Note to Mammadov v Azerbaijan (Eur. Ct. H.R.)' (2020) 59 ILM 35; Schmaltz (n 1) 39.

[24] *Mammadov* [Art 46] (n 22) paras 214ff; *Kavala* [Art 46] (n 22) paras 169ff. In detail Chapter 5.2.

[25] Çalı, Coping with crisis (n 12) 267.

[26] *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan* App nos 74288/14 and 64568/16 (ECtHR, 14 October 2021).

[27] *Todorova* (n 7); *Juszczyszyn* (n 7).

[28] *Synakiewicz v Poland* App no 46453/21 (communicated 23 May 2022); *Gąciarek v Poland* App no 27444/22 (communicated 10 June 2022); *Ferek v Poland* App no 22591/22 (communicated 7 November 2022); *Leszczyńska-Furtak and others v Poland* App nos 39471/22, 39477/22, 44068/22 (communicated 6 December 2022).

[29] Inter alia *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021); *Dolińska-Ficek and Ozimek v. Poland* App nos 49868/19 and 57511/19 (ECtHR, 8 February 2022); *Grzęda v Poland* [GC] App no 43572/18 (ECtHR, 15 March 2022).

[30] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982 and the Order imposing interim measures in Case C-2014/21 R *Commission v Poland (Indépendance et vie privée des juges)* ECLI:EU:C:2021:593.

the protection of the autonomy and independence of judges.[31] However, it remains to be seen if the Court finding a violation of Art. 18 in conjunction with Art. 8 ECHR leads to significant improvements regarding the protection of judicial independence.

3 Requirements of Art. 18-Violations

3.1 Scope of application

Normally, the Court only examines the possible application of Art. 18 ECHR when a violation is alleged by the applicant. In some cases, however, the Court has examined a possible misuse of power *ex officio*.[32]

3.1.1 Accessory nature

As Art. 18 ECHR is accessory in nature, it has to be applied in conjunction with other Convention-Rights but not solely on its own.[33] Art. 18 ECHR nonetheless does not lack an autonomous role.[34] This autonomy is underlined by the principle that Art. 18 ECHR can be violated in conjunction with another right even if the respective Convention Article itself is not violated.[35] The Court found such a restriction that violated Art. 18 in conjunction with another Convention right, which was not violated itself for the first time in the initial judgment in *Merabishvili*.[36]

3.1.2 Relation to other Convention rights

Due to the wording of Art. 18 ECHR which refers to the '*restrictions permitted under th[e] Convention*' and its position at the end of Section I, it can only be applied in conjunction with rights and freedoms subject to restrictions.[37] This requirement is certainly met, if

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[31] *Grzęda* [GC] (n 29) para 298; *Juszczyszyn* (n 7) para 333; also *Guðmundur Andri Ástráðsson v Iceland* [GC] App no 26374/18 (ECtHR, 1 December 2020) para 239.

[32] *Azizov and Novruzlu v Azerbaijan* App nos 65583/13 and 70106/13 (ECtHR, 18 February 2021); furthermore, the ECtHR issued questions regarding Art. 18 ECHR *ex officio* when communicating cases to the parties, cf. *Rustamzade v Azerbaijan* App no 38239/16 (communicated 7 December 2016) 3; *Haziyev v Azerbaijan* App no 19842/15 (communicated 12 December 2016) 4; *Leszczyńska-Furtak and others* (n 28) 6.

[33] *Kamma* (n 10) 9; *Gusinsky* (n 5) para 73; *Merabishvili* [GC] (n 7) para 288; *Juszczyszyn* (n 7) para 306; Schabas (n 5) 624; Tan (n 4) 121; Heri (n 2) 29; Aikaterini Tsampi, 'The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of *contre-pouvoirs* within the state after all?' (2020) 38 NQHR 134, 141.

[34] *Merabishvili* [GC] (n 7) paras 287f; *Todorova* (n 7) para 192; Tzevelekos (n 3) 164, 168; Heri (n 2) 33; Redondo Saceda (n 7) 487; Schmaltz (n 1) 37.

[35] *Gusinsky* (n 5) para 73; *Cebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007) para 49; *OAO Neftyanaya Kompaniya Yukos v Russia* App no 14902/04 (ECtHR, 20 September 2011) para 663; *Merabishvili* [GC] (n 7) para 102; *Juszczyszyn* (n 7) para 314; Tan (n 4) 121; Tsampi (n 33) 141; Tzevelekos (n 3) 168; Redondo Saceda (n 7) 487. Critical Santolaya (n 6) 529.

[36] *Merabishvili v Georgia* App no 72508/13 (ECtHR, 14 June 2016) para 102; Çalı, Coping with crisis (n 12) 268; Tsampi (n 33) 143. This was also the case in *Todorova* (n 7) para 204.

[37] *Gusinsky* (n 5) para 73; *Cebotari* (n 35) para 49; *Merabishvili* [GC] (n 7) para 290; *Todorova* (n 7) para 191; *Juszczyszyn* (n 7) para 308; Tsampi (n 33) 141.

the respective right is subject to explicit restrictions, e.g. the right to liberty according to Art. 5 (1) ECHR. Nonetheless, Art. 18 ECHR is also applicable in conjunction with rights subject to implicit restrictions.[38] Furthermore, Art. 18 may be invoked in relation with the other articles situated at the end of Section I of the Convention, such as the derogation of rights in times of emergency according to Art. 15.[39] In contrast, absolute rights which do not allow for explicit or implicit limitations, such as the prohibition of torture in Art. 3, do not fall within the scope of application of Art. 18 ECHR, as the inclusion of these rights would contradict the wording of the Convention.[40] Hence, applications claiming a violation of Art. 3 in conjunction with Art. 18 are inadmissible *ratione materiae*.[41]

While most of the violations of Art. 18 ECHR were found in conjunction with the right to liberty guaranteed by Art. 5,[42] the Court also applied Art. 18 with other provisions of the Convention: In some cases, it found violations in conjunction with the right to respect to private life in Art. 8[43] and the freedom of expression in Art. 10[44] or the freedom of assembly as guaranteed by Art. 11 of the Convention.[45] It also regarded monetary fines and confiscation of the assets of an NGO as a violation of Art. 18 in

[38] Santolaya (n 6) 529; Schabas (n 5) 625; Redondo Saceda (n 7) 487; Schmaltz (n 1) 37. Dominik Steiger, 'Art. 18' in Katharina Pabel and Stefanie Schmahl (eds.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Carl Heymanns 2014) para 27 extends this to so called 'limitations by delimination'.

[39] Ingrid Siess-Scherz, 'Art. 18 EMRK' in Karl Korinek and others (eds), *Österreichisches Bundesverfassungsrecht* (Verlag Österreich 1999) para 2; Steiger (n 38) paras 30ff; Schabas (n 5) 625; Tzevelkos (n 3) 164. In *De Becker* (n 9) para 271, the Commission took explicit reference to Art. 18 ECHR when stressing that restrictions under Art. 15 ECHR can only continue until the emergency ends, cf. Keller and Heri (n 1) 3.

[40] Helmut Satzger, Frank Zimmermann and Martin Eibach, 'Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings (Part 2)' (2014) 4 EuCLR 248, 260–261 nevertheless want to include Art. 3 ECHR into the scope of application of Art. 18.

[41] *Timurtaş v Turkey* App no 23531/94 (Commission report, 29 October 1998) para 329; *Tretiak v Ukraine* 16215/15 (ECtHR, 17 December 2020) paras 66–68; Santolaya (n 6) 529; Tan (n 4) 122.

[42] E.g. *Gusinsky* (n 5) para 78; *Merabishvili* [GC] (n 7) paras 318ff; *Navalnyy* [GC] (n 19) para 176; *Kavala v Turkey* App no 28749/18 (ECtHR, 10 December 2019) para 232 and recently *Yüksekdağ Şenoğlu and others v Türkiye* App nos 14332/17 and others (ECtHR, 8 November 2022) para 640; *Kutayev v Russia* App no 17912/15 (ECtHR, 24 January 2023) para 142. See table of judgments in Çalı, Alarm Bells (n 23) 283ff.

[43] *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR 25 July 2013) paras 624ff; *Aliyev v Azerbaijan* App no 68762/14 and 71200/14 (ECtHR, 20 September 2018) para 190ff; *Juszczyszyn* (n 7) paras 317ff; *Kogan and others v Russia* App no 54003/20 (ECtHR, 7 March 2023) para 77.

[44] *Todorova* (n 7) paras 203ff. An application under Art. 18 ECHR in conjunction with Art. 10 was declared admissible but a violation was denied in *Sabuncu and others v Turkey* App no 23199/17 (ECtHR, 10 November 2020) paras 235, 256 and *Şık v Turkey (No 2)* App no 36493/17 (ECtHR, 24 November 2020) paras 194, 219. In *Handyside v United Kingdom* App no 5493/72 (ECtHR 7 December 1976) the Court refused to examine the claim under Art. 18 ECHR because it raised no separate issue.

[45] *Navalnyy* [GC] (n 19) para 176.

conjunction with the right to protection of property according to Art. 1 Prot. No. 1[46] and the imposition of a travel ban on one of the organisation's members as a violation of Art. 18 taken together with the right to freedom of movement in Art. 2 Prot. No. 4.[47] In a recent communication of a case, the Court found a complaint by judges alleging that their transfer to another court was a disguised form of prosecution because of their judicial decisions and therefore violated Art. 4 (2) ECHR (prohibition of forced labour) as falling within the scope of Art. 18 ECHR.[48] Furthermore Art. 18 could also be applied in conjunction with Art. 9 ECHR[49] that provides for express restrictions as well as in relation with Art. 2 ECHR.[50]

3.1.3 Application in conjunction with Art. 6 and 7 ECHR?

The issue whether Art. 18 is also applicable in conjunction with the procedural safeguards in Art. 6 and Art. 7 ECHR and Art. 4 Prot. No. 7 remains open and controversial, partly due to the inconsistent case law. In some judgments, the Court has considered complaints under Art. 18 in conjunction with Art. 6 and 7 to be incompatible with the Convention *ratione materiae* and therefore inadmissible.[51] In other cases, the ECtHR considered applications under Art. 6 or 7 in relation with Art. 18 to be admissible[52] or refused to examine the allegation of a violation because it was regarded unnecessary but did not consider the claim to be inadmissible.[53] Once the Court even examined a complaint under Art. 6 (1) in conjunction with Art. 18 but deemed it manifestly ill founded due to lack of proof.[54] In two recent judgments, the ECtHR

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[46] *Democracy and Human Rights Resource Centre and Mustafayev* (n 26) para 98. A violation of Art. 18 in relation with Art. 1 Prot. No. 1 was also examined in *OAO Neftyanaya Kompaniya Yukos* (n 35) paras 659ff. In *Bîrsan v Romania* (dec.) App no 79917/13 (ECtHR, 2 February 2016) para 73 and *Rustavi 2 Broadcasting Company Ltd and Others v Georgia* App no 16812/17 (ECtHR, 18 July 2019) para 316 the Court acknowledged that Art. 18 ECHR can be violated in conjunction with Art. 1 Prot. No. 1. Satzger, Zimmermann and Eibach, Part 2 (n 40) 260 also regard Art. 1 Prot. No. 1 as lying within the scope of Art. 18 ECHR.

[47] *Democracy and Human Rights Resource Centre and Mustafayev* (n 26) para 98; Steiger (n 38) para 26.

[48] *Leszczyńska-Furtak and others* (n 28) para 28. For the inclusion of Art. 4 and 'limitations by delimination' in general into the scope of Art. 18, Steiger (n 38) para 27; Yutaka Ari and Joachim Meese, 'Prohibition of the Misuse of Power' in Pieter van Dijk and others (eds.) *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 1095, 1098.

[49] Steiger (n 38) para 26.

[50] In depth Steiger (n 38) paras 8–9.

[51] *Navalnyy and Ofitserov v Russia* App nos 46632/13 and 28671/14 (ECtHR, 23 February 2016) para 129; *Navalnyye v Russia* App no 101/15 (ECtHR, 17 October 2017) para 88. Similar *Bîrsan* (dec.) (n 46) para 73.

[52] *Khodorkovsky v Russia (No. 2)* App no 11082/06 (ECtHR, 8 November 2011) para 16; *Lebedev v Russia (No. 2)* App no 13772/05 (ECtHR, 27 May 2010) para 310; Keller and Bates (n 14) 10.

[53] *Engel* (n 11) para 93; *Khodorkovsky and Lebedev v Russia (No 2)* App nos 51111/07 and 42757/07 (ECtHR, 14 January 2020) para 622 also regarding Art. 4 Prot. No. 7.

[54] *Nastase v Romania* App no 80563/12 (ECtHR, 18 November 2014) paras 105, 109.

abstained from deciding whether Art. 18 can be violated in conjunction with Art. 6 ECHR, stating that this issue remained open.[55]

When denying the admissibility of Art. 18-claims in conjunction with Art. 6 or 7, the majority based its decision on the alleged lack of express or implied restrictions applicable to those provisions.[56] Contrary to this reasoning, some judges argued in separate opinions that according to the Court's case law Art. 6 is subject to implicit restrictions, e.g. limitations to the right to choose one's legal assistance[57] or even to the right of access to courts,[58] as well as express limitations regarding the possibility to exclude the press and public from trials,[59] and could therefore be applied in conjunction with Art. 18 ECHR.[60] In my opinion, this argument is difficult to disprove as the wording of Art. 18 does not restrict the application of this provision to explicit limitations. In addition to the character of Art. 6 as a relative rather than an absolute right, the object and purpose of Art. 18 ECHR – the prevention of the misuse of power[61] – support the application in conjunction with the right to a fair trial.[62] Furthermore, the ECtHR already found a breach of Art. 18 ECHR in relation with a Convention right subject only to implicit restrictions: A judgment delivered in 2021 detected a violation of Art. 18 in conjunction with Art. 5 (3) ECHR, which – according to its wording – does not provide for restrictions but implicitly allows for limitations.[63] In view of these circumstances, Art. 18 ECHR is also applicable in conjunction with Art. 6 or 7 in cases where a State Party makes use of the implicit or explicit limitations that can be applied to these Convention rights.

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[55] *Ilgar Mammadov v Azerbaijan (No 2)* App no 919/15 (ECtHR, 16 November 2017) para 261; *Nevzlin v Russia* App no 26679/08 (ECtHR, 18 January 2022) para 123 (no examination because the claim was manifestly ill-founded); see Tan (n 4) 124.

[56] *Navalnyy and Ofitserov* (n 51) para 129; *Navalnyye v Russia* (n 51) para 88; critical Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov para 6 in *Navalnyy and Ofitserov v Russia*; Keller and Heri (n 1) 6; Von Bogdandy and Hering (n 23) 60.

[57] *Dvorski v Croatia* [GC] App no 25703/11 (ECtHR, 20 October 2015) para 79; Christoph Grabenwarter, *European Convention on Human Rights* (C.H. Beck 2014) Art. 6 para 137.

[58] *Khamidov v Russia* App no 72118/01 (ECtHR, 15 November 2007) para 155; Grabenwarter (n 57) Art. 6 paras 67–68; Helmut Satzger, *International and European Criminal Law* (C.H. Beck 2012) § 9 para 62; Schabas (n 5) 285.

[59] See Art. 6 (1) sentence 2 ECHR; *Ilgar Mammadov (No 2)* (n 55), Joint Concurring Opinion of Judges Nußberger, Tsotsoria, O'Leary and Mits para 12; Grabenwarter (n 57) Art. 6 paras 100ff; Steiger (n 38) para 20; Schabas (n 4) 290.

[60] *Navalnyy and Ofitserov* (n 51), Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov para 6; *Navalnyye v Russia* (n 51), Joint Partly Dissenting Opinion of Judges Keller and Dedov para 7 and Partly Dissenting Opinion of Judge Serghides para 3; *Tchankotadze v Georgia* App no 15256/05 (ECtHR, 21 June 2016), Joint Concurring Opinion of judges Sajó, Tsotsoria and Pinto de Albuquerque para 5 FN 2 and Concurring Opinion of judge Kūris para 29; *Mammadov (No. 2)* (n 55), Joint Concurring Opinion of Judges Nußberger, Tsotsoria, O'Leary and Mits paras 8ff; Schmaltz (n 1) 43.

[61] *Mammadov* [Art 46] (n 22) para 189; *Kavala* [Art 46] (n 22) para 144.

[62] *Mammadov (No. 2)* (n 55), Joint Concurring Opinion of Judges Nußberger, Tsotsoria, O'Leary and Mits para 16; Keller and Heri (n 1) 6.

[63] *Azizov and Novruzlu* (n 32).

In the two Art. 46-judgments on Art. 18-decisions issued to date, the Court has held that a finding of a violation of Art. 18 in conjunction with Art. 5 ECHR vitiates any subsequent action taken on the basis of the restrictions pursuing an ulterior purpose.[64] This reasoning and the *Azizov and Novruzlu*-judgment finding a violation of Art. 18 together with Art. 5 (3) ECHR might signal that the Court now is of the opinion that restrictions of the right to a fair trial can be applied for illegitimate purposes and Art. 18 can therefore be violated in conjunction with Art. 6 of the Convention.[65] The questions communicated to the parties in two recent proceedings involving Polish judges may also indicate that the Court is willing to examine Art. 18 in relation with Art. 6 ECHR.[66] Notwithstanding those recent developments, a case currently pending before the ECtHR may bring some clarity: In the case of *Saakashvili v Georgia*, in its admissibility decision the Court held that the question whether Art. 18 is applicable in conjunction with Art. 6 or 7 is closely linked to the substance of the complaints in general and therefore joined the examination of this issue to the decision on the merits.[67]

3.2 Pursue of an ulterior purpose as a violation of Art. 18 ECHR

Prior to the Grand Chamber's judgment in *Merabishvili*, the Court required proof that the authorities of the respondent state acted in bad faith in order to find a violation of Art. 18 ECHR.[68] However, the *Merabishvili*-judgment brought a shift regarding this issue: Instead of the subjective bad faith of the acting authorities, the Grand Chamber focused on the more objective assessment of the existence of an *ulterior purpose*.[69] The Court based this clarification on the case law relating to the limitation clauses of the Convention, which are complemented by Art. 18 ECHR: According to the case law of the ECtHR, the good faith of the authorities is only one factor in determining whether the requirements of these limitations are met. Focusing simply on the proof of bad faith when examining Art. 18-violations would therefore be contradictory.[70] Instead, the pursue of such an ulterior purpose is to be assessed objectively and therefore differs from the concept of bad faith used in earlier cases but those two notions nonetheless can be equivalent.[71]

Consequently, since *Merabishvili* the Court requires the existence of an ulterior purpose to find a violation of Art. 18 ECHR. Such ulterior and therefore illegitimate purposes are all goals different from the reasons claimed by the authorities and are not

[64] *Mammadov* [Art 46] (n 22) para 189; *Kavala* [Art 46] (n 22) para 145.
[65] Schmaltz (n 1) 44.
[66] *Synakiewicz* (n 28) 5; *Leszczyńska-Furtak and others* (n 28) 7 and 8.
[67] *Saakashvili v Georgia* (dec.) App nos 6232/20 and 22394/20 (ECtHR, 1 March 2022) para 61.
[68] E.g. *Khodorkovskiy v Russia* App no 5829/04 (ECtHR, 31 May 2011) para 260.
[69] Tan (n 4) 136; Ciftci (n 1) 810.
[70] *Merabishvili* [GC] (n 7) para 283.
[71] *Merabishvili* [GC] (n 7) paras 282–283.

prescribed by the relevant article of the Convention.[72] In the earlier successful applications, the Court saw an ulterior purpose – respectively a proof for the authorities' bad faith – in the respondent's misuse of criminal proceedings to gain information or economic advantages.[73] Furthermore, such purposes may be the silencing of opposition politicians or human rights activists,[74] the hindering of activities of NGOs or the opposition[75] as well as the suppression of political pluralism and the limitation of the freedom of the political debate.[76] The ECtHR recently regarded disciplinary actions aiming to sanction and discourage judges from verifying the lawfulness of the appointment of other judges nominated in politicized proceedings as an illegal ulterior purpose.[77]

3.3 Fundamental Aspect Criterion

Especially in earlier cases where the Court already found a violation of another Convention right, it refused to further consider claims under Art. 18 ECHR because they raised no separate issue.[78] This approach was critizised because it suggested that Art. 18 is redundant and does not need to be examined separately.[79] In *Merabishvili* the Court implicitly renounced this line of jurisprudence and instead relied on the case law regarding Art. 14 ECHR:[80] As the Court emphasised in *Merabishvili* and on serval occasions since, the mere fact that a limitation of a Convention right or freedom does not meet all the requirements of the applicable express or implied limitation clauses, does not necessarily give rise to a question of a violation of Art. 18.[81] Rather, a separate

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[72] E.g. *Tymoshenko v Ukraine* App no 49872/11 (ECtHR, 20 April 2013) para 294; *Merabishvili* [GC] (n 7) para 292; *Tchankotadze* (n 60) para 113. Tzevelekos (n 3) 169.

[73] *Gusinsky* (n 5) para 76; *Cebotari* (n 35) para 53; also *Merabishvili* [GC] (n 7) para 353; such an allegation was furthermore examined in *Dochnal v Poland* App no 31622/07 (ECtHR 18 September 2012) para 116.

[74] *Tymoshenko* (n 72) para 299; *Mammadli v Azerbaijan* App no 47145/14 (ECtHR 19 April 2018) para 104; *Kavala* (n 42) para 232; *Koban and others* (n 43) para 77. Similarly, the silencing of judges criticizing the government, *Todorova* (n 7) para 213.

[75] *Azizov and Novruzlu* (n 32) para 79; *Democracy and Human Rights Resource Centre and Mustafayev* (n 26) para 110.

[76] *Navalnyy* [GC] (n 19) para 175; *Navalnyy v Russia (No 2)* App no 43734/14 (ECtHR, 9 April 2019) para 98; *Demirtaş (No 2)* [GC] (n 21) para 437.

[77] *Juszczyszyn* (n 7) para 317.

[78] *Bozano* (n 12) para 61; *Nemtsov* (n 16) para 130; *Georgia v Russia (I)* [GC] App no 13255/07 (ECtHR, 3 July 2014) para 224 (criticized in the partly dissenting opinion of Judge Tsotsoria 62 ff); *Kasparov v Russia* App no 53659/07 (ECtHR, 11 October 2016) para 74. Critical Eibach (n 2) 325ff. For further cases see Çalı and Hatas (n 10) 11–12 FN 43.

[79] Steiger (n 38) paras 57–58; Schmaltz (n 1) 50.

[80] cf. Heri (n 2) 31 and *Merabishvili* [GC] (n 7) para 291 with references to the case law regarding Art. 14 ECHR, i.a. *Timishev v. Russia* App nos 55762/00 and 55974/00 (ECtHR, 13 December 2005) para 53; *Oršuš and others v Croatia* [GC] App no 15766/03 (ECtHR, 16 March 2010) para 144.

[81] *Merabishvili* [GC] (n 7) para 291; *Navalnyy* [GC] (n 19) para 166; *Rashad Hasanov and others v Azerbaijan* App nos 48653/13 and others (ECtHR, 7 June 2018) para 120; *Demirtaş (No. 2)* [GC] (n 21) para 423; *Ibrahimov and Mammadov v Azerbaijan* App nos 63571/16 and others (ECtHR, 13 February 2020) para 150; *Todorova* (n 7) para 194; *Ugulava* (n 7) para 120.

examination of the application under Art. 18 is only warranted if the claim that a restriction has been applied for an ulterior purpose appears to be a *fundamental aspect* of the case.[82] Adhering to this requirement the Court refrains from examining the application under Art. 18 ECHR if the claimant's arguments are essentially corresponding to the submissions concerning the alleged violation of the respective other Convention right.[83] Hence, a claim under Art. 18 ECHR will only be examined if the essence of this complaint has not yet been assessed in the examination of the arguments regarding the other Convention right.[84]

Even though this change in jurisprudence was welcomed by some authors, it was also met with sceptisism as the precise interpretation of the fundamental aspect criterion by the Court was thought to be unpredictable.[85] The fundamental aspect criterion was furthermore critizised for contradicting the spirit of the ECHR because it presents the Court with an opportunity to refrain from examining claims under Art. 18 even if they are meritorious.[86] Indeed the stigmatising effect connected to a conviction by the ECtHR differs if the infringement found only affects a substantial Convention right or amounts to a violation of Art. 18 ECHR.[87] In my view, therefore, in cases where – in addition to another Convention right – Art. 18 might also be violated, the Court should not limit itself to a finding that the other right has been violated, but should examine the claim under Art. 18 in depth as well.

3.4 Plurality of Purposes

Sometimes a restriction of Convention rights or freedoms pursues multiple purposes. Before *Merabishvili,* it was unclear how the Court would act in the face of such a plurality of purposes. In an earlier judgment, the ECtHR denied a violation of Art. 18 in conjunction with Art. 5, 6, 7 and 8 ECHR because the prosecution was based on serious accusations against the applicants and therefore had a "healthy core".[88] Later, the Court addressed the issue of mixed purposes and established the so-called *predominant purpose test*. According to the Grand Chamber's reasoning in *Merabishvili* a restriction pursuing both a legitimate and an illegitimate purpose only violates Art. 18 ECHR if the illegitimate purpose is *predominant*.[89] Therfore, the mere existence of an ulterior

[82] *Merabishvili* [GC] (n 7) para 291; *Kavala* (n 42) para 219; *Todorova* (n 7) para 194; *Kutayev* (n 42) para 136.
[83] *Taner Kılıç v Turkey (No 2)* App no 208/18 (ECtHR, 31 May 2022) para 168.
[84] *Korban v Ukraine* App no 26744/16 (ECtHR, 4 July 2019) para 204; *Khodorkovsky and Lebedev (No 2)* (n 53) para 622; *Democracy and Human Rights Resource Centre and Mustafayev* (n 26) para 103; *Juszczyszyn* (n 7) para 317.
[85] Tan (n 4) 134.
[86] Schmaltz (n 1) 50; similar Heri (n 2) 32.
[87] Schmaltz (n 1) 50.
[88] *Khodorkovskiy and Lebedev* (n 43) para 908.
[89] *Merabishvili* [GC] (n 7) para 309; *Navalnyy* [GC] (n 19) para 165; *Korban* (n 84) para 213; *Juszczyszyn* (n 7) paras 310ff.

purpose does not automatically violate Art. 18,[90] nor does the lack of a legitimate aim constitute a breach of said provision in every case.[91] Consequently, it is not necessary that the measure applied by the government exclusively pursues an ulterior purpose, and a healthy core (i.e. pursue of a purpose prescribed in the relevant restriction clause) cannot redeem a restriction that predominantly serves an ulterior purpose.[92]

An objective pursued by a restriction of Convention rights predominates where it is the *true reason for the authorities' actions* or if it is the *overriding focus of their efforts*.[93] According to case law, the predominance of the purpose of a restriction depends on all the circumstances of the case, and the Court will take into account the nature and degree of reprehensibility of the alleged ulterior purpose when it is assessing this point.[94] The ECtHR also considers if the application falls into a pattern of misuse of power, which indicates the predominance of an ulterior purpose.[95] In case of a continuing restriction, such as the imposition of pre-trial-detention, Art. 18 ECHR is infringed, if the ulterior purpose predominates at any time during the ongoing limitation of rights.[96] Similarly, if the aim of the restriction changes from a legitimate to an illegitimate purpose, it constitutes a violation of Art. 18 ECHR if the new ulterior purpose becomes predominant.[97]

The predominant purpose test is widely criticized for condoning certain bad faith restrictions of Convention rights and for legitimising the misuse of power.[98] Furthermore, some argue that the wording of Art. 18 ECHR would not allow for such a proportionality-test,[99] and that the test is vague and difficult to apply, as the nature and reprehensibility of the ulterior purpose is a rather undetermined criterion.[100] However, the exclusion of cases where the ulterior purpose only plays a minor role is sometimes defended because it limits the scope of Art. 18 ECHR to serious violations and dangers

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[90] *Merabishvili* [GC] (n 7) para 303; *Korban* (n 84) para 211; *Todorova* (n 7) para 197; *Juszczyszyn* (n 7) para 312; Tzevelekos (n 3) 170.

[91] Heri (n 2) 55–56.

[92] *Merabishvili* [GC] (n 7) para 304; *Korban* (n 84) para 212; *Todorova* (n 7) para 198; *Juszczyszyn* (n 7) para 313; Heri (n 2) 31, 36; Tzevelekos (n 3) 170.

[93] *Merabishvili* [GC] (n 7) para 303; *Navalnyy* [GC] (n 19) para 165; *Korban* (n 84) paras 211–213; *Juszczyszyn* (n 7) paras 312–314; Tzevelekos (n 3) 169 f.

[94] *Merabishvili* [GC] (n 7) para 307; *Korban* (n 84) para 214; *Todorova* (n 7) para 200; *Juszczyszyn* (n 7) para 315; Heri (n 2) 31, 55.

[95] *Azizov and Novruzlu* (n 32) paras 76, 77; *Koban and others* (n 43) para 76.

[96] *Merabishvili* [GC] (n 7) paras 308, 351; *Todorova* (n 7) para 201; *Ugalava* (n 7) para 122.

[97] *Merabishvili* [GC] (n 7) para 272; *Todorova* (n 7) para 201; Ciftci (n 1) 809.

[98] *Merabishvili* [GC] (n 7), Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović para 1 and Concurring Opinion of Judge Serghides para 3; Tan (n 4) 137f.; Tzevelekos (n 3) 171; Heri (n 2) 31, 55; Ciftci (n 1) 809.

[99] Helmut Satzger, Frank Zimmermann and Martin Eibach, 'Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings (Part 1)' (2014) 4 EuCLR 91, 107; Ciftci (n 1) 809.

[100] Tan (n 4) 138.

to the rule of law and therefore preserves the stigmatizing effect and serious nature of Art. 18-judgments.[101]

4 Standard and Burden of Proof

4.1 Strict case law prior to *Merabishvili*

In the first judgments on Art. 18 ECHR, the Court has set very high standards of proof: In some cases, it demanded *incontrovertible and direct proof* that the respondent state restricted the applicant's Convention rights in bad faith.[102] In less strict decisions, it did not require incontrovertible and direct proof, but applied a *very exacting standard of proof*.[103] The ECtHR became more open in its last judgments before *Merabishvili*, considering not only direct evidence but also contextual evidence.[104] The inconsistent application of the different levels of proof required made the ECtHR's decisions unpredictable.

In addition to the high standard of proof, the case law laid the burden of proof entirely on the applicant.[105] They had to disproof the Court's general assumption that the contracting parties of the Convention act in good faith when applying restrictions on rights guaranteed by the ECHR.[106] This strict approach concerning the standard of proof as well as the distribution of the burden of proof was heavily criticised for making it almost impossible to claim Art. 18-violations successfully.[107]

4.2 Changes brought by the Grand Chamber in *Merabishvili*

The Grand Chamber addressed the issue of proof in *Merabishvili v Georgia* and brought significant changes in comparison to the requirements previously applied by the ECtHR. It held that there is no special standard of proof to be applied in cases

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[101] Tan (n 4) 138.

[102] *OAO Neftyanaya Kompaniya Yukos* (n 35) para 663; *Khodorkovskiy* (n 68) para 256; *Nastase* (n 54) para 109; *Bîrsan* (dec.) (n 46) para 73; cf. Tan (n 4) 127ff; Keller and Heri (n 1) 4–5; Keller and Bates (n 14) 6–7.

[103] *Dochnal* (n 72) para 112; cf. Keller and Bates (n 14) 7; Schmaltz (n 1) 45.

[104] *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 22 May 2014) paras 138ff; *Natig Jafarov v Azerbaijan* App no 6458/16 (ECtHR, 7 November 2019) paras 153ff; Başak Çalı, 'Merabishvili v Georgia: Has the Mountain Given Birth to a Mouse?' (*Verfassungsblog*, 3 December 2017) <verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/> accessed 11 January 2023; Schmaltz (n 1) 45.

[105] *Khodorkovskiy* (n 68) para 256; *Khodorkovskiy and Lebedev* (n 43) para 899; *Dochnal* (n 72) para 115; Satzger, Zimmermann and Eibach, Part 2 (n 40) 252; Keller and Bates (n 14) 6–7.

[106] *Khodorkovskiy* (n 68) paras 256, 260; *Khodorkovskiy and Lebedev* (n 43); Satzger, Zimmermann and Eibach, Part 2 (n 40) 252 f; Keller and Heri (n 1) 8; Von Bogdandy and Hering (n 23) 59; Schmaltz (n 1) 45.

[107] *Tchankotadze* (n 60) Joint Concurring Opinion of judges Sajó, Tsotsoria and Pinto de Albuquerque paras 7 – 10; *Kasparov and others v Russia (No 2)* App no 51988/07 (ECtHR, 13 December 2106), Partly Dissenting Opinion of Judge Keller paras 4–5; Keller and Heri (n 1) 8; Satzger, Zimmermann and Eibach (n 2) 249ff; Tan (n 4) 127ff.

regarding Art. 18.[108] Therefore, the Court's ordinary standard applies, which requires a violation to be proven *beyond reasonable doubt*.[109] However, this standard cannot be universally defined, but varies from case to case.[110] The necessary level of proof is linked to the specific facts of the respective case, the nature of the allegation made by the applicant and the Convention right concerned.[111]

The Court furthermore held that even regarding claims under Art. 18 ECHR there is no need to only accept direct proof,[112] as an ulterior purpose cannot always be proven by relying on a particular piece of evidence or a singular incident.[113] Instead, the ECtHR can use information on primary and contextual facts or sequences of events as circumstantial evidence.[114] In past cases the Court for example regarded the time elapsed between the alleged crimes and the applicant's detention, statements of public officials or legislative actions surrounding the challenged restrictions, reports and statements by NGOs or the media as well as the Court's findings in earlier cases concerning the same applicant.[115] It furthermore took into account if there is a pattern of misuse of power in the respondent state specifically targeting the applicant or certain demographic or political groups.[116] Especially but not exclusively in cases where only the respondent state has access to information confirming or rebutting the applicant's claims, the Court furthermore may draw inference from the government's conduct during the proceedings before the ECtHR.[117]

Apart from lowering the burden of proof required, the *Merabishvili* judgment brought a change regarding the distribution of the burden of proof. While the previous case law laid the burden of proof entirely on the applicant, the Grand Chamber held that neither the applicant nor the respondent bear the whole burden of proof.[118] Instead, the ECtHR examines all the evidence irrespective of its origin and can also obtain new material of

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[108] *Merabishvili* [GC] (n 7) para 316; *Demirtaş (No. 2)* [GC] (n 21) para 422; *Todorova* (n 7) para 202; *Juszczyszyn* (n 7) para 316.

[109] *Merabishvili* [GC] (n 7) para 314; *Kavala* (n 42) para 232; *Juszczyszyn* (n 7) para 316; *Kutayev* (n 42) para 137; Tan (n 4) 135; Heri (n 2) 31; Schmaltz (n 1) 47.

[110] *Merabishvili* [GC] (n 7) para 314; *Todorova* (n 7) para 202; *Juszczyszyn* (n 7) para 316; Keller and Bates (n 14) 8.

[111] *Merabishvili* [GC] (n 7) para 314; see also *El-Masri v "the former Yugoslav Republic of Macedonia"* [GC] App no. 39630/09 (ECtHR, 13 December 2012) para 151 with references.

[112] *Merabishvili* [GC] (n 7) para 316; *Mammadli* (n 73) para 98; *Korban* (n 84) para 215.

[113] *Hasanov* (n 81) para 120; Ciftci (n1) 810.

[114] *Mammadov* (n 104) para 142; *Jafarov* (n 104) para 158; *Merabishvili* [GC] (n 7) para 317; *Korban* (n 84) para 215; *Juszczyszyn* (n 7) para 316.

[115] E.g. *Merabishvili* [GC] (n 7) para 317; *Todorova* (n 7) para 202; *Juszczyszyn* (n 7) para 316; *Kogan and Others* (n 43) para 71.

[116] *Navalnyy* [GC] (n 7) paras 167–170; *Jafarov* (n 104) paras 64–65; *Demirtaş (No. 2)* [GC] (n 21) para 427; *Kogan and Others* (n 43) para 76.

[117] *Merabishvili* [GC] (n 7) para 313 with further references; Tzevelekos (n 4) 171.

[118] *Merabishvili* [GC] (n 7) para 311; *Korban* (n 84) para 215; *Todorova* (n 7) para 202; *Juszczyszyn* (n 7) para 316; Tan (n 4) 135; Keller and Bates (n 14) 7.

its own motion.[119] Furthermore, the Court can decide to combine the received evidence with contextual factors as provided by Rule 44c (1) of the Rules of Court.[120]

5 Consequences and execution of Art. 18-judgments

5.1 Consequences and effects of Art. 18-judgments

Judgments of the ECtHR finding a violation of Art. 18 ECHR committed by the respondent state have a stigmatizing effect and are sometimes referred to as a "red card".[121] They show that a state did not violate a Convention right by accident, but rather misused its power as well as its authorities and criminal justice system to silence political opponents and suppress democratic participation.[122] The Court can accordingly point out dangers to the rule of law and alert other states and the public to a decline of democracy and the rule of law by examining and finding Art. 18-violations.

In *Gusinsky*, the ECtHR would not award any monetary compensation to the applicant, as in its opinion the declaration of a violation of Art. 18 ECHR itself constitutes just satisfaction.[123] Since then the ECtHR's approach changed and monetary compensation for non-pecuniary damages under Art. 41 ECHR is often granted in cases of Art. 18-violations.[124]

ECtHR-judgments finding a violation of Art. 18 ECHR or any other Convention right or freedom are generally only of declaratory nature. Therefore, it is for the respondent state to choose the means of complying with the judgment.[125] However, if there is no real choice how the respondent could comply with the judgment, the ECtHR may indicate the measures necessary[126] to ensure compliance with the Court's decision.[127] In

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[119] *Merabishvili* [GC] (n 7) para 311; *Korban* (n 84) para 215.

[120] *Merabishvili* [GC] (n 7) para 312; Ciftci (n 1) 810.

[121] Eibach (n 2) 325, 327; Angelika Nußberger, 'Europa, deine Menschenrechte' (2020) 47 EuGRZ 389, 392.

[122] Eibach (n 2) 327.

[123] *Gusinsky* (n 5) para 84; Satzger, Zimmermann and Eibach, Part 2 (n 40) 262.

[124] See table of cases and granted damages in Çalı, Alarm Bells (n 23) 283 ff; recently *Kogan and Others* (n 43) para 82.

[125] *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)* [GC] App no 32772/02 (ECtHR, 30 June 2006) para 61; *Del Río Prada v Spain* [GC] App no 42750/09 (ECtHR, 21 October 2013) para 138; *Mammadov* [Art. 46] (n 22) para 182; *Kavala* (n 42) para 238; Schabas (n 5) 866ff; Jens Mayer-Ladewig and Kathrin Brunozzi, 'Art. 46 EMRK' in Jens Mayer-Ladewig, Martin Nettesheim and Stefan von Raumer, *EMRK Handkommentar* (4th edn, Nomos 2017) para 3; Ciftci (n 1) 800.

[126] In detail on such measures and the case law thereon, Hellen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2015) 26 EJIL 829, 833ff.

[127] *Scoppola v Italy (no. 2)* [GC] App no 10249/03 (ECtHR 17 September 2009) para 148; *Del Río Prada* [GC] (n 125) para 138; *Kavala* (n 42) para 239; Schabas (n 4) 869; Oliver Dörr, 'European Convention on Human Rights' in Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: Its Law and Policies* (OUP 2017) para 22.69; Ciftci (n 1) 800.

some cases of Art. 18-violations the ECtHR indicated individual as well as general measures:[128] In terms of individual remedies, it ordered the immediate release of the applicant on two occasions[129] and once prescribed the restoration of the applicant's professional activities.[130] General measures were prescribed twice. In one case, the ECtHR ordered the respondent state to focus on the protection of government critics, civil society and human-rights activists against arbitrary arrest and detention. Those actions had to ensure the eradication of retaliatory prosecutions and the misuse of criminal law against such individuals and prevent similar practices in the future.[131] In another judgment, it obliged the respondent to adopt legislative and general measures to establish a mechanism requiring the authorities to respect the fundamental character of the freedom of assembly according to Art. 11 ECHR.[132]

5.2 Execution of Art. 18-judgments

Final judgments of the Court are legally binding for the High Contracting Parties of the Convention as stipulated by Art. 46 (1) ECHR, however the respondent state remains free regarding the execution of judgements as long as the steps are taken in accordance with the conclusions of the Court's decision.[133] The Committee of Ministers (CoM) subsequently monitors compliance with the ECHR judgments.[134] The Court in principle has no jurisdiction regarding the execution of final judgments.[135] Nonetheless, if a state refuses to comply with judgments finding a violation of a Convention right, the CoM can bring this issue before the Grand Chamber by initiating *infringement proceedings* according to Art. 46 (4) and (5) ECHR.[136] Those proceedings neither reopen the already resolved issue if a breach of the Convention occurred nor empower the Court to issue financial penalties but aim to secure the execution of the original judgment.[137]

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[128] See Çalı, Alarm Bells (n 23) 281ff.
[129] *Kavala* (n 42) para 240; *Demirtaş (No. 2)* [GC] (n 21) para 420.
[130] *Aliyev v Azerbaijan* App no 68762/14 and 71200/14 (ECtHR, 20 September 2018) para 227; Çalı, Alarm Bells (n 23) 281–282.
[131] *Aliyev* (n 130) para 226; Çalı, Alarm Bells (n 23) 282.
[132] *Navalnyy* [GC] (n 19) para 186; Tsampi (n 33) 154; Çalı, Alarm Bells (n 23) 282.
[133] *VgT* [GC] (n 125) para 88; *Mammadov* [Art. 46] (n 22) para 148; *Kavala* [Art. 46] (n 22) para 128; Schabas (n 5) 867–868; Dörr (n 127) para 22.68.
[134] *Mammadov* [Art. 46] (n 22) para 147; *Kavala* [Art. 46] (n 22) para 128; Schabas (n 5) 866; Dörr (n 127) para 22.70; Mayer-Ladewig and Brunozzi (n 125) para 43; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, C.H. Beck 2021) § 16 paras 15f. On the monitoring process Çalı, Alarm Bells (n 23) 278f.
[135] *Moreira Ferreira v Portugal (No 2)* [GC] App no 19867/12 (ECtHR, 11 July 2017) para 102; Keller and Marti (n 126) 846.
[136] Schabas 872; Keller and Marti (n 126) 849; Dörr (n 127) para 22.70; Grabenwarter and Pabel (n 134) § 16 para 20.
[137] *Mammadov* [Art. 46] (n 22) para 159; *Kavala* [Art. 46] (n 22) para 132; Grabenwarter and Pabel (n 134) § 16 para 20.

In two cases regarding a violation of Art. 18 ECHR the CoM instigated such infringement proceedings according to Art. 46 (4) and (5) ECHR: In the first Art. 46-proceedings the Court examined whether the measures taken to execute the *Mammadov*-judgment were compatible with the conclusion and spirit of this decision, because it did not contain any explicit individual measures indicating how to implement it.[138] The judgement in question in the second Art. 46-proceedings, *Kavala v Türkiye*, on the other hand, contained an individual measure indicating how the respondent state must execute the original judgment and rectify the violation of Art. 18 ECHR.[139] In both cases filed by the CoM, the ECtHR subsequently found a violation of Art. 46 (1) committed by the respective respondent government.[140] However, the ECtHR emphasised that, in deciding on infringement proceedings under Art 46 (4) of the Convention, it has no power to find a new violation of Convention rights and cannot impose fines. Instead, the mere fact of the conducting of infringement proceedings and the judgment by the Grand Chamber should exert sufficient pressure to ensure the execution of the original judgments finding a violation of Art. 18 ECHR.[141] While the Court therefore did not award any damages to the claimant in the infringement proceeding regarding the *Mammadov*-case, in its Art. 46-judgment regarding the *Kavala*-case, it obligated the respondent state to reimburse the claimant for the legal fees caused by his participation in the infringement proceedings.[142]

Azerbaijan, the respondent state in the infringement proceedings in *Mammadov*, at first – even despite its conviction under Art. 46 (4) and (5) ECHR – did still not comply with the measures prescribed in the original judgment. However, the pressure asserted by the Court and the CoM, especially through an interim resolution issued nine months after the ECtHR's Art. 46-judgment expressing its deepest regret that the applicant still suffers the negative consequences of his conviction, ultimately led to the quashing of said conviction in September 2020.[143] The applicant in *Kavala* on the other hand remains incarcerated and an appellate court recently upheld his life sentence even though the ECtHR ordered his immediate release and later found the respondent state in violation of Art. 46 ECHR for failing to execute this order. Therefore, although infringement proceedings before the Grand Chamber help to put pressure on respondent states to comply with the Court's judgments, pro-active and determined monitoring of the execution of Art. 18-judgments by the CoM is also important in order to put an end to the misuse of state power through criminal prosecutions.[144]

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[138] *Mammadov* [Art. 46] (n 22) para 186; Von Bogdandy and Hering (n 23) 59.
[139] *Kavala* [Art. 46] (n 22) para 146.
[140] *Mammadov* [Art. 46] (n 22) para 214; *Kavala* [Art. 46] (n 22) paras 169ff.
[141] *Kavala* [Art. 46] (n 22) paras 104, 175.
[142] *Kavala* [Art. 46] (n 22) para 176.
[143] Çalı, Alarm Bells (n 23) 290.
[144] Çalı, Alarm Bells (n 23) 291.

6 Conclusion

As the misue of restrictions of fundamental rights and freedoms guaranteed by the Convention poses a great threat to democracy and the rule of law, it is essential that the Court is able to address such risks in an appropriate manner. The prohibition of the misuse of power in Art. 18 ECHR contains a measure with great potential that could live up to this purpose. However, this potential largely depends on the way the Court applies said article. While the ECtHR was very restrained in its case law until 2004, it has since begun to use the potential of Art. 18 ECHR more and more. Even in face of the improvements since the first judgment finding a violation of Art. 18, difficulties remained, especially regarding the high standard of proof and the fact that the burden of proof entirely fell on the applicant. Since the landmark Grand Chamber judgment in *Merabishvili* the recent jurisprudence brought further positive developments regarding issues of proof and led to a broader scope of application of Art. 18 ECHR. This facilitates the proof of Art. 18-violations, helps applicants in pursuing their claims and alerts the other Contracting Parties to authoritarian tendencies as well as the decline of the rule of law in the respondent state. However, in order to apply such pressure and protect the rule of law, in cases where Art. 18 is breached, the Court should not restrict itself to finding infringments of other Convention right but should furthermore examine the claim under Art. 18 in depth and subsequently convict the respondent state.

The possibility to prescribe general or individual measures is also an important instrument to ensure compliance with Art. 18-judgments, as it can add to the pressure on convicted states and lead to preventive actions. However, in order to ensure the implementation of the Court's judgments, the effective execution by both the CoM and the ECtHR is crucial to right the harm caused by the abuse of power. The fact that the first cases of infringement proceedings under Art. 46 (4) ECHR regarded Art. 18-judgments shows the importance of compliance in such cases, but the effectiveness of those proceedings remains to be seen.

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BALANCING INNOVATION AND ETHICS: A STUDY ON THE IMPACT OF AI ON MEDICAL NEGLIGENCE AND THE RULE OF LAW

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Abstract

Artificial intelligence systems are integrated in most professional fields, including healthcare, where it is already being utilized for prevention, diagnosis, or treatment. However, the application and potential misuse of AI can lead to adverse outcomes. This paper aims to analyse the role that the use of artificial intelligence systems in the medical field will play in the face of possible cases of professional negligence. The definition of the medical lex artis has always been the subject of doctrinal debate. This debate is now shaken by the introduction of these tools that are key in the decision-making process of the healthcare professional. To properly weigh this importance, it is necessary to analyse a characteristic common to most artificial intelligence systems, the black box.

1 Introduction

The use of artificial intelligence (AI) in the medical field is rapidly advancing and becoming an indispensable part of healthcare.[1][2] Machine learning tools, a subset of AI that utilizes algorithms to identify patterns within extensive datasets, are increasingly prevalent in medicine.[3] An example of this type of artificial intelligence in the medical field (AMI) based on machine learning would be "Watson for Oncology",[4] produced by the US multinational IBM (International Business Machines). This programme employs cognitive computing to interpret the clinical information of cancer patients to individualise the different possible treatment options. How does it work? Watson is fed, or "trained", with enormous amounts of information about cancer patients. By analysing this data, it can find patterns and infer the recommended treatments for a given patient from this information. The remarkable potential of this AI lies in its

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[1] Definition of AI by the European Commission: «Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behavior by analyzing how the environment is affected by their previous actions». Recommendations on the European Commission's White Paper on Artificial Intelligence-A European approach to excellence and trust, COM (2020) 65 final (the'AI White Paper') 16.

[2] Bradley Erickson, 'Machine learning for medical imaging' (2017) 37(2) R 505-515.

[3] Nicholson Price, 'Artificial intelligence in health care: applications and legal issues' (2017) 10 SL 10.

[4] Zhou Jie, Zeng Zhiying and Li Li, 'A meta-analysis of Watson for Oncology in clinical application' (2021) 11(1) SR 1-13.

ability to analyse large datasets and transform them into useful information for the doctor, being able to find patterns or relevant markers of the disease that would be very difficult to detect by humans.

One of the most important challenges we face when introducing tools with this capability in the medical field is determining whose responsibility it is when a medical error occurs due to their use, and this error leads to a harmful outcome. For example, what happens if the AI recommends a treatment, but the physician considers that, based on his or her experience, another treatment would be more appropriate? What happens if the AI recommends a treatment, the physician applies it, but the AI has made a mistake, resulting in a harmful outcome? These questions become even more complex when we consider that understanding how the AI made the decision is sometimes virtually impossible, essentially due to two factors:[5] 1. The immense amount of data considered to make a given decision; 2. The algorithm of operation of the machine, its "brain", is so complex that it is almost impossible to decipher how it arrived at a specific result ("black box"). Moreover, it is often sealed by intellectual property rights.

Assigning responsibility for the use of AI becomes significantly more complex when the AI's reasoning cannot be explained. It becomes virtually impossible to determine whether it is prudent or imprudent to adhere to or deviate from what is determined by the AI when we do not know how it operates within. When should a physician be bound by what the AI determines, or how could he or she deviate from the diagnosis given by this tool? These challenging questions remain unanswered due to the lack of understanding about how the AI operates.

Another important factor to consider when allocating responsibilities in this field is the fact that AMI is usually integrated as a tool used by physicians to treat their patients, rather than operating independently. As a result, the physician serves as the intermediary between the patient and the technology, maintaining a central role in this aspect. However, we cannot overlook the fact that these AMI tools are making an increasing number of decisions, gaining relevance in medical practice, which undoubtedly complicates the determination of who is ultimately responsible for a possible injury resulting from a medical failure.

The lack of trust in the algorithm, largely due to its opacity, is the biggest challenge for the implementation of AI in the medical field. As far as the legal sciences are concerned, the focus should be on determining liability in cases of patients' harm, which can range from the patient's physical integrity to his or her own life. The fundamental question is no other than: who will be held responsible? This question carries significant implications, including corporate, civil, and criminal liability.

[5] Price (n 3) 10.

This article aims to address the key issues raised by doctrine and jurisprudence regarding medical criminal negligence and, on this basis, analyse what impact the introduction of the AMI will have on them. Given the lack of pronouncements on this topic, we will provide a prognosis by considering hypothetical uses of the AMI and analyse how it could influence cases of medical negligence. Before analysing the relationship between medical malpractice and AMI, it is essential to describe more precisely the term "black box" and consider its potential implications.

2 The opacity of artificial intelligence

The collection and storage of medical records, along with the digitisation of radiological, endoscopic, and histological images, has generated a tsunami of data that can be used to train machine learning algorithms. Such programmes can be (and already are) helpful in medical decision-making. However, due to the complexity of the reasoning and connections that machine learning and deep learning make, humans are often unable to discern how the machine has arrived at its conclusions or the methodology it has employed for decision-making. This creates a communication problem between the machine and the doctor.

Machine learning algorithms used for diagnosis, prognosis, and disease prediction can incorporate numerous factors without providing detailed insights into the underlying connections. As a result, a black box is created, where the information obtained cannot always be explained in a way that is understandable for the doctor or the patient. The use of black boxes is less reluctantly accepted in areas such as finance or logistics.[6] However, in the medical field, it is more problematic to introduce such tools as the decisions of the machine have a direct impact on the health and lives of patients.[7] A higher level of caution is fully understandable.

Most AI tools used in medicine share this characteristic of having a black box. Nicholson Price describes the black box in the medical context as the use of complex computational models to make health-related decisions.[8] He highlights that a defining element of black box medicine is the lack of transparency in the algorithms, meaning that the relationships/inferences they employ to generate a result cannot be understood. The black box phenomenon is a direct outcome of deep learning.

The capabilities of deep machine learning are continuously expanding and evolving. An artificial intelligence known as Deep Patient was trained on the data of approximately 700,000 individuals and demonstrated remarkable accuracy in disease prediction when provided with new patient data.[9] Without any programming by

[6] Aaron Poon; Joseph Sung, 'Opening the black box of AI-Medicine' (2021) 36 (3) GH 581-584.
[7] Poon; Sung, (n 6) 581-584.
[8] Nicholson Price, 'Black-box medicine' (2015) 28(2) HJLT 419.
[9] Scott Schweikart, 'Who Will Be Liable for Medical Malpractice in the Future? How the Use of Artificial Intelligence in Medicine Will Shape Medical Tort Law' (2020) 22 (1) MJLST 7.

medical experts, Deep Patient found hidden patterns in the medical data that seemed to indicate when people were prone to a wide range of diseases, including liver cancer.

When doctors encounter a diagnosis that they cannot explain, they will ask themselves: Can I trust this model to provide accurate guidance for my patient? Can I trust it to give me the right result to guide my medical practice? Is this model consistent with my previous medical knowledge? What is this algorithm and how has it been engineered?

Conventional medical decisions are based on understanding pathophysiological mechanisms through various methods such as cellular experiments, genomic and metagenomic analysis, animal studies, and histopathological observation and interpretation. This is then followed by clinical trials and observations of control groups. Evidence-based medicine has become the standard in modern healthcare, and it is the current approach in medicine.

This is why many professionals in the sector are sceptical about implementing this type of technology in their medical practice.[10] They are hesitant to rely on the judgement of an AI without understanding its reasoning. However, there are others who argue that there is nothing to fear about AI and its opacity. Vijay Pande suggests that opacity, or the black box, is not exclusive to AI but is also a characteristic of human intelligence. Human intelligence can engage in complex reasoning and draw conclusions without being able to fully explain the underlying mental processes.[11] It may be in the very nature of intelligence that part of its functioning cannot be fully explained, with the human subconscious serving as the equivalent of the "black box" of artificial intelligence.

3 Medical negligence

The purpose of the medical activity to heal is incompatible with intentional acts against legal assets such as physical integrity or health. This does not exclude the possibility of malicious injury or death occurring during medical practice, although the fact that it occurs in this context will be merely anecdotal and will receive the same treatment as if it were malicious conduct in any other sphere. This is why it has been understood that within healthcare activity in the strict sense (to heal or improve the patient's quality of life) there is only room for one form of criminal liability, that of negligence. Moreover, in cases of malicious intent, the presence of an AMI will have no relevance, insofar as the subject pursued the production of the result, regardless of the means used. What we are really interested in is medical negligence that generates criminal liability, and to what extent the introduction of AMI can change the current paradigm. In this article we

[10] Schweikart (n 9) 7.

[11] Vijay Pande, 'Artificial intelligence's' black box' is nothing to fear' (2018) TNYT.

are going to focus exclusively on criminally relevant negligence, leaving out of our object of study those negligent conducts from which only civil liability arises. [12]

It is also worth noting at this point that, in the last two decades, we have seen an increase in the number of legal proceedings against doctors. [13] This increase may result in a kind of defensive medicine, [14] where doctors prescribe all necessary (even unnecessary) tests to protect themselves against future claims. In this respect, the use of AMI may also play a role. Compliance with the algorithm may end up being used as a shield against possible medical malpractice claims.

Before going into an analysis of how the introduction of AMI may affect medical negligence, we must address its main problems of interpretation in the field of criminal law.

The starting point for analysing negligence in Spanish criminal law must always be Article 12 of the Spanish Criminal Code (CC), which establishes a *numerus clausus* system for negligent crimes when it states that "negligent acts or omissions shall only be punished when expressly provided for by law". Few offences present a modality of imprudent commission, but those that can commonly be derived from imprudent action in the field of healthcare, such as injury (art. 152 PC), homicide (art. 142 PC), abortion (art. 146 PC) and injury to the foetus (art. 158 PC), are included.

The legislator has not offered any definition of what we should understand by imprudence, let alone medical imprudence. Traditionally, imprudence is defined as human conduct (voluntary, unintentional, or malicious action or omission) which, due to lack of foresight or failure to observe a duty of care, produces a harmful result for a legal asset protected by criminal law.

I will now outline the basic structural elements of negligence to be able to subsequently develop the specificities of medical negligence. Firstly, the conduct, which can be either an action or an unintentional voluntary omission (in which case it would be intentional). Secondly, the psychological factor, the subject when acting does not foresee the danger that ends up materialising in a harmful result when he should have done so. This element must be assessed under the specific circumstances of the case. Subsequently, we find the normative factor, constituted by the objective duty of care that the subject should have observed to avoid the result. Depending on the sphere in which we find ourselves, the objective duty of care may have different origins, such as

[12] Eduardo de Urbano Castrillo, 'La responsabilidad médica por el resultado: el caso de los odontólogos' (2007) 43 LLP 5-6.

[13] Carlos Sardinero-García, 'Responsabilidad por perdida de oportunidad asistencial en la medicina pública española' (2017) 43 (1) REML 5-12.

[14] Andrea Perin, 'La redefinición de la culpa (imprudencia) penal médica ante el fenómeno de la medicina defensiva. Bases desde una perspectiva comparada' (2018) 13 (26) PC 858-903.

legal rules, the general rules governing a particular profession, or simply the rules of coexistence shared by society.

This imprudent act must produce an injury, with imprudent acts which do not result in an injury to a legal right protected by the CC being criminally irrelevant. If this result, even if there is a negligent act, was not foreseeable or avoidable, we cannot speak of punishable negligence either.

Finally, there must be a cause-and-effect relationship between the negligent conduct and the harmful result produced. In other words, the conduct must have materially provoked the result, creating, or increasing an impermissible risk to a legal asset, the result being the materialisation of that risk. This point of union is broken when a supervening freak accident occurs which breaks the causal link.

Depending on the extent of the breach of the duty of care, and regardless of the seriousness of the result produced, we can distinguish between gross negligence and lesser negligence. It is said that imprudence is less serious when the rules of care that would be respected by a careful citizen are infringed, while we will be dealing with a case of serious imprudence when the most elementary duties of care are breached. Within gross negligence, there is an aggravated subtype called professional negligence. [15] This is characterised by the fact that the imprudent act has been carried out within the framework of the exercise of a profession, having seriously transgressed the rules that regulate it. The offender incurs an extra degree of unlawfulness due to the non-observance of the *lex artis* of his specific field. In cases of professional negligence, in addition to the penalty for the offence of serious negligence, the penalty of special barring from the exercise of the profession is added.

If we look at the articles in which the legislator has included professional negligence, we can affirm that he had health imprudence in mind. That said, it can be extended to other sectors, such as transport or construction. What is certain is that the field of health is particularly prone to harmful results that may or may not be due to professional negligence. The constituent elements of the negligent act present some particularities in the medical field that increase the complexity when it comes to determining when we are dealing with a criminally relevant negligent act. To declare criminal liability for medical negligence, it is necessary to identify in some of the phases of medical action, such as diagnosis or treatment, a medical error or failure, which is due to a disregard of the *lex artis*, causing a foreseeable and avoidable result.

[15] Virxilio Rodríguez; Natalia Torres, 'La responsabilidad penal médica por conductas imprudentes: Evolución de la jurisprudencia española en los últimos años' in Gonzalo Basso (coord.), *Libro homenaje al profesor Dr. Agustín Jorge Barreiro*. (Servicio de Publicaciones, 2019) 1205-1217.

To speak of medical negligence, we must begin with the human act, which in this case will be a medical action. [16] This is known as medical error or failure. Medical error or failure can occur in any of the phases of the medical-surgical activity (examination, clinic, diagnosis, prognosis, treatment, or intervention), causing an injury. But this error does not entail a legal assessment, as even a professional, acting prudently and following the protocols, can make mistakes that result in damage to legal assets. This is due to the inexact nature of medical science, which is constantly evolving and developing. Therefore, we cannot link medical failure with non-infringement of the standard of care. Medical failure is verifiable *ex post*, once we have seen the result we realise the error, for example, in the diagnosis made. In contrast, the transgression of the standard of care is assessable *ex ante*, the subject's actions have been inadequate according to the standard of care and have led to a harmful result.

Doctrine and jurisprudence have developed a series of general criteria applicable to medical errors or failures to distinguish those errors that are invincible (that would have been made by any other professional) from those that can be overcome and that could potentially lead to criminal liability for negligence: [171] 1. To be subject to criminal sanction, medical errors must be of great magnitude, so that they are obvious to any average professional; 2. A medical error cannot be considered negligent simply because the practitioner lacks specialised knowledge beyond that of the average professional; 3. The central aspect in analysing the doctor's negligence must be his or her specific behaviour in seeking to heal the patient, and there may be justified differences in the actions of different professionals.

In short, someone who has acted prudently and carefully, following all the protocols and, in short, acting under the *lex artis*, will not incur criminal liability despite committing a medical error of a merely technical nature.

As in the case of action, the duty of care also has some specificities in the medical field. Delimiting the medical duty of care is a particularly complex task since medicine is a field that cannot be statically regulated in law. In the absence of such regulation, and to give objectivity to the legal analysis of medical judgements, one must turn to the technical standards in the field, known as *lex artis*. This is a normative requirement in which we must compare the act performed with this generally accepted standard from the scientific point of view. A physician who acts contrary to *lex artis* is, in principle, in breach of the objective duty of care and may incur criminal liability in the event of a harmful outcome. But defining *lex artis* in medicine at a given point in time is a very complex task. This is due to the two main factors, [18] medical science is eminently

[16] Juan Carlos Suárez-Quiñones, 'La responsabilidad penal médica por el hecho imprudente. El error de diagnóstico. Jurisprudencia aplicable' (2008) 62 (2056) BMJ 594.
[17] Jesús Silva Sánchez, 'Aspectos de la responsabilidad penal por imprudencia de médico anestesista: La perspectiva del Tribunal Supremo' (1994) 2(1) DyS 48-50, and Francisco Benítez; José Blanca *La imprudencia punible en el ámbito de la actividad médico-quirúrgica*, (Dykinson, 2010), 187-188.
[18] Suárez-Quiñones (n 16) 598.

experimental, so there are limitations to its knowledge, and it is constantly advancing and evolving, which is incompatible with the concept of a "fixed" *lex artis* that serves as a standard for always evaluating medical action.

In addition, we must consider that we are dealing with a field in which society is willing to accept higher levels of risk, broadening the spectrum of acceptable risk. In other words, risks inherent in medical activities are accepted given their potential benefits, such as the risks derived from treatments like chemotherapy, surgical operations, or even the risks of experimental treatments. If a medical activity is performed with due care, its inherent risk is tolerated by criminal law despite the possibility of injury present in that activity. On the other hand, if that activity is performed carelessly, the risk is no longer permitted. This undoubtedly presents a challenging interpretation for the courts, as they must carefully balance the permissible risk with the standard of care.

To this already complex picture we must add clinical freedom. Freedom of method is a fundamental principle for the progress of science, and medical science needs this freedom to advance. The Declaration of 27 October 1984 on "Principles on Freedom of Prescription" states that physicians must have the independence to treat their patients, to make their diagnosis, and to choose their treatment. This medical freedom has played a significant role in advancing medical knowledge and making it more objective and verifiable.

However, it is important to recognize that this freedom is not absolute. While it allows for innovation, progress, and respect for clinical judgment, there are limits. The doctor cannot use treatments or concepts that have already been superseded by the objective and proven progress of medicine. His or her freedom to act is limited to the interventions available according to current medical knowledge. Within this margin, the physician must determine what he considers most appropriate for his patient on a case-by-case basis.

These factors must be analysed considering the specific case, the circumstances of the patient, and the real possibilities available for the practitioner. This is why we are moving from the concept of *lex artis* to that of *lex artis ad hoc*, i.e., the doctor is required to have complied with what is required on each occasion, following what medical science determines at that moment, but also taking into consideration the patient's situation. [19]

In this regard, the Supreme Court (SC) states that "it is medicine that establishes and defines the *lex artis* and the *lex artis ad hoc*, following standards accepted in the practice of the profession itself and taking into account the circumstances and conditions of science and the specific situation of the patient, as well as the existence of the so-called

[19] Amaya Merchán, 'Posibles consecuencias penales de la praxis médica durante el estado de alarma' (2020) 9700 DLL 3

"clinical freedom", which obliges the doctor to take decisions that may be debatable, but which must be considered prudent as long as there are no elements from which to infer the contrary". [20]

It should be borne in mind that medical science is not an exact science, but that the demand for accountability always presents great difficulties because its science is inexact. It involves unpredictable variable factors that can lead to serious doubts regarding the causation of the harm. Moreover, the freedom granted to physicians must be exercised responsibly, avoiding audacity or adventurism.

The physician's obligation to the patient is one of means, never of results. To comply with the *lex artis ad hoc* means to use all the means available to the physician in the case to bring about the patient's recovery. [21] The judge must determine whether in the specific case, the physician breached the duty of care, for which he must assess whether he acted following the current state of medical science, considering the patient's condition and the means available to him. But, as we know, *lex artis* is not a regulated field. Where can the judge go to make this comparative judgement between the conduct performed and the conduct owed?

Without wishing to draw up a closed list, Suárez-Quiñones states that the *lex artis* medica is essentially contained in protocols, action guides, and medical experience. [22] We can define medical protocols as "guidelines or recommendations established by a group of qualified experts to guide the daily work of professionals to improve the quality and efficacy of healthcare, i.e., the parameters accepted by the majority of professionals".[23]

Given the complexity involved in defining the medical *lex artis*, these medical protocols are of great use to the judge when making an initial assessment of the conduct. On paper, conduct that conforms to the protocol will not be negligent, but not all conduct that does not follow the recommended protocol will be. We can affirm that acting following the protocol is a rebuttable presumption of having acted prudently and under the medical *lex artis*.[24] However, this presumption is not indisputable and can be challenged by presenting evidence to the contrary. While following the protocol can indicate appropriate action, it should not be considered an absolute rule to be followed in every case.

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[20] STS (Sentence of the Spanish Supreme Court) 1193/94, de 8 de junio de 1994; STS 811/99, de 25 de mayo de 1999.

[21] María del Carmen Gómez, *La responsabilidad penal del médico*, (Tirant lo Blanch, 2008) 482-483.

[22] Suárez-Quiñones (n 16) 595-596.

[23] Benítez; Blanca (n 17) 180.

[24] Virxilio Rodríguez, 'La responsabilidad penal médica por homicidio y lesiones imprudentes actualmente en España (artículos 142 y 152 Código Penal)' (2006) 6601 DLL 7.

Another source that judges can rely on to assess the doctor's actions would be the clinical guidelines or health action guidelines. These include a series of possible actions depending on the characteristics of the patient, with the possibility of choosing between several options for the same ailment. These are flexible instruments that are constantly updated to align with the latest scientific evidence. [25]

Finally, one must consider their own medical experience, which can serve as a reference point for evaluating the prudent action of the professional. However, this will never be sufficient to justify acting contrary to what is determined by protocols or clinical guidelines. As can be seen from this section, it is not at all easy to establish a valid and objective standard with which to assess medical action. Even more so when the aim is to respect the two defining elements of medical activity mentioned above: its dynamic nature, constantly evolving, and the clinical freedom to which all professionals are entitled.

In conclusion, the *lex artis ad hoc*, along with the generally accepted protocols of action and clinical guidelines are indications that one is acting following the objective duty of care, and in general, this will be true. But it is far from being an arithmetical operation, and to determine whether the objective duty of care is being breached it is necessary to consider the specific circumstances of time and place, the medical knowledge available at the time, the patient's state, as well as the means available to the professional. However, the judge must try not to make a scientific judgement of the actions carried out. In short, we are navigating a complex terrain, where separating the scientific from the legal, clinical freedom from imprudent action, or defining the boundaries of permissible risk is particularly complicated. This complexity is amplified when considering that the legal assets at stake are of the highest value.

4 Medical negligence and Artificial Medical Intelligence (AMI)

This whole system will be significantly affected by the introduction of a new factor: the use of AMI. Its use is being introduced in various areas of medicine, from prevention and diagnosis to treatment, follow-up, and monitoring of diseases. Within these fields, diagnosis, and treatment are the most likely to present cases of criminal liability for negligence. For this to occur, there must be a diagnostic or treatment error that causes a harmful result that is objectively attributable to the error. The courts have been considering that "imprudence arises when the medical or surgical treatment involves careless behaviour, abandonment and omission of the required care, given the circumstances of the place, time, people, nature of the injury or illness, which, disregarding the *lex artis*, leads to harmful results".[26]

[25] Suárez-Quiñones (n 16) 600-601.

[26] STS 5836/97, de 3 de octubre de 1997.

Given the novelty of this situation and the limited legal precedents, our task is to formulate hypotheses and assess what the role of the AMI will be in the application of medical negligence:

- Scenario 1: The physician follows the diagnosis of AMI, and an injury occurs.
- Scenario 2: The physician deviates from the diagnosis of AMI and an injury occurs.
- Scenario 3: The physician follows the treatment given from AMI and an injury occurs.
- Scenario 4: The physician deviates from the treatment given from AMI and an injury occurs.

In all scenarios, we consider that a medical error has occurred that leads to a harmful outcome for the patient. Likewise, we consider that the AMI used has the characteristic described in the second section, namely, it is an opaque AMI. Depending on the use of the AMI, when are we dealing with medical negligence?

In scenarios 1 and 3 the physician follows the indications of the AMI. Initially, this leads us to believe that the professional has acted following the *lex artis* so that we cannot impute the harmful result to him as negligent. But what are the consequences of applying this reasoning in any case? In this way, *lex artis* and AMI would be linked, exempting the doctor who acts following the algorithm from criminal liability in any case, even when this opinion is questionable (we should remember that there is no infallible instrument). If this system were to be followed by the courts, it would be virtually impossible to find a doctor who deviates from the AMI, as any action outside the AMI could potentially give rise to criminal liability. Consequently, doctors would be compelled to provide diagnoses or treatments that they may not endorse and which, furthermore, may not fully understand due to the opacity of the AMI's reasoning.

On the other hand, in scenarios 2 and 4, the doctor deviates from the AMI's indications. This, in principle, leads us to think that the subject is acting contrary to the *lex artis* so that we could charge him with negligence for the harmful result. But what are the consequences of applying this reasoning in any case? Once again, *lex artis* and AMI would be linked, punishing the professional who deviates from the diagnosis or treatment determined by the algorithm for medical imprudence in any case, putting a complete end to medical freedom. Additionally, it would be challenging for the healthcare professional to justify satisfactorily the reason why he/she considered that the AMI was incorrect, as he/she does not know which factors were considered when making the diagnosis/treatment.

In short, what we are asking ourselves is what value the AMI will have within the definition of *lex artis*. It is possible that, with the normalisation of its use, it will end up

having a value comparable to that of protocols and guidelines for action, with its monitoring and use being a rebuttable presumption of prudent action. But a problem arises: unlike protocols or medical guidelines, we will not always know how the machine has reasoned. Consequently, it is difficult for the doctor to deviate from what it has determined if he does not know the reasons that motivate its result.

Let us draw a parallel with other technological instruments standardised in medical practice, doctors do not need to understand how an X-ray machine works to be bound by the results it gives to make a diagnosis. In other words, it is inconceivable today that a physician would not use an X-ray machine to make diagnoses in cases where its use is required, whether he or she understands how the machine works. If AMIs prove to be highly effective in predicting and diagnosing disease, would not using them be comparable to not X-raying a patient with a broken leg? This raises another scenario: is the physician obligated to use the available AMI?

Let us focus, for example, on diagnostic errors. The doctrine has summarised the situations in which a diagnosis is considered to have been made in breach of the duty of medical care and, consequently, the doctor has been held criminally liable:

"(a) when the doctor acts without sufficient medical capacity to deal with the medical action, i.e. lacks the minimum or basic knowledge necessary for the correct performance of the medical profession, (e.g. the use of dangerous therapies in some conditions requires adequate preparation of the professional); (b) when he adopts therapeutic measures without having previously determined the diagnosis; (c) when he issues a diagnosis without having previously examined the patient; d) when, to make a diagnosis, he has not made use of all the instruments and auxiliary technical means at his disposal; e) when, to make a diagnosis, he does not take into consideration remote but scientifically possible eventualities; f) when the results of analyses and complementary tests of all kinds are not taken into account or are not convincingly evaluated, in an inexcusable manner, to make the diagnosis; g) when there is an unjustified delay in making the diagnosis that can be qualified as late".[27]

The use or misuse of the AMI fits perfectly within the scope of letters d) and f). Letter d) would be the case of a doctor who makes a diagnosis without having used the AMI available to him or her. Imagine an oncologist who, having the Watson for Oncology AMI at his or her disposal, decides not to use it because he or she considers it to be a clear case of a cancer-free patient. In the end, this patient develops the disease and dies because it was not detected in time. Is this a negligent act on the part of the doctor? From our perspective, once AMI has been introduced into standard medical practice, we could be dealing with negligence on the part of the oncologist.

The second scenario, corresponding to letter f), is more complex. Introducing the AMI into this scenario would be the case of the doctor who unjustifiably deviates from what

[27] Benítez; Blanca (n 17) 189.

has been determined by the results it has provided. This is where the black box that characterises the most advanced AMI algorithms poses a significant barrier. That is, how can a physician justifiably deviate from the AMI if he or she does not know what his or her reasoning process has been? It is indeed difficult to assess when a physician has justifiably deviated from the algorithm's diagnosis without having insight into the specific factors considered by the algorithm.

The question to be resolved is what's the value of following, or not following, what the AMI has determined. In our view, it should be one more factor to consider when determining medical imprudence, but it cannot become an automatic rule that judges apply, considering it systematically imprudent to act contrary to the AMI, and following the law to act in line with the AMI. If we were to adopt this interpretation, it would lead to a form of objective medical criminal liability for any individual who deviates from the AMI and subsequently causes harm.

5 Future challenges

Considering the unstoppable progress of the use of AMIs, this work represents only an initial approach to the problems arising from the relationship between automation and AI systems and medical practice from the point of view of criminal law, without having explored other aspects of this complex relationship, such as robotics, morality, or civil and corporate liability. Unlike criminal liability, [28] the latter two have been regulated by the European Commission.

Firstly, we have the European Parliament Resolution of 20 October 2020, which provides recommendations to the Commission on a civil liability regime for artificial intelligence.[29] Article 14 recommends establishing a strict liability regime for high-risk AI systems when it states that "it seems reasonable to establish a common strict liability regime for high-risk autonomous AI systems".

More recently, we find the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules in the field of artificial intelligence (Artificial Intelligence Act) and amending certain legislative acts of the Union of 21 April 2021. [30] Particularly striking in this proposal are articles 14 and 29, as they are directly focused on trying to tackle one of the problems highlighted in this article, the "black box". Article 14 establishes the obligation for AI systems to be designed in such a way that they can be effectively monitored by humans. Among the obligations included

[28] As far as criminal liability is concerned, the European Committee on Crime Problems has set up a working group composed of AI and criminal law experts which is currently working on a proposal for a regulation <www.coe.int/en/web/cdpc/home/-/asset_publisher/2gsGo23sm8nj/content/ai-and-criminal-law-a-feasibility-study-to-be-submitted-to-the-cdpc?inheritRedirect=false> accessed 20 June 2023.

[29] <www.europarl.europa.eu/doceo/document/TA-9-2020-10-20_ES.html#sdocta9> accessed 20 June 2023.

[30] <eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:52021PC0206> accessed 20 June 2023.

in this Article, it is explicitly stated that the person entrusted with human oversight must be able to "fully understand the capabilities and limitations of the high-risk AI system and to adequately monitor its operation so that they can detect indications of anomalies, operational problems, and unexpected behaviour and address them as soon as possible".

Article 29 imposes obligations on users of AI systems, including the requirement to follow the provided instructions and ensure that the input data align with the intended purpose of the AI system. Both rules are aimed at overcoming the barrier of the opacity of AI systems and, to a certain extent, ensuring that the user of AI systems is liable for possible damages resulting from their use. Undoubtedly, the legislator faces the significant challenge of ensuring the safety and accountability of AI while fostering its development, which has the potential to bring numerous benefits to society.

Without diminishing the importance of these issues, we have focused on examining how the use of AMI tools can influence the determination of criminal liability for medical malpractice due to negligence. Specifically, our goal has been to evaluate the significance of employing AMI systems when determining whether a given conduct is in line with the medical *lex artis*. It is important to note that AMI systems do not completely replace medical professionals (in which case the responsibility of the system itself or its creator would have to be assessed), but it is equally true that the collaboration between doctors and machines is now a reality.

As we have seen in the previous section, the relationship between healthcare professionals and the AMI systems, and its ramifications in cases of medical negligence, raises unresolved questions, indicating the for regulation in this area. With the current state of technology, the only individual who can be held criminally liable for medical negligence is the doctor, but it is also true that we have not had such a powerful decision-making tool until now.

From our perspective, the outcome derived from the use of the AMI system should be one of the factors to be considered when assessing whether a given medical error has violated the *lex artis*. Nevertheless, it must not become an automatic and objective criterion for assessing criminal liability. Above all, the development of the AMI cannot lead to the absolutisation of the machine factor to the detriment of the human factor, nor the prioritisation of the human factor to the detriment of the machine. As Miró Llinares warns, the possible risks derived from the use of these new technologies should not lead us to embrace technophobia, but rather all these questions should be approached with a realistic, ethically critical, and empirically informed mindset. [31]

Ultimately, we must analyse this problem based on the current capabilities of the technology, rather than speculating about future possibilities. The legislator must

[31] Fernando Miró, 'Predictive policing: utopia or dystopia? On attitudes towards the use of big data algorithms for law enforcement' (2020) 30 RIDyP

address both the future and, more importantly, the present to provide legal certainty for healthcare professionals and patients who consent to the use of AMI systems.

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GENDER-BASED VIOLENCE AND HUMAN RIGHTS

PROTECTING WOMEN FROM VIOLENCE: THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW

By Sofia Braschi[*]

Abstract

The paper aims to assess the impact of international human rights law on national policies to combat domestic and sexual violence. After a theoretical framing of the issue, the author highlights how international law has contributed to the fight against violence against women. Then, it turns to examine a few problems arising from the use of criminal law as a means to protect fundamental rights. Finally, the author offers some general reflections about the role of international human rights law in combating violence against women.

1 Introduction

In recent years, international law has shown an increasing interest in the phenomenon of violence against women. Even if we overlook the numerous actions taken on a global level, we can note that in Europe the issue is addressed by a specific convention opened for signature in 2011 and now signed by 37 States. Moreover, it is the object of a considerable legislative activity of the European Union, recently resulting in the Proposal for a Directive on combating violence against women and domestic violence.[1] Although this renewed interest has been mostly welcomed, in Italy some scholars have expressed a critical attitude, pointing out that the need to fulfil international requirements is leading to an excessive hardening of the punitive response.[2] Hence it seems necessary to assess how human rights law is actually influencing our domestic legislation regarding violence against women.

As it is impossible to thoroughly examine all international sources, the paper focuses on the case law of the European Court of Human Rights (hereinafter ECtHR) and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (hereinafter the Istanbul Convention). We analyse their impact on national criminal policies, taking the Italian system as the main point of observation.

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[1] The proposal implements the strategy for gender equality, set out in spring 2020 (see Commission, 'A union of equality: the strategy for gender equality 2020-2025' COM (2020) 152 final); despite the title, it does not, however, contain any obligation to criminalise domestic violence (see n 21). It is worth recalling that the European Union has addressed the issue of violence against women also by laying down minimum standards of assistance and protection for the victims of crime (Directive 2012/29/EU of 25 October 2012).

[2] With reference to the European Union law Anna Maria Maugeri, *I reati sessualmente connotati e diritto penale del nemico* (IUS Pisa University Press 2021) 19; also in relation to the Istanbul Convention Tiziana Vitarelli, 'Violenza contro le donne e bulimia repressiva' (2020) 3 Dir Pen Cont - Riv Trim 461, 466.

With reference to both sources, we concentrate on the phenomena of domestic and sexual violence.[3]

We then proceed as follows: after a theoretical framing of the issue, we analyse how international human rights law has contributed to the affirmation of the prohibition of violence against women. We then discuss the problems related to the obligations to criminalise embedded in the regional conventions; finally, we draw some conclusions regarding the role that human rights law can play in combating violence against women.

2 Sources and binding nature of international obligations to criminalise

From a theoretical point of view the questions addressed in this paper must be framed within the more general issue of the influence exerted on criminal policy by international 'positive obligations'. In brief, to ensure the fulfilment of a human right, the State is required not only to abstain from committing violations (negative obligations) but also to take actions aimed at avoiding infringements perpetrated by individuals (positive obligations).[4] Therefore, it must resort to criminal law, by introducing deterrent penal provisions (substantive obligations) and conducting actual investigations when the right is violated (procedural obligations).[5]

The obligations to criminalise violence against women are contained only in international treaty law, especially within the framework of regional human rights conventions.[6] Indeed, on a global level, apart from a few exceptions relating to

[3] Indeed, both domestic and sexual violence take place in a private context, thus differentiating themselves from other forms of aggression against women (eg sexual harassment or trafficking for the exploitation of prostitution); this element assumes a particular significance for international law, which traditionally focuses on violations that take place in the public sphere. With reference to Italy, it is worth pointing out that its system does not contain crimes specifically aimed at punishing domestic violence. Instead, domestic and sexual violence is treated as falling under numerous broader offences (eg, art 572, 582, 583-*sexies*, 610, 612-*bis* of the criminal code): for more details Sofia Braschi, 'Combating Domestic Violence Against Women: Does Italian Legislation comply with the Istanbul Convention?' [2022] Eur Crim L Rev 312, 318.

[4] See Roberto Chenal, 'Obblighi di criminalizzazione tra sistema penale italiano e Corte Europea dei Diritti dell'Uomo' [2006] Leg Pen 171, 178; Riccardo Pisillo Mazzeschi, *Diritto internazionale dei diritti umani. Teoria e prassi* (Giappichelli 2020) 60 and 108.

[5] See Francesco Viganò, 'L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali' in Marta Bertolino and others (eds), *Studi in onore di Mario Romano* (Jovene 2011) 2645.

[6] On this point Sara De Vido, 'The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation No. 35' (2018) 2 Dir Um Dir Int 379, 395, according to whom the prohibition of domestic violence and femicide has already assumed the status of customary law.

international criminal law and humanitarian law,[7] there appear to be no other treaties including obligations to criminalise.

Admittedly, some prominent declarations condemn violence against women. As examples, we can mention the Declaration on the Elimination of Violence against Women, pronounced by the General Assembly of the United Nations (1995), and the resolutions adopted by the Commission on the Elimination of Discrimination against Women (hereafter CEDAW) dating from General Recommendation no 19 of 1992.[8] Insofar as they have a high acceptance level, these acts foster the creation of practices that can, over time, acquire the force of principles of customary international law.[9] Nevertheless, they do not have the force to compel States to amend their criminal law.

From this short overview, we can glean that the expression 'obligations to criminalise' can be used only with reference to regional conventions for the protection of human rights.[10] Having clarified this point, we must now examine how the impact of these acts on criminal policy is influenced by the structure and binding power of each provision.

Starting from the structure, we can distinguish two types of obligations. Firstly, the criminalisation of some conduct may constitute the premise of a more general duty of due diligence, aimed at ensuring the effective protection of the right under the convention.[11] Here the legislator is required to adopt all reasonable means available to

[7] Indeed, articles 7 and 8 of the Rome Statute of the International Criminal Court include sexual assaults and other forms of violence typically committed against women (sexual slavery, forced pregnancy, forced sterilization) within the scope of crimes against humanity and war crimes: for more details, also in an historical perspective, Lucia Poli, 'La tutela dei diritti delle donne e la violenza sessuale come crimine internazionale. Evoluzione normativa e giurisprudenziale' [2009] Dir Um Dir Int 396, 400.

[8] For further information on this treaty, promoted by the United Nations in 1979, Pisillo Mazzeschi, *Diritto internazionale dei diritti umani* (n 4) 147. For an overview of the main international acts on violence against women Lucia Re 'La violenza contro le donne come violazione dei diritti umani. Il ruolo dei movimenti delle donne e il *gender mainstreaming*' in Giuseppe Conte and Sara Landini (eds), *Principi, regole, interpretazione, contratti e obbligazioni, famiglie e successioni. Scritti in onore di Giovanni Forgiuele* (vol 2, Universitas Studiorum 2017) 173.

[9] In fact, States are urged to conform to the standards established at the universal level by the possibility of gaining material advantages (economic rather than political benefits): on the 'generating' or 'catalyzing' effect of soft law Benedetto Conforti and Massimo Iovane, *Diritto internazionale* (ES 2021) 49. According to the CEDAW General Recommendation no 35 'the prohibition of gender-based violence against women has evolved into a principle of customary international law' (here see, however, De Vido, 'The Prohibition of Violence Against Women' (n 6) 380).

[10] See Stefano Manacorda, '"Dovere di punire"? Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto' [2012] Riv It Dir Proc Pen 1370, who restricts the notion of 'obligation' to criminalise to cases where the international treaty provides for a jurisdictional mechanism capable of sanctioning the State that fails to comply with the duty of penal protection.

[11] On the evolution of due diligence obligations within international law and their content with reference to the protection of women from violence Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of

prevent the infringement of a fundamental right; these may include the provision of a criminal offence capable of deterring citizens from violating the right.[12] In the renowned case *X and Y v. Netherlands* (1985), the Strasbourg Court argued that States must employ criminal law whenever 'fundamental values and essential aspects' of the rights protected by the Convention are at stake; following this reasoning, it has then held that States must criminalise domestic and sexual violence.[13] Theoretically, this kind of obligation imposes fewer constraints on the lawmaker's discretion, leaving it free to select the most appropriate means of protection.[14] However, we should bear in mind that regional courts and international human rights bodies have been gradually specifying the extent of due diligence duties, sometimes even affirming the obligation to penalise specific conduct considered harmful to the rights under protection. [15]

Secondly, the obligation to criminalise may be enshrined in a provision that compels States to prohibit particular types of conduct. Structurally, such norms constitute specific-result obligations, and their fulfilment requires the State to use criminal law. We can find them especially in sectoral treaties such as the Istanbul Convention: indeed, articles 33 ff. list the different forms of violence against women that signatory States are required to criminalise.[16] Here, theoretically, criminal policy choices are influenced more than in the case of due diligence duties, since only in form is the lawmaker's authority respected. However, we already mentioned that the effectiveness of the obligations to penalise also depends on the enforcement instruments provided for by each treaty.

Women against Violence' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers 2008) 48 and 52.

[12] For further information on the content of due diligence obligations Maria Monnheimer, *Due diligence obligations in International Human Rights Law* (Cambridge University Press 2021) 117. With specific reference to the right to life see Pisillo Mazzeschi, *Diritto internazionale dei diritti umani* (n 4) 201, who qualifies the provision of a regulatory apparatus aimed at preventing the violation of this right as an obligation of result.

[13] With specific reference to domestic violence, Paolo De Stefani, 'Riflessi penalistici della tutela della famiglia nella giurisprudenza della Corte Europea dei Diritti dell'Uomo', in Elisabetta Palermo Fabris and others (eds), *Trattato di diritto di famiglia: le riforme 2012-2018* in Paolo Zatti (ed), *Diritto penale della famiglia e dei minori* (Giuffrè 2019) 47. A similar scenario can be observed in the context of the Inter-American Convention on Human Rights: on this point Sara De Vido, *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011* (Mimesis 2016) 60.

[14] For further information on the differences between the State responsibility in case of an obligation of due diligence and an obligation of result, and a few notes on the field of human rights Riccardo Pisillo Mazzeschi, *"Due diligence" e responsabilità internazionale degli Stati* (Giuffrè 1989) 387.

[15] See, in this perspective, the case of *M.C. v. Bulgaria* ECHR 2003-XII 3, discussed below. At the international level, a similar process of specification of the duties of due diligence was initiated in 1999 by the *Special Rapporteur on violence against women*: in this regard see Bourke-Martignoni (n 11) 57.

[16] Here, it should be pointed out that the Istanbul Convention also contains duties of due diligence, relating to prevention, protection and prosecution activities: see De Vido, *Donne, violenza e diritto internazionale* (n 13) 110.

Dwelling on the binding power of obligations to criminalise, it is first necessary to distinguish between acts of soft law and acts of hard law. The first category includes the aforementioned declarations of principles pronounced by the General Assembly of the United Nations. We have already pointed out that these acts have a non-binding nature and, as such, they do not provide for obligations to penalise. However, as seen, they do contribute to the development of international law and give impetus to the creation of multilateral agreements.

Moving on to acts of hard law, their influence on criminal policy is closely related to the enforcement mechanisms set out by treaties and to the capacity of legal systems to adapt to international law. As the analysis of this last profile would force us to deal with complex issues of constitutional law,[17] we will mainly focus on the first profile.

As known, conventions generally entrust the monitoring of their implementation to reporting procedures and follow-up mechanisms. For example, the Istanbul Convention's implementation is entrusted by the Group of Experts on Action against Violence against Women and Domestic Violence (hereafter GREVIO). Clearly, the efficacy of this convention is limited by the lack of means to 'sanction' the State that does not fulfil its obligations. Indeed, GREVIO periodically examines the reports sent by signatory States, if necessary requesting further information from NGOs and national human rights institutions; based on the data collected, it draws up a report which is published and may contain general recommendations.[18] When these recommendations express a negative evaluation, they affect the State on a reputational level and thus induce it to adapt its legislation to the standard required by the Convention. They are, nevertheless, the result of a secondary control and, above all, GREVIO has no instruments to 'force' the State to comply with its indications.

A different conclusion can be reached with reference to treaties such as the European Convention on Human Rights, which provides for a jurisdictional body in charge of examining complaints filed by individuals.[19] Indeed, the Court orders the State to pay compensatory damages whenever the latter proves to be unable to protect the right under the Convention. Every time the Court detects a structural deficiency, it can

[17] In this regard, we just observe that, despite the diversity of the solutions put in place, experience reveals an ever-increasing tendency of systems to provide mechanisms aimed at ensuring the immediate adaptation of domestic law to international law. For an overview of the orientations taken by the most recent constitutions Giulio Bartolini, 'A Universal Approach to International Law in Contemporary Constitutions: does it exist?' in [2014] CJICL 1287, 1296.

[18] For further information on this point Ronagh JA McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge 2017) ch V; De Vido, *Donne, violenza e diritto internazionale* (n 13) 179.

[19] On an international level this treaty is unique, as, after the adoption on 11 May 1994 of Protocol no 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, it provides for a permanent judicial body that is responsible for monitoring the enforcement of its provisions; on this point Laura Pineschi 'Diritti umani (protezione internazionale dei)', in *Enciclopedia del Diritto. Annali V* (2012) 576.

indicate general measures which must be adopted to avoid a new violation; their enforcement is supervised by the Committee of Ministers which provides for sanctions if the State fails to comply with the decision. Furthermore, national courts are also required to ensure the fulfilment of rights and obligations under the Convention: a cross-country examination of applied domestic law shows an increasing penetration of the Convention into national systems. [20]

Finally, we should remember that the European Union also provides for the protection of fundamental rights and has a strong influence on the criminal policy of each nation. For the purposes of the following analysis, however, it is not necessary to research this organisation's activity in depth. In fact, violence against women does not currently fall within the competence of the Union, whose interventions are so far limited to certain specific forms of aggression.[21]

To summarise, we can affirm that human rights law does not represent a unitary body, rather a set of acts which can impact national criminal policy to varying degrees. Naturally, this lack of unitarity also influences the content of obligations to criminalise; nonetheless, the dialogue between the Courts themselves and with the conventions' monitoring bodies considerably reduces the differences between the various human rights protection systems.[22]

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[20] For an overview Giuseppe Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' [2012] Eur J Intl L 407.

[21] We refer, in particular, to violations related to the areas of 'trafficking in human beings', 'sexual exploitation of women and minors' and 'cybercrime' (art 83 TFEU): from this perspective, note the Directive 2011/93/EU of 13 December 2011 on combating the sexual exploitation of children and child pornography. As for the Proposal for a Directive mentioned at the beginning, in the light of the clarifications we just made, it is easy to understand why the EU act provides for obligations to criminalise relating to non-consensual sharing of intimate or manipulated material (art 7), online stalking (art 8), online harassment (art 9) and incitement to online violence and hatred (art 10), without, instead, containing any obligations relating to the protection of children and minors. It is clear, however, that the approval of the Proposal would have significant effects on the matters to be regulated (with specific reference to the procedural regime of sexual violence see para 4).

[22] To confirm this statement, it is sufficient to consider that, on the one hand, the Istanbul Convention has been significantly influenced by the ECtHR case law; on the other hand, some recent decisions of the Strasbourg Court show traces of a reverse process of cross-fertilization. As example, we can take the already mentioned case of *Talpis vs. Italy*: drawing inspiration from articles 50 ff. of the Convention, the Court stated that, when it comes to assessing the immediacy of the danger that justifies the adoption of protection measures (the so-called 'Osman test'), the particular vulnerability of the victim of family violence must be taken into account and consequently a less restrictive standard must be adopted. On the roots of the Istanbul Convention Ronagh JA McQuigg, 'What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?' [2012] Intl J Hum Rights 949. On the Convention's influence on the ECtHR case law Sara De Vido 'Challenging the Osman Test through the Council of Europe Istanbul Convention?' (2017) 6 Ricerche Giur 7, 10.

3 The contribution of the ECtHR and the Istanbul Convention to the affirmation of the prohibition of violence against women

After having framed the topic of these reflections, we can now focus on how international human rights law has contributed to the affirmation of the prohibition of violence against women. Since we have already pointed out that only regional treaties contain obligations to criminalise, we first analyse the case law of the ECtHR, then move on to consider the role played by the Istanbul Convention.

Referring to the first source, the premise is that the European Convention on Human Rights does not contain explicit obligations to criminalise. Despite this deficiency, the Strasbourg Court has repeatedly affirmed that member States must use criminal law to ensure the full enjoyment of the rights protected by the Convention. As they are limited to the specific violation claimed by the applicant, the decisions of the ECtHR do not provide a comprehensive framework of requirements; yet their examination allows us to identify some general trends which reflect the Court's attitude towards domestic and sexual violence.[23] In short, the ECtHR case law tends to frame the obligation to punish domestic and sexual violence within articles 2 and 8, relating respectively to the right to life and the right to private and family life.[24] Within this general framework the Court often recognise the existence of special protection needs, sometimes considering violence against women as a form of indirect discrimination[25] and sometimes qualifying ill-treatment as a violation of the prohibition of torture enshrined in article 3 of the Convention.[26] The significance of such interpretations should not be underestimated. Indeed, this case law not only ascribes a particular wrongness to domestic and sexual violence but also justifies the introduction for these cases of special regulations aimed at ensuring a more effective functioning of criminal prosecution.[27]

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[23] An overview of the most significant Strasbourg Court jurisprudence on domestic violence can be found in Jonathan Herring, *Domestic Abuse and Human Rights* (Intersentia 2020) 60.

[24] See, among many, *Branko Tomašić and others v. Croatia* (Appl no 46598/06, ECtHR 15 April 2009); *J. L. v. Italy* (Appl no 5671/16, ECtHR 27 May 2021).

[25] As in the landmark case *Opuz v. Turkey* (ECHR 2009-III 107). See also *Talpis v. Italy* (Appl no 41237/14, ECtHR 2 March 2017); *Volodina v. Russia* (Appl no 41261/17, ECtHR 4 November 2019). It is worth noting that such a qualification implies the idea that 'a general practice of national authorities, in this case their inaction, ends up having a prejudicial impact on only one category of subjects, in this case women, and must therefore be considered discriminatory': Alessandra Viviani, 'Violenza domestica, discriminazione e obblighi degli Stati per la tutela delle vittime: il caso Opuz dinanzi alla Corte europea dei diritti umani' [2009] Dir Um Dir Int 669.

[26] See, again, *Opuz v. Turkey*, cit.; more recently *Valiuliene v. Lithuania* (Appl no 33234/07, ECtHR 23 March 2013). For further information on the basis of this solution and on the different orientation followed by the Inter-American Court De Vido, *Donne, violenza e diritto internazionale* (n 13) 67.

[27] In fact, the prohibition enshrined in article 3 of the Convention is absolute and does not admit limitations arising from the need to protect other fundamental rights; hence, for example, it is impossible to exclude the application of criminal sanctions even in cases where this is requested by the victim of the offence. On this point Herring (n 23) 80.

Given this background, in order to assess the impact of the European Convention on Human Rights on national policies to combat violence against women, it is worth recalling that on some occasions the Strasbourg Court has even affirmed the obligation of member States to criminalise specific types of conduct. Here we can cite the case of *M.C. v. Bulgaria*, in which the ECtHR clarified that the positive obligations of protection, stemming from articles 3 and 8 of the Convention, require an actual suppression of non-consensual sexual acts - regardless of any form of resistance expressed by the victim.[28] However, it is much more frequent that the Court criticises the violation of procedural obligations, lamenting the failure of States to carry out prompt investigations or to take appropriate protective measures. Clearly, in these cases the ECtHR implicitly recognises an obligation to criminalise as the existence of a criminal offence is a logical precondition for an effective trial and for the adoption of measures aimed at protecting the victim from a potential recurrence of the crime; however, here the Court usually limits itself to ordering the State to paying compensation without adopting any further general recommendations.[29]

With respect to this trend, the only exceptions are represented by cases where there are serious structural deficiencies.[30] It should nevertheless be emphasised that, even when there is no real obligation to change the national legal framework, in case of conviction the State is prompted to reform the law by the necessity to avoid a new breach of the fundamental right. From this perspective we can consider the example of Italy, recently convicted for failing to protect a woman victim of domestic violence (*Talpis v. Italy* Appl no 41237/14, ECtHR 2 March 2017). [31] As a result of this decision condemning the Italian State for having violated the right to life and the prohibition of discrimination, the Parliament approved law 19 July 2019, no 69, the so-called Codice Rosso which, with the intention of ensuring a faster response of the criminal justice system,

[28] For the sake of completeness, it should be pointed out that, in order to enforce the Court's decision, the Bulgarian government has not amended the provisions of the criminal code relating to the crime of sexual violence; however, it addressed circulars to police and judicial offices to guide the investigation in cases of sexual violence (see the Appendix to the Resolution of the Council of Ministers ResDH(2011)3). In more recent case law, a similar recognition of obligations to criminalise can be found in the case of *Söderman v. Sweden* (Appl no 5786/08, ECtHR 12 November 2011), in which the Strasbourg Court affirmed the need to punish the abusive acquisition of sexual images of minors. Shortly before the conclusion of the case, the Swedish Parliament amended the criminal code so as to criminalise the conduct brought to the Court's attention.

[29] On this point Viganò (n 5) 2677.

[30] See, in this perspective, the recent case of *Tunikova and others v. Russia* (Appl no 55974/16, ECtHR 14 March 2022), where the Court affirmed the Russian State's duty to amend its criminal legislation to ensure effective suppression of domestic violence against women (in particular, on the conditions to order general measures aimed at ending the violation, see para 146).

[31] For more details on the findings of the ECtHR Bruno Nascimbene, 'Tutela dei diritti fondamentali e "violenza domestica". Gli obblighi dello Stato secondo la Corte EDU' [2018] Leg Pen 1, 3.

established a 'fast track' for the prosecution of domestic abuse cases.[32] To sum up, we can say that, so far, on the one hand, the ECtHR has rarely forced States to amend their criminal law to fulfil specific duties to criminalise.[33] On the other hand, by sanctioning them, it has pushed States to adopt reforms aimed at ensuring a more effective fight against domestic and sexual violence.

Turning now to the Istanbul Convention, in order to assess the impact of this treaty on national criminal policy, it is useful to provide some preliminary clarifications regarding its content and efficacy. Firstly, it should be pointed out that - as already mentioned - the Convention contains both specific obligations to criminalise (art 33 ff.) and broader duties of prevention, protection and prosecution (art 49 ff.). In this general framework, a significant element lies in the choice to qualify violence against women as a 'manifestation of the historically unequal power relations between the sexes'.[34] Indeed, although it takes a gender-neutral approach in defining domestic violence and identifying the corresponding obligations to criminalise,[35] the Convention recognises the importance that cultural factors play in the aetiology and suppression of violence against women.[36] Consistently, it considers the promotion of gender equality as an essential instrument of prevention. Secondly, looking at the efficacy of the treaty, we have already mentioned that its enforcement is ensured by the monitoring activity of GREVIO - a body that has no means of coercion yet is able to exert notable pressure on governments, acting on a reputational level. Finally, it is worth pointing out that the ability of signatory States to make reservations confers to single provisions a different binding power.

In light of the preceding clarifications, it should be easier to identify the role played by the Istanbul Convention in the suppression of domestic and sexual violence. First, we can state that this treaty has prompted European legislators to criminalise conduct violating essential rights that was previously considered licit or not worthy of

[32] For an overview of the amendments regarding the procedural law Lorenzo Algeri, 'Il c.d. Codice rosso: tempi rapidi per la tutela delle vittime di violenza domestica e di genere' [2019] Dir Pen Proc 1363. To complete, it should be recalled that Italy has recently been convicted again – *Landi v. Italy* (Appl no 10929/19, ECtHR 7 April 2022) – for not having reacted promptly and effectively in a case of domestic violence; in the explanatory statement, however, the Strasbourg Court acknowledges that the State has moved to remedy the existing problems, by approving law no 69 of 2019.

[33] Therefore, the conclusion of Manacorda (n 10) 1399 still appears to be valid.

[34] See the preamble to the Convention.

[35] For further information on the meaning of the apparently contradictory choice adopted by the Convention, Herring (n 23) 101; in an historical perspective, which considers the influence exerted by feminist movements, De Vido, *Donne, violenza e diritto internazionale* (n 13) 83.

[36] From this point of view, the Istanbul Convention appears to have been influenced by the approach adopted by the CEDAW, which, starting from the already mentioned Recommendation no 19, qualified violence against women as a form of discrimination: on this point and on the link between cultural norms and the 'selective tolerance' of State apparatuses, Joan Fitzpatrick, 'The Use of International Human Rights to Combat Violence Against Women' in Rebecca J Cook (ed), *Human Rights of Women. National and International Perspectives* (University of Pennsylvania Press 1994) 534.

punishment. Since it is not possible to examine the full Convention, let us focus on the obligation to criminalise sexual violence: according to article 36 of the Convention State parties are required to take the 'necessary legislative or other measures to ensure' that the intentional 'engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object' is criminalised as well as the 'engaging in other non-consensual acts of a sexual nature with a person'. As the offence of rape has traditionally focused on the conduct of coercing another person to commit sexual acts, after the ratification of the Convention some European countries have changed their criminal laws. As an example, we can refer to the case of Germany which, with the *Fünfzigstes Gesetz zür Änderung des Strafgesetzbuches* of 9 November 2016, amended § 176 to criminalise the conduct of 'one who commits sexual acts with a person against his recognisable will'.[37] In the same vein, one may also recall Spain's recent decision to recast the regulation of crimes against sexual freedom (*Ley Orgánica de garantía integral de la libertad sexual,* of 6 September 2022): the new article 178 punishes as sexual violence 'anyone who performs acts violating the sexual freedom of another person without that person's consent'; it also specifies that 'consent shall only be deemed to exist when it has been freely expressed by acts which, taking into account the circumstances of the case, clearly express the person's will'. It is true that this reform is the outcome of a wide-ranging mobilisation, triggered by the scandal caused by the ruling in a case of sexual assault.[38] However, the legislative debate shows that it is also justified by the need to enforce the Istanbul Convention and eliminate the risks of secondary victimisation arising from the previous distinction between acts of violence or intimidation (sexual assault, agresión sexual) and mere sexual abuse (abuso sexual).[39]

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[37] Fünfzigstes Gesetz zür Änderung des Strafgesetzbuches - Verbesserung des Schutzes der sexuellen Selbstbestimmung, vom 4 November 2016, BD-Drucksache 18/9097. The need to reform § 177 StGB, in order to ensure its compliance with the Istanbul Convention, had already been advocated by Tatjana Hörnle, 'Menschenrechtliche Verpflichtungen aus der Istanbul-Konvention: ein Gutachten zur Reform des § 177 StGB' [2015] Deutsches Institut für Menschenrechte 1, 8, to whom we refer also for an in-depth discussion regarding the technical solutions that could be used in order to achieve this result.

[38] Reference is made to the so-called 'Manada' case, concerning an episode of sexual violence committed by five men against a young woman, who tolerated the acts passively. At first, the defendants had been convicted of the less serious offence of sexual abuse, due to the lack of any physical violence or coercion. For more details on the case see Patricia Faraldo Cabana, '¿Intimidación o prevalimiento? La sentencia de La Manada y los delitos sexuales en España' [2018] Crim Justice Network <www.criminaljusticenetwork.eu/it/post/intimidacion-o-prevalimiento-la-sentencia-de-la-manada-y-los-delitos-sexuales-en-espana> accessed 29 March 2023. For the sake of completeness, it should be noted that the reform in Germany was also occasioned by a mass movement, sparked by a series of sexual assaults committed on New Year's Eve 2016 in several German cities. However, this circumstance does not seem to have significantly affected the amendment of § 178 StGB. On this point, Anja Schmidt, 'Zum Zusammenhang von Recht, Moral, Moralpolitik und Moralpanik am Beispiel der Reform des Sexualstrafrechts' [2018] Zeitschrift für Rechtssoziologie 244, 245.

[39] See Congreso de los Diputados. Boletín oficial de las cortes generales, Proyectos de Ley, Nùm 62-5, 9. Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual.

To summarise, we can state that regional human rights treaties have in fact influenced criminal policy, giving impetus to the criminalisation of forms of violence that have traditionally been considered not worthy of punishment. Admittedly, national legislators have only rarely been 'forced' to amend criminal laws; they have more often responded also to demands for reform that were already widely felt by society. Nevertheless, there is no doubt that human rights law has strengthened and speeded up the passage of such reforms.

4 The limits of international human rights law

Having shed light on the contribution of the ECtHR case law and the Istanbul Convention to the affirmation of the prohibition of violence against women, we must now investigate the problems arising from the use of international treaties to counter domestic and sexual violence. Here, we need not deepen the objections that have been raised with regard to the transfiguration of human rights law that results from its use as a penal driver.[40] Rather, we want to assess whether human rights conventions are an appropriate means to achieve the objective of eliminating violence against women. Indeed, we have already mentioned that prominent scholars argue that international law has led our system to an excessive hardening of the punitive response.[41]

As a matter of fact, we can first of all observe that the reforms in Italy over the last few years have increased the penalties for the offences traditionally used to punish domestic and sexual violence. In particular, it seems that the legislator has tried to stigmatise an ideological element which can be identified in the patriarchal culture typically underlying such forms of aggression. In this perspective, we can consider the Italian law no 69 of 2019: in addition to the previously mentioned amendments relating to procedural law, it has introduced the offence of permanent disfigurement of the face (art 583-*quinquies* of the criminal code), punishing this conduct with a harsher penalty than that resulting from the application of the offence of intentional injury in its most severe degree. The lawmaker was prompted to amend the criminal code by some serious episodes of so-called *vitriolage*, ie, attacks committed with corrosive acid and animated by the intent to destroy the partner after the break-up of a relationship;[42]

[40] Indeed, some scholars believe that such a process leads to a weakening of international human rights law, since it reduces the stigma generally associated with the application of its protection instruments. For details and other critical observations, concerning the use of international human rights law to criminalise violence against women Kenneth Roth, 'Domestic Violence as an International Human Rights Issue', in Hilary Charlesworth and others (eds), *Human Rights of Women. National and International Perspectives* (University of Pennsylvania Press 1994) 332.

[41] See para 1.

[42] The idea of introducing a rule specifically aimed at punishing facial disfigurement is not new: Bill no 2757, submitted to the Senate during the 17th legislature, had already moved in this direction, speaking about 'identity murder'. On this proposal Marco Venturoli, 'Il sistema penale sul «baratro» della disintegrazione semantica. Note critiche al disegno di legge in materia di omicidio di identità' [2018] Leg Pen 1.

therefore, it has elevated this type of injury to an autonomous offence so as to stigmatise the intentional harm contained in such extremely serious forms of aggression. The same rationale explains the choice of law no 69 of 2019 to increase the penalties provided for the offences of domestic ill-treatment (art 572 of the criminal code) and sexual violence (art 609-*bis* of the criminal code): the sentences resulting from these amendments can only be understood from the perspective of condemning the violation of human dignity that is embedded in these kinds of aggression.[43] Finally, it is important to bear in mind that even other European countries have recently chosen to emphasise the discriminatory purpose pursued by the perpetrator as an aggravating circumstance: here, we can mention the example offered by Spain which, since 2015, includes a special circumstance focused on the perpetrator's machoistic motive.[44]

The above-mentioned reforms reflect the increasing awareness of the severity of domestic and sexual violence. At the same time, they intend to exploit the deterrent effect of criminal law and its ability to act as a means of cultural orientation. In other words, the legislator, by creating special aggravating circumstances and offences, aims to stigmatise the acts criminalised and to condemn the patriarchal attitude they express.[45] On closer examination, however, one can doubt the efficacy of the tightening of such sanctions: in fact, the above regulations are targeted at individuals who mostly act irrationally, thus revealing a limited capacity to serve as an instrument of social orientation.[46] Moreover, such reforms risk undermining the principles of proportionality and materiality.[47] Finally, since it is difficult to prove elements related

[43] Francesco Palazzo, 'La nuova frontiera della tutela penale dell'eguaglianza' [2021] Sist Pen 1, 3.

[44] Reference is made to article 22 para 4, introduced by *Ley Orgánica 1/2015*. The *Ley Orgánica* of 6 September 2022 required that this circumstance be applied to the new crime of sexual violence. Finally, it is worth mentioning that the *Ley Orgánica 1/2004* already introduced offences aimed at punishing more severely the commission of several offences against physical and moral integrity by men against persons with whom they are, or have been in a relationship. For further information on the latter provisions and on their interpretation in the case law of the Spanish Constitutional Court, Anna Maria Maugeri, 'Le "aggravanti" nei confronti degli uomini autori di "violenza di genere" nella disciplina spagnola: possibile strategia politico criminale o strumento di una politica della "sicurezza" discriminatoria?' [2016] Jura Gentium <www.juragentium.org/forum/violenzadonne/it/maugeri.html> accessed 29 March 2023. For an overview of current regulations in Spain aimed at sanctioning domestic and gender-based violence, see instead Francisco Muñoz Conde, *Derecho penal. Parte especial* (Tirant lo Blanc 2017) 181.

[45] On the function of cultural orientation of "gender" incriminations see, in the Spanish literature, Patricia Laurenzo Copello '¿Hacen falta figuras género específicas para proteger mejor a las mujeres?' [2015] Estudios Penales y Criminológicos 787; in the Italian one, Maugeri, *I reati sessualmente connotati* (n 2) 108. In the North American literature, on the contribution of criminal law to the production of cultural change, Cass R Sunstein, 'Social Norms and Social Roles' [1996] Columbia L Rev 904, 912.

[46] Francesco Palazzo, 'Nemico-Nemici-Nemico: una sequenza inquietante per il futuro del diritto penale' [2020] Riv It Dir Proc Pen 701, 709; Vitarelli (n 2) 466.

[47] On the first point see, with specific reference to the Italian new offence of permanent disfigurement of the face, Venturoli (n 42) 18. On the second point, we can recall the reflections developed in German doctrine with reference to hate crime: Frauke Timm, 'Tatmotive und Gesinnungen als

to the emotional sphere, increases in sentences based on cultural factors are strongly in tension with the principle of legality.

To sum up, we can state that the choice of aggravating the penalties for violence expressing a culture of discrimination stands in contrast to certain key criminal law guarantees. From this point of view, the criticism of the most recent reforms on domestic and sexual violence is therefore justified. Having clarified this point, we still have to understand whether this change is a result of the necessity to fulfil international requirements. In this regard, it is true that the aforementioned laws are consistent with the approach adopted by the Istanbul Convention which, as seen, recognises violence against women as a phenomenon closely related to culture and urges member States to implement measures aimed at eliminating gender inequalities. However, this treaty does not include specific indications concerning the need to make the perpetrator's misogynist or sexist ideology an aggravating element.[48] Indeed, article 42 merely states that, in case of domestic and gender-based violence, no excusing or mitigating conditions may be applied in relation to 'culture, custom, religion, tradition or so-called "honour"'. Furthermore, article 47, listing the elements to be assessed in sentencing, gives relevance to the relationship between victim and perpetrator without mentioning cultural motivations. In brief, there is no obligation to punish more harshly any conduct committed with a sexist motive; therefore, it is inappropriate to hold international sources responsible for the choices made in domestic legislature.

A more in-depth analysis needs to be made regarding procedural obligations. The premise is that the Istanbul Convention moves from the idea that, in order to combat violence against women effectively, it is necessary to punish any conduct ascribable to this phenomenon.[49] Therefore, it sets out not only specific obligations to criminalise, but also procedural duties aimed at ensuring the efficacy of State law enforcement. In this general framework, in order to understand the problems arising from such a punitive

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Strafrechtschärfungsgrund am Beispiel der "Hassdelikte"' [2014] Juristische Rundschau 141, 146; Hörnle, 'Menschenrechtliche Verpflichtungen aus der Istanbul-Konvention' (n 37) 97; on the relationship between violence against women and hate crime, see Leonie Steinl, 'Hasskriminalität und geschlechtsbezogene Gewalt gegen Frauen: Eine Einführung aus strafrechtlicher Perspektive' [2018] Zeitschrift für Rechtssoziologie 179, 191; Luciana Goisis, *Crimini d'odio. Discriminazioni e giustizia penale* (Jovene 2019) 453.

[48] On the different meanings of misogyny and sexism, Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press 2009) 143.

[49] At this regard, the influence exerted by the 'battered women's movement', which arose in the second half of the last century in the United States of America and then progressively spread in Europe, emerges. On the relationship between the Istanbul Convention and the claims of feminist movements, Lorena Sosa, 'The Istanbul Convention in the context of feminist claims' in Johanna Niemi and others (eds) *International Law and Violence against Women. Europe and the Istanbul Convention* (Routledge 2020). For an analysis of the influence on North American criminal policy of what has also been called 'carceral feminism', Leigh Goodmark, 'The Unintended Consequences of Domestic Violence Criminalization: Reassessing a Governance Feminist Success Story' in Janet Halley and others (eds), *The Governance Feminism* (University of Minnesota Press 2019) 125.

approach, we can focus on article 55(1) of the Istanbul Convention. According to this provision, 'Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35 [physical violence], 36 [sexual violence], 37 [forced marriage], 38 [female genital mutilation] and 39 [forced abortion and forced sterilisation] of this Convention shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint'.[50]

This norm establishes the priority of the public interest in the prosecution of the crime over the protection of the victim's privacy. In fact, on the one hand article 55 of the Convention indicates *ex officio* prosecution as the main regime for the investigation of acts of physical and sexual violence, on the other hand it requires a judicial authority not to abstain from prosecuting once an offence has been reported. Of course, the provision is also intended to protect the victim from any pressure aimed at getting him/her not to cooperate with law enforcement agencies. Moreover, as the victim's testimony is crucial for proving in domestic and sexual violence, its ultimate objective is to ensure the efficacy of the State's criminal law response to offending.

Now consider the Italian system. Italy has traditionally adopted an intermediate approach in that in many cases it leaves the victim the right to choose whether to proceed or not with prosecution.[51] Without modifying this framework, more recently the legislation has undergone several amendments aimed at avoiding inhibition of prosecutions after a report has been collected.[52] As examples, we can mention the decision to make the complaint irrevocable in cases of aggravated stalking (art 612-*bis* of the criminal code, as amended by art 1 lett. B), law no 119 of 15 October 2013), and, most recently, the exclusion from the scope of article 131-*bis* of the criminal code, of personal injuries inflicted by a person upon someone with whom they are, or have been in a relationship (art 21 lett. a), law no 134 of 27 September 2021).

These provisions have a worthy rationale. Similarly, it must be considered that, historically, norms such as article 55 of the Convention have promoted the idea that domestic violence must never be justified. From a critical point of view, it must nonetheless be considered that recent studies carried out in the United States highlight how a strict punitive approach can have the unintended consequence of hampering the

[50] For the sake of completeness, it is worth noting that, on several occasions, the ECtHR has also held that the withdrawal of the complaint by the victim does not relieve the State of its duty to protect her from domestic violence (see para 88 of *Levchuk v. Ukraine*, Appl no 17469/2019 of 3 December 2020).

[51] One can think from this perspective of the offences against sexual freedom committed against adults (art 609-*septies* of the criminal code); but the same considerations also apply to slight and minor injuries (art 582(2) of the criminal code).

[52] In this regard, it is important to emphasize that the same perspective adopted by the Istanbul Convention is transposed, with reference to sexual violence, into art 17(5) of the Proposal for a Directive mentioned above, n 1 and 21.

disclosure of domestic violence.[53] It is precisely measures like prohibiting the dismissal of proceedings that can have problematic results.

For instance, in an intimate relationship, the victim may often want the violence to stop without also desiring the punishment of the offender. For this reason, the victim can be discouraged from asking the institutions for help, if he/she has no control over the consequences deriving from the report. Moreover, in cases of economic vulnerability, the tendency not to report is increased by the fear of losing any financial support as a consequence of the potential imprisonment of the abusive partner. Scholars also observe that no-drop prosecution policies contribute to the 'institutionalisation' of the criminal response to family violence, thus conveying a negative prejudice against women who do not report the abuse. In this way, they lead the victim to be uncooperative out of fear of losing custody of minors if habitual violence emerges. Finally, since empowerment strategies make women less disposed to accepting any form of submission, it might be better to ensure the full involvement of the victim at each stage of criminal proceedings if domestic violence is to be confronted effectively.

To clarify, the aim of these reflections is not to criticise the rationale of article 55 of the Convention As it is impossible to deal with such a complex issue in this paper, we avoid taking any position concerning the most appropriate rules to prosecute domestic violence. The aim is only to point out that the punitive approach adopted by the Istanbul Convention may prove to be inadequate to achieve the goal of eliminating this type of violence. More generally, it is therefore justified to doubt the ability of human rights law to work as a criminal policy instrument. Indeed, it is known that international human rights treaties are generally inspired by a retributive conception of criminal justice and may therefore prove unsatisfactory if we assess their ability to combat criminal phenomena.

5 Final remarks

The analysis carried out in the previous sections now allows us to set out some final remarks on the role of human rights law in the suppression of violence against women.

To this end, it is first necessary to clarify the contribution that international human rights law has made to our domestic legal systems so far. At this regard, it would not be exaggerating to ask the same question formulated about twenty years ago by the feminist philosopher Catharine MacKinnon: 'Are Women Human?'.[54] Indeed, leaving aside the criticism of radical feminism regarding the structural incapacity of human

[53] See Michelle L Meloy and Susan L Miller, *The victimization of women: Law, Policies, and Politics* (Oxford University Press 2011) 123; and more recently, Goodmark (n 49) 133.

[54] Cathrine MacKinnon, 'Are Women Human?' (1999) in Cathrine MacKinnon, *Are Women Human? And Other International Dialogue*s (Belknap Press 2007).

rights law to eliminate gender inequalities,[55] it must be emphasised that, as pointed out earlier, there are currently no treaties in force on a universal level obliging States to sanction violence against women.[56] In addition, it is now worth highlighting that international scholars reject the proposition that the prohibition of gender discrimination has become a principle of customary law on which to ground a general obligation to penalise violence against women.[57] The situation does not appear to improve when we turn to covenant law; indeed, it is true that the prohibition of discrimination on grounds of sex is laid down in some universal treaties. Nevertheless, if we compare the regional conventions, a number of significant differences regarding the meaning of this prohibition can be deduced. In particular, it is known that in some areas there is a strong reluctance to accept the principle of gender equality which, as seen, the Istanbul Convention considers crucial in effectively combating violence against women.[58] In other words, although progress has been made in recent decades, international law has not yet succeeded in becoming a universal means of suppression violence against women. Meanwhile, the analysis of the sources in force on a regional level raises doubts about the claim of universalism from which human rights gain the power to limit State sovereignty.

A slightly different scenario can be observed in Europe. This paper has revealed that, although international human rights law has given impetus to significant amendments of penal systems, only rarely can we say that lawmakers have been 'forced' to change national law specifically to avoid sanctions based on the violation of obligations to criminalise. More often, international sources have been used to justify the acceleration of already existing reform processes or to strengthen arguments for actions with a broad social support. However, human rights law contributes to the enforcement of women's security, which other legal sources are unable to do. Firstly, it prompts reforms concerning the functioning of the State law enforcement system. Secondly, it

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[55] At the core of the skepticism expressed by radical feminism is the alleged inability of traditional legal structures to represent the needs of women. For more details, with reference to international law, Hilary Charlesworth, 'What are "Women's International Human Rights"?' in Rebecca J Cook (ed), *Human Rights of Women. National and International Perspectives* (University of Pennsylvania Press 1994) 63; for a cataloguing of feminist currents and some insights into the so-called radical feminism, Gari Minda, *Postmodern Legal Movements. Law and Jurisprudence at Century's End* (Cristina Colli tr, il Mulino 2001), 229. From a historical point of view, there is no doubt that the original focus of international law exclusively on aggressions committed in the public sphere has contributed to placing the phenomenon of domestic and sexual violence in the background: see McQuigg, *The Istanbul Convention* (n 18).

[56] On this point, in critical terms, Ronagh JA McQuigg, 'The Need for a UN Treaty on Violence against Women' [2016] Queen's Policy Engagement <qpol.qub.ac.uk/need-un-treaty-violence-women/> accessed 29 March 2023.

[57] Here see again De Vido, 'The Prohibition of Violence Against Women' (n 6) 380.

[58] See article 3(3) of the Arab Charter of Human Rights, which does not attribute an absolute character to the prohibition of discrimination. For further information on the contents of this treaty and its implications in relation to human rights theory, Federico Lanzerini, *The Culturalization of Human Rights Law* (Oxford University Press 2014) 89.

influences the way domestic and sexual violence is conceived and promotes the harmonisation of existing regional laws. In any case, it is clear that the situation we have just described will change considerably if domestic and sexual violence becomes an area of European Union competence.

To complete our analysis, we must now ask ourselves whether the expansion of international human rights law is a desirable outcome with a view to combating domestic and sexual violence more effectively. In fact, the study carried out on article 55 of the Istanbul Convention has revealed that international law is hardly capable of achieving criminal policy goals. In particular, human rights conventions adopt a retributive perspective and are thus structurally inadequate to operate as instruments to counteract domestic violence. However, this objection can be tempered by observing that States have the power to modulate the binding force of international sources. For this reason, indeed, it becomes crucial to reflect on the most appropriate instruments to ensure the adaptation of international sources to emerging social needs. For example, the opportunity that States have to make reservations to specific parts of a treaty[59] should represent a remedy against any obsolescence that may be manifested by a specific provision without nullifying the validity of the other rules imposed by the Convention. Furthermore, considering that duties of due diligence ensure greater flexibility, we should consider whether they are more appropriate to achieve criminal policy objectives.[60]

In conclusion, we must emphasise that only by adopting a critical approach to international law treaties is it possible to ensure that such sources do not make our legal system regress, and rather, that it continues to operate as a key instrument for the 'humanisation' of our criminal justice system.[61]

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[59] Significantly, international law reveals that the institution of the reservation has evolved so as to facilitate the participation of States in multilateral conventions. In this light, recall the States' ability to make reservations even after negotiation (so-called late reservations). For more on this point, Conforti and Iovane (n 9) 109.

[60] In this regard, see the reflections of Monnheimer (n 12) 142, who, noting the greater 'static nature' of the norms of international law, considers that due diligence duties are better able to adapt to changes in social reality.

[61] On the role of international law as a driver of 'humanization' of contemporary legal systems, Marielle Delmas-Marty, 'Une boussole des possibles. Gouvernance mondiale et humanismes juridiques' in Emanuela Fronza e Carlo Sotis (eds), *Una bussola dei possibili* (1088press 2021).

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PROTECTING WOMEN'S HUMAN RIGHTS THROUGH CRIMINALISATION: SOME CONSIDERATIONS ABOUT THE CASE OF FORCED MARRIAGES IN ITALY

By Giordana Pepè[*]

Abstract

This paper is an exploratory attempt to make some considerations, based on recent concrete data, around the role that criminal law can play against forced marriage. This is a peculiar form of culture-driven violence against women, which (re-)emerged in the context of western multi-ethnical and multicultural societies as a result of immigration in the past decades. After framing the background and the phenomenon, as well as the international legal context and debate, the focus will be on the case of Italy, where an ad hoc *offence has been introduced in 2019. In fact, this kind of legislation, especially in the field of culturally motivated crimes, is often criticised by scholars, who consider it to be merely "symbolic" and risking to submerge existing cases even more. However, the ministerial reports realised in Italy about the incidence of denounced forced marriages show an increase of them from a year to another. The objective of this article is thus to reflect on such evidence, also through a comparison with other empirical studies concerning female genital mutilations, arguing that criminalisation can actually have a concrete role of protection of human rights, specifically those of women, empowering victims and giving them a concrete instrument of opposition.*

1 Multicultural societies, criminal law and forced marriages

1.1 Background context: «the challenge of multiculturalism»[1]

It is unavoidable to start by briefly framing such a specific issue as forced marriage in the context of European (and in general western) societies. These have become always more multiethnical and multicultural due to the migratory flows towards them in the last decades. However, the cohabitation of many people that are different in ethnicity, language, religion and traditions – meaning "culture",[2] in a word – raises conflicts and brings what has been summarised in political philosophy literature as «*the challenge of multiculturalism*».[3] This expression recalls the fact that minority groups, which have been present in a certain country even for generations, start to revendicate their cultural and religious specificities, asking for their recognition by governments, institutions and laws. But such a request can sometimes enter into conflict with other laws or with fundamental rights and thus needs differentiated solutions according to each case.

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[1] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) 9.

[2] According to its most common anthropological conception. For a deeper understanding, see Alfred L Kroeber and Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (The Museum 1952).

[3] See in particular Kymlicka (n 1).

In order to find these solutions and answer the requests for recognition of cultural differences, modern legal systems have adopted and applied mainly two opposite models: the multiculturalist and the assimilationist one. The first is more inspired by the principle of substantial equality and thus aims to safeguard cultural differences of single groups, while the second privileges the idea of formal equality and thus supports the neutrality of the State towards cultural differences.

1.2 The multiculturalist conflict in criminal justice: culturally motivated crimes and the limit of cultural defences

With this summarised context as a background, the described conflicts reflect themselves also in the discipline of penal law. In fact, its aim is to protect individual or collective interests, but these might result offended by certain criminal behaviours that are influenced by cultural factors. Therefore, the criminal justice reflection of the "multiculturalist challenge" is the peculiar contrast that may arise between this very function of penal law and the request for recognition of cultural factors, damaging those same protected interests. This is the core of the so-called "culturally motivated crimes", meaning the acts committed by a person belonging to a minoritarian cultural group, that are considered as crimes in the legal system of the majoritarian culture but are condoned, accepted as normal, or even endorsed or imposed within the culture of the agent.[4]

Such situation has led to the development in trials of what common law legal systems call "cultural defenses": they are arguments emphasizing the cultural factors that have influenced a criminal conduct, in order to obtain a mitigation or the elimination of criminal responsibility.[5] The same has been pursued also in civil law systems, by resorting to some theoretical categories of criminal law, like the justifying circumstance of the exercise of a right or the exclusion of malice.[6] However, in both systems there is general consent over the principle that cultural factors should not receive recognition, or at least should not lead to a total exclusion of responsibility and punishment, when the criminal conduct has offended fundamental and inviolable rights of the person. These, such as life, physical integrity, personal and sexual freedom, can never, for no reason, be infringed.

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[4] Jeroen Van Broeck, 'Cultural Defence and Culturally Motivated Crimes (Cultural Offences)' (2001) 9(1) European Journal of Crime, Criminal Law and Criminal Justice 5.

[5] On this topic, see specifically and extensively Alison Dundes Renteln, *The Cultural Defense* (Oxford University Press 2004).

[6] As for the Italian scenario, see three exhaustive coeval works: Fabio Basile, *Immigrazione e reati culturalmente motivati. Il diritto penale delle società multiculturali* (2nd edn, Giuffrè 2010); Cristina De Maglie, I reati culturalmente motivati. Ideologie e modelli penali (ETS 2010); Alessandro Bernardi, Il "fattore culturale" nel sistema penale (Giappichelli 2010).

1.3 Culturally motivated violence against women, namely forced marriage

As stated at the beginning, it was important to draw these premises, although very generally, because they constitute the necessary starting point and framework to have in mind when focusing on the specific field of culturally oriented violence against women. Here, in fact, the multiculturalist conflict in general and its criminal-law-side are of utmost evidence and seriousness. Indeed, simply taking an eye on the case-law on culturally oriented crimes, it emerges that asserted cultural motivations are most often invoked to justify conducts of domestic or sexual violence against women.

The sometimes-dramatic tension between cultural rights and women's rights, which are a privileged field of the "multiculturalist challenge", has been emblematically depicted, among the first, by the feminist liberal philosopher Susan Moller Okin. In 1997, in fact, she published an essay titled «*Is multiculturalism bad for women?*»,[7] highlighting how the attempt to recognise in any case the cultural differences and the rights of minority groups risks to neglect their discriminatory and patriarchal aspects, with negative effects for women belonging to those same cultures. Women who themselves, according to the examples she brought, perceive some traditions as an imposition, more than a "cultural heritage" to preserve.

It is fundamental not to generalise nor strumentalise this theory, since gender discriminations are widespread and don't lurk only in "foreign" cultures, which shall never be stigmatised as such. However, evidence shows that certain harmful practices against women have remained specific of some cultural and ethnic groups (especially asiatic and african) and have "migrated" with them. In fact, "new" phenomena of gendered violence with strong cultural connotations have recently arisen also within contemporary multicultural societies and have become evident to the public attention due to some famous cases: the most common ones are female genital mutilations and forced marriages.

1.3.1 Definition(s)

Only the second will be examined more in detail in the following paragraphs, but there are many similarities and shared characteristics between the two phenomena: therefore, short parallelisms will be traced, when useful for a more comprehensive understanding.

[7] Susan M Okin, 'Is Multiculturalism Bad for Women?' [1999] Boston Review. In the same year the essay was published also in a book, together with answers and comments by other scholars, forming a sort of written debate: Martha Nussbaum, Joshua Cohen and Matthew Howard (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999).

Starting from the definition, in the absence of a universally recognised one, the indications coming from the UK Forced Marriage Unit[8] result clear and complete: «*a forced marriage is one in which one or both spouses do not (or, in the case of minors or some adults who lack the relevant mental capacity, cannot) consent to the marriage, and violence, threats, or any other form of coercion is involved*».[9]

First, it has to be clarified that the term "marriage" includes not only those having civil effects in a certain legal system, but also religious marriages and whatever union (or even just *more uxorio* cohabitation) having the meaning of a marriage within a community. Second, the attention shall be pointed on the extortion of a consent to marry, through different types of coercion varying from physical violence to psychological violence, threats and even more subtle pressures. These are often based on parental authority, economic or emotional blackmails, blaming and controlling the victim, who *de facto* cannot even conceive an alternative to accepting the marriage.

Those two elements – the lack of consent and the presence of coercion – distinguish forced marriages from arranged ones: even if the concrete difference can be sometimes hard to trace, arranged marriages are characterized by an important role of the families in the partner choice, but the final decision remains with the future spouses.

A partly different phenomenon is child marriage (or early marriage), where at least one of the involved parties is a minor under 18: this is often considered, especially in international legal sources, as a form of forced marriage, regardless of the presence of a concrete coercion, presuming the invalidity of any consent given by a minor.[10]

1.3.2 Characteristics

Some other aspects (which are also present in cases of female genital mutilations) are important to be mentioned. Forced marriages occur mostly in the familiar sphere: victims are mainly, even if not exclusively, young women coming from immigrant communities and families, often second - or third-generation immigrants of various origins. This dimension often reduces victims' willingness to denounce their own

[8] This is a Government institution, which was created in 2005 specifically to monitor the phenomenon and provide victims with assistance and support. See its dedicated website section: <www.gov.uk/guidance/forced-marriage> accessed 28 May 2023.

[9] Home Office, Foreign, Commonwealth & Development Office, *Forced Marriage Unit statistics 2021* (2022) <www.gov.uk/government/statistics/forced-marriage-unit-statistics-2021/forced-marriage-unit-statistics-2021> accessed 28 May 2023. Other similar definitions can be found in some documents of international organisations, like those cited in note 16.

[10] See, in this regard, United Nations Committee on the Elimination of Discrimination against Women & Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, CEDAW/C/GC/31-CRC/C/GC/18 (New York, 14.11.2014) 7, para. 20. This and the other cited United Nations documents can be found at <digitallibrary.un.org/>.

relatives, which adds to cultural resistences to ask help, as well as to the difficulties and sometimes isolation that immigrated people typically face.

Forced marriages are also characterised by transnationality, being often celebrated abroad, in the country of origin of the victims, which makes their prevention and repression very difficult, especially due to the territorial limits of criminal law.

But, most of all, the main reasons behind this phenomenon are all related with cultural, patriarchal and identitary dynamics, and particularly with the attempt to control women's behaviours, in their relational and sexual life.

These characteristics impose to approach the issue under a double, interconnected perspective: as a human rights violation and as a form of gender violence, hitting mostly women (although there is also a minority of male-victims[11]) and their right to free self-determination in personal, sexual and family life.

1.3.3 The difficulty of collecting overall data

Given their described peculiarities, it is very difficult to investigate and collect data on forced marriages, which remain a mainly submerged practice. Globally, we can only count on the UNICEF numbers on child marriage, a phenomenon that however is not precisely coincident with forced marriage, as explained above. The 2022 figures confirm that there are 12 million child brides per year in the globe.[12]

Otherwise, we have to rely on older country-based research,[13] while very rare regular statistics are realised by some institutions. One is the mentioned UK Forced Marriage Unit, that publishes an annual report on the cases it gives advice for,[14] which just helps to get an idea of the prevalence of the phenomenon there and in Europe. In any case, all the available data show only the tip of the iceberg, represented by the situations that

[11] In fact, available European researches (which will be mentioned below, in notes 13 and 15) show that some of the coerced spouses are young men. Another interesting aspect is that a slight number of victims does not come from migratory backgrounds.

[12] UNICEF Data, *Child marriage* (2022) <data.unicef.org/topic/child-protection/child-marriage/> accessed 20 June 2023.

[13] For example, a German study related to 2008 had detected 3.443 cases, of which 8% regarded men and 70% victims aged between 16 and 21: see Thomas Mirbach and others, *Zwangsverheiratung in Deutschland. Anzahl und Analyse von Beratungsfällen*, Bundesministerium für Familie, Senioren, Frauen und Jugend (Verlag Barbara Budrich 2011, short version available at <www.bmfsfj.de/resource/blob/95584/d76e9536b0485a8715a5910047066b5d/zwangsverheiratung-in-deutschland-anzahl-und-analyse-von-beratungsfaellen-data.pdf> accessed 20 June 2023. A research conducted in 2008 in the Italian region Emilia Romagna showed 33 cases of forced marriage: see Daniela Danna, *Per forza, non per amore. Rapporto di ricerca sui matrimoni forzati in Emilia Romagna: uno studio esplorativo* (Trama di Terre 2009) <www.danieladanna.it/wordpress/matrimoni-forzati-in-emilia-romagna/> accessed 20 June 2023.

[14] For the last one, see Forced Marriage Unit statistics 2021 (n 9).

have been denounced to the police or to associations protecting victims. The actual number of cases is thus supposedly higher everywhere.[15]

2 International legal and theoretical framework

2.1 International and European stance: the 2010 Istanbul Convention

International and European organisations have strongly condemned forced marriage. In fact, many soft-law and not-binding documents, succeeding each other, have from one side enshrined that women's rights can't be violated in the name of tradition and culture, and from the other side recommended States to adopt adequate laws in order to prevent and repress, also criminally, the phenomenon.[16]

Both these aspects have become legally binding for the States that signed and ratified the most important document in the field: the 2011 Istanbul Convention of the Council of Europe on preventing and combating violence against women and domestic violence, which for the first time imposed them to criminalise the practice. In particular, this legal obligation is established by Article 37 («*forced marriage*»), which asks ratifying States to «*take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised*». And the same for «*luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage*». To ensure the

[15] As for the United Kingdom, a study in 2008 had extended the analysys to episodes denounced to British associations others than the Forced Marrige Unit, estimating overall between 5.000 and 8.000 cases: see Anne Kazimirski and others, *Forced Marriage: Prevalence and Service Response*, Department of Children, Schools & Families, Research Report DCSF-RR128 (National Center for Social Research 2009) <oro.open.ac.uk/44739/1/__userdata_documents4_pk4594_Desktop_My%20Documents_forced-marriage-prevalence-service%5B1%5D.pdf> accessed 20 June 2023, 24.

[16] Those international documents had dealt with forced marriages initially as a form of modern slavery and progressively as an expression of gender violence, while in more recent years the phenomenon became specific object of reports, recommendations and resolutions, specifically by organisms of the UN, EU and Council of Europe. See, just as examples, United Nations Economic and Social Council, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (Geneva, 07.09.1956) Articles 1, 2; United Nations Committee on the Elimination of Discrimination Against Women, *CEDAW General recommendation No. 19: Violence against women* A/47/38 (New York, 1992, 11th session) para. 11; United Nations General Assembly, United Nations Secretary General, *In-depth study on all forms of violence against women – Report of the Secretary-General*, A/61/122/Add.1 (New York, 06.07.2006) 40, para. 122; CEDAW/C/GC/31-CRC/C/GC/18 (n 10) 7, para. 23; United Nations General Assembly, Resolution *Child, early and forced marriage*, A/RES/71/175 (New York, 19.12.2016); European Parliament, *Towards an EU external strategy against early and forced marriages — next steps*, Resolution no. 2275 (Strasbourg, 04.07.2018); Council of Europe, Parliamentary Assembly, *Forced marriage in Europe*, Resolution no. 2233 (Strasbourg, 28/06/2018) <www.coe.int/en/web/cm/documents> accessed 20 June 2023; International Labour Organization, Walk Free and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Geneva, 2022) <www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf> accessed 20 June 2023.

repression of such behaviours, therefore, it was not expressely requested to introduce a new offence.

Article 42,[17] on the other hand, provides for the prohibition of cultural justification, affirming the unacceptability of any violation of women's rights in the name of culture, tradition, or honour. More generally, the Convention recalls the need for adequate laws to prevent and repress, among other forms of gender violence, also forced marriages, as well as to sensitise, monitor and collect data about them.

2.2 *Ad hoc* criminalisation around Europe

Also as a consequence of the international indications, and in some cases even before the Istanbul Convention, the majority of European legislators have intervened by introducing in their criminal systems a specific offence addressing forced marriages.[18] And it is worth mentioning that similar laws have been adopted also in some non-European countries where the practice is particularly widespread. Nevertheless, despite the mentioned international stance, such legislative choice all over Europe has been strongly criticised by the criminal and socio-anthropological sciences and even by the feminist movement.

At the same time, as previously happened with female genital mutilations, the new norms have been scarcely applied by European courts and the case-law has remained very limited, not implying, however, that the phenomenon has disappeared. For this reason, the debate – which has animated the scholars before and after the introduction of these offences – around the usefulness of criminal law in combating traditional and cultural practices offending women's rights, turns out to be still actual. Thus, it will be first mentioned in the coming paragraph, before trying to argue in the following ones, through some empirical evidence from the Italian case, that criminal law can actually play an important and necessary role.

2.3 The evergreen debate around criminalisation

As anticipated, there are many similarities between the phenomena of forced marriages, female genital mutilations and other forms of honour-based violence.

[17] Named «Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"», its first paragraph states: «Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.».

[18] Following a research of the European Parliament, in 2016 they were 19 among 34 (including the 28 members of the European Union): see European Parliament, Directorate-General for Internal Policies, Women's Rights & Gender Equality, *Forced marriage from a gender perspective* (Policy Department C: Citizens' Rights and Constitutional Affairs, Brussels, 2016) <www.europarl.europa.eu/RegData/etudes/STUD/2016/556926/IPOL_STU(2016)556926_EN.pdf> accessed 20 June 2023. The number is nowadays higher.

Therefore, also the arguments that are usually brought by scholars against or in favour of their criminalisation are generally the same. They are in part based on considerations about specific legislative systems or practical implications for the victims and in part they rely on more theoretical and philosophical stances.

First of all, it has been frequently argued that European legislations could already count on norms protecting physical integrity and personal freedom per se. But – leaving apart the technical details of the norms – this statement probably fails to consider the very peculiar disvalue of such behaviours, which go beyond a mere attack to the integrity of the body or to freedom, being aimed at controlling the life of women. Reason why a criminal norm in this sense can help to convey, within the "targeted" communities, a message on the harmfulness of such conducts.

Another fear of the detractors of criminalisation is that this would result counterproductive: in fact, the risk to subject their families to a criminal trial would disincentive the victims to denounce their situation even to anti-violence centres, making the number of cases still more obscure. But, on the other hand, naming the harmful conducts in a clear way could represent an instrument of empowerment of the victims, raising awareness of the unfairness of their situations and, when possible according to their age, giving them legitimation to oppose.

However, the most frequent argument against criminalisation is that it would be merely symbolic, stigmatising negatively foreign cultures and traditions, just to affirm western values. This issue is extremely delicate and is at the core of a dated-back philosophical and anthropological debate, which is impossible to summarise here. Nonetheless, what we are trying to point out in this essay is that the role played by criminal law, even when symbolic, can be a positive one, of cultural orientation against practices that are, yes, traditional, but indeed harmful.

3 Italian context, criminal norm and recent data

3.1 Previous scenario and introduction of a specific offence

In order to reflect about some possible implications of criminalisation, it is interesting to consider the case of Italy. Notwithstanding the extremely scarce empirical research and available data on the prevalence of the phenomenon on its territory, a specific offence against forced marriage has been created in 2019.[19] Named "costraint or

[19] Art. 558-*bis* Italian criminal code. Costraint or induction to marry. (Offense translated by the Italian version.)
Whoever, by means of violence or threat, forces a person to contract a marriage or civil union shall be punished with imprisonment for one to five years.
The same punishment shall apply to anyone who, taking advantage of a person's conditions of vulnerability or psychological inferiority or need, with abuse of family, domestic, work relations, or of the authority deriving from the person's entrustment for reasons of care, teaching or education, supervision or custody, induces that person to enter into a marriage or civil union.

induction to marry", it was introduced by a more comprehensive law dealing with substantial and procedural aspects of the prevention and repression of violence against women.[20] The aim of this brief contribution is not to go into the technicalities and describe the provision and its possible limits,[21] but rather to focus on the specific issue of the use of criminal law as an instrument to address this cultural harmful practice and protect the rights of women.

Preliminarily, it has to be said that this time, differently from other countries,[22] there has not been any specific confrontation among legal scholars, nor previous, nor following the legislative novelty. This, in fact, was probably not considered as an important one, nor destined to have a concrete impact, also due to the little attention that is given to the phenomenon, deemed to be limited and non-alarming. However, the "scientific silence" can also be a signal that the opposing opinions have not changed since the introduction, in 2006, of a similar culturally oriented offence, addressing female genital mutilations (Art. 583-*bis* Italian penal code). In that case, the majority of Italian doctrine[23] was really skeptical and critical, arguing that the provision was a symbolic one, addressing ethnic minorities without a concrete usefulness. Only few[24] highlighted on the contrary the need for correct labels and the positive role of the new offence, which however is known to have received application in courts in very few cases.[25]

The penalty is increased if the acts are committed to the detriment of a child under eighteen years of age.

The penalty is two to seven years of imprisonment if the acts are committed to the detriment of a child under fourteen.

The provisions of this Article shall also apply when the fact is committed abroad by an Italian citizen or a foreigner resident in Italy or to the detriment of an Italian citizen or a foreigner resident in Italy.

[20] The so called "Codice Rosso": Legge 19 luglio 2019 n. 69, Modifiche al codice penale, al codice di procedura penale e altre disposizioni in materia di tutela delle vittime di violenza domestica e di genere.

[21] For a comment with this aim, may we refer to Giordana Pepè, 'I matrimoni forzati presto previsti come reato anche in Italia? Qualche approfondimento sul fenomeno ed un primo commento alla norma volta a contrastarlo, contenuta nel Disegno di Legge "Codice Rosso"' [20.05.2019] Diritto Penale Contemporaneo <archiviodpc.dirittopenaleuomo.org/d/6684-i-matrimoni-forzati-presto-previsti-come-reato-anche-in-italia> accessed 20 June 2023.

[22] See in this regard Emma Ratia and Anne Walter, *International exploration on forced marriages: A study on legal initiatives, policies and public discussions in Belgium, France, Germany, the United Kingdom and Switzerland* (Wolf Legal Publishers 2009).

[23] See in particular De Maglie (n 6) 39-49; Fabio Basile, 'Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)' (2007) 4 Rivista Italiana di Diritto e Procedura Penale 1343-1344.

[24] Especially Claudia Pecorella, 'Mutilazioni genitali femminili: la prima sentenza di condanna' (2011) 2 Rivista Italiana di Diritto e Procedura Penale 855-863. See also, in a more recent essay, Ombretta Di Giovine, 'Multiculturalismo e violenza contro le donne' (2018) 1 Archivio penale 135-140.

[25] Only two judicial cases concerning female genital mutilations came to the attention of legal scholars after the introduction of the *ad hoc* crime. The first one concluded with an acquittal by the Court of Appeal of Venice, reforming the first-degree decision by the Court of Venice: see about this Pecorella (*ibidem*) and about the appeal judgement Claudia Pecorella, 'La controversa interpretazione del dolo

3.2 Interior Ministry annual reports: a picture of forced marriages in Italy

Despite this unedifying scenario, and being still too early to fully assess through case-law the effectiveness of the forced marriage offence, interesting evidence comes from the data collected and published by the Italian Interior Ministry after the 2019 Law. First of all, it is at least a step forward that annual reports are being published, giving specific consideration to the phenomenon and its empirical features. In fact, it is the first time that we can have a photography of forced marriages occurring in Italy and this is very useful also for a better evaluation and implementation of policies. The Istanbul Convention itself, at Article 11, requests to systematically collect information and data on the phenomenon, which is specifically desirable considering the above-mentioned lack of empirical research all over Europe.

As these reports[26] show, the vast majority of victims were females (85%). Among the total (of both men and women), 33% were minors (in 6% of cases even under the age of 14), while the highest percentage (43%) regards young spouses between 18 and 24. As for the nationality, most of the victims were foreigners (64%), but it is likely that also many of the Italian nationals had different origins; particularly present were the Pakistani (57%) and Albanian (10%) nationalities, while fewer cases concerned people from India, Bangladesh, Sri Lanka, Croatia, Poland, Romania and Nigeria. The larger prevalence of denounced forced marriages has been found in Northern Italy, with Lombardia and Emilia Romagna on top; in the South, Sicily reported the highest number.

The reports, moreover, offer a picture of the authors of the coercion: mainly men (71%), aged between 35 and 44, with the same distribution of nationalities as the victims.

3.3 Attempt for a first assessment of the criminal norm usefulness

More particularly, apart from the provided information about the characteristics of victims and authors of forced marriages, the evidence coming from the numbers of

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specifico del reato di lesioni agli organi genitali femminili' (2013) 196 immigrazione.it. The second judgement is a recent one by the Court of Cassation, condemning a woman (while confirming the acquittal of her husband) for the mutilation of her minor daughters: see for a comment Dario Sciutteri, 'Reati culturalmente motivati e *ignorantia legis*: a margine della prima sentenza di legittimità sulle mutilazioni genitali femminili (nota a Cass. pen., sez. V, 2 luglio 2021, n. 37422)' (2022) 7 Stato, Chiese e pluralismo confessionale.

[26] See Ministero dell'Interno, Dipartimento della Pubblica Sicurezza, *Costrizione o induzione al matrimonio* (Direzione Centrale della Polizia Criminale, Servizio Analisi Criminale, Rome, February 2022) <www.interno.gov.it/sites/default/files/2022-03/induz_matrimoni.pdf> accessed 20 June 2023, which contains the most complete graphics, referring to cases registered until the end of 2021. The subsequent percentages, however, are perfectly coherent: see Ministero dell'Interno, Dipartimento della Pubblica Sicurezza, *Il punto. Il pregiudizio e la violenza contro le donne* (Direzione Centrale della Polizia Criminale, Rome, 25.11.2022) <www.interno.gov.it/sites/default/files/2022-11/2022_sac_brochure_violenza_sulle_donne.pdf> accessed 20 June 2023, 20-22.

registered criminal cases[27] could shed some new light on the very prickly issue of criminalisation.

Concerning the prevalence, 48 cases in total were registered by the authorities from August 2019 until November 2022: many trials are ongoing, but until now there has not been any known final judgment.

In this context, the most interesting aspect to underline is the rise of cases in the same period of time of two subsequent years: from 7 denounces between January and October 2020, to 17 beween January and October 2021.[28] This element seems pretty interesting and deserves some considerations.

It is true that among the possible reasons for the low number in 2020 we can include the Covid-19 pandemic and the effects of the "lockdown", which made more difficult both the celebration of marriages and the possibility for victims to resort to the authorities. However, from one side the restrictions haven't been present for the entire considered timescale, and from the other side the extraordinary Covid situation continued, with lockdowns and restrictions, also in 2021, although not identical: nevertheless, denounced cases increased during this year.

Therefore, a probable reason behind the rise of cases between 2020 and 2021 (as well as 2022, although less), more than an actual increase of marriages, could be an augmented awareness of the victims and their bigger propension to denounce, also thanks to the presence of a specific crime. This, together with the other percentages we can now dispose of, shows that the criminal offence can have the effect of letting the phenomenon emerge, through the empowerment of victims. And the emersion is achieved also because the offence and its disvalue are specifically labelled and well distinguished from general domestic abuse, which – as the reports also show – is the usual context of forced marriage situations. In fact, before the introduction of the *ad hoc* crime of forced marriage, the phenomenon could be faced mostly through the crime of domestic violence (punished by Art. 572 Italian penal code), although with some limits that can't be discussed here. Consequently, it was often almost impossible to clearly individuate it and have a statistic of its prevalence.

3.4 A complementary perspective: empirical data on female genital mutilations

For a complementary perspective on the positive effects of this kind of criminal norms, a parallel look can be shortly taken to some empirical evidence from two Italian studies

[27] See the integrated data coming from Ministero dell'Interno, February 2022 and 25.11.2022 (both *ibidem*).

[28] Ministero dell'Interno, Dipartimento della Pubblica Sicurezza, *Il punto. La violenza contro le donne* (Direzione Centrale della Polizia Criminale, Rome, 25.11.20219 <www.interno.gov.it/sites/default/files/2021-11/2021-_sac_brochure_violenza_sulle_donne.pdf> accessed 20 June 2023, 19.

about female genital mutilations prevalence. In the first one,[29] conducted in 2010 among 2000 foreign women residing in Lombardia, some of them spontaneously declared that they decided not to cut their daughters (at least the youngest ones) after the introduction of the criminal offence in Italy in 2006.[30] In light of this important indication, the impact of criminal law was given specific consideration in a subsequent investigation, carried out between 2014 and 2016 within a broader "Daphne" research project of the European Commission.[31] In fact, a sample of 1378 women older than 18 and residing in Italy was surveyed to estimate the prevalence of the practice, but more interestingly to understand if mutilated mothers would subject their daughters to the same. In case of a negative answer, they could select also the presence of criminal norms. As a result, some of those who stated their will to abstene from mutilations against their daughters ticked also the mentioned option among the reasons influencing this decision.[32]

Giving a more detailed glance to women's opinions, the 2016 results showed always lower support to the practice, confirming that the same protagonists don't actually agree with: only 12.9% (which fell to 9.4% in a more recent research by the same group[33]) expressed the will to pursue it. Interestingly, as said, women belonging to 7 nationalities out of 10 indicated the criminal prohibition as a reason for stopping the tradition, together with other motivations regarding the harmfulness, painfulness and negativity of the practice itself. It is true, however, that the women coming from countries with a higher prevalence of the phenomenon were more reluctant to this extent, demonstrating how sensitisation and cultural pressions remain crucial factors. Moreover and more generally, almost all the women were in any case aware of the existence of criminal prohibitions both in Italy and in their countries, and the majority of them declared agreement with the need for statal preventive interventions. More specifically, 72% (83.5% of second-generation immigrants) agreed with the need for the States of origin to intervene in the prevention of the practice, while 62.8% (79.5% of

[29] Istituto Regionale di Ricerca della Lombardia, Indagine sulla presenza nel territorio lombardo di popolazione a rischio in relazione alla salute sessuale e riproduttiva e alle mutilazioni genitali femminili (Milan, December 2010) <www.saperidoc.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/829> accessed 20 June 2023; Patrizia Farina, Livia E Ortensi and Alessio Menonna, 'Estimating the number of foreign women with female genital mutilation/cutting in Italy' (2016) 26(4) The European Journal of Publich Health.

[30] See in this regard also Claudia Pecorella, 'El papel del derecho penal en la lucha contra las mutilaciones genitales femeninas' (2021) 7 Revista Electrónica de Estudios Penales y de la Seguridad 2.

[31] Livia E Ortensi, Patrizia Farina and Els Leye, 'Female genital mutilation/cutting in Italy: an enhanced estimation for first generation migrant women based on 2016 survey data' (2018) 18(129) BMC Publich Health. See also Patrizia Farina and others, 'The impact of the law in the prevention of FGM: legal analysis' (2017) 14(2) Reproductive Health 7; Pecorella (*ibidem*) 2-3.

[32] Pecorella (*ibidem*) 3.

[33] Patrizia Farina, Livia E Ortensi and Thomas Pettinato, 'Le mutilazioni genitali femminili in Italia: un aggiornamento' [03.07.2020] Neodemos <www.neodemos.info/2020/07/03/le-mutilazioni-genitali-femminili-in-italia-un-aggiornamento/> accessed 20 June 2023.

second-generation immigrants) agreed with the need for Italy's preventive interventions.

4 "Concluding" remarks

To conclude this overview: as anticipated at the beginning, it must be stressed that those developed in this paper are just exploratory considerations and cannot be general conclusions on the effectiveness of the Italian criminal norm on forced marriages as a means to protect women's rights. However, they allow to highlight he necessary steps to be taken in order to deepen the topic and improve the prevention of the phenomenon. Specifically, more empirical research is needed, both on the actual number of submerged cases happening in Italy and on denounces to legal authorities and subsequent trials. Indeed, in the discourse on culturally motivated violence against women and criminal policies towards them, it is fundamental to always keep an eye on the concrete connotations of the phenomena and how they are perceived by their own victims.

In this light, what seems to emerge for the moment from the (little) available data is that specific criminalisation can have two positive impacts. On one side, it exercises its typical function of general prevention of some cultural harmful traditions, conveying a clear message on their disvalue. On the other, it constitutes an important instrument of empowerment of victims and emersion of the phenomenon in its characteristics.

At the same time, it remains clear that criminal law alone cannot be of any utility. On the contrary, in order to mitigate the risk for it to result merely symbolic, it has to be accompanied by thorough primary prevention actions (which unfortunately lack in the broader 2019 Italian law), such as monitoring and cultural sensitisation. An interesting path to be explored can also be its integration (although not substitution) by some mechanisms of community and alternative justice, as some scholars propose[34] and as experimented abroad. In particular, this could represent a potential solution for the biggest shortcoming that criminalisation shows in this delicate field: the punitive consequences against, most often, the parents of the victim, which might not always be desirable, especially when they consist of detention measures and break the parental relationship. However, the challenge in this regard seems that of finding a way of integration of such alternative models with existing criminal justice and, most of all, of avoiding the so-called secondary victimization.

In any case, criminal law can still help in the previous phase, not only in its role of a deterrent, but also or especially in cultural orientation. Indeed, it shall not be forgotten that criminal law itself is a mirror of society: the wish then, particularly with regard to such a peculiar phenomenon as forced marriage, is that some criminal provisions that

[34] In this sense, interesting is in particular the recent work of Clara Rigoni, *Honour-Based Violence and Forced Marriages: Community and Restorative Practices in Europe* (Routledge 2022).

are necessary now will not be necessary anymore in the future, as already happened across history, in parallel with the changes in culture.

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THE TUMULTUOUS RELATIONSHIP BETWEEN THE FEMINIST MOVEMENT AND CRIMINAL LAW: THE CASE OF BRAZIL

By Bruna Rachel de Paula Diniz[*]

Abstract

To understand if the feminist movement in Brazil perceives criminal justice as an effective tool to prevent and punish violence against women, this paper proposes a reconstruction of what has been addressed by feminist activists on the matter from the foundations of Brazilian feminism at the beginning of the 20th century to the current days. To analyze all the data collected, the first section presents the theoretical approach that guides the paper, the historical dialectical materialism, followed by a section on methodological considerations about the empirical material collected that was organized into different categories of feminist discourse about criminal law: "punitivist", "garantist" and "abolitionist". In the final and main section, three distinct periods are identified in the Movement´s history: in the first, there are no discussions about gender violence, followed by a second, in which domestic violence becomes a feminist issue without a clear desire for specific criminalization of gender violence. In the last and current period, activists portray themselves as victims and ask for the insertion of new (specific) kinds of criminal offenses related to gender violence. Also, the debates between punitivists and abolitionists intensify with the isolation of garantists to academia, showing the need for penalists to work alongside feminists to ensure theoretical advances with a gender-aware perspective without endangering material and procedural guarantees.

1 Introduction

The notion that criminal law is responsible for sanctioning the gravest forms of violations to the most fundamental interests in society is fairly consensual among academics and practitioners of law and is what subsides its characterization as the *ultima ratio* of all legal forms of control provided by the State. Yet, that is not a notion solely embraced within law, being also a strong social commonplace, based on the idea that serious offenses should be punished by criminal justice, specifically with prison. In this sense, it is a logical consequence that organized groups of civil society ask for new crimes to be created when they identify that a common and important interest, such as their safety, is being endangered. The main issue resides in the fact that the decision of whether an interest is truly relevant and should be protected by criminal law is left to congressmen who guide their convictions by political reasons that can drift away from what is being claimed by civil society and from the legal and constitutional standards provided by criminal law.

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In this scenario, the question to be addressed in this paper is one of the many that derive from demands of criminalization of identity-based violence that emerged in the 1940s in Brazil, with the Black Movement's pressure for the criminalization of racism. Because of the multitude of interests that could be analyzed, the object here is circumscribed to the disputes around the criminalization of gender violence, a demand formulated by the Feminist Movement since the late 1980s in Brazil.

The theme itself, the criminalization of hate crimes, is no novelty to academia in Brazil or abroad. Nonetheless, the body of theoretical work conducted in the field of legal studies has had as its primary focus the analysis of the legislation passed and the jurisprudence derived from it, with a few authors presenting a critical approach to the desires of criminalization, originated in the described movements. When looking at the works on gender violence, what is encountered is a clear tendency to naturalize criminalization and imprisonment as automatic responses to it.

Aware of the current stage of the body of research, what I propose is to shift the lenses through which the problem is seen. Instead of looking at the problematic of criminalization from the static premises of the history of legislation, as if the laws passed were the definite outcome of the political desires attributed to the feminist organizations, my goal is to understand feminist activists as vital actors in this process. This shift represents a unique view towards criminal law that comes from the perspective of the said organizations of civil society on the matter, showing that legal history is much more than the history of the legislation.

Another important premise of this paper is the notion that criminal law is historically determined, meaning that what is chosen to be criminalized, the corresponding sanctions prescribed and how courts apply (or not) the legislation passed varies according to the economic, social, and political factors that must be historically placed. In other words, there is not "a" way in which a question has been addressed by criminal law, but the way it has been addressed in a determined historical period.

Tying both these premises, (i) the realization that social movements, such as feminism, have their own views and are not solely recipients of institutional changes; (ii) the notion that criminalization is a political and historically oriented choice, the present research intends to answer the following question: Does the feminist movement in Brazil understand criminal justice as an effective tool to prevent and punish violence against women?

To answer this question some previous considerations are in order. Firstly, the methodological approach adopted throughout the work is discussed, the historical and dialectical materialism, leading to the Marxist critique[1] of criminal law that derives

[1] The use of the term "Critique" in this work is a translation of the word *Kritik* (German) or *crítica* (Portuguese), which is not common in English but is here adopted because the most common translation "criticism" has a distinct meaning that does not signify what is here intended.

from it. After this preliminary section, a second section addresses the empirical research conducted to gather and organize the data obtained from feminist organizations from the 1920s to the current days, followed by the description of the three analytical categories that will be used to recount the trajectory of the feminist movement in Brazil when dealing with criminal law: garantism[2], abolitionism and punitivism. The last, and main section, is dedicated to analyzing the historical thread of the relationship between Brazilian feminist and criminal law, divided into three periods: the first one marked by the absence of discussions about gender violence; a second in which violence against women becomes an issue for the Movement, that does not respond with expressive criminalizing desires; the third that starts when feminists openly demand that gender-based offenses are specifically criminalized.

As some final introductory remarks, it is crucial to bear in mind the plurality that exists within feminist theory, feminist organizations and also among women. This has been a crucial conclusion developed by scholars and by activists, firstly encountered in the academic and political work of black feminists and later in the intakes from decolonial feminism.[3] In this paper, the use of the term feminism or feminist movement in singular does not mean that all the distinct expressions of women's movements are ignored. On the contrary, it is a choice based on the idea that behind all the diversity that exists, there is one common ideal that unifies all feminisms – the notion that all social inequalities based on gender should be extinct. A secondary reason is also to avoid unnecessary plurals that could make reading less fluid.

2 Method and Methodologies adopted

2.1 The Historical-Dialectical Materialism and its implications on the understanding of Criminal Justice

Within academia, it is expected that researchers present their adopted methodologies to show how conclusions were reached and their scientific validity. Despite that, in the field of legal studies, it is common to encounter works that limit themselves to describe the research methods chosen, as if it was enough to fully present methodology, what may not be fully accurate, considering that method should comprehend more than simply a list of procedures employed by the researcher[4].

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[2] Garantism is a translation from the Italian term *Garantismo*, also encountered translated as Guaranteeism is some other works.

[3] The works of black feminists shed light on the notion that women are not a homogenous social group, with expressive differences when race was considered. Following this premise, a feminism that is blind to racial aspects fatally reproduces exclusion and is emancipatory only to white women. In the same trail, decolonial feminism emerges to address the necessity to include disparities in power derived from colonial domination, urging for the struggles of women of the global south to be equally considered. See: Patricia Hill Collins 'Defining black feminist thought' [2020] Feminist theory reader 278 and Françoise Vergès, *A Decolonial Feminism* (Pluto 2021).

[4] Flávio Batista, *Critíca da tecnologia dos direitos sociais* (Dobra editorial 2013).

As for this paper, the broader methodological approach adopted is the historical dialectical materialism, a perspective within Marxism characterized by the "central importance attributed to the (dialectically conceived) historicity of social facts and the willingness to apply the historical-dialectical materialism to itself"[5]. Considering that the object here is not a discussion about the method itself, I will shortly demonstrate how criminal law can be understood through the historical dialectical materialism, making it easier to differentiate the works that fully describe the method adopted and the ones that somehow *hide* it consciously or not.[6]

To understand the two main compounds of the historical-dialectical materialism, what we face at first is a historically situated analysis, meaning that the object to be studied has to be placed in the time when it exists, with nothing existing detached from the historical period in which it is inserted. The second compound, materialism, is a bit more complex to be grasped, but it can be understood as the idea that the object of analysis is determined by the material conditions of society, or, in other words, by the way that society functions by transforming the material assets that are given into the goods that are necessary to live.

By merging these two elements we get an analysis that combines the social relations that result from the material conditions of society, historically situating them. When talking about how material conditions determine social relations, I do not mean that all social aspects derive from economic relations, but that the way that society functions is ultimately determined by the material conditions posed[7].

I am aware that Marxist authors tend to be viewed as *economistic* and are considered by some to ignore questions related to identity, yet this is a vulgar understanding of Marxism and of historical materialism itself[8]. Authors who affiliate themselves with this theoretical tradition have dealt with how identity and cultural aspects are not excluded from the forms of analysis posed by Marxism in any form. As references, I

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[5] Michael Löwy, As aventuras de Karl Marx contra o Barão de Münchhausen: marxismo e positivismo na sociologia do conhecimento (Cortez Editora 2000).

[6] When pointing out that most of the works in law theory do not discuss the method adopted, I am not concluding that they are not scientifically valid or inaccurate, but that they assume that there is a clear difference between the universe to be researched and apprehended and the scholar placed in a higher and differentiated viewpoint. See: Batista (n 4).

[7] The idea briefly summarized in the paragraph that economic relations determine social structures was developed by Luis Althusser and conceptualized as an "Overdetermination". For a better understating see: Robert Paul Resch, *Althusser and the Renewal of Marxist Social Theory* (University of California Press 1992).

[8] Another common critique toward Marxist authors is that they provide a Eurocentric epistemology, that should be avoided, especially when analyzing the problematics of the Global South. This is accurate, with a recent body of work produced by authors who show how historical dialectical materialism can be an important methodological tool to address colonialism and its remains in current societies in the Global South. See: Kevin Anderson, *Marx at the Margins on Nationalism, Ethnicity, and Non-Western Societies* (Chicago University Press 2016).

point to German author Roswitha Scholz[9] who has a consolidated body of work dedicated to describing how political interests related to identity (mainly gender in her case) can only be authentically understood when the structural aspects of society are considered[10].

After describing the historical and dialectical materialism itself, it is time to apply it to the understanding of criminal law. To do that, it is necessary to go way back to the period when the structural aspects of criminal law were established in the 19th century. In the period, the punitive state apparatus is organized philosophically based on the idea of retributing an evil to the citizens who break the law, imposed through imprisonment, and measured in time.

This is the exact historical period in which the capitalist society is being established by extinguishing servants as the main workforce and replacing them with paid workers. Because of this change, the social relations that emerge from the new form in which work is performed are key to understanding the changes in the previous forms of punishment.

With the need to have a workforce that consisted of living and functioning individuals, it was crucial that sanctions did not involve death penalties or ones that severely damaged the body. Another impossibility was the imposition of fines, considering that the vast majority of people at the time did not have any possessions. In this scenario, the alternative that fitted best was prison, a place where people who broke the law could suffer punished remaining potential workers and, in some cases, also be shaped as the desired workforce.[11]

Despite all the changes that society and criminal law have experienced since this early formation, the structural aspects of it remain. The crimes prescribed in criminal legislation have a penalty that is majorly established previously in an abstract period of time, that is later precisely defined in a court sentence. This decision is guided by a set

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[9] Roswitha Scholz, *Das Geschlecht des Kapitalismus Feministische Theorien und die postmoderne Metamorphose des Patriarchats* (Horlemann 2000).

[10] This same approach to identity and social movements within Marxism is also found in the works of Domenico Losurdo. See: Domenico Losurdo, *Class Struggle: A Political and Philosophical History* (Palgrave MacMillan 2008).

[11] This process is described by Evgeny B. Pashukanis: "Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense. This form is unconsciously yet deeply linked with the conception of man in the abstract and abstract human labor measurable in time. It is no coincidence that this form of punishment became established precisely in the nineteenth century and was considered natural (at a time. that is when the bourgeoisie was able to consolidate and develop to the full all its particular features). […] For it to be possible for the idea to emerge that one could make recompense for an offense with a piece of abstract freedom determined in advance it was necessary for all concrete forms of social wealth to be reduced to the most abstract and simple form of human labor measured in time.". Evgeny Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1989).

of principles that formally guarantee the same forms of sentencing to all citizens, despite all the differences that can exist within society.

The notion that criminal law and the institutions that derive from it, forming the entire criminal justice system, are structured by the needs of capitalist society is key to understanding the conclusions that come from empirical studies describing the ways in which criminal law works from its early stages to the current days both in the global north and in the south. This body of data shows that the apparent fairness of criminal law is contradicted by the number of people sanctioned and imprisoned that are majorly from socially excluded groups. With that in mind, it is false to assume that criminal justice can be improved to a point where it becomes a totally fair sanctioning mechanism, considering that its structure derives from the capitalist form, that presupposes the maintenance of inequalities. On the other hand, it does not mean that theoretical advances accompanied by public policies cannot represent important limitations to the punitive apparatus, as long as scholars are aware of the concrete possibilities of improvement that can be achieved through Law.

This critical approach has academic roots but can also be found in the broader political arena with leftist tendencies that sees the roots of the criminal justice system in economic inequalities and addresses the need to be skeptical about the alleged protection that can be provided to citizens by criminal policies when it comes to providing safety. This theoretical and political frame is associated with what is known as penal abolitionism, an approach to criminal law to be addressed in the next section.

Besides these leftist tendencies critical of criminal law, other social movements, described as the *New Social Movements*, organize themselves based on issues that do not involve class struggles, justifying that other forms of inequality replaced class as the main sources of violence.

The various struggles of the 1960s provided the new social movements groupings organized around single issues such as gender, race, ethnicity, or sexual orientation, issues all too frequently ignored in mainstream politics with their fundamental ideological building blocks. The diversity of political activity in the 1960s demonstrated to its 1970s and 1980s successors how to mobilize marginalized constituencies, how to "politicize" culture, and how to deploy "difference" as an ideological tool in racially hegemonic societies. Having rejected the *old left's* narrow conception of politics, the *new left* expanded it to include and provide a precedent and a platform for modes of oppositionality that would, in the 1980s, be construed as struggles over representation and identity[12]. Apart from the general description of the New Social Movements, there are also works that relate them to specific desires to criminalize and harshly punish acts of violence against the minorities that they represent through criminal law. When this

[12] Grant Farred, 'Endgame Identity? Mapping the New Left Roots of Identity Politics' [2000] New Literary History 648.

happens, the designation *punitive left* emerges to denominate the fusion of "newer" forms of political protest with a positive attitude toward the criminal justice system. This is where the feminist movement is normally placed, as a social movement based on identity, detached from class struggles and fully supportive of criminalizing gender violence.

Recapturing the research question to be addressed in this paper, one can look at this rough characterization of the feminist movement as a purely punitive actor and find it a satisfactory conclusion. Notwithstanding that, a deeper analysis seems more adequate to see whether the critical approach previously addressed can be found among Brazilian feminists or different perspectives considering criminal law are present.

2.2 How to find the feminist discourse?

Facing the magnitude of the task posed, another set of methodological considerations are in order, bearing in mind that it is impossible to study any social movement in its entirety, because of how complex and multiple they are. When it comes to the feminist movement, this becomes even more complex, considering that even feminists themselves face the issue of dealing with the vast differences that exist among activists, even discussing the need to use the form feminisms (plural) and not feminism (singular), as previously discussed.

Also, my intent here was to understand the history of feminist activists from their own narrative, meaning that the data to be collected had to come from the organizations and not from what has been written about them. This does not mean that the production about the movement's history was not considered, quite the opposite. The works on the history of feminism were the starting point of the research and from them it was possible to formulate a timeline that begins with the foundations of the Movement and goes to the current days, exposing key historical moments, most mentioned NGOs and historical figures.

With this initial overview, I moved to a second phase of the investigation in which my goal was to find as many documents produced by feminist organizations as possible. In order to do that I accessed the archives that some of the organizations have put together; universities and governmental archives that preserved copies of publications of feminist groups; and also, in academic debates in print, here considered not as theoretical references but as part of the feminist activism developed in academia.

In this process, I was able to identify that, as the decades went by, the types of documents produced by feminist organizations varied. This will be more thoroughly addressed in the next section, but just as a brief example, from the early stages of the Movement in the early 1920s to the late 1980s, feminist magazines and material in print were especially important, yet, since the 1990s and especially today most of the data was found online on NGOs websites, social media platforms and in online publications.

The method of analysis of the documents combines a historical perception with an ethnographical one, being conceptualized as an "ethnography of documents". In sum, the goal is to understand whose voices are contained in the given sources and what is being said by activists through the document. In this sense, one major insight given by previous works that adopted this methodology is that the data that can be drawn from the documents does not always match what is physically written *in ink.* Because of that, the challenge is to work on the absences and sometimes on the contradictions found in the documents to achieve a richer universe of data.[13]

It is fundamental to address that this investigation is not quantitative or intends to find every document ever produced by all the different fractions of Brazilian feminism. Firstly, because it is an impossible task, since the forms of activism are so diverse and, most importantly, because the research question presented does not require all the documents ever produced to be found. In this sense, I adopt what Italian historian Carlo Ginzburg[14] names an *indiciary approach*, meaning that historical conclusions can be reached from traces left, when they are properly identified and analyzed, rather than from the entirety of elements that existed at a given period.

With all this material came the need to organize the data in a way that it would be possible to draw conclusions from it, bearing in mind the research question posed. From what I found, it was possible to identify moments in which activists did not address violence at all; moments in which criminal sanctions were highly demanded with no mercy for their perpetrators; and moments in that activists posed critics towards the criminal justice system as a tool to prevent or punish.

After this initial set of preliminary conclusions and supported by works that have dealt with similar investigation issues in the United States[15], I formulated three possible approaches toward criminal law that I have identified in the discourse of the activists. I named them *garantism, abolitionism and punitivism*.

Garatism is originally a theoretical approach towards criminal law developed by the Italian author Luigi Ferrajoli, that advocates for the maximal limitation of penal law in abstract and concrete sanctions having as tools a set of principles to guide legislative production and judiciary authorities[16]. It has obtained a huge resonance in Latin America, especially in Brazil, having among its first supporters academics who

[13] For a more detailed description of enography wih documents, see: Muzzopappa E, Villalta C, 'Losdocumentos como campo' [2011] Revista Colombiana de Antropología 42 and Angotti B, 'Reflexões sobre uma etnografia no Direito – notas sobre a metodologia da pesquisa' [2021] Juris Poiesis 778.
[14] Carlo Ginzburg, *Mitos, emblemas e sinais: morfologia e história* (Companhia das Letras, 1989).
[15] See: Nancy Whittier, 'Carceral and intersectional feminism in Congress: The Violence Against Women Act, Discourse, and Policy' [2016] Gender and Society 79 and Huibin Chew, Bringing the Revolution Home: Filipino Urban Poor Women, Neoliberal Imperial Feminisms and a Social Movements Approach to Domestic Abuse [2018] Women's Studies Quarterly 49.
[16] Luigi Ferrajoli, *Diritto e Ragione: Teoria Del Garantismo Penale* (Laterza, 1989).

consider themselves progressists and jurists who advocate for a more humane criminal justice system. Despite its academic origins the idea of being an activist who sees criminal responsibility within the limits of the law has spread various social movements, such as feminism, to the point where some people who do not have a background in law understand and even call themselves *garantists*.

Abolitionism is a theoretical and political approach that combines the critique of the criminal justice system with strategies to reduce or, in some perspectives, dismantle prison in its entirety and the institutions related to it[17]. In its origins, it has been conceptually developed by Thomas Matthiessen[18], Nils Christie[19] and Louk Hulsman[20], but has been appropriated and adapted by other authors, such as Angela Davis[21] to include in the analysis of racial aspects of criminalization. Since its origins, abolitionist authors have combined theory with political actions, developing a close relationship with social activists, in the process previously described of collaboration between scholars that adopt a Marxist analysis of criminal law and members of political organizations identified with the traditional left. As it will be possible to see in the nest section, when this approach is found in the documents analyzed, a stronger set of criticism of criminalization is established, usually rejecting it as an effective political tool to make women safer.[22]

Punitivism is a defense of criminal law as an effective and legitimate tool to prevent and punish acts of violence. It is a complex approach because among punitivist there are authors that identify themselves with right-wing interests alongside supporters of what has been named as the l*eft's neorealism* or *punitive left*, all seeking imprisonment and harsher forms of sanction to achieve security and justice. It can be also described as the academic defense of penal populism, which has been defined by David Garland as a "form of political discourse that, directly or by implication, denigrates the views of professional experts and liberal elites and claims instead the authority of 'the people' whose views about punishment it professes to express".[23] Different from the two other previous categories, it is very rare to see an activist or an organization calling themselves openly punitivists, given the pejorative connotation that the denomination has gained. In this way, this was the approach that had to be analyzed more carefully, because it is often hidden behind a discourse of security for the victims.

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[17] Sebastian Scheerer, 'Towards abolitionism' [1986] Contemporary Crises 10.

[18] Thomas Mathiesen, *Das Recht in der Gesellschaft* (Votum-Verl. 1996).

[19] Nils Christie, *Grenzen des Leids* (AJZ-Verl. 1986).

[20] Louk Hulsman, Jacqueline Bernat de Celis, *Afscheid van het strafrecht* (Unieboek BV 1986).

[21] Angela Davis, *Are Prisions Obsolete* (Seven Stories Press 2003).

[22] Abolitionist feminism is not exclusive to Brazil, being also encountered in many other countries, with emphasis on the expressive political and academic contribution of black feminists from the United States.

[23] David Garland 'What's Wrong with Penal Populism? Politics, the Public, and Criminological Expertise' [2021] Asian Journal of Criminology 258.

It is key to understand that these three paradigms are simplified categories of what is encountered in reality. In this sense, some authors who have researched garatism, abolitionism and punitivism use the terms in the plural, highlighting the diversity that exists within each one of these theoretical and political perspectives. Since my goal here is not to investigate the isolated categories, but to use them to organize the complex data featured in the documents analyzed, they will be simplified to a reasonable extent, bearing in mind the research question here posed.

With these three possible approaches identified, and their outlines traced, I reorganized my data to see in which documents there were discussions about whether (or not) to criminalize identity violence and, if they were present, which was the approach adopted. This body of organized data allowed me to reach the final part of my research, to be presented in the next section.

3 Feminism and Criminal Law

Even though the first national feminist organization was founded in Brazil in 1919 (Federação Brasileira pelo Progresso Feminino)[24], the idea of gender equality can be encountered in many publications that date back to the first half of the 19th century, when magazines with articles written by women expressed their desire for equal rights[25]. These early feminist texts were present in various forms of publications that fluctuated from magazines written "for women" that featured articles about fashion, beauty, and household-related matters to publications that were openly political, in which women expressed strong republican opinions against the monarchy and slavery. Most of these magazines did not survive the financial difficulties that the Brazilian press suffered throughout the 19th century and only a handful of them made it to the beginning of the 20th century, such as *Almanach das Senhoras* (1871-1927) e *Corymbo* (1884-1944).[26]

One important remark is that these early feminist organizations, founded in the first half of the 1920s, did not name themselves feminists, considering that the term had not been created yet, what does not mean that the feminist ideal was not present. The magazines featured articles that discussed gender inequalities, focusing on voting and civil rights, sided by texts that aimed to show how literate women could be, discussing complex social topics *from a woman's perspective* without it meaning inferiority.

At this point, gender violence is not discussed, and no mention of criminal law is encountered. Here one sidenote is key. When I say that criminal law is not present, I do not mean that it had no effect on women's lives or did not reproduce gender inequalities. Just to mention two illustrative examples, abortion was a crime with no

[24] In a free translation: "Brazilian Federation for the Female Progress".

[25] Constância Lima Duarte, Imprensa feminina e feminista no brasil: século XIX – dicionário ilustrado (Autêntica 2016).

[26] Idem.

legal exceptions[27], and rape charges could be dropped if the victim consented to marry her offender[28]. So, when I say absent, I mean absent as a mechanism developed for the protection or prevention of gender violence.

These traces remained for many decades, along with the political activities of women in other forms of activism, especially in leftist organizations, such as political parties. Yet, even in those, discussions about gender violence or the need to criminalize it were absent. Looking at another crucial social movement's trajectory during the period, the Brazilian Black movement, what is seen is much different. Since the 1940s, the desire for the criminalization of racial discrimination is present and when the first national Black convention takes place in 1945, one of its main outcomes was a manifesto[29] that explicitly stated that racist offenses had to be severely sanctioned with criminal law.

A rupture in this rich political environment is met under the Brazilian Dictatorship (1964-1988), a period when political activities were criminalized as *felonies against the nation* and also activists were persecuted and executed by officials of the State. In this scenario, the women who were part of leftist groups were forced to flee the country, bringing feminist discussions to political groups of the Latin American exiles in Europe. The feminists who remained in Brazil fitted generally into two groups, in the first, women dedicated themselves to fighting against the regime and did not hold expressive discussions about gender, given the struggles endured. The second one consisted of feminist groups which functioned mainly as study groups that held meetings to discuss the works of authors from the feminist *Second Wave*, such as Simone de Beauvoir[30].

A chance for these private groups to emerge to the public arena is encountered when the United Nations declares 1975 the year of women. In this breach, a national feminist organization named Centro da Mulher Brasileira[31] is founded to embrace the agenda against gender discrimination, but still, the main discussions revolved around civil and work-related rights[32].

The years that succeed are of great importance to the research question here posed. In them, feminism gains public strength, with the incorporation of women with distinct political tendencies within the mentioned organization, Centro da Mulher Brasileira. In it, coexisted feminists with clear Marxist-Leninist tendencies, who believed that gender equality derived from class issues; liberal feminists who pointed at the need for legal changes to achieve equality; and, lastly, a fraction named radical feminists, who

[27] Brazilian Criminal Code 1890, article 300.
[28] Brazilian Criminal Code 1940, article 107, VII.
[29] Brazilian Black National Convention, '*Manifesto*' [1945].
[30] Joana Pedro, *Nova História das Mulheres no Brasil* (Contexto, 2012).
[31] In a free translation "Center for the Brazilian Woman".
[32] Rachel Soihet, 'Encontros e desencontros no centro da mulher brasileira anos 1970-1980' [2007] Gênero 237.

advocated for a less centralized organization, with a political agenda revolving around questions exclusively related to gender oppression such as sexuality, abortion and violence against women.[33]

The discussions about gender violence were an important matter about which feminists diverged, mostly because the fraction identified with leftist tendencies considered it to be secondary to other struggles such as equal pay, public childcare, and healthcare for pregnant women. The magazines and reports analyzed from the period show this tendency clearly, with no mention of gender violence of any sort, also revealing that the called radical fraction had less visibility[34].

Works that research this very specific period interviewing women who were activists describe that violence against women was an issue viewed as a foreign idea, derived from a *French feminism* that was far from the Latin-American reality. In this sense, there are even some extreme episodes remembered by activists of the period who recall hearing from their peers that: "Brazil is way different from France. Here in Brazil if a woman is beaten up by her husband it is because she likes it".[35] These divergencies culminated in a fracture in the movement after the first national women's convention, held in 1979, with the activists who identified themselves with the violence-related agenda leaving the Centro da Mulher Brasileira to later in 1981 found the first organization to support victims of domestic violence named SOS Mulher.[36]

Along with the disputes inside the movement, the beginning of the 1980s was marked by feminicide cases that went unpunished or were *lightly* sentenced, which grasped media attention and made it to the public debate. This conjuncture led to a reunion of all fractions of the feminist movement around a common agenda against domestic violence, which contained the revindication for severe punishment of men who killed or physically abused their partners and the condemnation of defensive arguments such as the *right of self-defense of the husband's honor*[37] or the description of feminicides as *crimes of passion*.

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[33] ibid.

[34] Centro da Mulher Brasileira, 'Boletim da Mulher Brasileira' [1979].

[35] An interview done by author Rachel Soihet with activists of the period is particularly illustrative of the matter: "By suggesting the inclusion of the theme of violence, I was soon catalogued: This one comes with foreign ideas, ideas of a reality that has nothing to do with Brazil", obtaining the following response from one of the members of the CMB: 'Here in the Brazil is different from France. Here in Brazil, a woman who is beaten by her husband is because she likes it'". Soihet (n 32) 237.

[36] Centro da Mulher Brasileira, 'Boletim da Mulher Brasileira' [1979].

[37] The defensive argument known in Brazil as the right of self-defense of honor is a misuse of the right of self-defense, by justifying the murder of a wife or partner that previously cheated or somehow publicly humiliated her husband. Despite it being a vulgar interpretation of self-defense, not fulling properly any of the legal requirements present in the Brazilian Criminal Code, it had some capillarity in the Jurisprudence at the time.

In this sense, the feminist groups that were active in the decade[38] did not have a clear intent to ask for legal changes in criminal law, related to the creation of new crimes that involved gender violence or the increase in the sanctions already existent. The political efforts were all directed at the criminal justice system, with the light on the judiciary to punish perpetrators of domestic violence severely. Here, the documents produced by the feminist organizations, which became way more numerous, consisting of NGOs, student groups, and feminist groups of political parties show a naturalization of the worst possible outcome within criminal courts as the goal to achieve justice.[39]

In this scenario, punitivist traces are found subsided by a strong belief that exemplary condemnations of cases of domestic violence would result in a reduction in the number of victims and would promote a change in the public opinion that sided with the idea of domestic battery being a private issue. As seen in the trajectory of other Brazilian social movements that have expressed demands for criminal punishment, such as the black and LGBTQI+ movements, this initial strong belief in the criminal justice system is a common starting point from where other more complex views emerge later.

From the 1990s on, the feminist movement experiences a change, with an increase in the number of activists organized as NGOs and a decrease in groups that identified with the broader left's political agenda. This is a general tendency described by researchers of social movements at the end of the 20th century, who argue that with the end of the Soviet Union and the spread of neoliberalism, with huge impacts in Latin America, the forms of organizations of the civil society that worked against inequality adopted a political profile distant from the traditional left and aware of the social needs that an absent State imposes.[40]

Along with this tendency of social activism being identified with the NGOs, the period is also described as a consolidation of identity as the main compound to subside political protest, which also explains why these feminist organizations are created isolated themselves from political parties and worked on an agenda that was composed of explicit gender issues, with violence against women and especially domestic violence being one of them. The NGO that best characterized this model was Centro Feminista de Estudos e Assessoria,[41] founded in 1989, which united research on women's issues along with advocacy activities in the Federal Congress, that is followed by the foundation of many others in the years that come, culminating to a national articulation of NGOs, Articulação da Mulher Brasileira.

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[38] The list of feminist publications analyzed for the Feminist Movement for the period from 1974 to 2000 is based on the research of Elisabeth Oliveira that has cataloged all the Brazilian feminist magazines in print from 1975-2004. See: Elisabeth Oliveira 'Imprensa feminista brasileira pós-1974' (Master's Thesis University of São Paulo 2004)

[39] Ibid.

[40] Elizabeth Borelli, 'Neoliberalismo e ONGs na América Latina' [2008] Aurora 12.

[41] In a free translation: "Feminist Center for Studies and Consulting".

This reunion of the organizations in 1994 is also propelled by the United Nations' IV World Conference on Women which takes place in Beijing (China). The Brazilian delegation consisted of 300 activists that brought to the conference a unified platform of action that contained as one of the priority areas of action violence against women. As measures to fight against it, the documents produced by the Brazilian delegates for the conference proposed a clear definition of violence against women,[42] followed by the need to reinforce criminal sanctions on domestic violence, with a literal mention of inflicting suffering in the punishment to achieve justice. On the other hand, the documents do not express the need for new crimes to be created, but a desire for severe punishment within the legal frame that existed.

From the mid-nineties on, another kind of struggle within the Movement concerning criminal law resurfaces, yet this time it is not an outcome of distinct political orientations of activists, but of heated debates between feminist academics. In this dispute, on one side can be found authors that were against the use of alternative forms of punishment and simpler criminal procedures in cases of domestic violence, and on the other feminist authors that can be categorized as garantists. Despite it being a discussion that occurs mainly in an academic environment, it has some interesting points to analyze.

Firstly, the feminist-garantists defend the need to preserve a new set of decarceration mechanisms created by legislative changes passed in 1995, that allowed settlements to be made between public prosecutors and offenders in cases that involved misdemeanors. Among these offenses were delicts associated with domestic violence such as threatening[43] and bodily injury[44], that had lower penalties, and consequently allowed settlements to be made even against the victim's will. These authors argued that the punishment mechanisms available did not make women any less safe and that advocating against them was an unconstitutional request, considering that criminal guarantees of the offenders would be endangered.[45]

On the other hand, the other group of feminist academics, here described as punitivists, understood that by addressing domestic violence cases as misdemeanors, the victims were more likely to be endangered again, since aggressors would not face any serious punishment, such as prison. Also, they argue that the light sanctions imposed were

[42] As stated in the Brazilian common platform brought to the Conference: "Violence against women is one of the fundamental social mechanisms by which women are forced into a subordinate position compared to men. [...] which perpetuate the condition of inferiority conferred on women within the family, in the workplace, in the community and in society." (free translation). Declaration and Platform for Action of the Fourth World Conference on Women [1994].

[43] Brazilian Criminal Code, Article 147.

[44] Brazilian Criminal Code, Article 129.

[45] Maria Lúcia Karam, 'Violência de gênero: o paradoxal entusiasmo pelo rigor penal' [2006] Boletim IBCCRIM 14.

incapable of having a pedagogic effect, not serving as a teaching mechanism, for the aggressor himself or for the public opinion.[46]

The diagnosis of the ineffectiveness of these alternative mechanisms to prosecute and punish cases of domestic violence was shared by the broader feminism, especially by the NGOs that worked with victims of domestic violence, which saw them as a threat to the few advances that could be achieved in the previous years.[47]

A deeper analysis of the dispute also reveals that the garantist fraction speaks from a place of academic authority, setting them apart from *solely* activists, who are perceived as naïve and not aware of the real functions of the criminal justice system. On the other side, the punitivist feminists, showcase themselves as the *true feminists* and as the ones who are truly concerned with the everyday victims that are ignored by academics distant from the gravity of reality.

The debates in the Movement are renewed when President Luiz Inácio Lula da Silva wins the presidential election for his first mandate in 2002. Many feminist organizations saw this victory as a possibility to improve public policies involving gender inequalities and especially gender violence. This favorable environment was also subsided by the final report of the Interamerican Commission of Human Rights on the case of *Maria da Penha v. Brazil* in 2000, that is issued after several years of silence of the Brazilian state to the requests for an amicable solution.

In the report, the Commission concluded that there had been a violation of article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and of articles 8 and 25 of the Inter-American Convention on Human Rights and recommended that the Brazilian State provided a serious and thorough investigation on the reasons behind the irregularities in the ruling of the case of Ms. Maria da Penha, with the corresponding civil reparation. Besides that, a set of recommendations was prescribed for general cases of domestic violence, that included capacitating judges and judicial employees on the importance of not condoning domestic violence; simplifying criminal judicial proceedings, without affecting the due process of law; establishing mechanisms that serve as alternatives to judicial mechanisms, which resolve domestic conflict in a prompt and effective manner; increasing in the number of special police stations to address the rights of women and including in teaching curriculums of units aimed at providing an understanding of the importance of respecting women.[48]

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[46] Guita Grin Debert, Marcella Beraldo de Oliveira 'Os modelos conciliatórios de solução de conflitos e a violência doméstica' [2007] Cad. Pagu 305.

[47] Juiana Ruiz, 'Histórias de ativismo? Enquadramentos de gênero no Ministério Público de São Paulo' (Master's Thesis, Fundação Getúlio Vargas 2020)

[48] Maria da Penha v Brazil (Case 12.051) Interamerican Commission Decision 54/01 [2001].

The main outcome of this process was a federal bill draft that paid homage to Ms. Maria da Penha and was elaborated by the federal government with a group of feminist organizations, that were part of the fraction of the Movement described previously as punitivist, due to their critics to setting aside domestic violence cases from minor offenses. Despite the orientation, the draft that was presented to Congress was not especially punitivist. The majority of dispositions involved mechanisms to protect victims and to create specialized agencies to work with domestic violence in the criminal justice system, accompanied by a prohibition to apply any form of alternative criminal conflict resolution mechanism to cases of violence against women. When thinking about criminalization itself, there is solely one disposition that increased penalties in case of bodily injuries in a broader context of domestic assault.[49]

In the debates that take place among activists and congressmen when the bill is discussed, garantists and abolitionist critics are absent. The point here is that since the democratization, with the end of the Brazilian Military Dictatorship in the late 1980s, Brazil had never had such a favorable political environment toward women's rights. So, even feminists with other views became silent not to rattle the gains that were so palpable at the time. With the full approval and sanction of the Maria da Penha Law, the debates are renewed and the garantist and abolitionist feminist authors begin to publish again.

The academic debates rapidly resurface, with authors who were previously identified with a garantist perspective, showing also authentic abolitionist arguments against the criminal justice system. Meanwhile, this fraction starts to be confronted by academic feminists who openly refute these abolitionist reasons, by describing them as idealistic and irresponsibly liberal, as seen in the works of Guita Debert:

> In this way, one goes from one extreme to the other: the view of women as pure objects of the male domination system is replaced by the consideration that individual trajectories are always flexible, social and psychological constraints are of little importance, and inequality data can be easily neutralized. Then, the much-applauded self-help manuals and media programs begin to join the chorus, in which it is enough to have the will and disposition to guarantee the desired success. In addition, violence, power and conflict are transformed into problems of lack of confidence and self-esteem of the oppressed or, then, the couple's difficulty in communicating. The good society is that of dialogue based on democratic and Christian values; the possibility of dialogue is the necessary and sufficient condition for a just and egalitarian society. This is the tone that, as

[49] Brazilian Criminal Code 1940, article 129.

we have already seen, has marked the discourse of critics of the "Maria da Penha" Law, particularly the defenders of penal abolitionism.[50]

In the next decade, the feminist-garantism spreads from academia to activists in the broader political arena. The most illustrative example of this were the discussions held when the law that criminalizes feminicide is passed in 2015, in which some feminists showed concern with trusting the criminal justice system blindly and proposed that the only change that should be made in the criminal code would be to name the murder of women as Feminicide, with no increase in the penalties imposed. The proposal was not well received by the wider feminism or by most congressmen, who found it absurd that some women were demanding legal changes just for *symbolic reasons*.[51]

The beginning of the last historical period here analyzed coincides with what is later named the *Feminist Spring*, which took place gradually from the start of the 2010s and gained strength with each year that passed. What is seen are new forms of activism emerging online, in a political environment where women would openly and consciously call themselves feminists. This was not a particularity of Brazil, being also verified in many other countries in Latin America, including Chile and Argentina; in the EU and in the United States, with some authors also calling it the *#MeToo Era*.[52] Meanwhile, new feminist collectivities are founded attaching feminism to other social movements' agendas, such as environmental issues and prison abolition.

Besides the law that criminalized feminicide, this feminist reinforcement is met with the many criminalizing legislative initiatives that rapidly become law, such as stalking[53], psychological violence[54], sexual assault by touching[55] and revenge porn[56], which can be placed in a distinct analytical category, apart from the previous gender crimes introduced in legislation in the previous decades. This distinction is due to different ways in which feminist activists approach these sorts of violence in comparison to the previous set of crimes that revolved around domestic violence or violence that occurs in a context of a romantic relationship.

In this sense, the greatest shift that occurs is found in the way feminists identify themselves in relation to victims. While in the previous decades, activists who worked with violence described the victims as women who needed protection and who would

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[50] Guita Debert, Maria Filomena Gregori, 'Violência e Gênero: Novas Propostas, Velhos Dilemas' [2008] Rev. Bras. Ci. Soc 174.

[51] Clara Flores de Oliveira, 'De 'razões de gênero' a 'razões da condição do sexo feminino': disputas de sentido no processo de criação da Lei do Feminicídio no Brasil.'. [2017] Anals of the 11 & 13 Women's World Congress 4.

[52] Tatjana Hörnle, '#MeToo - Implications for Criminal Law [2018] Bergen Journal of Criminal Law and Criminal Justice' 115.

[53] Brazilian Criminal Code 1940, article 147-A.

[54] Brazilian Criminal Code 1940, article 147-B.

[55] Brazilian Criminal Code 1940, article 215-A.

[56] Brazilian Criminal Code 1940, article 218-C.

be the recipients of the public policies developed[57], what is seen in this last period is a fusion of the categories of the victim with the figure of the activist, that are now both embodied by the same individual. This change also approximates the feminist movement to LGBTQI+ and black activists, who have always described themselves as people who fought against the violence experienced by themselves.

A great illustration of this were some feminist campaigns, that had a strong online presence, centered on the idea of women sharing their own stories of abuse and gender violence. Highly inspired by the tactics adopted by the #MeToo movement on Twitter, women would share stories of street harassment and gender violence in the context of intimate relationships, by posting on social media platforms using hashtags that could reunite all entries and influence the public debate. By doing that, the women who participated in these initiatives portrayed themselves as both victims and activists, providing strong political support for the criminalization of conducts related to gender violence at a speed never seen before.[58]

This does not mean that the support for all the punitive initiatives was unanimous within the movement. In the opposite direction, the abolitionist critic gained strength among feminists, spreading its roots from the academic environment, where it had been previously circumscribed, finding its place in feminist organizations which worked in the broader political arena, with specific activist groups being founded and producing plenty of publications in websites and social media as a tool to provide awareness of the intrinsical issues of the criminal justice system and the fact that it is not the best mechanism to protect women or prevent violence.[59]

Some of these abolitionist groups presented a critical approach to criminal law in tune with the theoretical contribution provided in the first section of this paper, arguing that criminal justice is structurally molded to punish primarily the most vulnerable economic and racial groups, a trace that cannot be "corrected" just by including various kinds of gender violence as criminal offenses. This fraction has an expressive presence of black feminists and a racial compound in their political agenda, addressing primarily the impact of prison and criminal law on the lives of black people and black poor women criminalized with the war on drugs in Brazil, but also advocating for the need

[57] This condescending approach from activists to victims is found in interviews of feminists who participated in NGOs that worked with domestic violence in the 1990s who recall that some activists got enraged when victims got back together with their aggressors stating that they were not grateful for all the work done by them. This posture is not a constant, not being found in any of the documents analyzed since the 2000s, when there is still a separation between victims and activists, but without any condescending attitude. Celi Pinto, *Uma História do Feminismo no Brasil* (Editora Fundação Perseu Abramo 2003).

[58] Psychological violence, and stalking were both criminalized in 2021 and sexual assault by touching and revenge porn in 2018.

[59] Interview with Nuria Alabao 'Combater a extrema direita não é só uma questão de discurso, é preciso organização' Instituto Humanitas Unisinos (17 August 2022).

to replace the traditional criminal justice system institutions for other forms of achieving justice and security for victims, such as restorative justice mechanisms.

Lastly, the feminists categorized as garantists became even more restricted to academia, being hard to find expressions of garantism in a political arena each day more polarized[60]. But feminist scholars do not remain indifferent in this environment, also rethinking their views after facing all criticism that pointed out their distance from "the real world" and from the victim's everyday struggles. With that in mind, authors have presented works that demonstrate how material and procedural guarantees of the defendant can be preserved in a feminist perspective of criminal justice and also how can judges and other law practitioners adopt a gender-aware perspective when dealing with victims and remain still impartial when required.[61]

4 Conclusions

Criminal law, as well as law itself, is historically determined, not only structurally, as seen in the first section, but also in its content. Therefore, expressive social change through law can only be achieved to a certain extent that can never be truly emancipatory. On the other hand, this does not change the fact that human rights have been crucial legal instruments throughout the years to promote and guard the rights of vulnerable social groups, meaning that a critical understanding of law should not lead to a defense of dismantling every right that has been gained.

When dealing with criminal law specifically, the question becomes even more complex, considering that in offenses involving human rights violations, such as the case for gender violence, the desire for justice from the victim must be legally limited by the rights of her aggressor. In this tug of war, the suppression of material or procedural guarantees from the defendants can be read as an achievement for the victims, which is not necessarily true, bearing in mind that statistics are inconclusive when trying to show a correlation between an increase in sanctions and reduction of gender violence.

The trajectory of the feminist movement presented shows that the question of gender violence has not always been a priority and, even when it becomes one, as activists start addressing domestic abuse, criminalizing measures are not initially on their political horizon. In this sense, the demands for criminalizing specific forms of gender violence are fairly recent, emerging only in the current century, with an expressive increase in the number of new gender-based crimes in the last ten years.

[60] Not stating that academia is not political, on the contrary, but just concluding that this form of critique has almost no resonance in the debates outside the Academic Environment.

[61] Erika Rackley 'Why Feminist Legal Scholars Should Write Judgments' [2012]. Canadian Journal of Women and the Law 389 and Fabiana Severi 'Justiça em uma perspectiva de gênero'. [2016] Revista Digital de Direito Administrativo 576.

In this path, feminists have benefited from international organizations' initiatives, such as conferences organized by the United Nations, that allowed activists to resurface from clandestinity in the years of the military dictatorship and for the movement to reflect on the common goals to be achieved and later demanded from the Brazilian State. In a similar way, the achievements regarding women's rights that originated in the Organization of the American States were also important political factors to promote legal changes desired by the Movement, with emphasis on the signature of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the report of the Interamerican Commission on Human Rights in the case of Maria da Penha v. Brazil. Here, it is crucial to point out that the international organizations and human rights courts worked as boosters for demands that historically existed among the feminist goals, meaning that they were not the main reason for the adoption of public policies against gender violence in Brazil.

The growing desire for more criminalization ignites internal disputes in the movement, which may seem contradictory, considering that all activists seek to protect victims. However, the understanding of criminal law as an instrument of prevention and punishment becomes a central topic leading to a fracture that becomes clearer as the years pass, dividing punitivists (elsewhere named carceral feminists) and abolitionists.

The scenario poses a challenge to academics who must address the desire for criminalization together with the affirmation of the offenders' fundamental rights and the critique of the criminal justice system. In this sense, the paper concludes that penalists must not underestimate the feminist desires and ought to work alongside them, discussing the inherent limitations of criminal sanctions and the necessity to maintain material and procedural guarantees even for aggressors seen as the most despicable offenders.

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CRIMINAL LAW, IMMIGRATION AND MODERN SLAVERY

THE DETENTION OF MIGRANTS AND THE DEBATE ON CRIMINALITY, DECEITFUL DESCRIPTIONS AND UNDERLYING GUARANTEES

By Filomena Pisconti[*]

Abstract

The need to protect the rights and freedoms of migrants, as enshrined in international principles and obligations, is a red line that must not be crossed in the management of migration by States, regardless of whether the law provides for criminal sanctions for violations of immigration law or allows migrants to be deported to their countries of origin rather than detained. The different types of immigration detention under European and national law are associated with a hybrid collection of misleading labels (detention, treatment, etc.) that conceal the instruments used to deprive people of their freedom. While, on the one hand, European and international law allows for the deprivation of liberty to control immigration, on the other, migrants' guarantees and rights are at risk of vulnus. *This is because coercion - and the question of whether liberty should be deprived or merely restricted - is the* vexata quaestio *faced by conventional and European law, the parameters and criteria of which it is yet to clearly and uniformly define, though deprivation of liberty in some form or other is gradually increasing. The various migrant detention measures present criminal law scholars with the challenge of reshaping the conventional and constitutional limits of criminal law with regard to procedures that essentially amount to hidden punishments, but whose preventive character is the inevitable criterion for the legitimacy of criminal sanctions.*

1 The administrative detention of migrants from the perspective of crimmigration. Criminal policy profiles

The multi-faceted system of immigration detention[1] as an aspect of crimmigration is an example of the dangerous interplay between immigration law and criminal law that forms part of the regressive process of contemporary *ius puniendi* that oscillates between the risks of populism, the dangers of symbolism and the demands of securitarism.

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[1] See on this topic in general Michael Flynn, 'Immigration Detention and Proportionality' (2011) 4 GDP 3; Anil Kalhan, 'Rethinking immigration detention' (2010) CLRS 110 42; Daniel Wilsher, 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) ICLQ 53 897; Valsamis Mitsilegas, 'Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive', in Maria João Guia, Robert Koulish, Valsamis Mitsilegas (eds), *Immigration Detention, Risk and Human Rights* (Springer International Publishing 2016); César Cuauhtémoc, García Hernández, 'Immigration detention as punishment' (2014) UCLA 61 1347.

In particular, the systematic convergence of immigration and security[2] is a constant feature of the migration policy of the last decade, one of the outcomes of which is the use of deprivation of liberty as a (privileged) means of managing immigration.

The current criminal policy on illegal immigration, characterised by 'hostile social and political attitudes towards immigrants'[3], primarily responds to the security needs of a society willing to sacrifice the freedoms and rights of the immigrants it receives and rejects. The phenomenon referred to as 'crimmigration' involves the intertwining of criminalising logic and administrative efficiency in pursuit of the defining aim of the migration policies of many Western countries, namely the exclusion of undesirable foreigners.[4]

The system of criminalisation of immigrants encompasses three political-criminal strategies: predicting criminal consequences for violations of immigration law; predicting administrative consequences of immigration law in conjunction with criminal convictions; predicting measures to deprive or restrict personal liberty and related procedures.

The complex system of administrative detention of migrants falls within this third area, in which the overlap between the penal power of States and so-called *de libertate* measures makes it particularly difficult to balance the public interest in orderly management of migration flows with the fundamental rights of people *in vinculis*.

The specificity of European law in the field of detention lies in its hybrid administrative and criminal nature. While drawing on criminal law techniques and instruments to protect public interests, it fails to apply the guarantees offered by the criminal justice system, sacrificing such protections in pursuit of more effective action to combat irregular immigration.[5]

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[2] See on this point Elspeth Guild, *Security and migration in the 21st century* (Cambridge Polity Press 2009); see also Jef Huysmans, *The politics of insecurity. Fear, migration and asylum in EU*, (London Routledge 2006) and Jef Huysmans, Vicki Squire, 'Migration and security', in Dunn Cavelty, Myriam and Mauer, Victor (eds), *Handbook of security studies* (London Routledge 2009).

[3] Alessandro Spena, '*Iniuria migrandi:* criminalization of imigrants and the basic principles of the criminal law' (2014) 8 CLP 635.

[4] See on this point Gian Luigi Gatta, 'La pena nell'era della crimmigration: tra Europa e Stati Uniti' (2017) 2 RDPP 675; see also Lucia Risicato, *Diritto alla sicurezza e sicurezza dei diritti: un ossimoro invincibile?* (Giappichelli Editore 2019); Carol Ruggiero, 'Le linee di tendenza della crimmigration nel sistema penale italiano dal decreto Minniti al decreto sicurezza bis' (2020) 2 AP 1; Licia Siracusa, 'Sulle tracce della crimmigration in Europa: l'espulsione dello straniero in un confronto fra Spagna, Francia e Italia' (2019) 1-2 RTDPE 273; Izabella Majcher, 'Crimmigration" in the European Union through the lens of Immigration detention' (2013) 6 GDP 1.

[5] See on this point Luigi Foffani, 'Crimmigration: dalla giurisprudenza CEDU ai 'Decreti sicurezza' in Andrea Saccucci, Paulo Pinto de Alburquerque (eds), *I diritti umani in una prospettiva europea, Opinioni dissenzienti e concorrenti (2016-2020)* (ESI 2011) 375.

There is no opposition today to the idea of deprivation of liberty in the absence of a criminal offence, and each Member State enacts laws establishing the conditions for its legitimacy. The right to personal liberty in conventional law is enshrined in Article 6 of the Charter of Fundamental Rights of the European Union and has the same meaning as set out in Article 5 of European Convention on Human Rights (ECHR), because of the equivalence clause in Article 52 para. 3 of the Charter. Detention is a coercive measure that isolates a person, forcing him/her to remain permanently in a delimited and confined space.

2 Detention of migrants in the general debate on criminal matters. Typical and atypical forms in the context of the Italian experience

The most insidious aspect of the immigrant detention system is the deliberate use of false descriptions by States. These tend to disguise the punitive nature of a measure that amounts to genuine deprivation of personal liberty for reasons unrelated to commission of a crime, but merely to one's status as an irregular alien or asylum seeker, or to application of an administrative procedure aimed at managing migration flows.

Detention, like any other measure of a custodial nature, is the most immediate and effective response to domestic public security problems, both as an instrument of security against the 'criminal risk' of the migrant enemy and as an administrative safeguard of state control and management of migration flows. The various grounds justifying detention include irregular entry and stay in the territory and the urgency of effective expulsion of migrants.

The word 'detention' is used deliberately to deny the impact of the measure on personal liberty and to place it at as far a remove as possible from the area of criminal law.

This frames the measure in the context of the general debate on the definition of criminal matters, specifically regarding the criteria developed by the ECtHR, starting from the Engel judgment[6]. As is well known, ECtHR case law on the concept of criminal matters is characterized by a substantive approach, which allows any transgression and sanction the content of which is essentially punitive and restrictive to be designated as a criminal offence, regardless of its formal classification in national law.

The recognition of criminal nature implies the application of the guarantees established in Articles 6 (fair trial) and 7 (principle of legality of criminal acts and penalties and prohibition of retroactive application) of the Convention, as well as in Articles 2 (right to review of judgment) and 4 (prohibition of double jeopardy) of Protocol 7.

[6] *Engel and Others v. The Netherlands* (1976) App nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).

This conventional approach is associated with the principle of 'one-way autonomy', meaning that if an offense or sanction is classified as criminal under national law, the ECtHR automatically applies the conventional guarantees without any need to investigate the actual nature of that offense or sanction, just as the Court must apply the Engel criteria[7] and the guarantees for an administrative offense or a civil or disciplinary offense or sanction when they are criminal in nature.

Thus, the criterion of domestic legal classification only serves to formally describe a measure, while the other two more substantial criteria – concerning the nature of the offence and the severity of the penalty – have gradually grown in importance, applied only in a subsidiary and auxiliary manner to offenses and sanctions not domestically classified as criminal, to extend the application of the traditional guarantees to them.

The importance of formal domestic classification has led to insidious labeling fraud, referred to in Italian as *truffa delle etichette*, which dissuades the interpreter from analyzing the concrete effects of the measure. It is precisely its administrative function that conceals its effect of depriving the individual of liberty rather than merely restricting such, even in the absence of a criminal offense.

It is not easy to classify measures constituting atypica*l de facto* restrictions as depriving individuals of their liberty, because at the level of conventional jurisprudence the logical premise of deprivation of liberty has evolved over time in a less protective direction.

In Italian, the term *detenzione* sometimes disappears from the vocabulary of the legislator, in favour of the less invasive *trattenimento* that, while also meaning 'detention', denotes less invasive forms of exercise of punitive power; these are terms borrowed from administrative law, and the real challenge for the criminal law interpreter is to identify the legal and legitimate parameters for each form of coercion to ensure the absolute protection of migrants' liberty.

Indeed, the conceptual delimitation between restriction and deprivation of liberty is the key point at issue with the immigration system; this is especially true for atypical forms of administrative detention that take place in locations not traditionally identifiable as sites of real coercion.

The designations used in national laws for detention centres are very different, and it has not always been easy to classify the various forms as either restrictive or depriving; in the case of atypical forms of detention, deprivation of liberty actually takes place, but

[7] See on this point Luca Masera, *La nozione costituzionale di materia penale* (Giappichelli Editore 2018); Carlo Enrico Paliero, 'Materia penale e illecito amministrativo secondo la Corte europea dei Diritti dell'Uomo: una questione classica ad una svolta radicale' (1985) RIDPP 894; Francesco Mazzacuva, 'La materia penale e il "doppio binario" della Corte europea: le garanzie al di là delle apparenze' (2013) RIDPP 1899.

it is not always easy to identify it or to apply constitutional and conventional guarantees.

The Italian Consolidated Immigration Act (Legislative Decree No. 286 of 25 luglio 1998) omits the term '*detenzione amministrativa*' (unlike the equivalent UK law, which uses the term 'detention') in favour of the weakened expression '*trattenimento*' and other expressions such as, for example, *Centri di permanenza temporanea ed assistenza* – CTPA (Centres for Temporary Stay and Assistance), *Centri di permanenza per i rimpatri* – CPR (Centres for Temporary Residence and Assistance)[8], and terms indicating border centres, hotspots[9], police stations, reception centres, airport transit rooms, and the hypotheses of detention centres on quarantine ships or rescue NGOs. All these designations refer in practice to typical and atypical forms of detention of irregular migrants.

The hypotheses of detention under Italian law have a legal basis and are subject to judicial review, while in cases where deprivation of liberty actually takes place, it is not easy to activate the guarantees of the domestic legal system in the case of these so-called *extra ordinem* measures; there is also no general remedy of *habeas corpus* except to appeal to Strasbourg on the grounds of a violation of Art. 5 ECHR.

Defining any form of detention or deprivation of personal liberty as an administrative measure is not only an example of labeling fraud, as it circumvents constitutional and conventional guarantees, but also evidence of unacceptable trivialisation of personal liberty, declared inviolable under Article 13 of the Italian Constitution; the preventive nature of a detention measure cannot remove it from the criminal sphere given that it affects personal liberty.

3 Imprisonment or restriction of liberty. A differentiated system of guarantees between conventional provisions and juridical guidelines

Deprivation of personal liberty in the absence of a crime entails certain guarantees set out in Art. 5 ECHR para. 1 lit. f.), and others arising from conventional jurisprudence: exceptionality, legality, existence of legal remedies, non-arbitrariness, effectiveness, diligence in enforcement, proportionality, necessity of application. The mere restriction of freedom of movement, on the other hand, is subject to the milder protection of Art. 2 Protocol 4 ECHR, which only cover persons lawfully present in the territory.

[8] See on this point Marcello Daniele, 'La detenzione come deterrente dell'immigrazione nel decreto sicurezza 2018' (2018) 11 DPP 95; Giulia Colavecchio, 'Crimmigration practises. La detenzione dei migranti in Italia dopo l'entrata in vigore del "decreto sicurezza" alla luce del Diritto internazionale e dell'"Unione Europea"' (2019) 2 DS 113.

[9] See on this point Carmela Leone, 'La disciplina degli Hotspot nel nuovo art. 10 ter del d.lgs. 286/98: un'occasione mancata' (2017) 2 DIC 1; Luca Masera, 'I centri di detenzione amministrativa cambiano nome ed aumentano il numero, e gli hotspot rimangono privi di base legale: le sconfortanti novità del Decreto Minniti' (2017) 3 DPC 278; Giliberto Felici, Martina Gancitano, 'La detenzione dei migranti negli hotspots italiani: novità normative e persistenti violazioni della libertà personale' (2022) 1 SP 45.

Moreover, a detention measure is classified on the basis of its practical application, and the definition provided by national law is not decisive in determining whether a person is deprived of his liberty[10].

The truly problematic issue with regard to detention of immigrants is not the traditional system of guarantees, but rather the selection of *criteria* that make it possible to identify the custodial, rather than merely restrictive, effect of a detention measure; this is because different levels of protection apply when these conditions are met, especially, as mentioned above, in all cases where the detention of the immigrant takes place in hybrid places.

According to initial case law in the leading case *Guzzardi v. Italy*[11] – in which the Strasbourg Court stated that 'deprivation of liberty ... may take numerous forms' (95) – the difference between deprivation of liberty and simple restriction lies 'however, only in the degree or intensity, not in the nature or content' (93). The four criteria of 'nature, duration, effects, and manner of implementation' were supplemented in the case *Austin and Others v. United Kingdom*[12] by a fifth, 'the context in which the measure is taken', i.e., the reason for which the measure is taken. A situation of rigid and long detention, however, should be considered under Art. 5, on the basis of its real nature, independent of its real motivation.

In the case *Ilias and Ahmed v. Hungary*[13], concerning the detention of migrants in transit zones, while proceedings for their right to remain in the state were pending, the European judges further developed the test applied in the Guzzardi case and introduced more practical criteria: the first point is 'the individual situation of the applicants and their decisions'; the second refers to 'the applicable legal system of the country concerned and its purpose'; the next is 'the relevant duration, in particular taking into account the purpose and the procedural protection enjoyed by the applicants, until the facts are clarified'; the last is 'the nature and extent of the actual restrictions imposed on or contemplated by the applicants.'

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[10] *Amuur v France* App no 19776/92 (ECtHR 25 June 1996); *Nolan e K. v Russia*, App no 2512/04 (ECtHR 12 February 2009); *Abdolkhani e Karimnia v Turkey*, App no 30471/08 (ECtHR 22 September 2009); *Ashingdane v. United Kingdom*, App no 8225/78 (ECtHR 26 March 1985).

[11] *Guzzardi v Italia* App no 7367/76 (ECtHR 6 November 1980).

[12] *Austin et al. v Regno Unito* App no 39692/09 (ECtHR 15 March 2012). See on this point Lorenzo Bernardini, 'La detenzione degli stranieri tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di Godot', (2022) 1 DIC 75.

[13] *Ilias e Ahmed c. Ungheria* App no 47287/15 (ECtHR - GC 21 November 2019); see also *R.R. et al. v Ungheria* App no 36037/17 (ECtHR 2 March 2021). See on this point Cesare Pitea, 'La Corte EDU compie un piccolo passo in avanti sui paesi terzi "sicuri" e un preoccupante salto all'indietro sulla detenzione di migranbti al confine. A margine della sentenza della Grande Camera sul caso Ilias e Ahmed c. Ungheria' (2020) 3 DIC 193; Simone Penasa, '*Paese terzo sicuro e restrizione della libertà delle persone richiedenti asilo: il caso Ilias e Ahmed c. Ungheria*' (2020) 1 QC 180.

Ultimately, application of these unconvincing and less protective criteria allowed the Court to consider that the stay in the transit zone did not constitutes a deprivation of liberty because the applicants were free to leave the area and flee of their own accord. The Court is here inclined to sacrifice the system of guarantees for greater efficiency and speed in combating irregular immigration.

The Court of Luxembourg[14] adopted a different approach to the same issue, aiming to exclude the possibility that the significant number of persons seeking international protection justifies a weakening of the guarantees, and stressing the importance of maintaining a 'practical and realistic' approach that does not give border authorities 'a free hand' precisely with regard to the grey areas of the law, where a high level of attention is required.

According to the Luxembourg Court, deprivation of liberty must be considered to exist not only in specific detention centres but in any place that the asylum seeker cannot freely leave. Thus, the real difference between deprivation of personal liberty and mere restriction of freedom of movement lies in the degree and intensity, not in the nature or essence of the measure.

The same exegetical guideline has led Italian criminal jurisprudence in the field of abduction to consider the objective element of art. 605 of the Italian Criminal Code in a wider range of situations than the archetype of forced stay in a closed place, and to extend the hypothesis of deprivation of liberty to all situations in which freedom of action is significantly restricted, even for a short time[15].

With reference to certain hypotheses on deprivation of liberty, the criterion of voluntarily being able to choose to leave the space of coercion certainly, in the Italian context, makes it possible to define the detention of migrants on board Italian military ships as unlawful deprivation; as this form of deprivation of liberty is considered to be *extra-ordinem* (as an atypical measure), however, it does not give rise to the requirement of lawfulness under Art. 5 ECHR, meaning that the relevant guarantees are not extended to such forms of deprivation.

That a systematic deprivation of personal liberty occurred in Italian case *Diciotti*[16] was also clear and obvious to the National Guarantors for the Rights of Prisoners or Persons

[14] Cases C-924/19 PPU e C-925/19 PPU FMS, FNZ, SA, SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság [2020] ECJ (GC 14 may 2020).

[15] Cass pen (5) 13 April 2010, 2020 28509; Cass pen (1) 8 April 2009, 2009 18186.

[16] In August 2018, 190 migrants, who departed from Libya (mostly from Eritrea and Somalia), were rescued in the Maltese SAR zone by the Italian coast guard and transferred on board the ship 'Ubaldo Diciotti'. On 20 August, after three days spent near the island of Lampedusa, the Diciotti ship received the authorization to enter the port of Catania, but not to disembark the migrants. On 22 August, following an express request by the Prosecutor of the Juvenile Court of Catania, the disembarkation of children was authorized, while the other migrants did not disembark until 25 August.

Deprived of their Personal Liberty: the conditions of detention were indecent, the prisoners ate and slept on the deck where there were only two chemical toilets and no wash basins for one hundred and fifty people, the beds were made of cardboard.

The restrictive measures applied by the Italian authorities, which found that Italian ports did not meet the necessary conditions for classification and designation as places of safety for rescue operations carried out by foreign-flagged ships outside the Italian SAR area, throughout the period of the health emergency, was found to constitute unjust coercive measures, only justified on the grounds of containing the pandemic and preventing the collapse of the national health system, as well as ensuring proper management of measures to combat the spread of the virus. Such measures involved monitoring and self-isolation for a period of fourteen days in appropriate spaces or within reception centres or other structures set up for this purpose.

However, the lack of legal basis means the guarantees provided for under Art. 5 ECHR cannot be applied to all these situations in which migrants are deprived of freedom due to ministerial decisions[17]. In all such cases, the sea is a paradigmatic example of the absence of a realistic alternative to remaining on board while awaiting the provisions of authorities, with no opportunity for self-determination of movement. Migrants at land borders, like those at sea borders, are therefore poorly protected: despite apparent robustness, in the highly varied system of typical and atypical detention measures, the right to personal freedom in the context of immigration proves to be weak.

4 Conclusions regarding a more protective jurisprudential approach

Though the ECHR offers weak guarantees and establishes fuzzy limits regarding the deprivation/restriction binomial for all typical and atypical cases of immigration detention, the solution of one-way autonomy requires the national legislator to ensure compliance with the guarantees offered by the Convention for measures that satisfy or fail to satisfy the definition of deprivation under conventional jurisprudence in every case, even in the most recent cases benefitting from the least guarantees.

Integrating the two levels of protection will make it possible to define as unlawful in national legal systems those deprivations of liberty that do not comply with the system of conventional guarantees.

National law should free itself of the chains of labels, using the keys of ECHR guarantees for all measures that national law defines as deprivative and for all those that correspond to the conventional concept of deprivation of liberty, regardless of the label.

[17] See on this point Francesca Cancellaro, 'Dagli hotspot ai "porti chiusi": quali rimedi per la libertà "sequestrata" alla frontiera?' (2020) 3 DPC 428; Id., 'Immigration detention between law and practice in Italy: managing the border through arbitrary detention', Gian Luigi Gatta, Valsamis Mitsilegas, Stefano Zirulia (eds), *Controlling immigration though criminal lw: european and comparative perspectives on 'crimmigration'* (Hart Publishing 2021).

For these reasons, the Court should make greater use of the hermeneutic coordinates of the deprivation of liberty of migrants, rendering them protective, with a view to eliminating the concrete possibility of relegating migrants to places of limbo where even fundamental rights can be suspended and forgotten.

The protection offered by the Strasbourg Court, with its shield of guarantee, should therefore protect foreigners subject to its jurisdiction.

Abandoning this role would result in a situation in which there could be special persons within the European area who are subject to a special law that entails unclear detentions and deprivations of liberty.

When faced with multipurpose measures, such as administrative detention of migrants, the judge should adopt an interpretation that is as favorable as possible to defend migrants.

The principle of an interpretation favorable to aliens, true to the immigration rule of lenity[18], pursues the goal of protecting the immigrant, framed as an enemy of society, from possible arbitrariness using the state's punitive power.

A criminal law approach should therefore lead the judge to interpretations that are not only an expression of an abstractly understood legality, but that also contribute to more effective protection of fundamental rights at European borders.

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[18] See on this point Mario Caterini, Diana Zingales, 'La rule of lenity nell'immigration law statunitense: spunti comparativi per il diritto penale italiano' (2022) 3 AP 1.

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PROTECTING MIGRANT VICTIMS: WHAT ROOM FOR THE RIGHT TO SILENCE?

By Sara Bianca Taverriti[*]

Abstract

This paper aims at addressing the issue of access to justice for victims of crimes with an irregular migration status. One of the prominent side effects of punishing irregular migration is the substantial exclusion of these individuals from the circuit of the criminal justice system, as they fear being tried or ordered to leave the country after approaching the police. The article draws on the similarities between the condition of victims with an irregular migration status and the "cruel trilemma" of the defendant forced to choose between maintaining his silence and being held in contempt of court; lying and thereby perjuring, or incriminating himself. Thus, the paper questions whether the nemo tenetur se detegere *principle can be used to protect these victims. After reviewing a series of remedies and reliefs that somehow protect the right to silence of the migrant victim, the paper shows discriminations that are still affecting these individuals and it proposes to extend the scope of application of this guarantee, originally conceived for the defendant.*

1 Introduction

Over the last decades, the distance between criminal law and immigration law is somehow blurring, as in most countries violations of immigration law are criminally prosecuted or subject to administrative procedures of removal. One of the prominent side effects of punishing irregular migration is the substantial exclusion of these individuals from the circuit of the criminal justice system. In fact, as irregular migrants could be tried or ordered to leave the country after their identification, they are often disinclined to report crimes they have suffered or witnessed because they fear approaching the police. Therefore, part of the population is left not only unprotected but also more exposed to victimisation, as these people become the favourite prey of offenders who can rely on the silence of these victims.

This paper addresses the issue of these migrant victims left unprotected taking into consideration the Italian legal system as the main field of observation, and drawing on human rights – and, in particular, the right to access justice for victims of crimes and the 'right to silence' and its derivative guarantees – as tools of a possible solution to it.

2 Silenced migrant victims

With migration flows becoming an ever-more topical issue in the Western world, irregular migration has significantly drawn the attention of criminal lawyers and criminologists in Europe and North America. Several studies looked at irregular

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migration under the lens of criminal law, including "crimmigration"[1] studies analyzing irregular migration as a crime in itself (in those countries, as in Italy, where irregular entry or stay is penalized), and the countless studies that tried to confirm or bust the myth that depicts migrants (and particularly those with irregular status[2]) as more prone than natives to carry out a crime.[3] In return, the same level of attention has not been given to the other side of the medal, the one that sees migrants as victims (or witnesses) rather than authors of crimes.

2.1 From 'crimmigration' to 'victimigration'

Understanding how being a migrant can itself be a source of vulnerability – and, in particular, how having irregular status increases the level of vulnerability – remains largely unexamined. Studies analyzing migrants' victimization tend to be limited to specific national contexts or specific criminal activities, such as trafficking and

[1] Term coined by Juliet P. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) AmULRev 56 367; D.A. Sklansky,'Crime, Immigration, and *ad hoc* Instrumentalism' (2012) 15(2) NCLR 157; Cesar Cuauhtemoc Garcìa Hernàndez, *Crimmigration Law* (ABA 2017). On the roots of this tendency see also David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (The University of Chicago Press 2002); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007); The phenomenon of Crimmigration is also extending to other collateral political strategies, like the provision of immigration law consequences for criminal convictions, and the deprivation or limitation of personal freedom in immigration law enforcement, the criminalisation of rescue operation by NGOs; for a wide perspective on the European state of the art see, Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia, (eds), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on "Crimmigration"* (Hart Publishing, 2021), Francesca Curi and others, *I migranti sui sentieri del diritto. Profili socio-criminologici, giuslavoristici, penali e processual-penalistici* (Giappichelli 2020).

[2] Including individuals who have either entered the country without proper authorization, breaching immigration rules (irregular entrants), or who entered in compliance with such laws, but subsequently did not comply with the conditions of their stay (i.e. overstayers: migrants who have stayed in the country beyond the expiration of their visas 'overstayers'; migrants who have lost their regular status following other events, like divorce, the refusal of an asylum application, the loss of regular employment).

[3] On the nexus between immigration and crime rates see Frances Bernat, 'Immigration and crime' in Henry N. Pontell (eds), *Oxford research encyclopedias: Criminology and criminal justice* (OUP 2017); J.I. Stowell and others, 'Immigration and the recent violent crime drop in the United States: A pooled, cross-sectional time-series analysis of metropolitan areas' (2009) Criminology 47(3) 889; Ramiro Martinez Jr., Jacob I. Stowell & Matthew T. Lee, 'Immigration and crime in an era of transformation: A longitudinal analysis of homicides in San Diego neighborhoods, 1980–2000' (2010) Criminology 48(3) 797; Stefania Crocitti, 'Immigration, Crime, and Criminalization in Italy' in Sandra Bucerius, Michael Tonry (eds.), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (OUP 2013). See Robert J. Sampson, 'Rethinking crime and immigration' Contexts (2008) 7(1) 28; Rubén G. Rumbaut and Walter A. Ewing, 'The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men' (Immigration Policy Center, 2007). A recent synthesis of the empirical facts on immigration and crime, with a special focus on incarceration; Fabio Fasani and others, *Does Immigration Increase Crime?: Migration Policy and the Creation of the Criminal Immigrant* (CUP 2019).

smuggling of human beings or labour exploitation.[4] Yet, as we shall see, some studies did flag that there is a clear correlation between one's condition as a migrant, particularly if irregular, and an increased vulnerability to victimization to (any kind of) crime. Some studies in victimology gave this issue greater attention and explored the factors making migrants more exposed to crime than nationals.[5]

Irregular migrants may be even more prone to victimization than other foreign nationals. It has been long shown that irregular migrants are strongly deterred from seeking services or reporting crime due to the fear that contacting the authorities would inevitably lead to the detection of their irregular status and, subsequently, their deportation.[6] Irregular status and the related reluctance to report crimes exacerbate migrants' vulnerability, enhancing the chances that criminals will perpetrate offences against them. Studies in the US found, for example, that Latino migrants have been targeted by robbers because their ethnicity made them 'visually identifiable' to criminals who assumed Latinos would have irregular status, and therefore would not report crimes.[7] According to a study conducted in Italy[8] focused on immigrant victims

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[4] FRA, *Severe labour exploitation – Workers moving within or into the European Union* (Publications Office of the EU 2015) <fra.europa.eu/en/publication/2019/protecting-migrant-workers-exploitation-eu-workers-perspectives> accessed 31 March 2023; FRA, *Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive* (Publications Office of the EU 2021) <fra.europa.eu/en/publication/2021/employers-sanctions-against-exploitation> accessed 31 March 2023; Alena H. Chudžíková, Zuzana Bargerová, 'Victims of labour exploitation or "illegal" migrants? Ukrainian workers' labour rights protection in Slovakia' (2018) <ec.europa.eu/migrant-integration/library-document/victims-labour-exploitation-or-illegal-migrants-ukrainian-workers-labour-rights_en> accessed 31 March 2023.

[5] See Ezzat A. Fattah, *Understanding Criminal Victimization* (Prentice-Hall Canada Inc., 1991; Carl Kelsey, 'Immigration and Crime' (1926) AAPSS 125, Modern Crime: Its Prevention and Punishment 165; Hans Von Hentig, *The Criminal and his Victim. Studies in the Sociobiology of Crime* (1948 Yale University Press) 414-415. See Romolo Giovanni Capuano, *Immigrants as victims of crime in Italy: an exploratory study* (Lambert, 2011); Angelica S. Reina, Brenda J. Lohman and Marta Maria Maldonado, '"He said they'd deport me": Factors influencing domestic violence help-seeking practices among Latina immigrants' (2014) 29(4) JIV 593; Jill Theresa Messing and others, 'Latinas' perceptions of law enforcement: Fear of deportation, crime reporting, and trust in the system' (2015) Affilia, 30 (3) 328.

[6] Orde F. Kittrie, 'Federalism, Deportation and Crime Victims Afraid to Call the Police' (2006) 91 IoLRev 1449; R.Rodrigues and others, 'Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey' (NIWAP - American University Washington College of Law 2018), < library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf>; Reina et al. (n 8) 593–615; Messing et al. (n. 5) 328–340; Shannon Gleeson, 'Labor rights for all? The role of undocumented immigrant status for worker claims making' (2018) 35 Law & Social Inquiry 561; PICUM, *Guide to the EU victims' directive: advancing access to protection, services and justice for undocumented migrants*, (Brussels 2015) <picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf>.

[7] See Nicola Delvino, Markus González Beilfuss, 'Latino Migrant Victims of Crime: Safe Reporting for Victims with Irregular Status in the United States and Spain' (2021) 13 ABS 1; Raymond E. Barranco, Edward S. Shihadeh, 'Walking ATMs and the immigration spillover effect: the link between Latino immigration and robbery victimization' (2015) 52 SocSciRes 440.

of ordinary crimes, in addition to common factors influencing migrants' victimisation, there are several factors that may further enhance their vulnerability, like: recent arrival; being undocumented; being unemployed; being single; being a person of colour; being female (possibly); coming from Sub-Saharan Africa; living in degraded areas, and having poor knowledge of the language.

2.2 Underreporting and the dark figure of crime against migrants

The dark figure of crime[9] against irregular migrants is likely higher than any known figure since a significant number of crimes go unreported (and thus undetected) due to irregular migrants' fear of self-incrimination and deportation.[10] In addition, cultural gaps might lead foreign victims to disregard criminal action, when they see this as a natural behaviour within their cultural background despite it being a punishable offence in the country where they live. Migrants might also be reluctant to report crimes when the offender is a member of the family or if he/she comes from the same ethnic or national background.[11]

Concerning the situation in Italy, the Italian National Institute of Statistics (ISTAT) produced data on crimes against all foreign nationals, including those regularly or irregularly present in the national territory. According to a 2017 ISTAT report on Criminality, victims were foreign citizens (including non-residents) in one-fifth of crimes reported in Italy, but the percentage was dramatically higher for violent offences than offences against property. Proportionally, foreigners were more exposed to criminal offences than Italians.[12] Previous studies had shown that immigrants are more likely to suffer crimes committed by nationals of their own countries of origin rather than by Italian nationals and that crimes are more frequent within the same national

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[8] See Capuano, (n. 5).

[9] See the almost equivalent notion of 'secret deviance' in Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (NY:The Free Press 1963); Bureau of Social Science Research (Washington, D.C.) *Report on a Pilot Study in the District of Columbia on Victimization and Attitudes Toward Law Enforcement* (Washington, DC: President's Commission on Law Enforcement and Administration of Justice 1967).

[10] Carmen M. Gutierrez, David S. Kirk, 'Silence speaks: The relationship between immigration and the underreporting of crime' (2017) 63 Cri&Del 926; Reina, Lohman and Maldonado (n 8); Messing and others (n 8); Jacob Bucher, Michelle Manasse, Beth Tarasawa, 'Undocumented Victims: An Examination of Crimes Against Undocumented Male MigrantWorkers' (2010) SWJCJ 7(2) 159; Stefano Comino, Giovanni Mastrobuoni, Antonio Nicolò, 'Silence of the Innocents: Undocumented Immigrants' Underreporting of Crime and their Victimization' (2020) 39 JPolAn&Man 4, 1214; Elizabeth Fussell., 'The deportation threat dynamic and victimization of Latino migrants: Wage theft and robbery' (2011) The Sociological Quarterly 52 593.

[11] In situations involving human trafficking and smuggling of migrants, victims are often afraid to contact authorities because of the relationship with traffickers, which can vary from complete subjection due to fear of retaliation to gratitude for the help provided in the migration journey. UNHCR, (2017) *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral. Linee guida per le Commissioni Territoriali per il riconoscimento della protezione internazionale* (2017) 9.

[12] ISTAT, (2017) Delitti, imputati e vittime. Una lettura integrata delle fonti su criminalità e giustizia <www.istat.it/it/archivio/204158> accessed 20 June 2023.

group than between different groups.[13] According to ISTAT, in Italy, foreign nationals are victims of 20% of voluntary manslaughters/murders, 30% of attempted murders, 30% of sexual assaults, 14% of incidences of stalking, 23% of criminal injuries, 14% of threats, 12% of insults, 18% of thefts, 16% of muggings, and 20% of robberies.[14] In addition to common crimes, migrants tend to be victims of specific crimes like hate crimes, xenophobic assault, smuggling, trafficking of human beings and organs, modern slavery, debt bondage, exploitation of begging, and exploitation to commit other crimes.[15]

3 Going around a minefield: in search of a safe path for irregular migrants to report a crime

Now that we have reframed the topic from a criminological and victimological perspective, we have to analyse the issue in practice, considering the Italian legal system as a point of observation.

To get into the topic in practice, it might be useful to question which are the paths for crime reporting available in Italy, for a victim with an irregular migration status seeking to access the criminal justice system, knowing that in the Italian legal system, irregular entry and stay is provided not only as an administrative offence but also as a criminal offence.[16] In fact, Italian legislation establishes four different misconducts related to irregular migration punished as criminal offences. The main offences criminalising irregular migrants are detailed in the Consolidated Law on Immigration.[17] These are 'irregular entry and stay' in the State's territory [18]; the

[13] Marzio Barbagli, Asher Colombo, 'Immigrants as authors and victims of crimes: the Italian experience', in William F. McDonald (ed.), *Immigration, Crime and Justice* (Sociology of Crime, Law and Deviance - vol. 13) (Emerald JAI 2009).

[14] ISTAT (2017) (n 15).

[15] See FRA, Encouraging hate crime reporting. The role of law enforcement and other authorities (Report) 2021; FRA, Protecting migrants in an irregular situation from labour exploitation. Role of the Employers Sanctions Directive (Report) 2021. Amongst EU and international legislation, see Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Entry into force: 09 Dec 1978).

[16] See Alberto Di Martino and others, *The criminalization of irregular immigration: law and practice in Italy* (PisaUniversity Press 2013); Giulia Mentasti, 'The criminalisation of migration in Italy: current tendencies in the light of EU law' (2022) NJECL 13(4) 502.

[17] Decreto legislativo 25 luglio1998, n 286, Testo Unico sull'immigrazione (also Consolidated Law on Immigration, or CLI).

[18] CLI, Art. 10-bis, punished with a fine ranging from 5.000 euros to 10.000 euros.

infringement of an order to leave the State's territory;[19] the re-entry into the State's territory after an administrative expulsion;[20] and the re-entry into the State's territory after a border rejection or expulsion.[21] In practice, some of these criminal offences coincide with having an irregular migration status as such – this being particularly true for the crime of irregular entry or stay which sanctions people who irregularly entered the territory or overstayed in Italy after their residence permit expired.

Moreover, all these crimes are prosecutable *ex officio*, and the Italian criminal justice system places a duty to report crimes prosecutable *ex officio* upon all police officers, public officials, and, under certain conditions, doctors. Meaning that every public official (including police officers) has the duty to report crimes they gained knowledge of in the exercise of their function. The violation of the duty to report a crime for public officials is punished by art. 361 and 362 of the Italian Penal Code.

In short, the combined effect of the criminalisation of migrants with an irregular *status* and the duty to report irregular migrants for public officials, including police officers, makes the interaction between migrants and public authority problematic.

Concerning the paths for crime reporting, the victim can report directly to public authorities or through the support of another person (usually a lawyer). Reports by private parties (denuncia) can be submitted by whoever has knowledge of an offence (when prosecutable *ex officio*). The report shall be submitted orally or in writing, personally or by means of a proxy, to a Public Prosecutor or a criminal police official. When submitted in writing the report shall be signed by its author or their proxy (Art. 333 CPP[22]). Conversely, minor crimes, and some major offences (for instance, sexual assault or stalking), require a 'complaint' (querela) by the victim for the prosecution to be initiated. The complaint shall be submitted in the same way as the report by private parties (orally or in writing, personally or by means of a proxy). Moreover, if it bears an authenticated signature, the statement may also be delivered by an appointed person or sent by mail in a registered envelope.

When the victim approaches a police station he/she is immediately identified by police officers – either through ID documents or through database checks. At this moment, the migrant victim is immediately detected as irregularly present on the Italian territory

[19] CLI, Art. 14 para 5-ter, punished with a fine ranging from 10.000 to 20.000 euros and (5-quater) punished with a fine ranging from 15.000 to 30.000 euros.

[20] CLI, Art. 13 para. 13 and 13-bis, punished respectively with detention ranging from one to four years, and detention from one to five in case of illegal re-entry after expulsion.

[21] CLI, Art. 10 (2-ter) punished with dention ranging from one to four years and expulsion and (2-quarter) punished with detention ranging from one to five years. These two offences have been recently introduced by the the Decreto Legislativo 4 ottobre 2018, n 113 (also 'Salvini Decree'), for a comment see Alberto Aimi, 'Il "Decreto Sicurezza" 2018: i profili penalistici'(2019) RIDPP 1 137; Luca Masera, 'La crimmigration nel decreto Salvini' (2019) LP <www.lalegislazionepenale.eu/wp-content/uploads/2019/07/Masera-Studi.pdf> accessed 31 March 2023.

[22] Codice di Procedura Penale, DPR 22 Settembre 1988, n 447 (hereafter CCP).

and the criminal proceeding against him/her must start. In a different scenario, he/she could report the crime in writing, through a proxy (for example, a report drafted by a lawyer) preventing direct contact between the migrant with irregular status and public officials. Nevertheless, the identification of the victim and his/her participation in the trial is almost always necessary to continue the investigations and the trial. Moreover, it cannot be ruled out that this way of reporting may disclose (and bring evidence of) the irregular presence of the complainant, or clues of his/her irregular migration status.

With all this in mind, it is easy to understand that irregular migrants' approaching public authorities in Italy are effectively exposed to the risk of being detected, prosecuted and deported.[23] In this scenario, migrant victims are trapped in a deadlock: reporting the crime they have suffered, thus revealing (sooner or later) their condition of irregularity; or keeping silence on the crime suffered and remaining unprotected and exposed to the risk of further victimization.

4 A right to silence for silenced victims?

The situation we have just sketched sounds familiar to criminal lawyers as it reminds us of the so-called "cruel trilemma" of the defendant forced to choose between maintaining silence and being held in contempt of court; lying and thereby perjuring, or incriminating himself.[24] In that situation, the *nemo tenetur se detegere* principle – no one is bound to incriminate himself – offers a way out of this impossible decision: the defendant can remain silent without fearing contempt or other negative consequences.

The right to silence has distant roots that are impossible to summarize in a few lines[25] and even though it is not always expressly provided, most criminal justice systems rely on it. An explicit recognition of the right to not be a witness against oneself lies in the Fifth amendment of the US Constitution of 1791,[26] in the International Covenant on Civil and Political Rights, which also provide the right not to be compelled to

[23] Just to name two episodes that took place in Italy, see <www.osservatoriodiritti.it/2017/05/26/migranti-chiamano-ambulanza-arriva-la-polizia/> accessed 20 June 2023; <www.osservatoriodiritti.it/2017/06/14/irregolare-vittima-reato-giustizia-migranti/> accessed 20 June 2023.

[24] Term used by the United State Supreme Court in Murphy v. Waterfront Comm'n., 378 U.S. 52, 55 (1964), Kent Greenawalt, 'Silence as a Moral and Constitutional Right', 23 Wm&ML Rev 15 (1981) 16, 39 for a critical review of the argument see D. Dolinko, 'Is there a rationale for the privilege against self-incrimination?', (1986) 33 UCLA L Rev 1063, 1090-1107.

[25] Albert W. Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1996) 94 MLR 2625; D.Dolinko, (n. 25); R.H. Helmholz, 'Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune' (1990) 65 NYULR 962; Leonard W. Levy, *Origins of the Fifth Amendment* (OUP 1968); Mike Redmayne, 'Rethinking the Privilege against Self-Incrimination' (2007) 27 OJLS 209; Elena Maria Catalano, 'Diritto al silenzio, *right not to be questioned* e tutela della autoincriminazione. Note storico-comparative' (2011) 11 CP 4020.

[26] «No person […] shall be compelled in any criminal case to be a witness against himself».

confession,[27] in the Inter-American Convention on Human Rights[28] and the Rome Statute of the International Criminal Court.[29]

The European Court of Human Rights recognised the right to remain silent and the privilege against self-incrimination within the scope of art. 6 of the Convention,[30] although not specifically mentioned as these are «generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6».[31] The *rationale* is to fulfil the requirements of a fair trial and to assure the presumption of innocence preventing improper compulsion by the authorities and miscarriages of justice.

EU Law also recognized this right in art. 47 and 48 of the EU Charter of fundamental rights, which together provide for the right to a fair trial, the presumption of innocence and the right of defence.[32] As usual, in accordance with art. 52 (3) of the EUCHR, these standards are recognized the same meaning and scope as the corresponding guarantees provided by the ECHR, and they are thus interpreted taking into account art. 6 of the ECHR and the related case law. Also, the EU Court of Justice has recently recognised that the right operates even in administrative proceedings which fall within the scope of the *matière pénale*[33] when individuals are required to answer questions which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.[34] EU also took significative steps to further

[27] See Art. 14, para 3, (g).

[28] See Art. 8, para 2 (g).

[29] See Art. 67, para 1(g).

[30] See Andrew Ashworth, 'Self-Incrimination in European Human Rights Law – a Pregnant Pragmatism?' (2008) 30 Card.L. Rev 751; Stijn Lamberigts, 'The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure' (2016) NJECL 7(4) 418; Javier Escobar Veas, 'A Comparative Analysis of the Case Law of the European Court of Human Rights on the Right against Self-Incrimination' (2022) 8 (2) RBDPP 869; See Funke v France (1993) 16 EHRR 297, para 44; Saunders v United Kingdom (1996) 23 EHRR 313, para 68; Murray v United Kingdom (1996) 22 EHRR 29, para 45; O'Halloran and Francis v United Kingdom (2007) 46 EHRR 21, para 45; Bykov v Russia App no 4378/02 (ECtHR Grand Chamber, 10 March 2009), para 92; Ibrahim and Others v the United Kingdom App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR 13 September 2016), para 272).

[31] Murray v United Kingdom (1996) 22 EHRR 29, para 45.

[32] Emily Hancox, 'The Right to Remain Silent in EU Law' (2021) 80 CLJ 231

[33] See for all Francesco Mazzacuva, *Le pene nascoste. Topografia delle sanzioni punitive e modulazione dello statuto garantistico* (Giappichelli 2017).

[34] Case C-481/19, DB vs Consob (GC, 2 February 2021) commented by Enrico Basile, 'La Corte di giustizia riconosce il diritto al silenzio nell'ambito dei procedimenti amministrativi "punitivi"' (2021) SP <www.sistemapenale.it/it/scheda/corte-di-giustizia-nemo-tenetur-se-deteger-sanzioni-amministrative-punitive-abusi-di-mercato> accessed 31 March 2023; Matteo Aranci, 'Diritto al silenzio e illecito amministrativo punitivo: la risposta della Corte di giustizia' (2021) 2 SP 73 <www.sistemapenale.it/pdf_contenuti/1613424705_aranci-2021a.pdf> accessed 31 March 2023. See also the request for a preliminary ruling deriving from the Italian constitutional Court Corte Cost. 10 may 2019, Ord. n. 117 commented by Gaia Caneschi, 'Nemo tenetur se detegere anche nei procedimenti amministrativi sanzionatori? La parola alla Corte di giustizia' (2020) CP 579; Sofia Confalonieri, 'Il nemo

enhance the protection of the presumption of innocence with the 2016/343 Directive[35] explicitly providing the right to remain silent and not to incriminate oneself at art. 7.[36]

Even though the right to remain silent seems to enjoy a good reputation in most legal experiences around the globe, there are some points to outline about its objective and subjective scope of protection and range of application.

First, the right to remain silent is usually recognised as a guarantee for individuals that are already accused or at least suspected of committing a crime, and it generally applies to criminal proceedings starting from the point at which the suspect is questioned by the police.[37] So, it basically does not apply before the beginning of the police investigation. Moreover, the right to remain silent is not absolute. In fact, the scope of the guarantee does not protect against the making of self-incriminating statements *per se*, but against the risk of obtaining evidence through moral or physical coercion in defiance of the will of the accused.[38] This situation recurs when the accused person is obliged to testify under the threat of sanctions;[39] when he/she is under physical or psychological pressure to obtain evidence or statements;[40] when authorities try to elicit information using subterfuge even though the accused chose to remain silent.[41]

Moreover, the ECtHR considers the right to remain silent a relative one.[42] So, even though it is not possible to extinguish the very essence of this right, public interest

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tenetur se detegere nel labirinto delle fonti. Riflessioni a margine di Corte cost., ord. n. 117 del 2019' (2020) DPC 1, 108; Guerino Fares, 'Diritto al silenzio, soluzioni interpretative e controlimiti: la Corte costituzionale chiama in causa la Corte di giustizia' (2020) dirittifondamentali.it 1, 57 <dirittifondamentali.it/wp-content/uploads/2020/01/Fares-Diritto-al-silenzio-soluzioni-interpretative-e-controlimiti.pdf> accessed 31 March 2023; Giulia Lasagni, 'Prendendo sul serio il diritto al silenzio: commento a Corte cos., ord. 10 maggio 2019, n. 117' (2020) DPC 2 135;

[35] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11 March 2016

[36] See Anna Pivaty and others, 'Opening Pandora's box: The right to silence in police interrogations and the Directive 2016/343/EU' (2021) 12(3) NJECL 328; Anna Pivaty and others, 'Strengthening the protection of the right to remain silent at the investigative stage: what role for the EU legislator?' (2021) 12(3) NJECL 427.

[37] Murray v United Kingdom (1996) 22 EHRR 29, para 45.

[38] Ibrahim and Others v the United Kingdom App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR 13 September 2016), para 267.

[39] Saunders v United Kingdom (1996) 23 EHRR 313, para 68-70.

[40] Jalloh v. Germany [GC], 2006-IX; Gäfgen v. Germany [GC], 2010-IV.

[41] Allan v. the United Kingdom, 2002-IX; contrast with Bykov v. Russia [GC], 2009, para 101-102).

[42] Ashworth (n 30) 760-762; Murray v United Kingdom (1996) 22 EHRR 29, para 47; Ibrahim and Others v the United Kingdom App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR 13 September 2016), para 269.

concerns (i.e. in investigation and punishment) can justify – to some extent – a limitation of the right to silence.[43]

All this considered, the victim with irregular migration status approaching authorities to report a crime he/she has suffered is not yet accused or suspected of a crime, but the mere discovery of his/her name might disclose his/her condition, thus incriminating oneself. Nevertheless, he/she could not enjoy the right to silence which is exclusively recognized for the accused/suspected person.

In Italy, the right to silence is recognized as an articulation of the fundamental right of defence, provided in art. 24 of the Italian Constitution, but it is also connected to art. 27, c. 2 affirming the presumption of innocence, and art. 111 Cost. which sets the standards for due process in the Italian legal system, and art. 13 Cost which enshrined personal liberty is inviolable.[44] Even though there are a few cases where the issue arose with regard to irregular migrants in Italian jurisprudence, the question still has not been directly addressed by the Italian Constitutional Court.[45]

5 Seeking some shelter: safe reporting mechanisms between 'firewalls' and special resident permits

With all this in mind, we can now consider some measures that have been actually taken in different legal systems[46] to mitigate victimization and underreporting of people with irregular migration status, which could also be considered as an articulation of the *nemo tenetur se detegere* as there could be: (i) 'firewalls' shielding victims from being identified as "irregular" by authorities responsible for deportation/prosecution, thus protecting their silence; (ii) remedies that provide a regular migration status after crime reporting, thus encouraging victims to speak up.

[43] Saunders v United Kingdom (1996) 23 EHRR 313, para 67; Heaney and McGuinness v Ireland (2000) 33 EHRR 12, para 57.

[44] For an overview of the right to remain silence in Italy see Vittorio Grevi, *'Nemo tenetur se detergere': Interrogatorio dell'imputato e diritto al* silenzio nel processo penale italiano (Giuffrè 1972); Ennio Amodio, 'Diritto al silenzio o dovere di collaborazione? A proposito dell'interrogatorio dell'imputato in un libro recente', (1974) RDPr 408; Luca Luparia, *La confessione dell'imputato nel sistema processuale penale* (Giuffrè 2006); Oliviero Mazza, L'interrogatorio e l'esame dell'imputato nel suo procedimento (Giuffrè 2004); Vania Patanè, Il diritto al silenzio dell'imputato (Giappichelli 2006); Davide Tassinari, *Nemo tenetur se detegere. La libertà dalle autoincriminazioni nella struttura del reato* (BUP 2012); Diletta Marchesi, Michele Panzavolta, 'Keep silence for yourself: The protection of the right to silence in the Italian criminal justice system' (2021) 12(3) NJECL 365.

[45] See Trib. Min. Roma, Ord. N. 84/2010, 30.09.2010, in G.U. n. 21 del 18.5.2011, Corte Cost., 11 november 2011, Ord. N. 306; Trib. Voghera, 20 november 2009, R.G. 91/09

[46] See the comparative research conducted with regard to Belgium, Netherlands, Spain, USA and Italy under the guide of the University of Oxford

5.1 Firewall measures: keeping silence

Firewalls are measures that aim at keeping separated immigration enforcement activities from public service provision, criminal justice or labour law enforcement, to ensure that migrants with an irregular migration status are not discouraged from accessing essential services and/or reporting crime.[47] Also known as non-cooperation policies, firewalls in the area of crime reporting would prevent the detection of the victim as an irregular migrant or the communication of his/her personal details to other authorities responsible for immigration enforcement. Such firewalls generally operate according to a *'don't ask'* model, when they prohibit or limit the possibility of crime enforcement officers inquiring about the immigration status of the person they are interacting with; a *'don't tell'* model, when they proscribe communicating information about someone's immigration status to immigration enforcement authorities; and/or *'don't enforce'* model, when they prevent the arrest or detention of individuals by criminal enforcement actors solely for a violation of immigration law.[48] The rationale of these measures is to reassure migrants by encouraging them to report crimes they have suffered but also to build trust among police and communities in order to promote the cooperation of civilians in crime prevention.

Non-cooperation policies include a wide range of combinations of practices, encompassing one or more of the components cited above (*don't ask*, *don't tell*, *don't enforce*) and are pretty common in the United States, where they are often adopted at the local level (counties, cities and – at times – states) to prevent local police officers from getting involved in immigration law enforcement, which is the responsibility of the federal government (US Department of Homeland security).[49] This is also the case of the Netherlands which implemented the 'free in, free out' policy, which allows irregular migrants freely to enter a police station to report a crime and be guaranteed to be able to leave freely, without being arrested or detained.[50] The policy started as a pilot project in Amsterdam, and it was progressively extended to further municipalities (Utrecht and Eindhoven) and finally recognised at the national level as an implementation of the EU Victims' Directive requirements in the Netherlands.[51]

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[47] Fraçois Crépeau and Bethany Hastie, 'The case for 'firewall' protections for irregular migrants: safeguarding fundamental rights' (2015) 17 EJML 157 165.

[48] See extensively Nicola Delvino, 'Safe Reporting of crime for Victims and Witnesses with Irregular Migration Status in the United States' (2019) COMPAS: Oxford <www.compas.ox.ac.uk/wp-content/uploads/SR19-US-country-report-1.pdf> accessed 20 June 2023, 28 ff.; Kittrie (n 6) 1449.

[49] Doris Meissner and others, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Migration Policy Institute 2013).

[50] Ruben I. Timmerman and others, 'Free In, Free Out': Exploring Dutch Firewall Protections for Irregular Migrant Victims of Crime (2020) 22(3) EJM&L 427 <brill.com/view/journals/emil/22/3/article-p427_5.xml?language=en > accessed 31 March 2023.

[51] Timmerman and others (n. 50) 438.

Local initiatives undertaken by some municipalities envisage the issuance of identity documents that do not show the immigration status of the holder. This is the case of San Francisco, New Heaven and New York City's status-blind municipal ID card: a broadly accepted government-issued photo identification, recognized for interacting with the New York Police Department (NYPD).[52]

Taking a closer look at the Italian legal system, it is evident that it is not possible to replicate firewall measures deployed at the local level. The lack of distinction between immigration enforcement and police forces, and the duty to report irregular migrants, which binds both police officers and public servants make it particularly difficult to replicate in Italy firewall practices similar to those developed in Sanctuary cities in the USA.[53]

Something similar to a non-cooperation policy is provided about the obligation to report irregular migrants in the scope of the right to health. In fact, the duty to present a report does not apply to medical doctors when there is a risk of exposing the patient to criminal proceedings (Art. 365, para. 2 IPC). In addition, Art. 35, para. 5 CLI explicitly states that access to healthcare facilities cannot mandate any kind of reporting of migrants. This provision is aimed at reassuring migrants in need of healthcare, so they do not fear being reported or deported for accessing healthcare. The same exemption is not provided for migrants seeking to access the criminal justice system to report a crime they have suffered. Therefore, while healthcare facilities are conceived as safe harbours for migrants with irregular status, the same cannot be said for police stations and other public facilities migrants may need to access to exercise their rights.

5.2 Special resident permits: protecting words

Another way to defuse the deportation threat dynamic that discourages irregular migrants from reporting crime is providing migrant victims or witnesses with authorization to regularly reside in the state territory after crime reporting. These measures include special visas or residence permits, or the suspension of immigration enforcement. Unlike firewalls, these measures do not ensure the right to remain silent, but instead, provide protection to individuals releasing self-incriminating statements concerning their irregular status.

Italian legislation has introduced special resident permit for victims of certain crimes, showing both legislators' interest in addressing crime underreporting and in filling the justice gap for irregular migrant victims. These special permits offer protection by adopting a multi-agency approach, allowing victims to stay in the country, but also to

[52] See Els de Graauw, 'Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System' (2014) P&S 42(3) 309.

[53] See Sara B. Taverriti, 'Safe reporting of crime for victims and witnesses with irregular migration status in Italy' (2019) COMPAS: Oxford <www.compas.ox.ac.uk/wp-content/uploads/SR19-Italy-country-report.pdf> accessed 20 June 2023 10 f., 32 f.

obtain public support to reintegrate into Italian society. They are usually renewable and/or convertible into permits for work or study reasons, so they offer an encouraging horizon of stabilization. In Italy, special residence permits are provided for: (a) victims of serious crime released for social protection reasons; (b) victims of domestic violence; (c) victims of severe labour exploitation; (d) persons who cooperate in the prevention of terrorist attacks.

(a) Art. 18 of CLI provides a *special permit issued for reasons of social protection to people who have suffered a serious crime perpetrated by a criminal organisation*. This permit is one of the most inspiring examples of tools offered by Italian legislation for the integration and protection of migrant victims, it can be issued for victims of offences within the area of sexual exploitation, including sexual exploitation as such, recruitment for prostitution, and sex trafficking committed both at national and international level. But the permit also applies to a wide range of other serious offences that have in common the provision of mandatory arrest *in flagrante delicto*[54]. Three requirements define the scope of application of the special permit for social protection reasons: 1) the victim must have suffered one of the criminal offences listed in Art. 18 CLI; 2) the situation of violence against a foreigner or his/her serious exploitation has to be ascertained (either during police/judicial operations, or during intervention carried out by the social services); 3) the presence of an actual threat to the migrant's safety consequent to his/her attempts to escape the pressure of a criminal organisation perpetrating the crime,[55] or in retaliation for the statements given during preliminary investigations or trial.

(b) Art. 18-bis CLI provides a *special permit for victims of domestic violence*. This special permit was introduced in compliance with the Istanbul Convention, with the aim of combating gender-based violence and protecting victims.[56] The aim of this tool is to protect victims of domestic violence irrespective of their contribution to criminal proceedings. Accordingly, its issuance does not require victims to report the crime. It applies to crimes related to domestic violence,[57] thus including crimes perpetrated even by a single offender. There must be a real and actual danger for the foreigner's safety as a consequence of escaping the violence or due to statements provided during preliminary investigations or trials.

[54] For the full list of crimes, see CPP, Art. 380.

[55] It is important to notice that a special permit for social protection reasons does not apply to cases in which the crime is perpetrated by one single person, being necessarily the activity of a criminal organisation. This might significantly limit the application of this measure of protection.

[56] Council of Europe Convention on preventing and combating violence against women and domestic violence, made in Istanbul, 11.V.2011.

[57] Namely, art. 572 IPC (abuses in the family), artt. 582, 583, 583-bis CP (providing different kind of personal injuries), art. 605 CP (kidnapping), art. 609-bis CP (sexual violence), art. 612-bis (stalking) or one of the crime listed in art. 380 CPP.

(c) in compliance with Directive 2009/52/EC,[58] Italy introduced a *special permit for victims of severe labour exploitation*[59]. The main purpose of such permits is to allow the criminal justice system to benefit from the victim's cooperation in the fight against illegal employment and exploitation of migrants with irregular status. There are three basic conditions required for the permit to be issued: 1) a situation of severe labour exploitation; 2) a report submitted by the foreigner; 3) and that he/she takes part in the proceedings against the employer. Unlike the two other special permits analysed above, the permit for severe labour exploitation is at least partially intended to act as a reward as it requires the active cooperation of the victim with prosecutors. Indeed, to obtain the permit a victim must report the crime and cooperate in the trial against the exploiters.

(d) The special permit for investigative reasons was introduced in 2005 as a tool for counteracting terrorism.[60] In this situation, the person who reports a crime is not a victim, but an informant who is encouraged to report to public authorities as a witness of the activities of a terrorist organisation. It is possible to issue this special residence permit when, during police operations, investigations or criminal proceedings for crimes of terrorism, the permanence in the State's territory of the person who cooperated becomes necessary.

Despite being considered 'best-practices', these special permits also suffered from limitations and shortcomings. On the one hand, special permits do not cover the whole spectrum of crimes that migrants with irregular status suffer the most (i.e. immigration frauds related to their irregular condition, street crimes perpetrated by one single offender or outside the scope of domestic violence). On the other hand, the successful use of these measures depends on victims' awareness about the existence and the functioning of special permits; but also on the actual presence, within a certain territory, of associations authorized to carry out these initiatives.[61] In addition, the release of special permits is never automatic, as the public authorities who are responsible for their issuance (the Public Prosecutor and the *Questore*) retain wide discretion about it.

[58] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[59] D. lgs. 16 july 2012, n. 109, 'Attuazione della direttiva 2009/52/CE che introduce norme minime relative a sanzioni e a provvedimenti nei confronti di datori di lavoro che impiegano cittadini di Paesi terzi il cui soggiorno è irregolare'.

[60] D. L. 27 july 2005, n. 144, Misure urgenti per il contrasto del terrorismo internazionale.

[61] See Nicola Delvino, Sarah Spencer, 'Irregular Migrants in Italy: Law and Policy on Entitlements to Services' (2014) ESRC COMPAS: Oxford <www.compas.ox.ac.uk/wp-content/uploads/PR-2014-Irregular_Migrants_Italy.pdf> accessed 31 March 2023.

6 Concluding remarks and future directions

At the end of our analysis, we can now draw some conclusions on the state of the art of the protection of victims with an irregular migration status and suggest some proposals to enhance equal and effective access to justice for this kind of individuals.

This article outlined the condition of vulnerability affecting victims with an irregular migration status that makes them more exposed to victimization and demonstrated that the fear of being detected as 'irregular' and thus being subject to criminal or administrative proceedings that culminate in deportation plays an important role in discouraging crime reporting for these people. Thus, there are victims – with special needs of protection – who are discriminated and substantially denied justice, as they are not able to access the criminal justice system in practice. We have then verified that in Italy there is an actual risk of deportation or prosecution discouraging irregular migrants from reporting crime, precisely deriving from the conjunction of the criminalization of irregular entry or stay, the need for identification of the victim during reporting procedures which easily reveal their condition, and the duty to report irregular migrants with no exceptions for public authorities.

As immigration and public security issues are the monopoly of the central state and are both the responsibility of the same police forces, firewall practices seems unlikely to take place in Italy. Thus, the most suitable action for enhancing equal protection for victims with an irregular status would be a legislative reform at the national level. To this end, comparing the right to healthcare and the right to access justice for the victims, it would be reasonable to introduce a special exemption to the obligation to report irregular migrants applicable to judicial authorities and police forces receiving a criminal report from a migrant seeking protection, irrespective of the crime suffered. Likewise, the potential extension of the scope of application of special permits for victims of crimes ought to be conceived at the national level, considering the wide range of criminal cases whose victims are typically irregular migrants that are still not covered by this form of relief.

Alternatively to legislative reforms, which might be difficult to achieve, there may be some room for the judicial affirmation of the right to remain silent for victims with irregular migration status in order to prevent discrimination in their access to justice.

As we have seen, the condition of migrant victims compelled to reveal their irregular migration status resembles very much to the condition of the defendant at risk of self-incriminating oneself, but limitations in the scope of application (the suspect or the accused person, after the beginning of the proceeding) and in the relativity of the right to remain silent suggest that the *nemo tenetur se detegere* is not *per se* a way out of the issue. The protective measures we have analysed show several similarities with the right to silence and its corollaries, suggesting that the right to remain silent and not incriminate oneself could be a suitable tool of protection. So it remains to verify if there

are other possible way to affirm a general right not to incriminate oneself for the migrant victim when reporting a crime. Hereafter we will sketch some proposal to achieve this objective at different levels, challenging the duty to report irregular migrant for public authorities.

First, according to the principle of primacy of the EU law, it could be argued that public authorities getting in touch with an irregular migrant in the scope of a reporting procedure can disapply on their own motion, and thus infringe, the norm providing a duty to report as it would be in contrast with EU law with direct effect.[62] To this end, it is worth noticing that victims' protection has gained greater attention from the EU over the last decade, especially with the adoption of the so-called 'victims directive' Dir. 29/2012[63], which emphasized the need for victims' protection inside and outside the criminal proceeding, clearly establishing that victims' rights should apply to all victims without discrimination with respect to residence status (Art. 1) and Member States should "take the necessary measures" to ensure that the rights set out in the Directive are not made conditional on the victim's residence status (Recital 10). Indeed, obstacles in crime reporting for irregular migrants violate several provisions of the victims' directive regarding information and support, the rights related to the participation of the victim in the proceeding, and the right to receive adequate protection. Thus, combining the right to remain silent deriving from EU legal sources mentioned above, and the victims right laid down in the victims' directive, we can derive the possibility of disapplying the duty to report irregular migrants approaching public authorities to report a crime. Nevertheless, this solution shows some risk of arbitrariness and uneven application when left to the discretion of each public authority involved, thus it could be useful to request a preliminary ruling from the Court of Justice of the EU.

Further perspectives of protection could be achieved through a judicial review of the duty to report irregular migrants deferred to the Constitutional Court. As we have seen, precedent case law did not expressly address the issue of victims' right to silence concerning their irregular status when reporting a crime. So, as the range of applications of the right to remain silent is recently expanding in the view of the Italian constitutional Court, it could be interesting to raise the question in front of the Court to

[62] See essentially the seminal case law Case 106/77, Simmenthal, EU:C:1978:49, Case 103/88, Costanzo, EU:C:1989:256 and subsequent jurisprudence of ECJ. In the Italian doctrine, for all, Vittorio Manes, 'L'evoluzione del rapporto tra Corte e giudici comuni nell'attuazione del "volto costituzionale" dell'illecito penale', in Vittorio Manes and Valerio Napoleoni, *La legge penale illegittima. Metodo, itinerari e limiti della questione di costituzionalità in materia penale* (Giappichelli 2019) 26 ff.; Francesco Viganò, 'La tutela dei diritti fondamentali della persona tra corti europee e giudici nazionali' (2019) QC 481.

[63] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, see Marta Bargis, Hervè Belluta (eds), *Vittime di reato e sistema penale. La ricerca di nuovi equilibri*, (Giappichelli, 2017); Luca Luparia (ed), *Victims and Criminal Justice. European Standards and National Good Practices*, (Wolters Kluwer, 2015) available at <www.protectingvictims.eu/upload/pages/85/English-volume.it.en.pdf> accessed 20 June 2023.

verify if the reasons supporting the right of defence of the victim (articulated in the right to report crimes suffered) could be used as a driver of the expansion of the right not to incriminate oneself to any individual (irrespective of his formal condition of accused/suspected of having committed a crime) even before the formal beginning of the proceeding against him/her (thus, in any form of approach of the individual to public authorities).

Finally, the case law of the ECtHR gives some food for thought to suggest wider protection in these situations. As we have seen, if we consider the right to remain silent and not to incriminate oneself taken alone, as recognised according to the interpretation of art. 6 provided by the ECtHR, there is no way to cover the situation of migrant victims of crime with irregular status. Nevertheless, if we consider the whole picture, one could argue that the duty to report irregular migrants even when they are approaching public authorities to report a crime gives rise to serious discrimination in the effective access to justice and related protection for victims of crimes, which make these individuals disinclined to report, and thus more exposed to suffer crimes in the territory of the State. Looking at the issue from this perspective, the duty to report irregular migrants seeking to report a crime, would not only infringe on victims' right of defence (the right of access to a court according to art. 6 of the ECHR), but also the positive obligation (derived from art. 1 of the ECHR) to protect his/her life, physical and psychological well being, and private life (i.e. artt. 2, 3, 8 of the ECHR), which requires domestic authorities to display due diligence in protecting individuals whose life is at risk and take preventive measures[64]. The same considerations apply when we consider that the substantial deprivation of accessing the criminal justice system to report a crime results in the breach of the duty to put in place and apply an adequate legal framework affording protection against acts of violence by private individuals.[65] Besides all, we should consider that the denial of justice deriving from the situation analysed affects only migrants with an irregular status, precisely because of their migration status, resulting in clear contradiction with the prohibition of discrimination established by art. 14 of the Convention.

In the end, the road towards the affirmation of the right to silence for victims of crimes is long and winding, but when we consider reshaping the *nemo tenetur se detegere* to adjust it to this situation, we should also consider balancing the extension of the guarantee with the public interest of the State. Well, on a closer inspection, keeping the duty to report irregular migrants secures the enforcement of Immigration Law

[64] See Frédéric Sudre, 'Les obligations positives dans la jurisprudence européenne des droits de l'homme', (1995) RTDH 363; Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); William Schabas, *The European Convention on Human Rights* (OUP 2015) 90 ff. and passim.

[65] See, for example, *Osman v UK* ECHR 1998-VIII; *L.C.B. v. the United Kingdom*, 9 June 1998, para. 36, Judgments and Decisions 1998-III; *Opuz v. Turkey*, 2009-III, para 128; *Makaratzis v. Greece* [GC], no. 50385/99, para. 57, ECHR 2004-XI; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II. *Beganović v. Croatia*, no. 46423/06, §§ 85–86, 25 June 2009.

(including its criminal limb), but on the other hand, discouraging crime reporting by victims with an irregular status jeopardises the public interest to protect not only that single victim but the entire community, as it prevents to detect and prosecute all the crimes committed on the territory, which is also a core task of every State. We should probably reflect on what our priority is and on whether this can be considered a fair and proportionate balance of interests.[66]

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[66] See, for all, Nicola Recchia, *Il principio di proporzionalità nel diritto penale. Scelte di criminalizzazione e ingerenza nei diritti fondamentali* (Giappichelli 2020).

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MODERN SLAVERY, INDIVIDUAL ACCOUNTABILITY AND CORPORATE COMPLICITY: THE BRAZILIAN CASE

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Abstract

The article intends to investigate the role of criminal law as a formal social control mechanism responsible for protecting human rights. This investigation will first analyse the foundations of the criminal conduct of modern slavery as described in article 149 of the Brazilian Criminal Code[1] *("reduction to a condition analogous to that of a slave"). After that, the investigation moves to a second part, which is concerned with the criminological aspects of the exploitation of modern slavery and the role of corporations within this scenario. In this section of the article, the analysis will show that the main "criminal" actors responsible for maintaining the conditions necessary for the abusive exploitation of the workforce are multinational corporations, as data available on this matter – collected, analysed, and disclosed by the International Labour Organization (ILO) – currently show. Then, in the next section, the analysis will focus on the limitations of criminal law in addressing the complicity of corporations with gross human rights violations and, more specifically, modern slavery within supply chains. The absence of criminal control over corporate complicity with human rights violations impedes the development of convergence between formal and informal social control mechanisms, and, thus, leads to problems regarding prevention mechanisms, underenforcement and underdeterrence over socially harmful corporate behaviour. In the final section, new possible solutions to these problems will be outlined.*

1 Introduction

The abolitionist practices of slavery in Brazil, despite being formally accomplished in 1888 with the enactment of the *Lei Áurea*, continue to be a historical democratic deficit.[2] Data on abusive labour exploitation - or the practice of "reduction to a condition analogous to that of a slave"[3] – allow us to evidence this historical *continuum* and the complicity in the victimisation of vulnerable Brazilian social groups until nowadays.[4] Not to mention the racial intersection, since the majority (70%) of workers rescued in

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[1] Hereinafter referred to as BCC.

[2] For the analysis of the Brazilian democratic deficit and the permanent exclusion of minorities, mainly members of the Afro-Brazilian communities, and the maintenance of authoritarian dynamics by the Brazilian state, see Leonardo Sakamoto (org.), *Escravidão contemporânea* (Contexto 2020) 8; Silvio Luiz de Almeida, *Racismo estrutural* (Sueli Carneiro; Pólen 2019) 45ff.

[3] As conceptualized in Art. 149 of the Brazilian Criminal Code. <www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm> accessed 13 March 2023.

[4] The database on modern slavery exploitation in Brazil can be accessed online through the Smartlab platform <smartlabbr.org/trabalhoescravo> accessed 31 March 2023.

slave-like conditions are members of black, brown or indigenous communities.[5] This shows that abolitionist practices deserve even more scientific effort and "experimentation"[6], especially in criminal sciences if it is the case to normatively structure criminal law in such a way as to enable the effective distribution of personal liberties[7] and the promotion of social justice.[8]

In any case, formally or informally, what matters most is that the deleterious effects of the abusive exploitation of the labour force are replicated. Since the postulates of political philosophy, abuse is expressed precisely from the alienation of the subjectivity of people reduced to the object of accumulation, in its most primitive and aggressive form by those who exploit them.[9]

The theoretical-legal justification, on the other hand, is based on abusive exploitation through the deprivation of personal liberties.[10] At least in theory, this would be an adequate level of understanding of the normative framework and how, based on it, solidarity and personal liberties are destructured in abusive labour exploitation relations. Or, on the contrary, how the social disintegration and the vulnerability of these freedoms demand greater intensity in the verification of fundamental rights[11] in each of the labour relations.

The development of normative and monitoring standards at the international level can be observed from the first normative frameworks (art. 1, Geneva Convention, 1926 and

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[5] For the data, see Smartlab, Obvservatório da Erradicação do Trabalho Escravo e do Tráfico de Pessoas. <smartlabbr.org/trabalhoescravo/localidade/0?dimensao=perfilCasosTrabalhoEscravo> accessed 15 March 2023.

[6] Patrice Cullors, 'Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability' (2019) Harvard Law Review 1684- 1694.

[7] Ralf Kölbel, ‚Die dunkle Seite des Strafrechts: Eine kriminologische Erwiderung auf die Pönalisierungsbereitschaft in der strafrechtswissenschaftlichen Kriminalpolitik' (2019) Neue Kriminalpolitik 249-268.

[8] Dorothy Roberts, 'The social and moral cost of mass incarceration in African-American communities' (2004) Stanford Law Review 1271-1305. For the Brazilian context, see Ana Luiza Pinheiro Flauzina, *Corpo negro caído no chão*: o sistema penal e o projeto genocida do Estado brasileiro (Tese-UNB 2006) 84ff..

[9] Karl Marx, *Economic and Philosophical Manuscripts* (Progress Publishers 1959). In the field of criminology, see Gregg Barak, *Unchecked Corporate Power*: *Why the Crimes of Multinational Corporations are Routinized Away and What We Can Do About It* (Routledge 2017) 3-41. For an analysis of the current Brazilian context, see Ricardo Antunes, *O privilégio da servidão*: *o novo proletariado de serviços na era digital*. (Boitempo 2018) 61ff.

[10] For the protection of personal liberties as the objective of the special part of criminal law, see Michael Kubiciel, *Die Wissenschaft vom besonderen Teil des Strafechts*: *ihre Aufgaben, ihre Methoden* (Vittorio Klostermann 2013).

[11] Carl-Friederich Stuckenberg, ‚Grundrechtsdogmatik statt Rechtsgutlehre: Zum Verhältnis von Strafe und Staat' (2011) Goltdammer´s Archiv 654 . See also, Matthias Jahn; Dominik Brodowski, ‚Das Ultima Ratio-Prinzip als strafverfassungsrechtliche Vorgabe zur Frage der Entbehrlichkeit von Straftatbeständen' (2017) Zeitschrift für die gesamte Strafrechtswissenschaft 363–381.

the Supplementary Convention on the Abolition of Slavery, 1956), from Convention no 29 of the International Labor Organization (ILO)[12] - which defines the concept of forced labour - to the most recent international norms, such as the prohibition of slavery and forced labour (art. 4, European Convention on Human Rights), and the Convention on the Elimination of Slavery (art. 5) of the International Labor Organization (ILO) as well as the European Convention on Human Rights (art. 4), which imposes on member nations the positive duty to protect people under their jurisdiction against slavery and servitude. These initiatives have been improved through ILO reports and collective actions for the promotion of international cooperation, which proposes to overcome the state of vulnerability of the victim submitted to modern slavery.[13]

More recently, new initiatives have been developed to track the number of victims, the distribution of exploitation worldwide and the practices in which modern slavery is most used as a tool for capital accumulation. For this joint initiative, modern slavery is defined by two main practices, which are forced labour and forced marriage, both referring to "situations of exploitation in that a person cannot refuse or leave because of threats, violence, deception, abuse of power or other forms of coercion"[14]. The most recent estimates were published by a partnership between the International Labour Organization (ILO), the Walk Free Foundation (WFF) and the International Organization for Migration (IOM), known as the "Global Slavery Index". According to its estimates, approximately 50 million people are being exploited worldwide. The most prevalent practice under the "modern slavery" umbrella concept is the exploitation of forced labour within global supply chains which account for 27.6 million people.[15]

In the Brazilian context, the number of people trapped in modern slavery is also alarming due to its sharp increase during the COVID-19 pandemic amidst the higher levels of worker vulnerability and lack of monitoring by public authorities. From 1995 to March 2023, more than 60 thousand people were found trapped in contemporary forms of slavery exploitation.[16] The victim's profile shows that more than 70% are composed of black people which are exploited amidst agribusiness operations or even in the garment sector in urban areas.[17]

The following sessions of this essay aim, thus, at exploring the normative foundations of criminal law protection against the exploitation of modern slavery by using as an

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[12] International Labour Organization; Walk Free Foundation. *Global Estimates of Modern Slavery*: *Forced Labour and Forced Marriage* (ILO 2022).

[13] Siddharth Kara, *Sex trafficking*: *Inside the Business of Modern Slavery* (Columbia University Press 2009) 4ff. See also, Siddharth Kara, *Modern slavery*: *a global perspective* (Columbia University Press 2017).

[14] ILO; Walk Free; IOM. *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (ILO 2022).

[15] ibid.

[16] RADAR SIT. <radarsit.economia.gov.br/extensions/RadarSIT/RadarSIT.html> accessed 2 April 2023.

[17] SMARTLAB Observatório da Erradicação do Trabalho Escravo e do Tráfico de Pessoas. <smartlabbr.org/trabalhoescravo> accessed 2 April 2023.

example the provisions proscribed in art. 149 of the Brazilian Criminal Code (BCC). Then, a criminological analysis will be developed to challenge the traditional biases still present in criminal law and its difficulties in providing accountability for severe human rights exploitations which take place within corporate supply chains. In the end, new solutions based on recent tendencies towards providing corporate accountability through supply chains will be analysed.

2 Criminal law doctrine

Aligning itself with the development of international initiatives on the issue and amidst the pressure for the disclosure of data on slave labour, Brazil began to deal with the subject in a more focused way. The interaction with the constitutional interpretation allows us to evidence two main movements responsible for the protection of personal liberty. In the first case, the protection of individual self-determination within the scope of legality is emphasized (art. 5, II, Brazilian Federal Constitution). The constitutional norm is criminally protected through the crimes of constraint, threat and kidnapping and private prison (arts. 146, 147 and 148, Criminal Code). In a second moment, personal liberty is protected through the constitutional protection of inhuman or degrading treatment (art. 5, III, Constitution), which finds support in the criminal sphere through the crime of reducing someone to a condition analogous to that of a slave (art. 149, BCC). The interpretation of the penal conduct of reduction to a condition analogous to that of a slave allows us to evidence the penal reinforcement of the legal protection of freedom and other fundamental rights, notably from the constitutional protection of personal liberties (art. 5, II and III, Constitution).[18]

The criminal conduct, however, more than protecting the violation of freedom of locomotion through the suppression of the *status libertatis* - in its factual aspect, since the legal protection of freedom remains unaltered - aims at the incrimination of conducts responsible for the reduction of human subjectivity to a condition equivalent to that of a slave i.e., to an object.[19].

Hence, the purpose of legal protection against abusive labour exploitation should find its foundation in overcoming the process of worker reification through the systematization of recognition practices[20] in such a way that people are no longer reduced to objects or instruments, as was once allowed, in favour of egoistic conceptions of concentration of capital and income. At this point, the deterrence effect triggered through criminal law operates as a technique of punitive reinforcement,

[18] Beatriz Corrêa Camargo; Catharina Lopes Scodro, 'O crime de redução a condição análoga à de escravo como melhor exemplo do Direito Penal do Trabalho de última geração? Uma introdução crítica ao direito penal do trabalho no Brasil' (2020) Revista Brasileira de Ciências Criminais 19-70.

[19] Nélson Hungria, *Comentários ao código penal* (Forense 1980) 198-201.

[20] Georg Wilhelm Friederich Hegel, *Phänomenologie des Geistes* (Philip Reclam Jun. Stuttgart 2014). For a new assessment of Hegel's recognition theory based on institutional reciprocal recognition, see Axel Honneth, *Kampf um Anerkennung: zur moralischen Grammatik sozialer Konflikte* (Suhrkamp 1994).

justified by the insufficiency of other legislative or regulatory measures to offer a suitable response to the protection of gross human rights violations and the legal protection of personal liberties.

It is in this context of trying to promote deterrence over forced labour exploitation and in degrading conditions that governmental actions were mobilized to stimulate the improvement of regulations and the functioning of institutions in this field. The enactment of Law n. 10.803/2003 provoked an alteration in the caput and added paragraphs 1 and 2 to art. 149, BCC, in such a way that the main conducts described in the criminal conduct of "reduction to a condition analogous to that of a slave" became three: (i) submission to forced labour or imposition of an exhausting workday; (ii) degrading work conditions or (iii) any other context that limits freedom of locomotion due to debt bondage. In addition to the elementary figures of the conduct, there are equivalent incriminated conducts that extend the normative reach to the restriction of transportation and ostensive surveillance, which were added in the first paragraph of the legal framework. In the second paragraph, the penal norm aims to develop greater deterrence through the insertion of circumstances that increase the penalty related to the victim profile i.e. if the person exploited is a child or adolescent or when the crime is committed with discriminatory intent (race, colour, ethnicity, religion or origin).[21]

The legislative alterations were intended to increase the specificity of the criminal type and a more adequate description of the conduct, from the attempt to remove the excess of openness in its description and the porosity in the legislative wording. The distinction between the elementary figures of the criminal conduct, notably from the differentiation between "work in degrading conditions" and "forced labour", has extreme relevance in the legal scenario. Thus, although all forced labour is degrading, not all degrading labour is forced. This means that the protection of the worker determined by the *ratio legis* of the criminal legal framework extends beyond the protection of freedom of movement, a fundamental right provided in the element "forced labour", seeking to protect the factual conditions of the development of labour by the individual so that his dignity is protected in labour relations, a right protected by the prohibition of the exploitation of "labour in degrading conditions".[22]

After the legislative alteration of 2003, the enactment of Law n. 13.344/2016 was destined to provide a new update on the legal protection of modern slavery. The legal protection of human trafficking, until the enactment of Law n. 13.344/2016, was limited to the incrimination against sexual exploitation ("international human trafficking for sexual exploitation", provided in art. 231, and "internal human trafficking for sexual

[21] Eduardo Saad-Diniz; João Victor Palermo Gianecchini, 'Reducción a condiciones análogas a la esclavitud en el Brasil y la esclavitud moderna' in Lothar Kuhlen, José Luis Cusi Alanoca, Derecho Penal, Constituciín y Garantismo. (Ibañez 2021) 269-289.

[22] Rebecca J. Scott; Leonardo Augusto de Andrade Barbosa; Carlos Henrique Borlido Haddad 'How does the law put a historical analogy to work?: Defining the imposition of 'a condition analogous to that of a slave' in modern Brazil' (2017) Duke Journal of Constitutional Law & Public Policy 1-46.

exploitation", provided in art. 231-A, both revoked by Law n. 13.344/2016)[23], a fact responsible for reducing the scope of the criminal type, which was no longer capable of understanding the contemporary dimensions acquired by the updating of the dynamics responsible for the exploitation of workers through human trafficking.[24]

To this end, the criminal conduct of human trafficking was introduced through art. 149-A, Brazilian Criminal Code. The crime is characterized as labour analogous to slavery (clauses II and III) in the hypotheses in which the abusive exploitation of labour is proven, the transfer of the worker from one place to another, and involves, to a large extent, cases of extreme deprivation of liberty starting with the retention of documents, recurrence of practices of threat, violence, coercion, fraud or abuse of vulnerable situations and other forms of violence[25], as well as it can be framed through the exploitation of forced labour, in which physical violence is not necessarily employed, but other methods of coercion to work. The configuration of trafficking in people has also been maintained for sexual exploitation (item V).[26] This modality is often practised transnationally and therefore requires the development of effective international cooperation between the different countries where the crimes are committed, as well as the improvement of social control strategies to provide effective monitoring and enforcement to prevent and repress the practice.

Despite attempts to update the concept through criminal law, the uncertainty as to the normative scope of the type affects the achievement of justice in the solution of criminal conflicts. It is not by chance that, based on an empirical analysis of the decisions of the Brazilian Regional Federal Courts, Mariana Armond Dias Paes reveals that, despite the legislative innovation and the expansion of the list of criminally typified conducts, the judges continue to decide in a restrictive manner, in such a way that only in situations in which there is evidence of the restriction of freedom of locomotion, similar to the slavery of colonial origin, is the employer responsible for the perpetration of the crime condemned.[27]

In this sense, the perpetuation of the normative openness in the description of the criminal type results, in the last instance, in the maintenance of the difficulties in the

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[23] Sven Peterke; Felipe Negreiros, ‚Strafbarkeit des Menschenhandels nach brasilianischem Recht Anmerkungen im Lichte des VN-Protokolls zur Verhütung, Bekämpfung und Bestrafung des Menschenhandels' (2012) Zeitschrift für internationale Strafrechtsdogmatik 4.

[24] Available at <www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13344.htm#art16> accessed 31 March 2023.

[25] Siddharth Kara *Sex trafficking*: *Inside the Business of Modern Slavery* (Columbia University Press 2009) 4ff.

[26] Sven Peterke ‚Zur Neuregelung des Menschenhandels im brasilianischen Código Penal Eine vorläufige Bilanz' (2022) Zeitschrift für internationale Strafrechtsdogmatik 555-562.

[27] Mariana Armond Días Paes 'A história nos tribunais: a noção de escravidão contemporânea em decisões judiciais' in Lívia Mendes Moreira Miraglia; Julianna do Nascimento Hernandez; Rayhanna Fernandes de Souza Oliveira (orgs.) *Trabalho Escravo Contemporâneo*: *Conceituação, Desafios e Perspectivas* (Lumen Juris 2018).

promotion of enforcement. The anachronistic apprehension of the extension of the concept, whose orientation, beyond the protection of freedom of locomotion, aims to protect dignity in labour relations, prejudices judicial protection and impedes the legal protection of personal liberties in the analysis of concrete cases. The difficulties in the enforcement of the crime are proven by the research of the Slave Labor and Human Trafficking Clinic of the Federal University of Minas Gerais, responsible for demonstrating that only in 4.2% of the inquiries opened for the investigation of cases typified in the nucleus of the type of reduction to a condition analogous to that of slavery there is punishment in the criminal sphere.[28]

The anachronistic jurisprudential interpretation of the description of the typical conduct of art. 149, BCC, contributes little or nothing as a guideline for punitive reinforcement to the protection of personal liberties and for the promotion of the verification of fundamental rights[29]. A new updated version of the legal provisions should incorporate, in an objective manner, the plural forms of the subjection of one individual to another, the dynamics of recruitment, the threat of retaliation and impediment to the exit of workers from the workplace, the forms of humiliation and reduction of the individual that impede the exercise of free will and self-determination within the scope of legality (exercise of personal liberties) as a way of delimiting the choice of work, as well as the definition of objective conducts destined to configure the violation of human dignity in concrete cases. The provision of such conducts should inform the updating of the elementary conducts and/or equivalent figures foreseen in the criminal conduct to overcome the normative openness and porosity, in favour of the construction of a true juridical-penal guardianship of modern slavery, as well as to express deterrence over criminal acts.[30]

2.1 The legal concept of modern slavery in Brazil: defining the elements of criminal conduct (submitting someone to a reduction to a condition analogous to that of a slave)

The first conduct that is foreseen in the penal conduct of art. 149, BCC, is submission to forced labour. As seen in section 3.1, the guideline for the description of the conduct of forced or compulsory labour comes from the Convention n. 29 of 1930 (ILO Convention

[28] Carlos Henrique Borlido Haddad; Lívia M. Miraglia; Braulio, F. A. Silva *Trabalho escravo na balança da justiça* (Clínica de Trabalho Escravo e Tráfico de Pessoas da Faculdade de Direito da UFMG 2020) 472.

[29] Carl-Friederich Stuckenberg ‚Grundrechtsdogmatik statt Rechtsgutlehre: Zum Verhältnis von Strafe und Staat' (2011) *Goltdammer´s Archiv* 653-661.

[30] Rebecca J. Scott; Leonardo Augusto de Andrade Barbosa; Carlos Henrique Borlido Haddad, 'How does the law put a historical analogy to work?: Defining the imposition of 'a condition analogous to that of a slave' in modern Brazil' (2017) Duke Journal of Constitutional Law & Public Policy 1-46.

n. 105), which refers to "all work or service exacted from an individual under the threat of any penalty and for which he did not offer himself of his own free will".[31]

The (Brazilian) criminal law system incorporates the same orientation. Forced labour is characterized by the restriction of the freedom of choice of the worker to opt to perform the work or to abstain from performing it, by the compulsory nature of the work itself, by the submission of the worker to coercion in the development of his activities. The individual finds himself, in this case, in a situation of work imposition through the annulment of his will and, therefore, his faculties to decide for its cessation or interruption are removed, hurting his right to self-determination. Similarly, this is the guideline reproduced in article 7, I, of Normative Instruction n. 138/2018, which aims to guide the labour inspection by labour auditors. Through this regulation, forced labour is defined as "that which is required under threat of physical or psychological sanction and for which the worker has not offered himself or in which he does not wish to remain spontaneously".[32]

2.2 Submit someone to exhausting working hours

On the other hand, the configuration of work exacted through exhaustive working hours occurs when the circumstances involving the performance of the work impose the submission of the victim to exhaustion, whether physical or psychological.[33] The delimitation of the exhausting work day was further developed by the *National Coordination for the Eradication of Slave Labour* (CONAETE), from the edition of Guideline n. 03, which associates it to the submission of the worker to circumstances of intensity, frequency, wear and tear, or others, that attack his human dignity, causing damages to his physical or mental health, and result from a situation of subjection that, for any reason, makes his will irrelevant[34]. In the same way, Normative Instruction n. 139/2018, in its article 7, item II, defines an exhausting workday as "any form of work, of physical or mental nature, which, due to its extent or intensity, entails the violation of the worker's fundamental rights, notably those related to safety, health, rest, and family and social life".

In this case, not only the time limits, foreseen in the contractual working day provided in the Federal Constitution of 1988 and labour law are responsible for the configuration of the crime. It is important to concretely evaluate the situation of the worker, who, due

[31] ILO. *C029 Trabalho Forçado ou Obrigatório* available at <www.ilo.org/brasilia/convencoes/WCMS_235021/lang--pt/index.htm> accessed 30 March 2023.

[32] BRASIL. Instrução Normativa nº 139, de 22 de Janeiro de 2018. Disponível em: <www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/2075837/imprensanacional> accessed 20 June 2023.

[33] Corrêa Camargo, Lopes Scodro (n 18).

[34] Flávia F. J. Menezes; Raphael Miziara, *Conaete – Coordenadoria Nacional de Erradicação do Trabalho Escravo*. (Juspodvm 2020) 142.

to the level of physical or psychological exhaustion, may be in a condition characterized by submission to work analogous to slavery.

In another opportunity, it was possible to analyze the development of the jurisprudential interpretation of the Federal Supreme Court (STF), which associates forced labour and the imposition of exhausting workdays to delimit the configuration of reduction to a condition analogous to that of a slave, more specifically configured by the imposition of inhuman work shifts, without the destination of weekly breaks and periodic rests, whose analysis in comparison with the Brazilian labour legislation (*Consoldação das Leis do Trabalho,* CLT) presupposes the configuration of the crime.[35]

2.3 Work in degrading conditions

A greater problem is found in the configuration of work in degrading conditions. On the one hand, the criminal legislation does not prescribe the indicators of degradation in the work environment, making the configuration of the conduct dependant on the integration between different normative provisions, or even constituting an elementary act of criminal conduct which entails a porous description, requiring the interpreter to complement its normative concept. On the other hand, the concrete verification of the provision depends on the delimitation of the limits of tolerance to the violation of labour rights. In other words, what are the criteria established for identifying the cases that give rise to the application of labour protection norms and, in what circumstances does a progressive deepening of the violations to the concrete conditions of the exercise of labour take place to configure the crime of art. 149, BCC.

The criminal configuration of abuse concerning degrading conditions of the exercise of labour goes back to the violation of human dignity as a fundamental right provided in the constitutional order. In this sense, the normative orientation n. 04/CONAETE and art. 7, item III of the Normative Instruction n. 139/2018 also regulate, respectively, the delimitation of work in degrading conditions from the verification of the breach of the fundamental rights of the worker, especially those relating to hygiene, health, safety, housing, rest, food, as well as the violation of other rights related to personality, in which the subjection of the worker makes his will irrelevant.[36]

The analysis of the decisions of the Brazilian Supreme Court allows us to identify references to the applicability of the criminal label to the conduct. It happens because of description that is proscribed in art. 149, BCC, whose normative openness is present in the concept of "degrading conditions" and, therefore, ends up harming the judicial protection of the crime. In the analysis of the configuration of the crime, the report prepared by the UN is constantly used to justify the inapplicability of the conduct

[35] Eduardo Saad-Diniz; João Victor Palermo Gianecchini, 'Redução a condição análoga à de escravo no Brasil (art. 149, CP) e a escravidão moderna' in Miguel Reale Júnior; Maria Thereza de Assis Moura (eds) *Coleção 80 anos do Código Penal* (Revista dos Tribunais 2020) 248.
[36] Menezes and Miziara (n 34).

based on the excessive openness (or porosity) of the legal description. Its lack of definition could open the way to ideological interference in the performance of the criminal justice system.[37]

The misunderstanding of the scope of the criminal conduct ends up reproducing an anachronistic and reductionist interpretation in which the configuration of the conduct is described in art. 149, BCC, is considered only in the hypotheses in which the restriction of freedom of locomotion is proven as a dimension of the protection of individual liberties[38]. On the contrary, the legislative reforms of 2003 and 2016 intend to develop an updated orientation to the standards of convergence between the human rights agenda and modern slavery, in which the intention is to guarantee protection to situations of abuse in labour relations that go beyond the historical references of pre-republican slavery. The legal-penal protection of human dignity in labour relations seeks to protect the worker in the dimensions of the exercise of personal freedom, through the right to self-determination. In the same way, its legitimation foundation can be apprehended through the prohibition of alienation of individual autonomy[39] through the concrete exercise of dignity in labour relations.

In turn, the analysis of work in degrading conditions acquires a rhetorical dimension in the reasoning of the Brazilian Supreme Court's decisions, for not being considered, by itself, as an element of the criminal conduct suitable for the configuration of the crime of reducing someone to a condition analogous to that of a slave, even after the judgment of Inquiry 3412/AL in which the Supreme Court recognized that the element of the criminal conduct already fulfils the normative requirements established in art. 149, BCC. The orientation of the Supreme Court allows the apprehension of exemplary conditions in which the degradation of the individual and its association with the violation of human dignity (art. 1, III, CF) is perceived, which are observed from the deprivation of workers' access to drinking water, adequate health conditions, verification of working conditions in disagreement with the labour legislation in what concerns the maintenance of a place to eat, among other conditions that are considered in the concrete case concerning the labour legislation on the matter.

On the other hand, the concrete verification of degrading conditions for the exercise of labour, established by CONAETE and by Normative Instruction n. 139/2018, and carried out *in locus* through reports prepared by the labour monitors, subordinated to the Secretariat of Labour Inspection, should constitute suitable information. The concrete verification of degrading working conditions established by CONAETE and by Normative Instruction n. 139/2018 and carried out *in locus* through reports prepared

[37] Saad-Diniz and Gianecchini (n 35) 248-250.

[38] STF. INQ. 2131/DF, Ministra Relatora Ellen Gracie, 23.02.2012. See also STF. RE 459.510/MT, Rel. Min. Cezar Peluso, 26.11.2015 <portal.stf.jus.br/> accessed 20 March 2023.

[39] Tatjana Hörnle, 'Criminalizing Behavior to Protect Human Dignity' (2012) *Criminal Law and Philosophy* 307-325.

by the inspection bodies should be used as a suitable element of information to instruct criminal investigations, as well as be better used as part of the body of evidence in criminal proceedings to instruct the judicial activity in favour of a better-grounded jurisprudence on the criteria for measuring the element of working in degrading conditions. This would be a better way to use criminal law in conjunction with the normative and labour inspections in favour of effective law enforcement.[40]

2.4 Restriction of locomotion due to debt (debt bondage)

Debt bondage, or "restriction of locomotion due to debt", is the most common situation and already characterized in the national pre-republican historical scope, it is the imposition of a restriction on freedom of locomotion of the worker subject to abusive exploitation. This modality inscribed in the "caput" of art. 149, BCC, is characterized by the creation of fictitious and fraudulent debts between the employer and the worker. In this circumstance, the worker has a moral obligation to pay the employer and is physically prevented from leaving the workplace until the debt is settled. Debts are usually initiated by charging for work material, personal protective equipment (PPE), transportation costs, food, or other items fundamental to the execution of the task or the survival of the worker. The employer establishes the price arbitrarily and abusively, deducting it from the worker's salary, who always remains in debt to the employer and is prevented from leaving work until he pays his supposed debt[41]. In this same sense, Normative Instruction n. 139/2018 provides in its article 7, item IV, that it is a "limitation to the fundamental right to come and go or to terminate the provision of work, due to a debt charged by the employer or representative or the inducement to indebtedness to third parties.[42]

The Supreme Court's judicial interpretation analyzes debt servitude in conjunction with the element "forced labour" or "exhausting workdays" as elements that make up the complete restriction of the worker, whether in the form of personal freedom or, more restrictively, freedom of movement. In this sense, the conduct labelled as "restriction of locomotion due to debt" constitutes a reinforcement to the legal protection of the worker's liberties, in this case, defining the circumstance in which the employer subjects another to the payment of debts as a condition for the access to material goods of personal use and food to feed himself and his family.[43]

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[40] Scott, de Andrade Barbosa, Borlido Haddad (n 31).

[41] Brazil, *O Sistema Único de Assistência Social no combate ao trabalho escravo e ao tráfico de pessoas*. (Ministério da Cidadania 2020) 16.

[42] Brazil, Instrução Normativa nº 139, de 22 de Janeiro de 2018 <www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/2075837/do1-2018-01-24-instrucao-normativa-n-139-de-22-de-janeiro-de-2018-2075833> accessed 30 March 2023.

[43] STF, INQ. 2131/DF, Ministra Relatora Ellen Gracie, 23.02.2012. <portal.stf.jus.br/> accessed 30 March 2023.

3 Criminological foundations of modern slavery

Historically defined as the suppression of freedom of movement due to the performance of one's labour activity, nowadays the transnational economic praxis and the new forms of exploitation of an individual by another (or organization in the case of corporations) require the development of new scientific investigations around the delimitation of the profile of perpetrators, victims, dynamics of harm causation and victimisation levels, its causes and the contexts in which the new phenomenon of labour force abuse is carried out[44].

From this new dynamic of labour exploitation and after the apparent exhaustion of the paradigm related to the criminalization of slavery-like conducts, new demands are marked by the use of forced and degrading labour in the activities of global value chains[45]. In the corporate context, the diffusion of responsibility and the difficulties in the individualisation of the conducts inherent to the opacity of the corporate supply chains are responsible for building the opportunities for the exploitation of forced labour, as they act as criminogenic dynamics[46]. In the same way, the presence of intermediary labour force suppliers, a characteristic present in outsourcing and subcontracting regimes, constitutes a propitious environment for the exploitation of forced labour and labour in degrading conditions and reproduces the difficulties in the promotion of accountability regarding serious human rights violations and abusive labour exploitation.[47]

In contrast to the shackles of Brazil's slave-owning past, the "new slavery"[48] can manifest itself through different modalities of labour activity[49]. The main manifestations of contemporary slavery are the exploitation in the clothing and construction industries promoted in large urban centres, the contracting of workers for agricultural work, the imposition of abusive labour situations to promote deforestation in the Amazon Rainforest and the service of production linked to agribusiness[50], and

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[44] Andrew Crane, 'Modern slavery as a management practice: exploring the conditions and capabilities for human exploitation' (2013) Academy of Management Review 49-69.

[45] Andrew Crane *et al*. 'Governance gaps in eradicating forced labor: From global to domestic supply chains' (2019) Regulation & Governance 86-106.

[46] Kai Ambos, *Wirtschaftsvölkerstrafrecht*: *Grundlagen der völkerstrafrechtlichen Verantwortlichkeit von Unternehmen* (Dunckler & Humblot 2018).

[47] André Campos (Repórter Brasil), Mariëtte van Huijstee, Martje Theuws (SOMO) *From moral responsibility to legal liability? Modern day slavery conditions in the global garment supply chain and the need to strengthen regulatory frameworks: The case of Inditex-Zara in Brazil*. (SOMO 2015).

[48] Kevin Bales, *Disposable people*: *new slavery in the global economy* (University of California Press 2012) 1-32.

[49] Justine Nolan and Martijn Boersma, *Addressing modern slavery* (UNSW Press 2019).

[50] Bethany Jackson; Jessica L. Sparks, 'Ending slavery by decarbonisation? Exploring the nexus of modern slavery, deforestation, and climate change action via REDD+' (2020) *Energy Research & Social* Science 1-5.

even the development of forced labour and degrading conditions through sex trafficking.[51]

The exploitation of modern slavery reveals the logic of the market that demands high-quality products at ever-lower costs[52]. This selfish need for capital accumulation is often associated with the covering up of practices analogous to slavery amidst the activities developed in the corporate supply chains, whose purpose is to avoid punishment by resorting to the difficulties in the attribution of responsibility[53], as well as the regulatory and legislative fragility and the disarticulation of the action of the authorities responsible for the law enforcement of socially harmful corporate practices.[54]

The practices developed within production chains, therefore, constitute a space for the violation of human rights on a large scale, mainly through the development and maintenance of business models in which the opportunity structures for the exploitation of forms of indecent work, and especially forced labour, are able to prosper. This context is marked by the violation of workers' and victims' rights, especially in underdeveloped and developing countries, which are the headquarters of the production of goods for export, although more recent analyses reveal the maintenance of the practice also in developed countries, such as the nations of the United Kingdom.[55]

Still, in the organizational context, Christoph Burchard analyses that the corporate structure is responsible for promoting four main characteristics: (i) the large size of corporations and the impersonal nature of the conducts developed in the corporate context make it difficult to exercise corporate governance, so as to hinder the success of initiatives to control the company in relation to the activities of its agents. This scenario is responsible for increasing the possibilities of a loosening of moral agency and the commission of crimes and human rights violations in the organizational context; (ii) secondly, large corporations due to their large structure and fragmentation of the activity of their agents end up facilitating the generation of informational asymmetry through the excessive division of labour, facilitating the development of alienation processes of corporate agents in relation to the consequences of the acts they perform and (iii) the transformation of companies into a "black box". Finally, (iv) large corporate

[51] Kara (n 25).

[52] Robert Caruana *et al*, 'Modern Slavery in Business: The Sad and Sorry State of a Non-Field' (2020). *Business and Society* 3-37.

[53] Brent Fisse and John Braiithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 2010).

[54] Michael Rauscher and Bianca Willert, 'Modern slavery, corruption, and hysteresis' (2020) European Journal of Political Economy 2-26.

[55] Genevieve Lebaron, 'The Role of Supply Chains in the Global Business of Forced Labour' (2021) Journal of Supply Chain Management 1-14.

structures end up hindering accountability and enabling the impunity of agents and irresponsibility for promoting socially harmful behaviour in the corporate context.[56]

According to this institutionalist approach, corporate severe human rights violations have as their main characteristic the development of moral neutralization by their offenders (corporate agents) through the process of dehumanization of their victims. At this point, corporate culture exerts special preponderance, since it influences offending agents by appealing to the generation of profit, wealth and shareholder value, as well as to the political interests of the institution they represent, to the detriment of respect for the norms and social structures of the countries of which they are part. In this context, the development of true normative orders by corporations is preponderant for the interpretation of the conduct responsible for the commission of transnational human rights violations, since the culture reproduced at the internal level of the corporation, which is intertwined with the development of a mythology of the superiority of corporate interests, is responsible for the annulment of the social structures and norms in force in their national realities and, consequently, develops the context favourable to the systematic violation of human rights.[57]

The contemporary prevalence of the maintenance of forced labour cases within corporate production chains is not revealed as mere chance. LeBaron argues that the exploitation of forced labour as a business dynamic represents a structural phenomenon that results from the intersection of systemic dynamics responsible for creating a supply of highly exploitable workers and its coupling with a high demand for labour exploitation[58]. On the one hand, there are overlapping economic-political conditions that are responsible for exposing workers to the vulnerability to forced labour. On the other, there are socio-economic pressures responsible for maintaining the supply of workers, which must be explained through the perpetuation of root causes of forced labour exploitation, which are expressed through poverty and low levels of education, responsible for subjecting workers to the informal market where labour exploitation practices are concentrated; identity and discrimination issues (based on characteristics such as gender, race or ethnicity, caste or migratory status); limited protection to labour practice and restricted mobility regimes, in addition to the absence of social assistance programs and of income transfer or credit supply to workers in situations of extreme vulnerability, mainly due to circumstances involving extreme poverty conditions[59]. On the other side, corporate demands for forced labour reveal the concentration of corporate ownership and power; the massive use of

[56] Christoph Burchard, 'Ancillary and neutral business contributions to "corporate-political core crime"' (2010) *Journal of International Criminal Justice* 924.

[57] Susanne Karstedt, ‚Transnationale Unternehmen und Völkerstrafrecht: Kriminologische Perspektiven', in Florian Jeßberger, Wolfgang Kaleck; Tobias Singelnstein (eds) *Wirtschaftsvölkerstrafrecht* (Nomos 2015) 159.

[58] Lebaron (n 55).

[59] Crane (n 44).

outsourcing and subcontracting practices; irresponsible sourcing practices and governance gaps.[60]

4 Towards a new legislative solution: providing corporate accountability for human rights violations within supply chains

With the intensification of globalisation since the 1990s, multinational companies have increasingly transferred their raw material and commodity production centres to companies in the Global South, either through commercial partnerships or even by setting up subsidiaries[61]. Not only lower production costs and the need to obtain competitive advantages but also the maintenance of lax regulatory regimes and the reproduction of colonial exploitation dynamics motivated the decentralisation of production to underdeveloped and developing countries, as well as the integration of global markets through corporate supply chains[62]. From this, multinational companies have increasingly influenced living and working conditions in the Global South, a dynamic responsible for manifesting both positive and negative consequences, including the maintenance or intensification of exploitation and victimisation of the workforce within global supply chains. In this context, the growth of corporate power and the increasing digitalisation and globalisation of corporate activity make it more difficult to exercise political and legal control over corporate behaviour and have led to political and legal discussions about possible new forms of regulation and control over corporate activity.[63]

Despite the global intensification of market integration and the growth of corporate impact on the capacity to regulate labour and production conditions in corporate supply chains, the immediate duty to observe, comply with and guarantee the protection of human rights, in the corporate context, has remained limited to States and, therefore, without any imposition of direct duties on corporations that establish the need to respect and guarantee human rights. There are some exceptions, though, which refer to some treaties that, despite not pointing directly to the responsibility of companies, do not limit the prohibition of forced labour exploitation and other practices analogous to slavery to natural persons, signalling a certain normative openness for the inclusion of companies as active subjects of human rights violations, as in the cases of art. 8 I of the "International Covenant on Civil and Political Rights";

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[60] David Hess, 'Modern Slavery in Global Supply Chains: Towards a Legislative Solution' (2021) Cornell International Law Journal 247-291.

[61] Christoph Kathollnig, *Unternehmensstrafrecht und Menschenrechtsverletzung: die strafrechtliche Verantwortlichkeit für Menschenrechtsverletzung im Rahmen internationaler Unternehmensaktivitäten*. (Neue Wissenschaftlicher Verlag 2016) 30ff.

[62] Michael Kubiciel, ‚Menschenrechte und Unternehmensstrafrecht – eine europäische Herausforderung' (2016) *Kölner Papiere zur Kriminalpolitik* 5-6.

[63] Wolfgang Kaleck, ‚Die Verantwortung von Unternehmen und Unternehmern für Völkerrechtsverbrechen – die Entwicklung seit den Nürnberger Prozessen' in Florian Jeßberger, Wolfgang Kaleck; Tobias Singelnstein (eds) *Wirtschaftsvölkerstrafrecht* (Nomos 2015) 83.

art, 6 I of the "American Convention on Human Rights" and art. 5 of the "African Charter on Human and Peoples' Rights". The limitation imposed by the absence of a direct link between the companies and the norms of international law results, in the last instance, in difficulties in the promotion of enforcement of human rights violations.[64]

Nevertheless, a set of non-binding guidelines, whose maturation presupposes the creation of internationally binding standards, started to be developed within the United Nations Organization with the "UN Global Compact" in 2000. In the context of human rights protection, the instrument suggests, in principles 1 and 2, that companies should support and respect the protection of internationally recognized human rights, as well as avoid complicity with human rights abuses. And principle 4 establishes the need for companies to act in a way that eliminates all forms of forced or compulsory labour. Subsequently, the 2003 "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights" establish immediate (direct) duties to companies for the protection of human rights, including the prohibition, in Section D, of the exploitation of forced labour by corporations. Although the movement has been criticised as being a transfer of duties and responsibilities from States to companies, the fact is that the new orientation brought about by the "UN Norms" is materialised by the expansion of the addressees of duties and responsibilities for the respect of human rights, as an attempt to solve the exponential growth in the power of companies and, consequently, their impact.[65]

In addition to the so-called UN Norms, both the OECD (Organisation for Economic Co-operation and Development) and the ILO (International Labour Organisation) have established non-binding guidelines for multinational enterprises. The OECD established the "Guidelines for Multinational Enterprises" in 1976 and successive revisions up to 2011. Chapter V of the first part of the instrument stipulates that multinational enterprises must respect all labour standards set out in applicable laws and regulatory instruments and, in particular, includes a (non-binding) commitment to contribute to the elimination of all forms of exploitation of forced or compulsory labour and child labour, as well as to develop the necessary instruments to ensure that this type of exploitation does not occur in their business operations. Within the ILO, the main instrument is the "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" of 1977. Hence, besides providing for state responsibility for the development of effective measures for the eradication of forced labour and adequate redress instruments (Principle 23), they should also provide support and guidance so that companies may establish mechanisms to identify, prevent, mitigate and account for how the risks of labour exploitation in their operations and products are addressed. In the same vein, the guideline suggests that companies, multinational

[64] Constantin Köster, *Die völkerrechtliche Verantwortlichkeit private (multinationaler) Unternehmen für Menschenrechtsverletzungen* (Duncker & Humboldt 2010) 69ff.
[65] Katholnig (n 61).

and national, should develop appropriate mechanisms to ensure the prohibition and eradication of the exploitation of forced or compulsory labour.[66]

Subsequently, in 2011, under the decisive influence of the edition of the United Nations Guiding Principles, or the "Protect, Respect and Remedy Framework" ("Ruggie Principles"), the incorporation of sanctioning mechanisms, including those of a legal and criminal nature, to companies for human rights violations, began to be directly, but non-bindingly, provided for in the first principle. As for corporations, principle 11 establishes the duty of companies to respect human rights, including through the incorporation of compliance mechanisms, such as human rights due diligence and risk assessment, that demonstrate the fulfilment of obligations regarding the protection of human rights, especially in cases involving business activities in regions that have weak governance zones.[67]

However, as highlighted in the comment that follows the alleged imposition of direct duties to companies, it is only a matter of a mere social and political expectation of conduct (global standard of expected conduct), but they do not constitute binding obligations[68]. In other words, it is only betting on the voluntarism of the corporations in implementing prevention and control measures in face of human rights violations. Furthermore, the Guiding Principles also do not make it clear if there is a direct imposition of duties of protection or fulfilment of human rights, or if these predictions are directly binding only on States. Nevertheless, the UN Guiding Principles play a central role in the recognition of corporate responsibility for human rights.[69]

Although the provision of the need for protection against human rights violations in globally recognised international instruments is important, the lack of binding force ends up limiting the effect of the guidelines to mere normative expectations directed, in this case, at both states and companies so that they implement mechanisms responsible for protecting and preventing human rights violations. On the other hand, however, it is hoped that these principles and instructions will serve as a source of interpretation and pressure for the creation of future treaties. Those should incorporate binding standards, to be ratified at a global level, encourage domestic legislation to establish specific duties for companies to protect human rights in their supply chain operations,

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[66] 25. Multinational as well as national enterprises should take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations. Katholnig (n 61).

[67] United Nations. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UN 2011).

[68] Martin Böse, ‚Die strafrechtliche Verantwortlichkeit deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' in Marc Engelhart, Hans Kudlich, Benjamin Vogel, *Digitalisierung, Globalisierung und Risikoprävention: Festschrift für Ulrich Sieber zum 70. Geburtstag.* (Duncker & Humblot 2021) 395-410.

[69] Luigi Foffani and Adán Nieto Martín, ‚Auf dem Weg zu einem europäischen Wirtschaftsstrafrecht der Menschenrechte' in Marc Engelhart, Hans Kudlich, Benjamin Vogel, *Digitalisierung, Globalisierung und Risikoprävention: Festschrift für Ulrich Sieber zum 70. Geburtstag*. (Duncker & Humblot 2021) 411-420.

mainly through compliance and due diligence mechanisms that aim to prevent, identify, mitigate, provide for corporate accountability, and repair damages to the victims of human rights violations in their various dimensions.[70]

Given the asymmetry of both regulatory power, enforcement capacity and consistency between different jurisdictions and between states in the Global North and states in the Global South, the Guiding Principles also encourage the extraterritorial imposition of enforcement, including through criminal law, by countries where the multinational corporation's headquarters have jurisdiction. In cases where there are human rights violations by business partners or affiliates of the transnational corporation, it should be punished criminally in the jurisdiction where its headquarters are located.[71]

From this international political-legal movement, several nations started to develop legislation guided by the need to prevent the violation of human rights in global supply chains and to impose due diligence mechanisms as an informal social control mechanism to be developed by corporations as a requirement for the fulfilment of the duty of care and prevention of abuses within supply chains. These include the *UK Modern Slavery Act*, the *California Transparency in Supply Chains Act*, the *Australian Modern Slavery Act* and the most recent German legislation, the *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* (*Lieferkettengesetz*), as well as the *European Union's Directive 2014/95/EU*, which regulates the duty of transparency and reporting on measures taken by large companies to protect human rights.

However, most of these laws only provide for civil or administrative sanctions, as is the case of the *Lieferkettengesetz*, and some of them, such as the *UK Modern Slavery Act*, the *Australian Modern Slavery Act* and *Directive 2014/95/EU*, only provide for disclosure and transparency duties, therefore not establishing control standards of a criminal nature.[72] In this context, the opportunity is lost to develop a convergence of controls, which, would be the standard responsible for providing state control and enforcement over duties developed through corporate self-regulation, namely, duties of transparency, voluntary disclosure of non-financial information and due diligence for the prevention of human rights violations.[73]

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[70] Ambos (n 46) 29.

[71] Kubiciel (n 62). Adán Nieto Martín 'Hacia un derecho penal económico europeo de los Derechos Humanos' (2020) 137-172.

[72] Kadriye Bakirci and Ritchie Graham 'Corporate liability for modern slavery' (2022) Journal of Financial Crime 576-588.

[73] William S. Laufer, *Corporate bodies and guilty minds*: *the failure of corporate criminal liability* (Chicago University Press 2006). John A. Vervaele. 'Corporate Compliance and Criminal Liability of Corporations in the Light of Corporate Social Responsibility and Human Rights Obligations' (2021) Revue Internationale de Droit Pénal 415-434.

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FREEDOM OF EXPRESSION AND CRIMINAL LAW

PRE-TRIAL PUBLICITY: THE INTERPLAY BETWEEN FREEDOM OF EXPRESSION, PRESUMPTION OF INNOCENCE AND THE RIGHT TO AN EFFECTIVE REMEDY

By Athina Sachoulidou[*]

Abstract

The relation between crime, criminal justice and media has been seen in a new light since the advent of digital and social media, a context where the defence may have to respond to criminal charges (if any), negative publicity and the public opinion. Aiming to address the blurring of the boundaries between the judicial determination of guilt and labelling, the ECtHR jurisprudence and the Directive (EU) 2016/343 entail an express prohibition on public statements of authorities suggesting or implying a defendant's guilt before the final judgment. Notwithstanding this, public premature expressions by private actors of a defendant's guilt fall outside the material scope of the presumption of innocence – instead, they may be protected under the freedom of expression and indirectly justified in the name of the victim's right to an effective remedy. Using the media coverage of the Greek #metoo movement as an inspiration platform, this paper embarks on an exploration of the case of pre-trial publicity. It delves into the roles of media, defendants and victims in their capacity as right-holders in order to examine the interplay between the freedom of expression, presumption of innocence and the right to an effective remedy. It showcases lacunas of protection and assesses critically national responses to "crime in the news". Lastly, it argues in favour of alternative positive interventions to resolve this conflict of interests.

1 Introduction

In early 2021, Greek athletes, actors and university students came forward to denounce sexual and physical violence in workplace – with their initiative giving rise to the first Greek #MeToo movement.[1] These publicly formulated accusations led the Greek judicial authorities to order preliminary investigations. Nevertheless, in several cases no charges were pressed, as the incidents at issue had already fallen under the statute of limitations. At the same time, this movement has been marked by the *uncontrolled* media coverage of the respective criminal cases, ranging from the publication of leaked court documents to media trials with victims and witnesses testifying on TV. The citizens discussed massively these incidents on social media – with their comments ranging from a public outcry against concealing sexual abuses to a straightforward

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[1] Christina Michael, 'Better Late than Never: The "Me Too" Movement Arrives in Greece and Cyprus' (2021) Human Rights Pulse <www.humanrightspulse.com/mastercontentblog/better-late-than-never-the-me-too-movement-arrives-in-greece-and-cyprus> accessed 9 March 2023.

criticism of court rulings on guilt or the procedural treatment of those brought to justice.

This can serve as a representative example of how publicity of high-profile criminal cases, supported by information and communication technologies and the rise of social media platforms, may (attempt to) promote justice, but results in a substantial conflict of rights. Freedom of expression (FoE) and the right to an effective remedy come into conflict with the right to privacy and to a fair trial, including the presumption of innocence (PoI) and various meta-rules the latter entails, such as the (limited in scope) prohibition of public pronouncements on guilt. This is a conflict of rights several stakeholders are possibly affected by: (alleged) victims and offenders, public authorities, including but not limited to the police and the judiciary (including jurors), defence lawyers and (social) media representatives.

This paper explores this conflict by placing an emphasis on the *interplay* between FoE, PoI and the right to an effective remedy. To attain this goal, it first provides a typology of the phenomena the term "crime in the news" stands for, based on the distinction between pre-trial and trial stages of criminal proceedings. The analysis subsequently focuses on pre-trial prejudicial comments and the challenges arising from digitalisation of communication and public speech (Section 2). Next, it delves into the roles of three key right-holders: (social) media representatives, the defendant and the victim with the aim of showcasing their conflicting rights in criminal justice settings (Section 3). The system of reference comprises the European Convention on Human Rights (ECHR) as complemented by the Charter of Fundamental Rights of the EU (CFR) and EU secondary laws on defence rights. This doctrinal analysis is informed by the respective case law of the European Court of Human Rights (ECtHR).[2] The next step is to scrutinise national responses to this conflict of interests, using the Greek legal order as an example (Section 4). Lastly, this paper concludes by advocating alternative positive interventions outside the realm of criminal law (Section 5).

2 Crime in the news

2.1 Typology

Criminal proceedings consist of the pre-trial phase and the trial phase, including the appeal or other remedial proceedings, followed by the execution of the respective judgment.[3] The trial phase is governed by the principle of publicity, a principle tightly

[2] The focus lies on the ECtHR jurisprudence inasmuch as the pertinent case law of the Court of Justice of the EU is limited in relation to the conflict of rights in question, particularly as regards the context under analysis. See Zoi-Anna Kasapi and Maria Mousmouti, 'Media coverage of criminal cases in the case law of the European Court of Human Rights' in ARISA (ed) *The presumption of Innocence and the Media Coverage of Criminal Cases* (Centre for the Study of Democracy 2021) 57, 58 <arisa-project.eu/wp-content/uploads/2021/04/The-Presumption-of-Innocence_EN_WEB.pdf> accessed 9 March 2023.

[3] E.g., Maria Kaiafa Gbandi, Nikolaos Chatzinikolaou and Athina Sachoulidou, 'Greece'; Thomas Weigend 'Germany'; Ramon Ragués, 'Spain' in Pedro Caeiro, Sabine Gless, Valsamis Mitsilegas, Miguel

linked to the fair trial (arts 6 (1) ECHR, 47 CHR) and the function of democracies.[4] It encompasses the requirement to hold a public hearing, which can be subject to exceptions,[5] and the public delivery of judgments.[6] In most (if not all) European legal orders, whether following an inquisitorial or an adversarial system, pre-trial proceedings are either conducted in writing and without publicity or the publicity thereof is governed by strict procedural rules aiming to guarantee an effective investigation and to protect defence rights and the right to privacy.[7] In other words, the pre-trial phase is closed to the public and only information serving the public interest may be released.

Media eagerness to report criminal cases manifests differently across the various stages of criminal proceedings. *At the pre-trial stage*, media interference can take the form of prejudicial comments, non-authorised publication of the name and the image of the suspect and the alleged victim, interviews of the latter and possible (expert) witnesses, leak-based publication of materials intended to serve as evidence, contributing all together to the so-called media trials.[8] *While the litigation is still pending*, the media coverage of trials may involve broadcasting or taking pictures during the trial without authorisation or publishing court documents not intended to be public or not yet read in open court.[9] *After the verdict is delivered*, media may comment on the quality of the judgment and the integrity, skills and personal merit of the involved judges[10] or publish the stories of the defendants, whether found guilty or been acquitted.[11]

João Costa, Janneke De Snaiher and Georgia Theodorakakou (eds), *Elgar Encyclopedia of Crime and Criminal Justice* (Elgar 2023).

[4] ECtHR, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb)' (2022) para 278 <www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf> accessed 9 March 2023.

[5] Art 6 (1) ECHR: "[…] the press and public may be excluded from all or part of the trial […] where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

[6] ECtHR (n 4) para 280.

[7] E.g., Kaiafa Gbandi *et al.* (n 3); Catherine van de Heyning, 'Presumption of Innocence: procedural rights in criminal proceeding. Country: Belgium' (2020) 12–13 <fra.europa.eu/sites/default/files/fra_uploads/belgium-2021-country-research-presumption-innocence_en.pdf> accessed 9 March 2023; Conceição Gomes, Paula Fernando, Carolina Carvalho and Marina Henriques, 'Presumption of Innocence: procedural rights in criminal proceeding. Country: Portugal' (2020) 23–24 <fra.europa.eu/sites/default/files/fra_uploads/portugal-2021-country-research-presumption-innocence_en.pdf> accessed 9 March 2023.

[8] See Tatiana-Eleni Synodinou, 'The media coverage of court proceedings in Europe: Striking a balance between freedom of expression and fair process' (2012) 28 Computer Law & Security Review 208, 212.

[9] *Ibid* 215–216.

[10] However, judges are subject to a duty of discretion that precludes them from replying. See *Morice v France* App no 29369/2010 (ECtHR, 23 April 2015) para 128; *Di Giovanni v Italy* App no 51150/2006 (ECtHR, 9 December 2013) para 71.

[11] See Synodinou (n 8) 217–218.

Today, publicity, whether pre-trial, trial or post-trial, is to be perceived in a broad way to the extent that press, radio and TV are not the sole origin thereof. Citizens often act as amateur journalists commenting actively on high-profile criminal cases on social media. What public interventions of this kind have in common is that they may be the outcome of the originally noble intention to promote justice, protect victims and inform the public, but they may jeopardise the interests of *both* defendants and victims and, ultimately, impede justice. This contradiction becomes apparent in the case of, *inter alia*, prejudicial comments made in public as part of media trials or similar public discourses taking place online, phenomenon the following analysis focuses on.

2.2 Focal point: pre-trial publicity

Pre-trial publicity (PTP) of high-profile criminal cases is hardly a new phenomenon. The US Courts have addressed PTP-driven infringements on the Sixth Amendment right to an impartial jury since the early 1960s.[12] They highlighted the adverse impact of inflammatory content of media reports and feelings aroused by PTP on the impartiality of jurors, including the risk that the latter may succumb to the pressure of satisfying an outraged public.[13] Similarly, since early 2000s, the ECtHR has held that a virulent press campaign can spill over fair trial impacting on guilt perceptions among the citizens and the jurors in particular.[14]

According to empirical studies on PTP, the information media may release range from confession evidence, the defendant's connection to another illegal conduct, criminal record and defendant's (negative) characteristics often linked to (inadmissible) statements by persons pertaining to their social circle.[15] This content is distinguished into: factual information (e.g., past convictions) and emotional content (e.g., involvement into an unrelated scandal) – in both cases, the more realistic the information appears to be, the stronger the PTP effects become.[16] Jurors' exposure to such information may pre-determine the way they will interpret admissible evidence presented in court, suggesting that PTP can operate via predecisional distortion.[17] Similarly, more recent studies underline the PTP impact on source memory errors

[12] See *Irvin v Dowd* 366 US 717 (1961); *Sheppard v Maxwell* 384 US 333 (1966).

[13] See David Zimmerman, Dario Rodriguez, Amanda Bergold and Steven Penrod, 'The influence of pretrial exposure to community outrage and victim hardship on guilt judgments' (2016) 22 Psychology, Crime & Law 435, 436.

[14] E.g., *Akay v Turkey* App no 34501/97 (ECtHR, 19 February 2002); *Craxi v Italy* App no 34896/97 (ECtHR, 5 March 2003) para 98; *Beggs v UK* App no 15499/10 (ECtHR, 16 October 2012) para 123.

[15] For an overview of this empirical evidence see Zimmerman *et al.* (n 13) 437.

[16] *Ibid*.

[17] See Kurt Clarson and Edward Russo, 'Biased interpretation of evidence by mock jurors' (2001) 7 Journal of Experimental Psychology: Applied 91; Lorraine Hope, Amina Memon and Peter McGeorge, 'Understanding pretrial publicity on juror decisions: Predecisional distortion of evidence by mock jurors' (2004) 10 Journal of Experimental Psychology: Applied 111.

"finding that jurors attributed PTP information as having been presented during trial".[18]

PTP information may be revealed by investigative journalists or as part of accusations made by victims on TV (not necessarily accompanied by a formal complaint) or interviews with possible witnesses. In the case of the Greek #MeToo movement and other high-profile criminal cases that have recently trembled the Greek legal order, the floor was also given to defence lawyers, whether involved in these specific cases or not, and other professionals who could serve as expert witnesses, such as psychologists and digital forensics experts.[19] In the particular case of legal professionals, such interventions, which are *prima facie* protected by FoE,[20] may pursue varying interests: sharing legal expertise and advertising legal services, but also *defending a client outside the courtroom*. Notwithstanding the above, this is a context where legal professionals may become, whether wittingly or unwittingly, an active part of media trials with detrimental consequences for the private, family and professional life of the concerned individuals.[21] This is particularly the case where the communication with media involves confidential information entrusted with the defence lawyer or premature statements on the case, which may be disproved during the trial. This may reverse the dialectical terms of the criminal trial – with the defence lawyer getting into a defensive position *before the journalist* instead of defending his/her client *before the court*.[22] This distortion is further exacerbated when invoking the PoI is perceived as a weakness and the duty to secrecy becomes a means of escaping challenging questions.

Sometimes, journalists themselves invoke the PoI, but only after they had depicted the suspect as guilty.[23] Rendering PoI into empty words, media coverage of criminal cases jeopardises not only fair trial as a fundamental tenet of criminal procedure, but also the social meaning of a future acquittal that may not mean much to an outraged public.[24] The focus seems to lie on the "common sense of justice", a fluid notion of justice,[25] which often manifests itself in comments concerning the impartiality and the skills of the judiciary and the way the latter handles a particular case. This is relevant not only

[18] See Christine Ruva and Cathy McEvoy, 'Negative and positive pretrial publicity affect juror memory and decision making' (2008) Journal of Experimental Psychology: Applied 226.

[19] See European Agency for Fundamental Rights (FRA), 'Presumption of innocence and related rights-Professional perspective' (2021) 47–48 <fra.europa.eu/en/publication/2021/presumption-of-innocence> accessed 9 March 2023.

[20] Cf. Art 40 (4) of the Greek Code of Conduct for Lawyers (Law 4194/2013), which stipulates that lawyers are not allowed to give interviews to the press publishing information related to a case they handle that is pending before a court. See Aristomenis Tzannetis, 'Negative publicity, media defence and common sense of justice: three communicating vessels' (in Greek) (2023) 17 novacriminalia 2.

[21] *Ibid* 2–3.

[22] *Ibid* 3.

[23] FRA (n 19) 47.

[24] Cf. Ariana Tanoos, 'Shielding the presumption of innocence from pretrial media coverage' (2017) 50 Indiana Law Review 997, 1012.

[25] See Tzannetis (n 20) 3.

at a post-trial stage, namely concerning the decision on guilt and the corresponding penalty,[26] but also at early stages of criminal proceedings, when the court will decide whether to order, for instance, the measure of pre-trial detention. The common sense of justice may also enter the courtroom, particularly in the case of mixed panels – with jurors exposed to PTP information feeling obliged to return a verdict that complies with the majority sentiment.[27]

Lastly, PTP often originates from leaked (not necessarily accurate) information. Empirical studies suggest that the source of these leaks can be: the police, court and prosecution clerks; lawyers; victims' representatives or victims themselves who may be more willing to talk to the media than to testify to the competent authorities.[28] On the other hand, journalists sometimes cooperate with the police, being even willing to conceal information to avoid obstructing their work. However, market-driven competition often leads to the airing of suspiciously individualised rumours.[29]

2.3 Emerging challenges: media multiplication and diversification and the cancel culture

Historically, crime has been one of the main features of newspapers, which progressively gave their place to TV in terms of the "main venue for the media sensationalism regarding crime news".[30] Developments in the media landscape, including 24/7 news coverage, multiplication of daily talk shows and online media forums, have created not only more "space" for crime news, but also led the media professionals to look for incidents to pique the public's curiosity.[31] Online media forums have added an extra layer of comfort for the audience, considering that the latest revelation concerning a suspect's prior misconduct is just a click away. Convenience and rapid access go hand in hand with virality of information that can be inaccurate and, definitely, difficult to remove from the online world.[32]

Besides online media forums, which nowadays count as traditional broadcasting channels, social media have amplified rapid dissemination of publications. Twitter, Facebook, Instagram, TikTok are just a few examples of social media platforms deployed not only by professional journalists, but also by citizens, in order to, *inter alia*, share their views on issues that pertain to the public sphere.[33] Interestingly, this is a

[26] Cf. Ilias Anagnostopoulos, 'Communication barbarism and institutional stagnancy' (in Greek) (2022) 15 novacriminalia 1.

[27] See Zimmerman *et al.* (n 13) 438–439.

[28] FRA (n 19) 49–50.

[29] Francisco Seoane Pérez and Lidia Valera-Ordaz, 'Stolen innocence? Observance of the EU Directive on presumption of innocence by Spanish crime reporting' (2021) 34 Communication & Society 15, 20.

[30] *Ibid* 17.

[31] Tanoos (n 24) 1010.

[32] See Synodinou (n 8) 214.

[33] See Jocelyn Edzie, 'Disclosure of information and media coverage of criminal proceedings' in ARISA (ed) *The presumption of Innocence and the Media Coverage of Criminal Cases* (Centre for the Study of

context where lay journalists may even question the privilege of "truth" professionals enjoy and, by means of powerful statements, start claiming a stake in the adjudication of the respective cases.[34] Part of this reality is also the "cancel culture", a term that stands for:

> "the withdrawal of any kind of support […] for those who are assessed to have said or done something unacceptable or highly problematic, generally from a social justice perspective".[35]

Despite not necessarily linked to criminal conduct, the cancel culture was turbocharged by the American #MeToo movement.[36] Today, it is often experienced as a modern form of ostracism based on "a judgment made in the court of public opinion".[37] In this court, which does not operate on the basis of predetermined norms, PoI is replaced by a presumption of guilt supported by trends and opinions instead of factual evidence. Additionally, cancel culture is coupled with loss of nuance[38] – with those cancelling, for instance, a person accused of a sexual offence failing to understand the different kinds thereof and the different legal consequences associated with each of them. Despite lacking the legal background that would enable a sound assessment of the situation at hand or not having access to the entire body evidence, social media users' comments have the potential to establish a certain perception of the events that often results in mass dissatisfaction with the final outcome of the case and can even create a fear of acquittal.[39] This poses the question of whether this phenomenon can exacerbate the PTP effects and impact adversely on defence rights in the name of FoE. The next section embarks to explore this interplay adding the right to an effective remedy to the equation.

Democracy 2021) 8, 26 <arisa-project.eu/wp-content/uploads/2021/04/The-Presumption-of-Innocence_EN_WEB.pdf> accessed 9 March 2023.

[34] See Marina Skoumpou, 'The legal counsel and the social media spotlights' (in Greek) (2022) 15 novacriminalia 4, 5.

[35] Eve Ng, 'No Grand Pronouncements Here…: Reflections on Cancel Culture and Digital Media' (2020) 21 Television & New Media 621, 623.

[36] *Ibid* 263.

[37] Beatriz Oliveira, 'A return to public square trials? How cancel culture and perp walks may undermine trial impartiality and criminal justice' (2021) <www.culawreview.org/journal/a-return-to-public-square-trials-how-cancel-culture-and-perp-walks-may-undermine-trial-impartiality-and-criminal-justice> accessed 9 March 2023.

[38] Ng (n 35) 263–264.

[39] Cf. FRA (n 19) 48; Maria Doichinova, 'Publicity ethics in high-profile cases' in ARISA (ed) *The presumption of Innocence and the Media Coverage of Criminal Cases* (Centre for the Study of Democracy 2021) 110, 117 <arisa-project.eu/wp-content/uploads/2021/04/The-Presumption-of-Innocence_EN_WEB.pdf> accessed 9 March 2023.

3 The interplay between FoE, PoI and the right to an effective remedy

Law enforcement and judicial authorities are legally bound to comply with the fair trial principle and defence rights when communicating with media. Despite the public expectations they have to deal with,[40] they are responsible for striking the right balance between the public's right to information and the defendant's right to be presumed innocent and to privacy. Against this backdrop, external communication has already received significant attention – with several soft law instruments aiming to offer guidance to the judiciary as to how to communicate with media and the public.[41] The following analysis goes beyond this framework to address the potential conflict between the way such information is handled by *private actors* and the interests of *both* defendants and victims in criminal cases.

3.1 (Social) Media representatives

The ECtHR jurisprudence on the social role of media as "public watchdog" is assertive in terms of connecting "the task of the press in imparting information and ideas on all matters of public interest to the public's right to receive them".[42] And this is a role that, together with the protection afforded by art 10 ECHR, the ECtHR progressively recognised to non-governmental organisations, academic researchers and authors, bloggers and popular users of the social media, considering the internet's role in facilitating access to and dissemination of news.[43] (Social) media stakeholders take on the task of promoting transparency and social understanding in judicial settings, a challenging task considering the public's lack of familiarity with judicial proceedings that would allow them to decode court rulings.[44] As part of this effort, they face significant difficulties in "manoeuvr[ing] between fundamental rights, avoiding censorship and promoting development", difficulties that are exacerbated by the everchanging landscape of public communication and, in the case of professional journalists, the rules of the free market.[45] In this environment, high-profile criminal cases appear as a "gold mine" the exploitation of which may dictate prioritising emotional content over informative values.[46]

Art 10 ECHR[47] reflects the need for maintaining an equilibrium. It stipulates the "freedom to hold opinions and to receive and impart information and ideas without

[40] Doichinova (n 39) 116.
[41] E.g., European Commission for the Efficiency of Justice, 'Guide on communication with the media and the public for courts and prosecution authorities' (2018) <rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe#_Toc524690253> accessed 9 March 2023.
[42] ECtHR, 'Guide on Article 10 of the European Convention on Human Rights. Freedom of expression' (2022) para 298 <www.echr.coe.int/documents/guide_art_10_eng.pdf> accessed 9 March 2023.
[43] ECtHR (n 42) paras 300–304.
[44] Edzie (n 33) 8.
[45] Doichinova (n 39) 119.
[46] *Ibid* 120.
[47] Cf. Art 11 CFR.

interference by public authority" (para 1), formulation that encompasses the fundamental role of the press in democracies. These freedoms are subject to limitations pursuant to art 10 (2) ECHR, arising from the need to, *inter alia*, protect the reputation or rights of others, prevent the disclosure of confidential information or maintain the authority and impartiality of the judiciary. In that sense, the press does not enjoy a wholly unrestricted FoE even in the case of matters of *serious public concern*.[48] Instead, the ECtHR underlines that the protection of art 10 ECHR is provided on the premise that journalists act in good faith and on an accurate factual basis and provide information that is reliable and precise following the tenets of responsible journalism, principles that shall also apply to those engaging in public discourses.[49]

Even in this context, there is space left for misconduct, particularly to the extent that media and professional journalists in particular may stray from facts, the misinterpretation of which can serve as grounds for being held liable for libel, and turn the spotlight onto opinions. For instance, they can accommodate *opinions* as to one's guilt or dangerousness or *incomplete stories* that can affect legal proceedings.[50] At the same time, the press is free to exaggerate or even provoke when reporting on a given case – with neither the ECtHR nor national courts being able to intervene in the choice of the news items, or the extent of their media coverage.[51]

Notwithstanding the above, art 10 (2) ECHR refers expressly to the protection of the "authority and impartiality of the judiciary" suggesting that FoE may come into conflict with other Charter's rights, including PoI (art 6 (2)) and the right to privacy (art 8). These limitations are applicable -first and foremost- to the judiciary and other public officials who should be vigilant in exercising their right to FoE in the context of ongoing investigations, in as much as the information they deal with may be protected by legal secrecy rules designed to ensure the proper administration of justice.[52] In the case of criminal investigations, the ECtHR has reiterated that art 6 (2) ECHR cannot prevent the authorities from informing the public, but they shall do so "with all the discretion and circumspection necessary if the [PoI] is to be respected" and by choosing carefully their words.[53] Thus, the ECHR does not entail any positive State obligations concerning statements of guilt made by private persons to the extent that there is no interference with art 8 ECHR.[54] Lawyers are also protected in the light of art 10 ECHR,

[48] The use of the term "serious public concern" calls out for distinguishing between matters of public interest, such as an ongoing environmental disaster that may jeopardise citizens' wellbeing, and catchy topics, such as a crime committed under intriguing circumstances. See Doichinova (n 39) 112–113.
[49] ECtHR (n 42) paras 328–330.
[50] See Tanoos (n 24) 1009.
[51] See ECtHR (n 42) para 343.
[52] *Ibid* para 464.
[53] *Ibid* paras 465–466.
[54] Kasapi and Mousmouti (n 2) 63.

but the ECtHR takes the view that they cannot be equated with journalists considering their leading part in the justice system.[55]

Legal secrecy rules (often suggesting that a certain behaviour amounts to a professional misconduct or even a criminal offence), the authority[56] and impartiality of the judiciary, the effectiveness of criminal investigations and PoI shall equally shape the context in which judicial proceedings are covered by the press. Attempting to strike a fair balance, the ECtHR stresses that the media reporting of and public discussion on matters pending before the courts are consonant with the requirement under art 6 (1) ECHR that hearings are public, provided those taking over these tasks do not overstep the bounds imposed in the interests of the proper administration of justice and respect PoI – thus, their protection does not extend to prejudicial comments likely to undermine fair trial and public's confidence in the role of courts.[57] The application criteria of these general principles include: 1) the contribution to a public debate on a matter of general interest; 2) the nature or content of the impugned comments; 3) the method of obtaining the impugned information – with the ECtHR suggesting that the illegality of obtaining the relevant information does not necessarily determine the assessment as to whether a journalist complied with their duties and responsibilities when publishing this information;[58] and 4) the proportionality of a ban on publication or a sanction.[59] In this context, the ECtHR had ruled that "criminal sanctions, *exceptionally compatible with Article 10*, had not been disproportionate" in a case where serious accusations related to a rape incident had been presented as facts with the applicants failing to verify whether those had a factual basis and publishing them before the start of the criminal investigation.[60]

Other contextual considerations ECtHR rulings rely upon when addressing cases of media coverage encompass the likelihood of publications/statements: 1) to influence the conduct of the judicial proceedings, considering the publication's time, the nature of its content and the status of the judges (professional or lay); 2) to entail a breach of the confidentiality of judicial investigations and PoI, considering the stage of the respective criminal proceedings; 3) to disclose information protected by art 8 ECHR; and 4) to amount to contempt of court.[61] PTP has the potential to "tick all the boxes", but, as will

[55] ECtHR (n 42) para 472.

[56] This term encompasses the acceptance of courts by the public as the correct forum for resolving legal disputes and determining one's guilt or innocence on a criminal charge as well as the respect for and confidence in courts' capacity to carry out these tasks. See *Morice v France* (n 10) para 129; *Di Giovanni v Italy* (n 10) para 71.

[57] For an overview of the general principles of media coverage of criminal cases in the light of art 10 ECHR see ECtHR (n 42) paras 477–486.

[58] See *Bédat v Switzerland* App no 56925/2008 (ECtHR, 29 March 2016).

[59] For an overview of the application criteria see ECtHR (n 42) paras 487–504.

[60] *Ruokaken and Others v Finland* App no 45130/2006 (ECtHR, 4 October 2010) para 48.

[61] For an overview of the contextual considerations see ECtHR (n 42) paras 505–530.

be shown below, the threshold for proving that there has been a violation against PoI is significantly high.

3.2 Defendant

When the focus is shifted from the courtroom to the TV screens and social media posts, the defendant's right to a fair trial and to be presumed innocent can be put at risk. The PoI is enshrined in arts 6 (2) ECHR and 48 CFR using an almost identical formulation: Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. Pursuant to the ECtHR case-law, various meta-rules emerge from PoI, including the principle of objectivity requiring that the judiciary should not start with the preconceived idea that the accused has committed the offence charged[62] and the obligation to refrain from judicial pronouncements of guilt prior to a court finding of it. The Directive (EU) 2016/343 does not only replicate arts 6 (2) ECHR and 48 CFR in art 3, protection granted "at all stages of criminal proceedings" (art 2),[63] but also endorses the ECtHR jurisprudence on the aforementioned meta-rules.[64] In particular, the Directive embarks to address the challenges posed to the protection of PoI by "the blurring of the boundaries between the judicial determination of guilt or innocence […] and labelling",[65] introducing not only rules of judgment (arts 6–7), but also rules of treatment throughout the criminal proceedings (arts 4–5).[66]

Art 4 Directive (EU) 2016/343 stipulates that public statements made by *public authorities* and judicial decisions, other than those on guilt, shall not refer to defendants as guilty, unless they have been proved guilty according to law (para 1). This principle is binding for any authority involved in the criminal proceedings (e.g., judicial authorities, police and other law enforcement authorities) and other public authorities, such as ministers (recital 17) – *excluding, thus, private persons*. Art 4 (3) introduces an exception to this rule, according to which public authorities are not prevented "from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest". This may be the case when the public is asked to assist in identifying the alleged perpetrator or when information is provided to those possibly affected by a criminal offence for safety reasons, provided that this practice is "confined to situations in which this would be reasonable and proportionate, taking all interests into account" (recital 18).

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[62] *Barberà Messegue and Jabardo v Spain* App no 10588/1983, 10589/1983, 10590/1983 (ECtHR, 6 December 1988) para 77.

[63] The European Parliament advocates a broad approach to the term "criminal proceedings" as grounded on the Engel criteria of the ECtHR. See Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022) 278.

[64] *Ibid* 277–282.

[65] *Ibid* 282.

[66] Maria Luisa Villamarín López, 'The presumption of innocence in Directive 2016/343/EU of 9 March 2016' (2017) ERA Forum 335, 343.

Out of respect for FoE, the Directive does not provide any guidance as to how the media should report on criminal cases, nor attempts to regulate the conduct of journalists.[67] Instead, it only suggests that Member States should ensure that their public authorities abstain from public references to guilt when they provide information to the media, while informing the latter of the importance of having due regard to PoI (recital 19). This comes as no surprise to the extent that the Directive follows the ECtHR jurisprudence.[68] According to the latter, in cases where prejudicial statements are made by private entities –without constituting a verbatim reproduction of official information provided by the authorities– no issue arises under art 6 (2) ECHR, but art 8 ECHR may be applicable.[69] Moreover, the ECtHR stresses that PoI is consonant with informing the public about criminal investigations in progress, provided the authorities do so with all the discretion and circumspection required.[70]

Next, the ECtHR pays particular attention to virulent press campaigns that could impact adversely on fair trial and PoI.[71] In such cases, however:

> "what is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his or her fears can be held to be *objectively* justified".[72]

To assess this, the ECtHR takes into account: the time elapsed between the press campaign and the begin of the respective trial; whether the publications at issue were attributed to or informed by the authorities; and whether the publications influenced the judges or the jury and, thus, prejudiced the respective ruling, while underlying that professional judges possess, unlike jurors, the experience and training required to avoid external influence.[73] In that sense, the threshold of proving that PoI has been violated is rather high.[74] Instead, it is more likely that the ECtHR will rule in favour of a violation of art 8 ECHR in the form of adverse consequences for the accused and their honour, reputation, psychological wellbeing, social and working life.[75] This may encompass the damage associated with exposure to public attitudes resembling a presumption of guilt (a damage that concerns not only the alleged offender but also

[67] FRA (n 19) 41.
[68] For an overview of this jurisprudence see Kasapi and Mousmouti (n 2) 64–73.
[69] *Mityanin and Leonov v Russia* App No 11436/2006, 22912/2006 (ECtHR, 7 August 2019) paras 102; 105.
[70] ECtHR (n 4) paras 358–359.
[71] *Ibid* paras 258; 361–362.
[72] *Ibid* para 259 (emphasis added).
[73] *Ibid* paras 260–261.
[74] See FRA (n 19) 51.
[75] For an overview of this case-law see Olivia Dorak, 'The presumption of innocence and the protection of the right to privacy of suspects and accused' in ARISA (ed) *The presumption of Innocence and the Media Coverage of Criminal Cases* (Centre for the Study of Democracy 2021) 30–45 <arisa-project.eu/wp-content/uploads/2021/04/The-Presumption-of-Innocence_EN_WEB.pdf> accessed 9 March 2023.

his/her family),[76] but fails to encompass the *procedural* risk of biased administration of justice those exposed to PTP are facing or the loss of respect for courts as the appropriate forum for deciding on one's guilt or innocence. Additionally, the choice to address prejudicial comments under art 8 ECHR does not necessarily take into account that the same individual may be deprived of effective protection under art 6 ECHR as part of future investigations or criminal proceedings.[77]

In the rare case, where a violation of PoI is confirmed, the affected individual is entitled to effective remedies; this is also set out in arts 4 (2), 10 Directive (EU) 2016/343 (considering its limited protective scope). According to interviews conducted in EU Member States, suing the media for damages is the only remedy defendants publicly referred to as guilty have at their disposal, but the prospects of doing so successfully are rather limited.[78] If successful, compensation payments come with great delays and corrections or counterstatements made by media outlets inevitably result in re-exposure to publicity.[79] The effectiveness of such remedies may also be compromised by the time lapse between the first incident of PTP and the court's final decision.[80] Lastly, these corrections may mean nothing to the outraged public, often consisting of anonymous social media users, which may reproduce over-quickly the allegations, but not react the same way after a libel or defamation action had been adjudicated in favour of the alleged offender.[81]

3.3 Victim

It is important for victims to speak up and share their stories, right encompassed by FoE (arts 10 ECHR, 11 CFR), choosing the timing, the content and the channel of communication. Besides this, they have the right to file formal complaints and seek an effective remedy (arts 13 ECHR, 47 CFR). However, the victim's right to seek justice is not necessarily observed by media. For instance, in the case of the Greek #MeToo movement, the victims had to address frequently the question of "Why now?" due to the time lapse between the incident at issue and the complaint, a question that took the form of criticism against them – with those commenting on such cases failing to understand the specificities of sexual crimes and the trauma associated therewith. Furthermore, the urge of professional journalists to surface the motivation behind the allegations and to explain the timing thereof often resulted in the re-victimisation of those trusting them with such an intimate confession.

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[76] Such stigma may have far-reaching consequences, including hate speech and violence against certain groups. See *ibid* 43–44.

[77] Cf. *ibid* 45.

[78] FRA (n 19) 51.

[79] *Ibid* 52.

[80] *Ibid*.

[81] See Dorak (n 75) 38, who stresses that the information once posted "remains stored on a server forever and can be found, regardless of updates, corrections, or takedowns".

Although such publicly formulated allegations may suggest the guilt of another private person, the victim is not necessarily bound by PoI, even when (s)he becomes a trial party. Despite this, the European Agency for Fundamental Rights (FRA) has recently issued the opinion that other participants in criminal proceedings, *including victims*, "should be subject to strict rules prohibiting information leaks about ongoing investigation".[82] This presupposes that there is such an investigation, which is not the case with criminal offences already time-barred.[83] Indeed, several statements pertaining to the Greek #MeToo movement were made only after the limitation period had expired. In this context, the alleged offender may not be able to respond to the allegations within the organised context of criminal proceedings, but can file a criminal complaint for defamation against the victim. In this case, an important shift takes place: PoI works in favour of the alleged victim of the time-barred offence, while the alleged offender cannot invoke protection under art 6 (2) ECHR.[84]

Deadlocks of this kind and the difficult-to-achieve balance should not be left in the hands of journalists, whether professional or lay, no matter how noble their intentions may be. This is particularly the case to the extent that the violation of their duty to respect PoI is subject to such high standards of proof that its respect becomes rather a matter of moral judgment. And the latter is often susceptible to market considerations.

Instead, to balance FoE, PoI and the right to an effective remedy, the focus should lie on motivating the victims to report the incidents concerned *before the competent public authorities*. Next, it presupposes a distinction between "what interests the public" and "what is in the public interest" in *both* legal and societal terms, inasmuch as victims' confessions are often manipulated to appease the voyeuristic proclivities of the public – without this necessary serving their interest, namely that of seeking justice.[85]

4 National responses to PTP: the Greek example

It is common to regulate how *public authorities* should communicate with the media, in order to respect PoI without prejudice to FoE. The respective rules encompass data protection laws and legislation protecting the confidentiality of criminal investigations, and are often coupled with soft-law instruments, such as codes of conduct that address

[82] FRA (n 19) 10.

[83] Athina Sachoulidou and Christos Lampakis, 'The statutory limitation of crimes in the Greek legal order' (2021) DCPE Online 3765, 3795 <www.dpceonline.it/index.php/dpceonline/article/view/1442> accessed 9 March 2023.

[84] Aristomenis Tzannetis, 'Guilty on the grounds of failing to prove otherwise? – Between #metoo and #himtoo' (in Greek) (2021) 12 novacriminalia 2, 3; Sachoulidou and Lampakis (n 83) 3795–3796.

[85] Cf. Dorak (n 75) 36–37.

the conduct of *private persons*, including journalists and other media representatives.[86] This is also the case with the Greek legal order, which serves as an example below.[87]

PoI is enshrined in art 6 (2) ECHR combined with art 28 (1) of the Greek Constitution (GrConst) and art 71 of the Greek Code of Criminal Procedure (GrCCP). Also, the right to privacy and the right to personal data protection enjoy constitutional protection (arts 9–9A GrConst),[88] which is further reflected in the prohibition of using evidence obtained in breach of these rights (arts 19 (3) GrConst; 177 (2) GrCCP). The Greek Criminal Code (GrCC) prohibits the sharing of confidential or classified information by professionals involved in criminal proceedings (art 252), including police officers.[89] Furthermore, lawyers bear the same responsibility for breaching court secrecy as the judiciary (art 251 (1–2) GrCC). The breach of confidentiality may also constitute a disciplinary offence pursuant to arts 140 (2) lit d, 38 of the Greek Code of Conduct for Lawyers. Exceptions to confidentiality/publicity rules are prescribed in art 2 (lit b) subpara 2 (combined with art 3 (2) Law 2472/1997 (as amended by Law 4624/2019) in the case of, *inter alia*, crimes against sexual freedom or financial exploitation of sexual life for the purpose of protecting the public, minors, vulnerable or underprivileged population groups and facilitating crime repression. In such cases, personal data related to prosecutions or convictions may be publicised by means of a fully and specifically reasoned order of the prosecutor specifying the manner and duration of the publicity. Furthermore, there is a specialised communication channel between the Hellenic Police and the media (Information and Media Management Department and Police Press Officer, arts 17 (1) lit a, 55 Presidential Decree 178/2014 as amended by Presidential Decree 34/2023).

Regarding media coverage of criminal proceedings, art 8 (2) Law 3090/2002 sets out rules on broadcasting, videoing, recording or taking pictures in the courtroom. There is no equivalent legal framework governing PTP as such. The GrConst provides for the protection of press and prohibits censorship (art 14),[90] which together with the constitutional provisions establishing the right to participate in the social, economic and political life (art 5 (1)) and the FoE (art 10) protect the journalists in the exercise of

[86] For an overview of national laws on issuing public statements in criminal cases see FRA (n 19) 43–44.

[87] For an overview of the applicable legislation see ARISA, 'Disclosure of information and media coverage of criminal cases. Country report Greece' (2020) <arisa-project.eu/disclosure-of-information-and-media-coverage-of-criminal-cases-country-report-greece/> accessed 9 March 2023.

[88] The Law 4624/2019, which transposed the General Data Protection Regulation and the Law Enforcement Directive into Greek law, provides for criminal liability for data breaches (arts 38; 81).

[89] Breach of confidentiality as a disciplinary offence may result in termination from service (if it causes harm to the service or to a third party or if it impedes police work) or temporary suspension (arts 11 (1) lit a, 12 (1) lit d Disciplinary Law for Police Personnel).

[90] The same provision stipulates that, under exceptional circumstances, a publication is to be withdrawn by order of the prosecutor if it, *inter alia*, offends public decency (para 3 lit d), and that the media are obliged to publish responses of those affected by inaccurate, offensive or defamatory articles and restore their damage according to the laws in place (para 5).

their profession, protection that remains, however, subject to the principle of proportionality (art 25 (1)).[91] Radio and television are subject to direct State control exercised by the National Council for Radio and Television (art 15 (2) GrConst), the operation of which is governed by Law 2863/2000. This is an independent administrative authority responsible for imposing administrative sanctions in cases where the media, *inter alia*, fail to comply with their duty to ensure an objective and fair representation of the news or to respect the value of the human existence.

As particularly regards radio and TV broadcasts on events relevant to criminal offences, the State-own Hellenic Broadcasting Corporation – National Radio and Television is *obliged*, pursuant to art 3 (3) Law 1730/1987, to respect PoI (lit b) and refrain from "vague judgments on the alleged perpetrators or suspects" (lit a).[92] Similar rules apply to private television and radio stations that have to respect personality, honour, reputation, private and family life, professional, social, scientific, artistic or other activities of the affected individuals (art 3 (1) Law 2328/1995).

This regulatory framework is complemented by means of *self-regulation*.[93] Art 11 of the Code of Ethics for Broadcasting Television Journalistic and Political Programmes (Presidential Decree 77/2003) sets out the duty to respect PoI, stressing that accused persons shall not be referred to, whether directly or indirectly, as guilty and journalists shall not use derogatory language when referring to alleged offenders (para 1). Moreover, the publication of documents or other elements made known to the authorities at the pre-trial stage is prohibited (para 6). The Code of Ethics for Journalists, issued by the Association of Editors of Athens Daily Newspapers, reaffirms the duty to respect PoI (art 2 lit c). Next, the Chapter 5.4 of the Code of Ethics for Digital Media addresses the topic of how to refer to suspects. It emphasises the imperative need for respecting the right to private and family life and PoI that equally applies to public figures to the extent that they do not render their identity known or the events of the case have not already been public knowledge. Interestingly, the drafters of this Code chose to highlight the permanent nature of online content as a game changer concerning the publicity of suspects and accused persons.

Lastly, press liability matters are regulated in both specialised laws, such as the Law 1178/1981, and general provisions of the Civil Code and the Criminal Code.[94] As particularly regards criminal liability of journalists and other media representatives, besides violations of data protection rules amounting to criminal offences, criminal proceedings may be initiated on the grounds of arts 361 (insult), 362 (defamation) or 363 (libel) GrCC depending on the specific characteristics of the case at hand. Criminal

[91] The GrConst also provides for the public's right to information (art 5A).

[92] For the unofficial translation of the respective provisions in Greek see ARISA (n 87) 14.

[93] For the importance of codes of media ethics in the light of the ECtHR jurisprudence see Synodinou (n 8) 212. For an overview of the respective soft-law instruments in the Greek legal order see ARISA (n 87) 16–18.

[94] For an overview see ARISA (n 87) 15–16 and 19–20.

liability may be waived on the grounds of justified interest (art 367 (1) lit c GrCC) and, particularly, the public's right to information (art 5A GrConst). If the respective acts are committed publicly or through the internet, the court, following a request of the individual who submitted the criminal complaint, may order the publication of the conviction (art 369 GrCC).

Surprisingly, in the case of the Greek #MeToo movement and other high-profile criminal cases, the legal framework outlined above has not been mobilised, neither in the case of media professionals overstepping the boundaries of their profession and promoting keyhole journalism, nor in that of lawyers that violated the rules governing their profession in the name of the public defence of their clients.[95] On the contrary, the way those criminal events were presented in public seems to have "pushed" the national legislator to take initiatives in the realm of criminal law, which were not always well-aligned with the laws in place and did not comply with the principle of proportionality, nor promoted intra-systematicity in the corpus of criminal legislation. Indeed, there have also been positive interventions, such as the amendment of the rules governing the suspension of the limitation period in the case of crimes against sexual freedom and crimes of economic exploitation of sexual life against minors (art 113 (4) GrCC).[96] But the over-quick choice to increase penalty frameworks rather confirmed a well-established assumption in international scholarship as to the influence of market-driven news on punitiveness.[97]

5 Conclusion: the need for positive alternative interventions

Despite the multitude of legislative interventions, whether at supranational or national level, and the significant contribution of the ECtHR jurisprudence in terms of striking the right balance between FoE, PoI and the right to an effective remedy, this tension remains substantial and takes on new forms as the media landscape evolves and grows beyond a strictly professional context. To resolve the respective conflict of interests, it is important "to focus on the common objective [, namely] the establishment of rule of law and of the ideal of justice in a democratic society".[98] As part of this effort, avoiding a chilling effect on the public discourse should be a clear priority, considering the varying degrees of protection of FoE around the world and within the EU. This does not negate the need for effective enforcement of the already existing rules (including but not limited to secrecy in criminal investigations and restrictions on media coverage thereof), nor for refining central guidance (cf. Recital 19 Directive (EU) 2016/343) as to, for instance, prejudicial comments amounting to media pronouncements of guilt. At national level, more emphasis can be placed on the codification of all media related

[95] Cf. Anagnostopoulos (n 26) 2.
[96] See Sachoulidou and Lampakis (n 83) 3796.
[97] See Sara Sun Beale, 'The news media's influence on criminal justice policy: How market-driven news promotes punitiveness' (2006) 48 William & Mary Law Review 397.
[98] Synodinou (n 8) 219.

laws in one document in order to enhance accessibility and legibility.[99] Equally necessary is an intervention in the form of institutionalised training not only for public officials, which are often the source of leaks, on information disclosure procedures, but also for media professionals on criminal justice principles with the aim of signalling that, for instance, PoI is not, nor should be perceived as, empty words. Lastly, considering that the public is actively involved in the (social) media coverage of criminal cases, educational programmes should also be addressed to citizens in order to ensure access to reliable information on criminal justice and proceedings and enable them to take an informed stand on events in compliance with fundamental rights.

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BALANCING PUBLIC INTEREST AND FREEDOM IN PREVENTING DISINFORMATION: IS IT NECESSARY TO CRIMINALIZE DISINFORMATION?

By Ezgi Çırak[*]

Abstract

In recent years, there has been a period of technological breakthrough in which the internet and social networks have become globally widespread. In this process, new 'information' has been able to reach so many, faster than ever before, and 'information pollution' has become a public problem. In recent years, various methods have been used to prevent disinformation, a problem for many countries, and this issue is now reflected in national laws worldwide. This study focuses mainly on criminalization of disinformation. The first part examines the definition and types of disinformation, and the second, the current legal situation in Turkey and Germany regarding criminal sanctions. The third part focuses on the question of whether criminal law protection against disinformation is necessary. In this context, it is aimed to evaluate the purpose and limits of freedom of expression, especially in the context of ECHR § 10.

1 Introduction

Rumours, conspiracy theories, fabricated information and disinformation are not new phenomena, but have existed for millennia. Rulers, governments, or popular figures have spread fake information or opinions under the guise of real news to gain support and increase popularity. However, the complexity and scale of information pollution in our digitally connected world has taken on unprecedented proportions. The internet lowered standards regarding the quality of information in circulationand eroded borders. Fake and misleading content can easily and quickly circulate worldwide. Especially social media has reached a position where they are competing with traditional media. Unlike traditional media, social media allows bilateral communication, and it enables active feedback from consumers of information or disinformation and social media users. It is now very difficult to distinguish between factual and fabricated information. The abundance of information combined with the fact that many people do not take the time to verify the information has led to an overabundance of fake news.

Due to the harmfulness and danger of disinformation, many actors have attempted to prevent this tendency. This issue needs to be resolved with the consensus of both governments and the social media platforms themselves. However, it is necessary to prevent information pollution on social media without violating freedom of expression,

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one of the indispensable elements of democracy. Otherwise, it may open the way for bans and could be used as an excuse for oppression by despotic governments.

Although various methods are used to prevent disinformation, now on the agenda of many countries, especially in recent years, many states have attempted to include these measures within the scope of their current legal framework. Many countries do not directly enact disinformation acts but rather internet acts or social media acts. They mainly regulate accountability and responsibility of social media platforms or remove/banned context. In the absence of the legislation, countries such as Canada, Japan, Nicaragua, Sweden and the United Kingdom apply relevant provisions of existing civil, criminal, administrative and other laws regulating the media, elections, and anti-defamation. Other countries, such as China, Egypt, France, Germany, Israel and Malaysia, enact new and more focused legislation that imposes sanctions on social media networks that spread disinformation, usually imposing fines and ordering the removal of information identified as false. Some other countries, such as Sweden and Kenya, approach the issue in a more general way though education and they focus on educating citizens on the dangers of disinformation. However, in recent years, many countries prefer to prevent disinformation by introducing criminal offences under the penalty of imprisonment in Greece, Russia, Hungary and more recently, Turkey.

This study focuses mainly on criminalization of disinformation. The first part examines the definition and types of disinformation.

In the second part of the study, the current legal situation in Turkey and Germany regarding criminal sanctions is examined. One of the pioneers in countering the threat of disinformation through legislation was the Council of Europe's report in 2017, which aimed to identify the extent of this threat, and formulate policies. This has been followed by a serious decline in freedom of expression on the internet, also under the law. Following this report, the Network Enforcement Act (Netzwerkdurchsetzungsgesetz) was enacted in Germany in 2017. The Act aims to hold social media platforms accountable. However, Germany has no Act that puts disinformation on legal bases and introduces new rules or penalties for disinformation. On the other hand, in Turkey, with the new social media law, disinformation is treated as a new offence in the Turkish Penal Code.

The third part focuses on the question of whether criminal law protection against disinformation is necessary. In particular, it will emphasize the principle of ultima ratio and the principle of legality, which are among the basic principles of criminal law.

2 What Is Disinformation?

2.1 Definition of Disinformation

Following the definition of the EU Commission's Expert Group on Fake News and Disinformation, disinformation is *"false, inaccurate or misleading information that is*

invented, presented and disseminated for profit or deliberate public harm"[1]. The concept of disinformation is thus deliberately defined in broad terms because powerful disinformation campaigns are not based exclusively on freely invented factual claims, but on a mixture of true events, rumours and suspicions that have been neither proven nor disproven, and invented details[2].

Disinformation is not a legal term, but a generic term for numerous manifestations. In contrast, in disciplines outside of legal doctrine, such as journalism and media studies, and science and technology studies, there is rich literature on the definitional problems associated with the notions of disinformation and false information[3]. Therefore, better suited for this purpose is the conceptual pair of misinformation and disinformation developed in communication science. The distinction is based on the intent of the person making the statement. These terms are related to other terms with similar but slightly different meanings, such as false information, misinformation, disinformation, mal-information, and alternative fact[4].

2.2 Types of False Information

There are many terms for the production or sharing of false information, but all share a common element: "*incorrect information*". Although all these terms are used to describe false information, these are not identical. The boundary between each terms is ambiguous and it is difficult to distinguish between them

False information refers to incorrect information. However, this term does not involve any motivation. It merely emphaisizes that that the information is not correct[5].

Misinformation is not necessarily incorrect, but is misleading, and the statement of the misinformation may mislead the audience[6]. Misinformation is unintentional false news, and is not intended to cause harm. It has an unbiased intent. Misinformation is more easily verifiable because it is not intentional. Misinformation ranges from comparatively irrelevant false information to serious cases of dissemination of insufficiently verified reports, which can indicate a negligent breach of journalistic due diligence on the part of the media.

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[1] European Commission (2018) <ec.europa.eu/commission/presscorner/detail/en/IP_18_1746> accessed 19 January 2023, 11.

[2] European Commission (2018) <ec.europa.eu/commission/presscorner/detail/en/IP_18_1746> accessed 19 January 2023, 10.

[3] Andersen, J., & Søe, 'Communicative actions we live by: The problem with fact-checking, tagging or flagging fake news – the case of Facebook' (2020) 35(2) European Journal of Communication 126, 130.

[4] Chih-Chien Wang, 'Fake News and Related Concepts: Definitions and Recent Research Development' (2020) 16(3) Contemporary Management Research 145, 153.

[5] Wang (n 4) 153.

[6] Wang (n 4) 153.

While misinformation describes the dissemination of untrue information without the intention to mislead, disinformation stands for the intentional dissemination of untrue information[7]. Disinformation refers to the deliberate and covert dissemination of false information to influence public opinion, and includes the deliberate decontextualization of true information to mislead both the reader and the media[8]. Unlike misinformation, which does not reveal the purpose of the misinformation, disinformation is deliberately created to cause harm[9]. The definition of disinformation also requires that its dissemination can cause public harm. Disinformation deliberately creates to harm a person, social group, organization or country[10] and is a result of a distortion of information to deliberately create false news. It is distorted news that is biased for certain purposes. It is difficult to prevent because it is rapidly and deliberately spread.

Disinformation is to be distinguished from satire or parody, which is covered by freedom of expression and art[11]. Satirical content also often contains deliberately untrue statements of fact. In contrast to disinformation, however, this is not supported by an intention to deceive and manipulate, and is usually recognized for what it is. This does not apply to disinformation that attempts to spread defamatory claims under the guise of satire, for example, with a small, hard-to-find reference to[12]?

Mal (malicious)-information is usually genuine information shared to cause harm, often by moving information intended to be private into the public sphere. This refers to information that is used to harm others. The concept of mal-information is easy to confuse with disinformation. However, unlike disinformation, mal-information refers to fact-based information used to harm a person, social group, organization or country. Mal-information is intrinsically based on reality and can include leaks, harassment and hate speech. It is difficult to prevent because it is rapidly and deliberately spread.. Mal-information is genuine information that is shared to cause harm, often by moving information intended to be private into the public sphere.

3 Current Legal Situation Against Disinformation

3.1 In General

Disinformation can threaten the process of individual and public_opinion forming and thus, the democratic formation of will. Public communication can be distorted if

[7] Wang (n 4) 154.

[8] Frederik Ferreau, 'Desinformation als Herausforderung für die Medienregulierung' (2021) 52(3) Zeitschrift für das gesamte Medienrecht / Archiv für Presserecht 204, 205.

[9] Wang (n 4) 154.

[10] UNESCO <en.unesco.org/fightfakenews> accessed 22 January 2023.

[11] Kurt Faßbender, Was darf die Satire? Bemerkungen aus der Perspektive des deutschen Verfassungsrechts (2019) 11 Neue Juristische Wochenschrift, 705, 707; Edson C. Tandoc Jr., Zheng Wei Lim & Richard Ling, 'Defining "Fake News" (2018) 6(2) Digital Journalism, 137-140.

[12] Tandoc & Wei Limand& Ling (n 11) 142.

participants in public discourse gain an unjustified position of power[13]. Therefore, the protection of the communication process demands the prevention of the hijacking of public discourse by powerful actors, and the guarantee of diversity of opinion[14]. This guarantee is possible with legislation. This legislation can be grouped into false information laws contained in criminal legislation and non-criminal legislation; examples of the former are false information laws enacted during the Covid-19 pandemic, and laws targeting false news and false information during elections.

Non-criminal legislations usually are the removal of content, blocking of access, interventions on internet traffic bandwidth, or fines against platforms. This kind of legislation should also not, but may sometimes, infringe the freedom of speech.. This paper focuses mainly on criminal aspects of Turkish and German Law. These two examples were chosen for comparison because sin German Law does not have a direct and specific crime for disinformation, but Turkish Law has recently criminalized it[15].

3.2 Regulation against Disinformation on Turkish Law

Until 2020, there was no legal regulation to be effective on social media and the Internet in Turkey. However, websites including social media giants such as YouTube and Twitter were temporarily blocked or even completely closed by court decisions involving the violation of personal data or insulting behaviour. These actions were based on Law No. 5651 "Law on Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications", which entered into force in 2007. Law No. 5651 contains regulation of publications on the internet and suppression of crimes committed by means of such publications: the penalties are: "removal of content", "removal of content and blocking of access", fines and interventions on internet traffic bandwidth[16].

Several legal steps were taken in January 2020 to prevent disinformation on social media within Law No. 7253, also known as the "Social Media Law", "The Law on Amending the Law on Regulating Publications on the Internet and Fighting Crimes Committed through These Publications", which became law in July 2020. Although a comprehensive and positive justification was provided for the enactment of the law, many experts argued that the law aimed to deliberately restrict freedom of expression. Although the new social media law appears mainly to affect social network providers,

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[13] S. BVerfGE 20, 162 (176).

[14] BVerfGE 57, 295 (322); Steinebach M, Bader K, Rinsdorf L, Krämer N, Roßnagel A, *Desinformation aufdecken und bekämpfen Interdisziplinäre Ansätze gegen Desinformationskampagnen und für Meinungspluralität* (1th Edition, Nomos, 2020) 35.

[15] Official Gazette, Number: 31987, Date 13.10.2022 <www.resmigazete.gov.tr/> accessed 25 January 2023.

[16] Ahmet Taha Gedikli, 'Karşılaştırmalı Hukukta İnternet Ortamindaki Asilsiz Bilgiye Paylaşımlarının Önlenmesi (Prevention of Sharing Misleading Information in Internet with Regard to the Comparative Law)' (2020) 2(2) 221, 231.

it also indirectly affects users; with the introduction of a total access barrier ora total access block, users would be deprived of social networking services.

There has been a general increase in access blocking on the internet, especially with the measures aimed at combating misinformation during the pandemic. However, it is also observed that national authorities, while trying to strike a fair balance between conflicting rights in the context of freedom of expression in terms of access blocking, also resort to certain purposes not foreseen in the law, or, in other cases, fail to justify how the measure responds to an urgent social need in an appropriate and sufficient manner in the actual context. The Turkish Constitutional Court also found a violation of freedom of expression in the total blocking of access to a website due to the lack of sufficient and appropriate justification, and concluded that the imposition of a total blocking of access was unnecessary in a democratic society. The criminalization of the dissemination of false and manipulative information fulfils a social need for public order, and, clearly, leaving false statements unpunished cannot be justified by protection of freedom of expression. However, while regulating this as an offence, it should be in accordance with the criminalization technique. In particular, the principle of the ultima ratio should be observed, and primarily, non-punitive methods should be used to prevent misinformation and thus fulfil the state's obligation to inform the public correctly.

Until the new offence was added by Article 217/a of the TPC on 18.10.2022, there was no specific and direct offence against disinformation in Turkish law. Nevertheless, there were many crimes already regulated under the Turkish Penal Code (TPC) and Turkish Commercial Code (TCC), whose aim was to prohibit different forms of disinformation[17]. These types of offences are intended to prevent disinformation in certain specialized or technical fields[18]. Although these offenses may not appear to be directly related to disinformation, many legal proceedings were initiated after establishing a causal link between the statements made by different users on social media. As can be seen, even before the latest offence on disinformation, users are constantly prevented from expressing themselves freely on social media channels, and this is justified by certain law provisions. Expanding the existing field of regulation within a structure that can be applied in almost every field, such as Article 217/A of the TPC, however, is incompatible with the principle of ultima ratio.

[17] For example, influencing prices (Art. 237 TCC), dissemination of false information in wartime (Art. 323 TCC), unfair competition (Art. 62 Turkish Commercial Code), protection of banks' reputation (Banking Law Art. 158), market fraud (Capital Markets Law Art. 107), Insult (TPC Art. 135), provoking the public to hatred, hostility or fegrading (TPC Art. 216), Calumny (TPC Art. 267), Fabrication an Offence (TPC Art. 271)

[18] İnanç İşten, 'İnternette Bireylere Yönelik Dezenformasyonun Cezai Sorumluluk Açısından Değerlendirilmesi (Evaluation of Disinformation Directed to Individuals on the Internet in Terms of Criminal Liability) İnternet Hukukunda Dezenformasyonla Mücadele (1th Edition On İki Levha, 2022) 195.

Within the new regulation TCP 217/A "*Anyone who publicly disseminates incorrect information concerning the internal and external security, public order and public health of the country, with the sole intention of creating anxiety, fear or panic among the public, in a manner likely to disrupt public peace, shall be sentenced to imprisonment from one year to three years.*

If the perpetrator commits the crime by concealing his real identity or within the framework of the activities of an organization, the penalty imposed according to the first paragraph shall be increased by half."

It is stated that the legal values that are protected by the creation of this offence is the prevention of manipulative content, and to ensure the public's right to receive news, and protect freedom of expression. However, ironically, the creation of this type of offence may also violate the very rights that are intended to be protected.

It is not clear which statements are actually covered by this offence. It provides no legal definition of disinformation, incorrect information, or informational disorder. Ambiguous terms in codes are used as a means of ensuring punishment. In practice, there is a danger that statements in the form of allegations and comments may be included in the subject matter of the offence. The wording of this type of offence includes imprecise definitions: In violations of freedom of expression, imprecise definitions of "disinformation", even contradicting other legal texts, can lead to confusion and abuse of power, and the imposition of policing functions on platforms. For example, disinformation, which can sometimes be the result of the action of a misinformed user or journalistic error, would fall under this offence. It is stated that the intention of this crime type is to punish disinformation, but the aim is not to punish misinformation[19]. In such cases of misinformation, there is no intention to disinform. The concepts of internal and external security, public security and public peace, which the offence aims to protect, are ambiguous in terms of ensuring legal security, as they are concepts that change according to the political and academic conditions, and through interpretation. This raises a series of difficulties; as such, terms are not well suited to keep pace with the ever-changing impact of online disinformation, and may run counter to human rights as protected within the Constitution and international obligations.

For this offence to apply, the information disseminated publicly must be "incorrect ". In the evaluation of the type of offence, it is important to consider the time that it occurs and actual conditions.. Since authenticity is an important concept in terms of the right to inform, the evaluation of this concept in press law is instructive for this type of crime. There are two types of reality in the news and for the press; the first is a concrete reality, which means the conformity of the reporting of the event to the actual event. The second is the apparent reality, which means the conformity of the content, subject

[19] Cem Şenol, 'Halkı Yanıltıcı Bilgiyi Alenen Yayma Suçu (TCK m. 217/A)' (2022) 17(50) Ceza Hukuku Dergisi 331, 342.

to the news and to the situation related to the event at the time the news was reported[20]. The accurate information in journalistic activity may be based on apparent truth, rather than the full verification of the event. This procedure may be required to keep the news topical. However, journalists also need to verify apparently accurate information, and construct the actual situation appropriately. In reference to this offence, it is important to consider whether the information is correct or not, rather than how it is conveyed. The essence of the information, and the intellectual bond related to it falls outside the scope ofof the definition of the crime[21].

Information that can be the subject of a crime is information whose accuracy can be proven. In this respect, only statements regarding facts may be subject to the crime. Value judgments based on factual grounds, on the other hand, are subject to this crime, since they are evaluated within the context of freedom of expression. Whether factually based value judgments are true or not make no sense in terms of this crime. In parallel to this, conveying predictions for the future or revealing that the information does not reflect the truth due to a change in the factual basis does not mean that the offense has been committed[22].

In this offence, the person who "publicly" disseminates incorrect information is punished for the offence of publicly disseminating misleading information. Although the concept of publicity is controversial, it is generally defined in the doctrine as the possibility, but not the certaintyof the act being perceived by more than one person, as the main criterion for determining publicity. It should be noted tha posts on a private social media account not open to the public do not have "the motive of creating public concern, fear or panic". For it to be accepted that false information was intentionally disseminated it must be clearly understood that the intention was in this direction. For example, if a false social media post is liked or retweeted, no penalty should be imposed, as this intention cannot be fully determined[23].

Article 217/A of the TPC is a type of offence involving the danger of interference with freedom of expression. For this offence to occur, it is necessary and sufficient that the dissemination of false information has the potential to disrupt the public peace. Whether or not the danger of disturbing public peace was actually realized determines whether the offence is a concrete danger offence or an abstract danger offence. Although it is stated in the preamble of the article that the offence is a concrete danger offence, there are opinions in the doctrine that the wording of the article is in the

[20] Çetin Özek, Türk Basın Hukuku (1th Edition, İstanbul Üniversitesi 1978) 165; Sulhi Dönmezer and Köksal Bayraktar, Basın Hukuku (5th Edition Beta 2013) 238-239.
[21] Aras Türay, Aslı Ekin Yılmaz, Eşref Barış Börekçi, Yalım Yarkın Özbalcı, Halkı Yanıltıcı Bilgiyi Alenen Yayma Suçu (TCK M. 217/A): Ceza Hukukuna İlişkin Değerlendirmeler (1th Edition, İstanbul Bilgi Üniversitesi İnsan Hakları Hukuku Uygulama ve Araştırma Merkezi, 2023), 11.
[22] Türay, Yılmaz, Börekçi, Özbalcı (n 20) 4.
[23] Şenol (n 19) 344.

opposite direction[24]. In order to commit the offence regulated in Article 217/A of the TCC, there is no necessity for a danger to disrupt public peace; if carrying out an act of disseminating news is sufficient to create this danger, the offence is an abstract danger crime. However, it is considered a concrete danger offence if it was intended to disrupt public peace[25]. The criterion of whether the dissemination of information is likely to disturb public peace must be evaluated in terms of whether there is a compelling social need, which is used in the limitation of Article 10 ECHR[26].

The regulation of a crime that interferes with freedom of expression as an abstract danger crime creates a serious problem. In order to impose a penalty under the relevant article in a case concerning the dissemination of false information, it is necessary only to examine whether the statement is capable of disturbing public peace, rather than whether there is a concrete danger of disturbing it. For example, social media statements by a Member of Parliament stating, "election security is jeopardized and the seals on the election envelopes are invalid" have a credible effect on society and may affect the public peace. However, if polling officials share evidence contradicting this on social media, even though the criterion of being capable of disrupting public peace has been eliminated, the crime will still exist under the TPC. This will seriously affect the prevention of freedom of expression. Thus, dangerous crimes are an invitation to widen the scope of punishment and limit freedom of expression.

3.3 Regulation against Disinformation on German Law

In 2017, the Network Enforcement Act (NetzDG) was passed with the specific aim of fighting fake news on social networks by improving the enforcement of the current laws. The law was aimed at the rapid eradication of illegal content, fake news, and, especially, hate speech. It stated that the responsibilitylies not only with the users but also with the social media platforms themselves, as stated in the general justification of the German social media law. Germany also makes effort to ensure that citizens have access to accurate legal information by providing open access to legislation and court decisions online.

NetzDG applies to Telemedia service providers who operate platforms on the Internet with the intention of making a profit, which allows users to share any content with other users or make it accessible to the public (social networks). Platforms with journalistic-editorial content for which the service provider is responsible are not considered as social networks within the meaning of this Act. The same shall apply to platforms intended only for individual communication, or for the dissemination of specific content.

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[24] Türay, Yılmaz, Börekçi, Özbalcı (n 20) 4.

[25] Şenol (n 19) 336.

[26] Case of Mehdi Zana/ Turkey, Application No: 26982/95, 6 April 2004 <hudoc.echr.coe.int/eng?i=001-66248> accessed 20 June 2023.

According to this act, if any unlawful content is shared on the internet, the person whose rights are violated will be able to apply directly to the social network operator to request the removal of the content in question without first applying to any court. It is noteworthy that, when faced with such a request, the social network operator will not be able to argue that the freedom of communication has been violated or that freedoms have been restricted. The concept of unlawful content is comprehensively addressed, and referring to the German Criminal Code, the various crimes listed in the law are considered fall within the Code's? The Act obligates the covered social media networks to remove content that is "clearly illegal" within twenty-four hours after a user complaint. To determine whether an act is "illegal," the Act refers to the Criminal Code, to the provisions that are listed[27][28].

The platform itself has a legal obligation to remove content that is hateful, abusive, insulting, or disruptive of public order[29]. Social networks can be a location for and driver of disinformation. For example, if false news is published on social networks, the platform operators have a responsibility to act against this. The Network Enforcement Act (NetzDG) obliges them, among other things, to process user complaints quickly so that hate crimes can be effectively combated online. Within the NetzDG is an emphasis?? on the special legal responsibility of large social networks, which on the one hand must fulfil legal deletion and blocking obligations after reports of illegal, especially criminal, content, , and on the other, regulate user-generated content with reference to the network's terms and conditions. In this respect, questions have not yet been clarified regarding the scope of their powers to remove content or restrict its visibility and block and remove users' accounts. NetzDG requires large social media platforms, such as Facebook, Instagram, Twitter, and YouTube, to promptly remove "illegal content," as defined in provisions of the criminal code, which range in scope from insult of public office to actual threats of violence.

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[27] Section 86 (Dissemination of propaganda material of unconstitutional organizations), Section 86a (Using symbols of unconstitutional organizations),Section 89a (Preparation of a serious violent offense endangering the state), Section 91 (Encouraging the commission of a serious violent offense endangering the state), Section 100a (Treasonous forgery), Section 111 (Public incitement to crime), Section 126 (Breach of the public peace by threatening to commit offenses), Section 129 (Forming criminal organizations), Section 129a(Forming terrorist organizations), Section 129b (Criminal and terrorist organizations abroad), Section 130 (Incitement to hatred), Section 131 (Dissemination of depictions of violence), Section 140 (Rewarding and approving of offenses), Section 166 (Defamation of religions, religious and ideological associations), Section 184b (Distribution, acquisition, and possession of child pornography), Sections 185 to 187 (Insult, malicious gossip, defamation), Section 201a (Violation of intimate privacy by taking photographs), Section 241 (Threatening the commission of a felony),Section 269 (Forgery of data intended to provide proof) <www.bmj.de/SharedDocs/FAQ/EN/NetzDG/NetzDG.html> accessed 20 June 2023.

[28] The Law Library of Congress, Global Legal Research Directorate, Initiatives to Counter Fake News in Selected Countries (2019) 39.

[29] Law Library of Congress (n 28) 37.

The criminalization of disinformation overlaps with certain offences in the German Criminal Code. The publication of general false news without reference to a specific person or group of persons is usually not punishable. However, offences for the protection of honour may be considered if disinformation contains defamatory statements of fact. There are several provisions that prohibit the assertion or dissemination of personal information that is either false or impossible to prove.. However, these offences do not criminalize the dissemination of fake news, and these are not directly regulated disinformation on the internet. These are offences under the StGB, such as disturbance of public peace § 126.2 StGB[30], defamation according to § 186 StGB[31], defamation according to § 187 StGB[32], insult according to § 185 StGB, or incitement to hatred under § 130 StGB[33].

The regulation of disinformation is embedded in constitutional duties of protection. On the one hand, both the fundamental rights of affected individuals and the conditions for democratic decision-making must be protected against disinformation. On the other, the basic communication rights guaranteed in Article 5 of the German Constitution (Grundgesetz) must be respected when uncovering and combating disinformation. This requires a delicate balance that brings the two guarantees of protection into line with each other in a practicable way.[34].

4 Is Criminal Law Protection Against Disinformation Necessary?

Disinformation can play a significant role in humans' lives, wherever it is observed. Furthermore, the rise of far-right populist movements in the world has been made possible by media policy failure; unregulated digital platforms have enabled high visibility for such phenomena. However, disinformation is not limited to politics. It can play a role in other spheres of life; to illustrate, the promotion of fake medical

[30] According to § 126 if it is pretended against one's better knowledge that a crime such as murder, manslaughter, etc. is imminent. This has already been affirmed for a blog entry about a fictitious terrorist attack. This requires that the publication of the article is capable of seriously disturbing parts of the population or a not inconsiderable majority of people and of damaging confidence in the public's legal security. AG Mannheim, MMR 2019, 341 Rn. 35.

[31] Defamation according to § 186 of the Criminal Code can be considered in the absence of knowledge of the untruthfulness of the disseminated fact, which, moreover, does not have to be demonstrably true. Kristian Kühl and Martin Heger, Strafgesetzbuch (29th Edition, C. H. Beck, 2018), Rn. 35.

[32] According to § 187 of the Criminal Code, defamation requires that the perpetrator acted against his better knowledge, i.e. with certain knowledge of the untruth. Lackner/Kuhl (n 31) § 187 Rn. 1.

[33] Digital disinformation can fulfil criminal offences that serve to protect public peace. According to § 130 StGB, incitement of the people is punishable if hatred is stirred up against population groups protected by the provision through grossly untruthful and one-sided distortions. If the corresponding false report can disturb the peace both qualitatively and quantitatively, § 130 para. 1 StGB may be relevant. However, even if this rather high threshold is not exceeded, the disinformation can be punishable according to para. 2 if it is spread via the internet and thus via a "telemedium". Ansgar Koreng , 'Hate-Speech im Internet-Eine rechtliche Annäherung' 2017 (3) KriPoZ 151, 153.

[34] Bader (n 14) 150.

information is also the target of disinformation campaigns. The popularity of incorrect information is a part of the anti-intellectualist approach. For example, due to infodemia, more than 700 people in Iran died after drinking toxic methanol, as they were under the impression that it would cure the Covid-19 virus. Another example is spreading misleading images of empty hospitals to negate the danger of the SARS-CoV2 virus, as well as deliberately spreading misinformation that has no factual basis. The rise of that kind of news has led to serious social problems. For this reason, it is very important to identify such information and prevent its spread, so that negative consequences are not further amplified. However, the question remains, should criminal law be the first priority in preventing this?

Criminal law has the characteristic of being the ultima ratio, the last resort. For this reason, criminal law, with its severe sanctions , should intervene in social life only if absolutely necessary. If possible, violations of rights should be dealt with by civil law, and only in the case of a deficiency should criminal law should be applied. Not every unlawful act can be the subject of criminal law. Offences must also be compatible with the objectives of punishment. The punishment of a crime is generally based on the idea of preventing future offences (prevention theories) and compensation for the offences (retribution theories).

For an act to be criminalized there must first be a protected legal interest. The most important issue in terms of legitimacy is that the interest protected by the offense must be of such gravity that the criminal law is able to intervene, i.e., the principle of the ultima ratio should be at the forefront of criminal and penal policy. If every action becomes a crime, the population will not be able to even breathe or move. The principle of legality is undermined by the regulation of offences where it is unclear whether a particular act is an offence or not.

The principle of specificity, which is one of the elements of the principle of legality, is also very important for this issue. Specificity means that a rule should have content that does not lead to arbitrariness. The legal regulation on the limitation of fundamental rights must be specific in terms of content, purpose, and scope, and must provide clarity so that the addressees can understand their legal situation.

In criminal proceedings against persons exercising their right to freedom of expression, the competent judicial authorities must take into account whether, under all circumstances and conditions, the interference is based on the law, whether judicial guarantees are provided, whether the legitimate aim of the law is pursued, and whether it is necessary to maintain a democratic society and, in the final analysis, whether it is proportionate. The grounds used by the judicial authorities in this balancing analysis should be considered adequate and must be appropriate. Arbitrary and unnecessary restrictions, which may constitute a general prohibition in a democratic society, must be avoided through criminal procedural safeguards and a balancing analysis.

Disinformation has become a major problem in today's world, where reality is losing its importance, and perception is becoming reality, and needs to be prevented. However, when assessing the need to prevent disinformation, one should not focus only on the outcome. A positive outcome alone does not necessarily make justify the cause. As stated before, disinformation brings many dangers to public safety, public health, etc. However, it is important to ensure that the necessary balance between freedom of expression on the one hand, and on the other, the greatest possible preservation of the safety of the internet and the protection of other fundamental rights. Cooperation between the administration and the media should be ensured ideally without resorting to direct criminal law sanctions. Media literacy is one of the most important aspects in the fight against disinformation, as media platforms should not be allowed to become monopolized, and a majoritarian media environment should be promoted.

The first response to the dissemination of false information should be to ensure transparency in a manner conducive to access to real information, rather than to punish. Many ways and means should be tried before criminal law sanctions; the intervention of criminal law should be the last, not the first resort. . Civil courts or public prosecutors can be given specific powers to order internet access providers to block access. For example, Proposal for a Regulation of The European Parliament And Of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC stipulates a range of obligations, including transparency reporting, renewal of service conditions in terms of fundamental rights and freedoms, warning-removal mechanism, complaint and redress mechanism, alternative dispute resolution mechanism and risk assessment reporting. It is common to see such orders requiring action on the part of the internet access provider within 24 hours, and with no notice required for the content provider or host themselves. Even if this kind of intervention puts at risk freedom of expression, it is preferable to criminalization of disinformation, which makes it impossible to access and provide such freedom.

Disinformation, in most cases, does not fall into any category of illegal content. Therefore, the tendency is to apply various types of offences as appropriate for the concrete case, but one of the most important principles of criminal law is the prohibition of comparison. Falsity alone is not a sufficient basis to criminalize speech unless other contextual circumstances make its dissemination dangerous to society. Such contextual circumstances can be, for example, the harm caused due to the dissemination techniques, and the intent, reach, or intensity of the published content. On the other hand, this approach must address the question of who is responsible for false information spreading on the Internet. Is it only the original sender, who may be now impossible to identify? Are there also people who spread the information and make it effective in the first place? What responsibility do network operators such as Facebook and Twitter bear, considering that the operators have the best resources to

detect coordinated disinformation campaigns and technical forms of manipulation such as malicious bots?

We can identify three key elements that emerge from the various definitions applicable to disinformation that provisions require of (a) false information, (b) disseminated with a specific intention (i.e., maliciously), and (c) specific harm (i.e., to public opinion or good order, public health). In addition, while most of the definitions contain some core common elements, they also differ widely in detail, for example, some specify causing a behavioural change, or the use of a certain method of dissemination. There are varying specific harms mentioned, including economic, public, or personal harm, personal dignity, harm to elections, and harm to public health measures (e.g., Covid-19 measures).

The criminalization of disinformation constitutes an interference with freedom of expression as it penalizes the dissemination of information. In a democratic society, there are certain criteria to ensure that restrictions on freedom of expression do not lead to human rights violations. These criteria are as follows: that law prescribes the interference, pursued a legitimate aim, and is necessary in a democratic society. For the punishment of disinformation to avoid violating freedom of expression, it must meet the criterion of necessity in a democratic society. An interference that claims that expression is necessary in a democratic society because of a compelling social need must be accompanied by limitations, and these must be proportionate. To show the existence of a compelling social need to interfere with expression, it is necessary to demonstrate the social relevance of the expression.

The concept of expression is to be understood broadly. Sharp, polemical, provocative, or repulsive expressions of opinion also fall within the domain of the protection of freedom of speech. The value or unvalued of an opinion is just as irrelevant as the quality of the sources underlying an opinion, since communication is protected not for its content, but for its own sake. This is because the fundamental right of freedom of opinion seeks not only to ascertain the truth, but also to ensure that everyone can freely express themselves, even if they do not or cannot give verifiable reasons for their judgment. At the same time, freedom of expression should also serve to establish the truth in the communication process. Thus, deliberately untrue facts (deliberate lies) and facts whose untruthfulness is undoubtedly established at the time of the statement are excluded from the scope of protection. Such statements cannot make any meaningful contribution to the constitutionally presupposed task of forming an accurate opinion In the case of mixed statements in which opinion and factual assertion are inseparably linked, however, in the interest of effective protection of fundamental rights, the statement as a whole is covered by the scope of protection of freedom of opinion, even if the fact-based part of the statement has been disproven. This can also apply to disinformation if the deliberately untrue factual assertions are inseparably linked to value judgments, e.g. in the form of alleged scientific evidence or invented quotations.

Although it is considered appropriate to block (or remove) rather than penalize, this should also be within certain legal limits. As to the removal of content, direct orders by state authorities relating to the removal by hosts of content need to satisfy the conditions of Article 10 (2) of the ECHR. There are some judgments in which the ECtHR held that hate speech or expressions of extremely anti-democratic opinions fall outside the protection of 10 of the ECHR. Nevertheless, in almost all situations, the ECtHR applied the test of Article 10 even to these extreme expressions. There are three principles in this respect. First, there must be a sufficient legal basis under national law for the relevant measure ("prescribed by law"). Secondly, that legal basis and the particular measure must pursue goals necessary in a democratic society as enumerated by Article 10 section 2 of the ECHR (e.g., national security, health or morals, protection of the reputation or rights of third parties, protection of confidentiality). Finally,, the legal basis in national law and the particular measure on which it is based must be proportionate.

Just like ECtHR, as early as 1958, the German Federal Constitutional Court stated that freedom of expression is "paramount to a free democratic state order". Information is an important prerequisite for participation and involvement in public opinion-forming processes. Therefore, freedom of information, which is also guaranteed by Article 5 (1) sentence 1 of the German Constitution, protects the free formation of opinion and anyone who wishes to obtain information from generally accessible sources. The special function of the press and broadcasting for the formation of individual and public opinion is constitutionally recognized in Article 5 (1) of the German Constitution. More than half a century ago, the German Federal Constitutional Court ruled that the press is obligated to report truthfully: "The truthfulness is not only demanded the sake of the protection of the honour of the person concerned,"; however, the press is at the same time justified by its role in the important work of public opinion-forming in the overall organism of a free democracy. Public opinion can only be formed correctly if the reader is correctly informed to the maximum possible extent. Therefore, news and allegations must be verified. Careless dissemination of untrue news is inadmissible, only a deliberate distortion of the truth.

In addition, the Turkish Constitutional Court stated that freedom of expression encompasses not only the freedom "to hold thoughts and opinions", but also, the freedom "to express and disseminate those thoughts and opinions" and the freedom "to receive and impart information and information and the opinions of others". In this framework, freedom of expression means that individuals can freely access news and information, and the opinions of others, and furthermore, cannot be condemned for the thoughts and opinions they have acquired, and can freely express, explain, defend, transmit and disseminate them in various ways, alone or with others. In order for freedom of expression to fulfill its social and individual function, the Turkish Constitutional Court refers to ECtHR, as frequently stated in its judgments on freedom of expression, there must be free expression without sanctions not only for "news" and

"thoughts" that society and the state consider positive, correct or harmless, but also, for news and thoughts that the state or a section of the public considers negative or wrong, and that disturbs them. Freedom of expression is the foundation of pluralism, tolerance, and open-mindedness, without which there can be no discussion of a "democratic society".

5 Conclusion

In today's Information Age where truth is increasingly devalued, it is more important than ever to combat disinformation. However, applying directly to criminal proceedings without exhausting legal remedies or alternative mechanisms other than criminal law infringes the "ultima ratio" principle. The question on how to move forward in treating disinformation, and how to apply a brake to the criminalization of disinformation is a complex conundrum. Preventing disinformation in social media provides access to healthier information for users and society. However, while preventing this disinformation, the restriction of individuals' freedom of expression with anti-democratic legislation is not the way to go. The correlation between vulnerability to disinformation and freedom of expression is inverse; the greater the lack of free expression, the greater vulnerability it is to disinformation. The problem of misinformation needs to be looked at holistically.

In the event of a violation, all reasonable and necessary measures, such as deleting or restricting access to such information to prevent the dissemination of false information, may be taken by judicial decision. Preferring such measures instead of punishment would be more suitable in the context of the principle of proportionality.

If disinformation is to be criminalized, a clear and transparent definition of disinformation must first be agreed upon. The key to the problem is overcoming the lack of such a clear definition and the ambiguity of its application as a criminal sanction, the lack of clarity in defining the problem, and the frequent lack of serious agreement on exactly what kind of behaviour and content should be considered problematic. If we do not know or cannot agree on what disinformation is, it will be difficult to address and punish it effectively and proportionately. This problem exists because the determination of what constitutes disinformation is inherently political.

Regarding disinformation in general, especially assessments of new criminal offences, it is important to consider the extreme importance of the effective enforcement of the laws already applicable. In many countries, similar types of offences already exist to prevent such situations arising from disinformation.

The regulation of disinformation is embedded in constitutional protection tasks. On the one hand, both the fundamental rights of affected individuals and the conditions for democratic decision-making must be protected against disinformation. On the other, the uncovering and combating of disinformation must respect the fundamental rights

of communication guaranteed in Constitutions. What is required is a balance that strikes a practicable equilibrium between the two guarantees of protection.

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HUMAN RIGHTS AND CRIMINAL LAW ENFORCEMENT IN EUROPEAN AND INTERNATIONAL PERSPECTIVE

EU'S MUTUAL TRUST CRISIS IN THE RULE OF LAW PATTERN: A CALL FOR HARMONIZATION IN THE AREA OF FREEDOM, SECURITY AND JUSTICE?

By Michał Wawrzyńczak[*]

Abstract

Over many years, we have witnessed a phenomenon known as the 'rule-of-law backsliding' process. The ongoing autocratisation of several Member States - in particular Poland and Hungary - has caused a breakdown of trust among the Community's members. These developments carry vital implications for European cooperation in criminal matters in the AFSJ. The author identifies layers and relations characterised by a lack of trust in this study. Those are analysed through the prism of the ECJ and the ECtHR jurisprudence on the issues related to the Rule of Law and mutual trust, as well as the rulings of national courts refusing to execute the EAW due to doubts regarding the legitimacy of the other Member State's judiciary. An essential point of the analysis is to highlight the paradigm shift of European constitutionalism. Lastly, an attempt is made to determine whether mutual trust constitutes sufficient grounds for developing further cooperation in criminal matters.

1 Introduction

The issues surrounding the principles of mutual trust and recognition of judgments are at the centre of criminal law deliberations in the Area of Freedom, Security and Justice (hereinafter: AFSJ). Indeed, it not only concerns the scholarly discussion and the judgments referring to these principles (on both national and supranational levels) but also immensely addresses the Rule of Law (alternatively: RoL), which is inherently linked to EU cooperation.[1] The crisis that has been observed for several years in some European Union countries is referred to as 'the process of Rule-of-Law backsliding',[2] being simultaneously linked to the co-determination of cooperation in criminal matters. The issue at stake is multifaceted, involving various elements that must be considered when formulating conclusions and proposals. The crisis of mutual trust in the European Union manifests itself on several layers, which all need to be considered.

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[1] The Rule of Law notion is deeply analysed in Kim L Scheppele and Laurent Pech, 'Is the Rule of Law Too Vague a Notion?' (*VerfBlog*, 1 March 2018) <verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/> 093757 accessed 31 March 2023.

[2] For an analysis of the process, see Kim L Scheppele and Laurent Pech, 'What is Rule of Law Backsliding?' (*VerfBlog*, 2 March 2018) <verfassungsblog.de/what-is-rule-of-law-backsliding/> accessed 31 March 2023.

Moreover, the complexity of this topic is also manifested through two research poles that represent different perspectives, which seem to be engaged in an incoherent discussion, depending on the advocated approach or leading language.[3] Simultaneously, this crisis is intertwined with the necessity to react to developments of a political nature which influence the decisions taken on the issues under discussion.

Currently, due to the separation of powers crisis (most critically regarding the independence of judiciary) in Poland and Hungary, the activity of the Court of Justice of the European Union (hereinafter: ECJ; the Court) has focused, *inter alia*, on ensuring effective protection of the RoL and halting its degradation within the EU community. However, one must note that this crisis has multiple dimensions, as will be highlighted later in this paper. The judgments of the ECJ and European Court of Human Rights (hereinafter: ECtHR) will be analysed. Moreover, the judgments of the Member States' courts that refused to execute the European Arrest Warrant (hereinafter: EAW) will be indicated.

2 The backbone of the Rule of Law crisis. From *Portuguese Judges* to multiple Polish judges' cases

For a complete understanding of the problems related to the principle of mutual trust and the recognition of judgments, it is necessary to backtrack as far as the *Białowieża Forest* case,[4] which, albeit not concerning matters related to the RoL or, more specifically, to judicial independence, can nevertheless be linked to a crisis of mutual trust. This case concerned proceedings for interim measures ordering a halt to tree logging in the Białowieża Forest, a UNESCO World Heritage site protected under EU law.[5] Despite granting the Commission's request for interim measures, Poland had publicly declared that it would not comply with the request[6] and continued work on the site. On 20 November 2017, for the first time, the Court agreed with the Commission on the imposition of a penalty payment on the State, should it fail to comply with the order in question, set at a ceiling of EUR 100,000 per day of infringement.[7] However, it should be noted that the Polish government refused to comply with the Court's order before the triggering of Article 7(1) TEU procedure,

[3] See Daniel Thym, 'The Solitude of European Law Made in Germany'(*VerfBlog*, 29 May 2014) <verfassungsblog.de/en-die-einsamkeit-des-deutschsprachigen-europarechts/> accessed 31 March 2023.
[4] ECJ, Case C-441/17 R *Commission v Poland (Białowieża Forest)* [2017] ECLI:EU:C:2017:877.
[5] <whc.unesco.org/en/list/33> accessed 31 March 2023.
[6] See Joanna Berendt, 'Defying E.U. Court, Poland Is Cutting Trees in an Ancient Forest' (*New York Times*, 31 July 2017) <www.nytimes.com/2017/07/31/world/europe/poland-bialowieza-forest-bison-logging.html> accessed 31 March 2023.
[7] Editorial Comments, 'Winter Is Coming. The Polish Woodworm Games' (2017) 2 EP 797; Laurent Pech and Dimitry V Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (SIEPS 2021:3) 35-36.

marking, so to speak, the first point of the dispute between Poland against the EU and the ECJ.

This case constitutes a breakthrough from both a political and legal point of view - representing a milestone in the context of both the first-ever refusal by any Member State to comply with an ECJ order/judgment (political dimension) and the Court's recognition that it wields power to impose interim sanctions on any Member State should it fail to comply with the judgment in question.[8] Moreover, in its Order, the Court held that periodic penalty payment cannot be seen as a punishment, but its essence is to ensure the effective application of EU law as 'such application being an essential component of the RoL, a value enshrined in Article 2 TEU and on which the European Union is founded'.[9]

Consequently, the Rule of Law theme returned in yet another case representing a milestone in the development of the AFSJ, the *Portuguese Judges*.[10] Indeed, this case has been described as the most influential since *Les Verts* when it comes to the understanding of the RoL and the meaning scope of this concept in EU law.[11] While, at first glance, it barely concerned issues related to this principle, as the main focus of the proceedings was to decide whether reductions in judges' salaries were compatible with the principle of judicial independence, it was used to tackle the rule-of-law backsliding process indirectly. Briefly summarising this case, let us note that the General Court, interpreting Article 19(1) TEU, and more specifically its subparagraph 2, derived from this provision the existence of an obligation to ensure that 'the bodies which, as "courts or tribunals" within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection'.[12] Furthermore, the Court emphasised that 'as regards [to] the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter'.[13] This is essential since, as a result of this decision, it can be concluded that even private parties are entitled to challenge under Article 19(1)[2] TEU any national measure which might undermine the independence of any national court capable of applying Union law.[14]

Nevertheless, another indirect effect of this ruling was a reorientation of Community law. The issue at stake was as vital as it was controversial, given that it heralded a kind of paradigm shift in applying EU law. Until then, in order for a case to be heard by the

[8] Pech and Kochenov (n 7) 38.
[9] *Białowieża Forest* (n 4) para 97–105.
[10] ECJ, Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117.
[11] Laurent Pech and Sébastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 CML Rev 1827, 1827.
[12] *Portuguese Judges* (n 10) para 37.
[13] Ibid para 29.
[14] Pech and Kochenov (n 7) 29.

Court, it was required to have a substantive connection to EU law. With the *Portuguese Judges* decision, as we have seen, ECJ somewhat broadened the scope of its jurisdiction by shifting the requirement of a direct link with EU law to an indirect one. This is how the Court's possibility of adjudicating on cases involving bodies which merely can (potentially) apply and interpret EU law must be understood. This change is referred to as the emergence of a new 'functional' sphere of EU law, which sees the role of national courts within the European judicial system as central for the application of EU law.[15] Mere observation - somewhat foregrounding further considerations - is that this 'functional' application of EU law and perception of the national courts' role has been met with scholarly criticism.[16]

Returning to the examination of Rule of Law issues, we can further identify several cases concerning the Polish judiciary. Due to their material/subject linkage, we shall discuss them together. However, we must make a remark that considering both the number of judgments and their complexity, a thorough review of these cases would exceed the scope of this study. Indeed, for this paper, it is sufficient to merely highlight the plurality of concerns surrounding the lawfulness of the Polish judicial system. Rulings of the ECJ, on both RoL and the backsliding process in the context of Poland, were made in the following cases: Case C-619/18,[17] with interim measures proceedings,[18] Case C-192/18,[19] Case C-791/19,[20] with interim measures proceedings,[21] C-812/18,[22] joined cases C-748/19 to C-754/19,[23] joined cases C-558/18 and C-563/18[24] as well as joined cases C-585/18, C-624/18 and C-625/18.[25] Case C-204/21[26] with 3 orders for interim measures, along with a penalty payment of 1 million EUR per each day of

[15] Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 ECL Rev 622.

[16] See Anneli Albi, 'A Paradigm Shift in the Role of Courts? Disappearance of Judicial Review through Mutual Trust and other Neofunctionalist Tenets of EU Law' (2022) 31 Juridica Intl 3; Fritz W Scharpf, 'The double asymmetry of European integration: Or: why the EU cannot be a social market economy' (2009) MPIfG Working Paper 09/12 <www.econstor.eu/handle/10419/41661> accessed 31 March 2023, 22.

[17] ECJ, Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:2019:531.

[18] ECJ, Case C-619/18 R *Commission v. Poland (Independence of the Supreme Court)* [2018] ECLI:EU:C:2018:1021.

[19] ECJ, Case C-192/18 *Commission v. Poland (Independence of the ordinary courts)* [2019] ECLI:EU:C:2019:924.

[20] ECJ, Case C-719/19 *Commission v. Poland (Disciplinary regime for judges)* [2021] ECLI:EU:C:2021:596.

[21] ECJ, Case C-719/19 R *Commission v. Poland (Disciplinary regime for judges)* [2020] ECLI:EU:C:2020:277.

[22] ECJ, Case C-812/18 *A.B. et al. (Appointment of judges to the Supreme Court – Actions)* [2021] ECLI:EU:C:2021:153.

[23] ECJ, joined cases C-748/19 to C-754/19 *(Prokuratura Rejonowa w Mińsku Mazowieckim*) [2021] ECLI:EU:C:2021:931.

[24] ECJ, joined cases C-558/18 and C-563/18 *(Miasto Łowicz and Prokurator Generalny)* [2020] EU:C:2020:234.

[25] ECJ, joined cases C-585/18, C-624/18 and C-625/18 *A. K. et al. (Independence of the disciplinary chamber of the Supreme Court*) [2019] ECLI:EU:C:2019:982.

[26] ECJ, Case C-204/21 *Commission v. Poland (Independence and privacy of judges);* no judgment to date.

non-compliance with the Court's judgment[27] constitutes an interesting case. Given the significant number of judgments in question, their analysis will not be detailed. Nevertheless, it should be noted that their importance - both in terms of the application of individual instruments to combat democratic regression but also their impact on the shaping of rules and Member States' judiciaries - is considerable.

As we noted earlier, the *Białowieża Forest* case preceded the triggering of Article 7(1) TEU procedure against Poland. In December 2017, the Commission came up with a reasoned proposal in accordance with Article 7(1) TEU regarding the RoL in Poland, which summarized the Commission's main concerns on the latest critical issues with the Polish judiciary.[28] The procedure was preceded by acceptance of the reasoned proposal under The Commission's Rule of Law Framework (2014)[29] which had been acknowledged by the Court.[30] Notably, ECJ has already decided in a similar case – on the reduction of the retirement age of judges, prosecutors and notaries in Hungary.[31] Just like in the case of the Polish Supreme Court and, subsequently, the ordinary courts, the ECJ found that the national legislation lowering the retirement age of judges violated the principle of non-discrimination based on age. However, there are fundamental differences between the rulings on the Polish and Hungarian judiciary, manifested in their relevance to the issue at hand. In the case against Hungary, no interim measures implementing instruments to protect the judiciary were requested. Moreover, at the time of the *Judicial Retirement Age* case (2012), there were insufficient regulations allowing for taking measures preventing violations of the RoL by the Member States. This is because the first comprehensive regulations on this topic were only introduced in 2014 in response to the manifested threats to the RoL in several States.[32] Some scholars have pointed out that the Court's ruling alone – merely declaring the Hungarian government's actions to breach the non-discrimination principle – did not sufficiently protect the judiciary from legislative changes and, as a result, from being captured.[33]

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[27] ECJ, Case C-204/21 R *Commission v. Poland (Independence and privacy of judges)* with 3 interim measures orders: ECLI:EU:C:2021:593; ECLI:EU:C:2021:834; ECLI:EU:C:2021:878, imposing the penalty payment.

[28] Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, 2017/0360 (APP), 20 December 2017. For an analysis, see Dimitry V Kochenov, Laurent Pech and Kim L Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (*VerfBlog*, 23 December 2017) <verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> accessed 31 March 2023.

[29] Application regarding Poland explained in Laurent Pech and Petra Bárd, 'The Commission 2021 rule of law report and the EU monitoring and enforcement of Article 2 TEU values' (European Parliament 2022).

[30] *Independence of the Supreme Court* (n 17) para 81.

[31] ECJ, Case C-286/12 *Commission v. Hungary (Judicial Retirement Age)* [2012] ECLI:EU:C:2012:687.

[32] Commission's Communication to the European Parliament and the Council of 11 March 2014 entitled 'A new EU Framework to strengthen the Rule of Law' (COM(2014) 158 final.

[33] See e.g. Tamas Gyulavári and Nikolett Hôs, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts' (2013) 42 Indiana L J 289; Attila Vincze, 'The ECJ as

On the contrary, the case varies for the Polish Supreme Court and ordinary courts. In the former case, the Commission sought interim measures to protect the Polish judiciary from unlawful changes introduced by the Polish government until the ECJ adjudicated the case. Thus, case C-619/18 R concerned ordering Poland, through interim measures, to restore the legislation prior to the introduction of the controversial changes that were the subject of the main proceedings[34] – which was welcomed in the doctrine.[35] The significance of this case also lies in the fact that the Court granted the requested measures twice (for the first time on 19 October 2018,[36] followed by the final order of 17 December 2018),[37] representing significant progress for the purposes of RoL protection compared to the analogous situation concerning the Hungarian judiciary in 2012. In the main proceedings (C-619/18), the Court reiterated its former approach expressed in the *Judicial Retirement Age* ruling and held that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. An analogous decision was issued in the *Independence of ordinary courts case*, wherein the Court found that Poland had violated the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation by establishing different retirement age for male and female judges along with failure to fulfil the State's obligations under the second subparagraph of Article 19(1) TEU by granting the Minister for Justice (Poland) the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges. However, we can note that the rulings in the present case underline the lack of trust in the intra-national relationship (individual/judge - State) as well as at the extra-national level – in particular, at the political and community dimension.

3 EctHR's approach to problems with the Rule of Law – selected cases analysis

We should observe that the Rule of Law issue has not been restricted solely to the ECJ jurisprudence. The concerns and problems with the Polish judiciary were also recognized by the EctHR and various bodies intervening in cases before this court. References to its violations in Poland can be found in the judgments: *Xero Flor w Polsce sp. z o.o. v. Poland*,[38] *Reczkowicz v. Poland*,[39] *Grzęda v. Poland*,[40] *Żurek v. Poland*,[41] *Advance*

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the Guardian of the Hungarian Constitution: Case C-286/12 Commission v. Hungary' (2013) 19 Eur Public L 489.

[34] European Commission, Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, Press release IP/18/5830, 24 September 2018.

[35] Pech and Kochenov (n 7) 42-43.

[36] Order of the Vice-President of the Court in Case C-619/18 R *Commission v. Poland* EU:C:2018:852.

[37] *Independence of the Supreme Court* (n 18).

[38] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021).

[39] *Reczkowicz v. Poland* App no 43447/19 (ECtHR, 22 July 2021).

[40] *Grzęda v. Poland* App no 43572/18 (ECtHR, 15 March 2022).

Pharma sp. z o.o. v. Poland[42] and *Broda and Bojara v. Poland*,[43] although the case of *Baka v. Hungary*[44] also ought to be included here. These have a common denominator: in each case, a separate (although not always dissenting) opinion was expressed by Judge Wojtyczek. Again, whilst it is necessary to emphasise the non-unanimity (or disagreement as to the reasons for a given decision) of the ECtHR, a very detailed review of both the judgments and Judge Wojtyczek's opinions exceeds the framework of this study. Instead, the present author wishes to outline only some essential elements which seem somewhat pertinent.

Firstly, there are significant doubts about the scope of judges' individual rights - particularly judicial independence. Judge Wojtyczek touched upon this element in the judgment in *Broda and Bojara v. Poland*, in which he points out that in Germany, judicial independence is seen not so much through the prism of the judge's individual right but rather as an element of the institutional protection of the judiciary as such.[45] In conclusion to the judgment in question, he draws attention to an entirely different and, in the present author's view, much more fundamental issue. Indeed, Judge Wojtyczek rightly observes that viewing legality and the Rule of Law through the prism of the European Convention on Human Rights may be problematic when the ECtHR's interpretation differs significantly from well-established jurisprudence in some Member States.[46]

The present author argues that the opinion presented by Judge Wojtyczek - albeit put in different terms and intended to challenge the ruling in the given case - is primarily related to the discourse on whether international law should be interpreted and applied in a substantive manner or viewed through the prism of its functionality. Hence, referring to the reservation made above, one must note that this is essentially a kind of dispute between two strands - of which the present author leans towards acknowledging that the quoted judge represents the substantive one. This can be observed in his other separate opinions. In the one submitted to the *Baka v. Hungary* judgment, he indicated that it is necessary to separate subjective (individual) rights from objective guarantees of the Rule of Law, as the latter - although it may affect the situation of an individual either more or less directly - is meant in essence to serve the public interest.[47] The case regarded the President of the Supreme Court (Hungary), whose mandate was terminated ex-lege through a law appointed by the Hungarian Parliament, reorganising the Supreme Court. Without delving deeply into the details of the case at hand, it suffices only to point out that Judge Wojtyczek opted to view the

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[41] *Żurek v. Poland* App no 39650/18 (ECtHR, 16 June 2022).
[42] *Advance Pharma sp. z o.o. v. Poland* App no 1469/20 (ECtHR, 3 February 2022).
[43] *Broda and Bojara v. Poland* App nos 26691/18 and 27367/18 (ECtHR, 29 June 2021).
[44] *Baka v. Hungary* App no 20261/12 (ECtHR, 23 June 2016).
[45] See *Broda and Bojara v. Poland* (n 44) with the dissenting opinion of Judge Wojtyczek, para 6.1.
[46] Ibid.
[47] *Baka v. Hungary* (n 45) with the dissenting opinion of Judge Wojtyczek, para 5.

case as an internal matter between the Hungarian Supreme Court and the Parliament, which - while undoubtedly falling within the scope of the RoL in general and judicial independence in particular - is not within the ECtHR's jurisdiction, but rather ought to be adjudicated on the grounds of and following instruments pertaining to the RoL and judicial independence in the EU.[48]

A somewhat different reservation was made by this judge in his concurring opinion to the judgment in *Reczkiewicz v. Poland*. Although Judge Wojtyczek shared the opinion of the adjudicating panel, he remarked that, in his opinion, the ECtHR focused overly on the general and structural problems associated with the Polish judiciary but not sufficiently on the applicant's situation.[49] Moreover, he pointed out that it is worth considering judicial independence 'not only from the viewpoint of objective law but also from the perspective of the parties to the domestic judicial proceedings, with their individual rights, interests and legitimate expectations.'[50] Likewise, he expressed a similar stance on the case of *Xero Flor in Poland sp. z o.o. v. Poland*, in which, although he partially concurred with the decision reached by the ECtHR, once again drew attention to, in his view, the questionable justification and reasoning of the panel, the blurred view of domestic law, and at the same time, a careful omission as to case law, which constitutes unfavourable precedents in the context of the decision in question.[51]

Thereby, once again, one can see a firmly held and articulated position that can be labelled as traditional - juxtaposed with a (neo)functional view of the law. Regardless of the accuracy of submitted dissenting and separate opinions, overlooking Judge Wojtyszek's positions would be as unreasonable as inappropriate. Indeed, it would also fit the trend noted by Annelli Albi of 'silencing' and 'excluding' those critical voices which condition the phenomenon of 'disconnecting' national and supranational discourses.[52] The arguments raised by Judge Wojtyczek manifest a national perspective primarily - and call for its inclusion as part of international adjudication processes. It would seem that this approach should be characterised as synthetic - which nowadays seems to be marginalised, favouring an approach that can be described as autonomous - which is manifested, in particular, within the framework of EU law and EU constitutionalism.[53] Although it may seem somewhat dubious and controversial, the re-engagement in discourse with representatives of the 'national strand' and, therefore - a kind of methodological return to comparativism could prove beneficial.

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[48] Ibid. para 17.

[49] *Reczkowicz v. Poland* (n 40) with dissenting opinion of Judge Wojtyczek, para 3.

[50] Ibid.

[51] *Xero Flor w Polsce sp. z o.o. v. Poland* (no 39) with the dissenting opinion of Judge Wojtyczek, para 20.

[52] Albi (n 17) 5.

[53] For an excellent topic analysis, see Anelli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-Operative Constitutionalism' Part 1' (2015) 9(2) Vienna ICL Journal 151; Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-Operative Constitutionalism' Part 2' (2015) 9(2) Vienna ICL Journal 291.

It should be noted that the 'varieties of constitutionalism' concept,[54] i.e. diverse national views could, on the one hand, give momentum for further Community development and, on the other hand, engage a broader range of scholars in the discourse, paying particular attention to specialists from rule-of-law backsliding countries.

4 Rule of Law protection mechanisms – from RoL monitoring to the Conditionality Mechanism

The necessity to protect the Rule of Law in the EU is nothing new. The first instrument, which somewhat referred to the crisis of trust (referred to in this case by the term 'confidence'), was established as early as 2013.[55] The EU Justice Scoreboard (hereinafter: EUJS) – intended to be a tool promoting effective justice and growth – highlighted that post-economic crisis reality depends on an 'efficient and independent justice system', which 'contributes to trust and stability'.[56] It also underlined how important the proper functioning of judicial systems is, given that if there are shortcomings, it undermines the confidence of citizens and enterprises in the justice institutions. This first element of the Rule of Law Framework draws attention to what can be called an 'internal' crisis of trust. Indeed, one must note that the judicial deficiencies affect not only the national judicial systems but the whole EU cooperation. It was recognised as early as 2013 that effective judicial systems are indispensable for strengthening the mutual trust needed for developing and implementing EU instruments based on mutual recognition and cooperation.[57] We can therefore say that the crisis of mutual trust - both at the internal (state) and external (EU) layer - had already commenced for good - or, more accurately, articulated - even ten years ago. While this instrument may not be an effective tool to combat the rule-of-law backsliding process per se, researchers do see the potential for developing it into an applicable index to combat the EU Rule of Law crisis.[58] However, it certainly is not irrelevant, as the 2021 Rule of Law Report referenced this index a total of 273 times,[59] with the 2022 edition maintaining this pattern within the individual Member State reports.

Note, however, that although the EUJS drew attention to the crisis of mutual trust and the RoL, it amounts to an instrument designed to monitor rather than combat this phenomenon. The unfolding crisis, arguably, required new solutions. Thus, 2014 is significant, given that it resulted in adopting two instruments dedicated to the Rule of Law. First of these is the already mentioned Commission's Rule of Law Framework

[54] Extensive work on the matter was conducted by Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84(3) ML Rev 478.
[55] The EU Justice Scoreboard. A tool to promote effective justice and growth, COM(2013) 160 final.
[56] Ibid, introduction.
[57] Ibid.
[58] See András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936, 947-955.
[59] Pech and Bárd (n 30) 32.

(2014),[60] implementing a procedure consisting of the following steps: 1) adopting a formal opinion following the activation of the Framework; 2) issuing a formal RoL recommendation if the Member State in question fails to provide satisfactory answers to an opinion from stage 1; 3) activation of the mechanisms (one or multiple) set out in Article 7 TEU in case of non-compliance.[61] For the procedure activation, the Commission must consider that the Rule of Law in a given Member State is under systemic threat. Despite its the implementation towards Poland, it has fallen completely short. It led to the first-ever triggering of the Article 7(1) TEU procedure in December 2017 - which some scholars see to be evidence underlying the weakness of the regulation in question, predominantly based on a dialogue-based mechanism.[62] The other instrument is The Council's Annual Rule of Law Dialogue (2014), established to help promote and safeguard the RoL. It was rightfully criticised by Kochenov and Pech, who perceived it to be 'grossly inadequate to tackle the problem' and, what turned out to be entirely accurate, simply 'disappointing'.[63] Nonetheless, the very idea of the Council's initiative in question was hardly welcomed by researchers, virtually post factum confirming the soundness of the criticisms voiced as to its effectiveness.[64]

The issue of a new instrument to protect the Rule of Law in the European Union is quite the contrary. As far back as 2018, academics suggested that an effective - and necessary - instrument to combat the increasing autocratisation of Member States is to disconnect them from EU funds.[65] This is precisely the strategy exploited by the Commission in its new regulation, adopted on 16 December 2020[66] (hereinafter: Regulation). One should be aware that the work on this Regulation - starting with the first proposal for its wording until its adoption - generated considerable discussion, controversy and criticism.[67] Although the mechanism entered into force on 1 January

[60] See (n 31).

[61] Pech and Bárd (n 30) 33.

[62] See e.g. Dimitry V Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11(3) ECL Rev 512.

[63] Dimitry V Kochenov and Laurent Pech, 'From bad to worse? On the Commission and the Council's rule of law initiatives' (*VerfBlog*, 20 January 2015) <verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/> accessed 31 March 2023.

[64] See e.g. Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54 JCMS 1075.

[65] Daniel R Kelemen and Kim L Scheppele, 'How to Stop Funding Autocracy in the EU' (*VerfBlog*, 10 September 2018) <verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/> accessed on 31 March 2023.

[66] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I 1.

[67] See e.g. Kim L Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (*VerfBlog*, 13 December 2020) <verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/> accessed 31 March 2023; Adam Bodnar and Paweł Filipek, 'Time Is of the Essence: The European approach towards the rule of law in Poland should not only focus on budgetary discussions' (*VerfBlog*, 30 November 2020) <verfassungsblog.de/time-is-of-the-essence/> accessed 31 March 2023; Alberto Alemanno and Merijn Chamon, 'To Save the Rule of Law

2021, the European Council concluded that, in the event of an action for annulment of the regulation being initiated by any Member State, the Commission would refrain from applying measures under the Regulation.[68]

Expectedly, the regulation in question was contested by Hungary and Poland. In Cases C-156/21[69] and C-157/21[70] these States requested the annulment of the Regulation based on Article 263 TFEU. Both States referred to the opinion of the Council Legal Service No 13593/18 of 25 October 2018,[71] which found the primary proposition on the new Rule of Law conditionality mechanism not being independent or autonomous from the procedure under Article 7(1) TEU.[72] Without delving into the nuances of the cases, let us indicate that the Court dismissed both actions, pursuant to the recommendation of the Advocate General Campos Sánchez-Bordona, voiced in his Opinions.[73] Both the AG's Opinions and the case itself were widely commented upon, whilst the judgments were warmly welcomed.[74]

One can undoubtedly see the vital role of instruments allowing the suspension of EU funds to countries where a rule-of-law backsliding process is observed. Although the Commission took the first steps towards activating the procedure under the Conditionality Mechanism by sending information letter requests on 17 November

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you Must Apparently Break It' (*VerfBlog*, 11 December 2020) <verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/> accessed 31 March 2023. For propositions on its application, see e.g. András Jakab and Lando Kirchmair, 'How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?' (*VerfBlog*, 22 December 2020) <verfassungsblog.de/how-to-quantify-a-proportionate-financial-punishment-in-the-new-eu-rule-of-law-mechanism/> accessed 31 March 2023; Justyna Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020—Is It all About the Money?' (2021) 13(1) Hague J Rule Law 79.

[68] European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20.

[69] ECJ, Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97.

[70] ECJ, Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98.

[71] Council Legal Service No 13593/18 of 25 October 2018 concerning the Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018) 324 final).

[72] ST 13593/18 INIT para 51.

[73] ECLI:EU:C:2021:974; ECLI:EU:C:2021:978

[74] See e.g. Jasmina Saric, 'Hungary and Poland against Rule of law Conditionality Regulation: the AG's Opinions' (*CROIE*, 28 January 2022), <croie.luiss.it/2022/01/28/hungary-and-poland-against-rule-of-law-conditionality-regulation-the-ags-opinions/> accessed 31 March 2023; Benedikt Gremminger, 'The New Rule of Law Conditionality Mechanism clears its first hurdle –Analysis of AG Campos Sánchez-Bordona Opinions in Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)' (*European Law Blog*, 14 December 2021) <europeanlawblog.eu/2021/12/14/8043/> accessed 31 March 2023; Laurent Pech, 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism' (*VerfBlog*, 16 February 2022) <verfassungsblog.de/no-more-excuses/> accessed 31 March 2023; Andi Hoxaj, 'The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5(1) NJEL 131; Niels Krist, 'Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of The Rule of Law Crisis in The European Union?' (2021) 6(1) EP 101.

2021 to the Polish and Hungarian governments,[75] this instrument was used merely to withhold the transfer of EU funds with respect to Hungary.[76] Nevertheless, it should be borne in mind that the funds for Poland were also frozen - although, in this case, the disbursement of funds was suspended for failure to meet the conditions indicated in the respective fund frameworks, which appears to have exerted effective pressure leading to long-awaited legislative changes implementing EU recommendations.[77] In this context, it can therefore be considered that instruments linking the payments of EU funds to the independence of the judiciary and the respect of the Rule of Law, along with the other values expressed in Article 2 TEU seem to pass the test. From the point of view of protecting endangered judicial systems, financial pressure exerted on the countries that stand as the biggest beneficiaries of EU programmes constitutes arguably the most significant accelerator of change. Assuming this perspective and analysing the instruments associated with the Conditionality Mechanism, we must identify them as effective and necessary.

However, neither the Regulation nor the decision implementing the Conditionality Mechanism with respect to Hungary refers directly to the principle of mutual trust but merely to issues relating to the Rule of Law. Somewhat less succinct are the judgments in Cases C-156/21 and C-157/21, which indicate that the implementation of the principle of solidarity through the Union budget is based on the principle of mutual trust, presupposing responsible use of the common resources included in that budget, a commitment of each Member State to comply with its obligations under EU law and respect to the Rule of Law.[78] The RoL and judicial independence crisis in the autocratically-progressing Member States thus not only affects the lack of trust at the political (via the activation of the Article 7(1) TEU procedure), judicial or, more generally, systemic level - both in terms of the internal layer, i.e. citizen-system

[75] See Eszter Zalan, 'EU Commission letters to Poland, Hungary: too little, too late' (*EU Observer*, 23 November 2021) <euobserver.com/democracy/153591> accessed 31 March 2023.

[76] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary OJ L 325, 94–109. See also Kim L Scheppele, 'Will the Commission Throw the Rule of Law Away in Hungary?' (*VerfBlog*, 11 July 2022) <verfassungsblog.de/will-the-commission-throw-the-rule-of-law-away-in-hungary/> accessed 31 March 2023; Kim L Scheppele, Daniel R Kelemen and Johl Morijn, 'The Good, the Bad and the Ugly: The Commission Proposes Freezing Funds to Hungary' (*VerfBlog*, 1 December 2022) <verfassungsblog.de/the-good-the-bad-and-the-ugly-2/> accessed 31 March 2023.

[77] See e.g. Paulina Pacuła, 'EU withholds all funds from Poland, not just National Recovery Plan. The government is silent on that matter' (*Iustitia*, 8 February 2023) <www.iustitia.pl/en/4631-eu-withholds-all-funds-from-poland-not-just-national-recovery-plan-the-government-is-silent-on-that-matter> accessed 31 March 2023; Piotr Buras, 'The final countdown: The EU, Poland, and the rule of law' (*ECFR*, 14 December 2022) <ecfr.eu/article/the-final-countdown-the-eu-poland-and-the-rule-of-law/> accessed 31 March 2023; Daniel Tilles, 'Judicial bill aiming to unlock Poland's EU funds passes to president for final decision' (*Notes From Poland*, 9 February 2023) <notesfrompoland.com/2023/02/09/judicial-bill-aiming-to-unlock-polands-eu-funds-passes-to-president-for-final-decision/> accessed 31 March 2023.

[78] *Hungary v Parliament and Council* (n 70) paras 125, 129; *Poland v Parliament and Council* (n 71) paras 143, 147.

relationship, and the external layer - MS system - MS system relation (cf. sections 2 and 3 regarding the judgments of the ECJ and the ECtHR), but also at the financial-budgetary level, where the suspension of funds is stemming not only from a pragmatically oriented attempt to stop financing harmful changes of an organisational-structural nature but also due to a genuine lack of political and factual confidence in the way the given budget is spent.[79] This subsequent factual dimension of the mutual trust crisis across the EU thus contributes to the discussion as to whether an autonomously oriented European constitutionalism is the optimal way forward, which would be the harmonisation of EU law within the AFSJ.

5 Mutual Trust and Mutual Recognition of Judgments – a highlight of ECJ and domestic courts' judgments

The final component of the analysis within this study will address the principle of mutual trust and recognition of judgments through the case law of the ECJ and domestic courts. As we observed earlier, the jurisprudence of the Court regarding the Polish judiciary (both common courts and the Supreme Court, as well as the Constitutional Tribunal) is voluminous and highlights a number of systemic deficiencies causing doubts on the Rule of Law standard. There are three ECJ rulings that play a fundamental role in interpreting the desired criminal justice practice amidst the mutual trust crisis in the AFSJ: the first, in the *Aranyosi & Căldăraru* case,[80] establishing a standard further clarified in the *Generalstaatsanwaltschaft*[81] and *Dorobantu*[82] cases; the second - in the context of the admissibility of the execution of an EAW to a country with serious concerns about the Rule of Law (Poland), establishing a test to be performed by domestic courts - in the *LM*;[83] the third in the *L-P* case,[84] in which the Court reaffirmed the need for a case-by-case review of the legitimacy of the refusal to execute an EAW, upholding the test established in the LM case.[85] The *LM*

[79] See e.g. Balint Magyar and Balint Madlovics, 'Hungary's Mafia State Fights for Impunity' (*BIRN*, 21 June 2019) <balkaninsight.com/2019/06/21/hungarys-mafia-state-fights-for-impunity/> accessed 31 March 2023; CRCB, 'The EU funds, Viktor Orbán and the performance of firms owned by Lőrinc Mészáros, the Hungarian gas fitter, in the Hungarian public tenders 2005-2018' (Budapest: CRCB 2019) <www.crcb.eu/?p=1791> accessed 31 March 2023.

[80] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198; for an analysis, see e.g. Wouter van Ballegooij and Petra Bárd, 'Mutual Recognition and Individual Rights: Did the Court get it Right?' (2016) 7 New J Eur Crim Law 439; Koen Bovend'Eerdt, 'The Joined Cases *Aranyosi* and *Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?' (2016) 32(83) Utrecht J Intl Eur L 112.

[81] ECJ, C-220/18 PPU *Generalstaatsanwaltschaft* [2018] ECLI:EU:C:2018:589.

[82] ECJ, Case C-128/18 *Dorobantu* [2019] ECLI:EU:C:2019:857.

[83] ECJ, Case C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586.

[84] ECJ, Case C-354/20 PPU *Openbaar Ministerie* [2020] ECLI:EU:C:2020:1033.

[85] Barbara Janusz-Pohl, 'Mutual Recognition of Judicial Decisions in Criminal Matters in Relation to the Rule of Law Concepts – example of the EAW execution refusal' in Grzegorz Pastuszko (ed.) *Rule of Law* (Wydawnictwo IWS 2023*)*.

ruling is the most pivotal - particularly in the context of those EAWs involving a transfer for trial.

Notably, this decision - although the Court upheld the position previously expressed in *Aranyosi & Căldăraru* that mutual trust is subject to certain limitations - expressed the belief that even systemic deficiencies in the judiciary cannot justify an automatic suspension of cooperation in criminal matters without triggering the application of Article 7 TEU sanctions. The test, established by the Court in this ruling, has rightly been subjected to harsh criticism by scholars.[86] Although, based on the ECJ judgment in the *LM* case, it was determined that despite doubts as to the Rule of Law and independence of the judiciary, the risk of violating an individual's rights cannot be stated when executing an EAW, as a result of a change in judicial trends, many decisions have been issued to refuse their execution in last years, constituting a turning point in the history of cooperation between the Member States within the EU community. This test has been found unworkable by the German[87] courts in the cases: *Ausl 301 AR 95/18*, *Ausl 301 AR 104/19*, *Ausl 301 AR 156/19*, *AuslAR 33/20*, *Ausl 301 AR 34/20*; Dutch's Rechtbank Amsterdam (the only court adjudicating on EAW matters in Netherlands) in the cases: *ECLI:NL:RBAMS:2018:4720*, *ECLI:NL:RBAMS:2018:5925* and *ECLI:NL:RBAMS:2020:184*; or by the UK courts in the cases of *Celmer* (Ireland), *Lis, Lange and Chmielewski* (England and Wales) and *Maciejec* (Scotland).

The grounds for refusing to execute warrants were the doubts of courts of enforcement states as to fulfilment by the EU Member State initiating the procedure of the Rule of Law and fair trial standard, while sometimes even advancing to recognise the entire given legal system as unlawful. Facing the loss of trust in following the RoL by the criminal courts of other Member States, it is imperative to identify the consequences of losing this confidence and the possible methods of rebuilding it. Such an attempt is yet to be made by the doctrine and jurisprudence, by far exceeding the possibility of making such a proposal within the framework of this paper. Reference must also be made to a number of doubts raised by the constitutionalists of the various Member

[86] See e.g. Fair Trials, 'The case of Artur Celmer: an analysis of the latest developments' (*Fair Trials*, 21 December 2018) <www.fairtrials.org/articles/news/case-artur-celmer-analysis-latest-developments/> accessed 31 March 2023; Petra Bárd and John Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I)' (*VerfBlog*, 18 April 2020) <verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/> accessed 31 March 2023; Petra Bárd and Wouter van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM' (2018) 9(3) New J Eur Crim Law 353; Cillian Bracken, 'Episode 5 of the Celmer Saga – The Irish High Court Holds Back' (*VerfBlog*, 28 November 2018) <verfassungsblog.de/episode-5-of-the-celmer-saga-the-irish-high-court-holds-back/> accessed 31 March 2023; Theodoros Konstadinides, 'Judicial independence and the rule of law in the context of non-execution of a European Arrest Warrant: LM' (2019) 56(3) CML Rev 743.

[87] For an analysis on German post-LM judgments, see Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe' (2020) 4 Eucrim 321.

States about the EAW - further stressing the need to seek a better system of cooperation in criminal matters.[88] However, we can see that in the case of proceedings concerning the execution of the EAW, we can speak about a lack of systemic trust on the part of the judiciary of the other Member States, which adds up to an additional dimension of loss of trust. It can be provisionally referred to as the 'judicial' dimension, in addition to the 'individual' (discernible in cases submitted to the ECtHR for adjudication) and the 'political' (materialising in the financial layer) ones.

6 Conclusions

When discussing the mutual trust crisis in the European Union, we usually refer to problems concerning judicial independence and the Rule of Law. We seldom discuss the perception of European constitutionalism's target form and long-term solutions. In the author's view, it is the discussion on taking into account the different perspectives of constitutionalism - and thus the perception of law and the role of the EU[89] – or focusing efforts on harmonising Community law as a response to the crisis of confidence. Some authors point out that the current crisis of trust regarding several Member States exposes the shortcomings of a cooperation system based on mutual trust and recognition of judgments.[90]

Suppose that the cooperation in criminal matters will remain based on the above mechanism. In that case, it can be argued that it no longer serves the sole purpose of its introduction - since there is a lack of real trust between the Member States, with Poland and Hungary both being prime examples. In this article, the author has presented the multifaceted nature of the trust crisis. At the domestic level, it manifests itself in the entity-state relationship, as confirmed by many cases presented to the ECJ and the ECtHR for examination by, for example, Polish judges. At the external level, it manifests itself in the political (government-to-government) relationship confirmed, for example, by the initiation of the Article 7(1) TEU procedure; the financial (government-to-government/state structures) relationship, confirmed by the withholding of funds granted to Poland and Hungary; the judicial-organisational-systemic relationship, confirmed by several judgments of the Member States' courts declining execution of the EAW. Such a profound crisis may confirm the inefficiency of a cooperation system based on trust, which dictates either the need to search for alternative possibilities to reconstruct trust between States (*novum*) or to move towards harmonisation as a direction to construct a new cooperation system in the AFSJ. Given that the EU, as a community, is currently in a transformational stage, it shall result either in strengthening the existing ties and forming even closer bonds among their Member

[88] See Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (Springer Nature 2019).

[89] See the extensive analysis of evolutionary, post-fascism and post-communism constitutionalism approaches provided by Larsen (n 55).

[90] See Cecilia Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' (2019) 25(1) ELJ 37.

States or in other exits, following the example set by the UK. Harmonisation could provide uniform regulations - systematically and procedurally wise - while even the substantive criminal law, often determined by a given society's moral and ethical convictions, could remain within the scope of national legislation.

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ON THE LEGITIMACY OF THE EUROPEAN PRISON CHARTER

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Abstract

The European Parliament has long called for the adoption of a European Prison Charter, a legally binding document that would harmonise broad aspects of prison law at EU level. In the view of both Parliament and EU scholarship, the justification for such harmonization proves, primarily, functional: safeguard the effective operation of mutual recognition instruments in the Area of Freedom, Security, and Justice. This is evidenced also by the choice of Article 82(2) TFEU as legal basis. However, the Charter has not been welcomed by the national authorities, who instead challenge the competence of the Union to legislate in the area of detention. National challenges relating to the (il)legitimacy of EU prison law-making seem to be grounded on both domestic and EU-related grounds. Domestically, member states may lack either the political will or the capacity to effectively enforce EU detention legislation; furthermore, EU law itself has been criticized for instrumentalizing detainees' individual rights. In light of such considerations, future EU action needs to reframe itself, restoring individual rights at the forefront of EU law-making, and building on the concrete benefits that the Prison Charter would entail for national safety and financial interests.

1 Introduction

This paper shall defend the following proposition. EU legislation on national prisons in its current, functionalistic format, proves illegitimate; though the issue does not necessarily lie to its functionalistic nature, but rather the very functions promoted. In other words, the issue is not one of form, but content. Indeed, the operationalization of detention[1] by the Union has the potential to prove considerably effective and impactful; further, it may prove legitimate, though to this end the EU should re-affirm the place of the individual in its policy-making, and further reframe its proposal in the following manner. Instead of focusing on EU-centred interests deriving from mutual recognition, EU prison policy should stand firmly on national-centred grounds, highlighting the security - and resources-oriented benefits that national authorities would reep, should such policy become reality.

Since the dawn of the 21st century, calls for the adoption of a European Prison(s)[2] Charter (henceforth EPR, or 'the Charter') have steadily increased. Traditionally, such calls have stemmed from the Council of Europe (henceforth CoE, or 'the Council').

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[1] A note on terminology: the terms 'prisoner', 'inmate' and 'detainee' are used interchangeably, for the purposes of the article; the same holds true in regard to the terms 'imprisonment', 'incarceration' and 'detention'.

[2] Official Council of Europe and EU documents tend to refer to a European Prisons Charter, while scholarship more frequently utilises the singular form, referring rather to a European Prison Charter – such differences in terminology are miniscule, and do not subtract from the tautology.

While escaping the focus of this contribution, it should be noted that the legitimacy of the CoE to act in the area of detention has go unchallenged; and for good reason. Historically serving as the very first pan-European entity with a human rights mandate, one of the Council's first tasks was to produce the European Convention on Human Rights (ECHR). The first CoE convention, and the cornerstone of the Council's activities, the ECHR contains a number of provisions relevant to detention, including prohibition of torture and inhuman treatment, forced labour, and imprisonment for debt; the rights to liberty, respect for private and family life, freedom of throught, expression, and education; and the *nulla poena sine lege* and *ne bis in idem* principles.

Furthermore, (most of)[3] these rights may be qualified, yet their core or 'essence' shall under no circumstances be taken away.[4] In this sense, the CoE endorses the principle of *inherent universality* of rights: detainees (as all individuals) should at all times enjoy all rights, whether incarcerated or not.[5] In other words, human rights apply to all, just by nature of being human, and the scope of the Convention's application is not to be restricted by the prison walls. The corresponding European Court of Human Rights (ECtHR), responsible for safeguarding the Convention's guarantees, has repeatedly endorsed this approach in several judgments. In *Khodorkovskiy*, the Court clarifies that "the Convention cannot stop at the prison gate […] and there is no question that a prisoner forfeits all of his […] rights merely because of his status as a person detained following conviction",[6] whereas in *Hirst (No. 2)*, it declares:[7]

> [P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right of liberty […]. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention […], they continue to enjoy the right to respect for family life […] the right to freedom of expression.

Consequently, the CoE advocating for a European Prison Charter provokes little debate – after all, this is exactly why the Council was created, and such a task falls expressly within its mandate. This is made clear also by the wording of Recommendation 1656 (2004) of the Parliamentary Assembly,[8] the key document setting out the idea of a pan-European Prison Charter, where it is submitted that "[l]iving conditions in many

[3] With the exception of the so-called absolute rights, which may never be restricted; see Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15 Human Rights Law Review 101; and Natasa Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) Human Rights Law Review 723.

[4] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

[5] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press 2013) 1, 10.

[6] ECtHR *Khodorkovskiy and Lebedev v. Russia* App n. 11082/06 and 13772/05 [25 October 2013] para. 836.

[7] ECtHR *Hirst v. the United Kingdom (no. 2)* App n. 74025/01 [6 October 2005] para. 69.

[8] Recommendation 1656 (2004) of the Parliamentary Assembly.

prisons and pre-trial detention centres have become incompatible with respect for human dignity".[9] It is for deontological reasons, then, and for the sake of *dignitas*, that the Assembly submits its proposal.

On the other hand, and contrary to the CoE, the EU has never been a human rights organisation – and "to suppose otherwise is to engage in mythology".[10] While the CoE adopted the ECHR immediately after its inception, the Union's Founding Treaties make no explicit reference to human (much less detainee-specific) rights, or principles of punishment; and while the ECtHR is a human rights court, the CJEU does not serve the same purpose.[11] Instead, the Union's *raison d'être* has been linked to issues surrounding the Common Market and economic integration.[12] Such matters seemed of little relevance to human rights, and it seemed imprudent to duplicate the CoE efforts.[13] Granted, through time, the nature and competences of the Union evolved past purely economic matters, gradually involving environmental, social, and security issues.[14] Further, the overseer CJEU was eventually forced to recognise human rights as a general principle of EU law,[15] a reality which is today reflected in the Union's Treaty framework.[16] Nevertheless, the EU remains without explicit competence in detention or prisons.

Overall, then, the protection of individual rights in the European Occident was for long seen as a task for the CoE, rather than an EU objective.[17] Consequently, the fact that the

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[9] ibid para 4.

[10] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45.

[11] Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649.

[12] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 155-176; Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) CMLRev 1307, 1308; Smismans (n 21) 46; Gerard Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 McGill Law Journal 849, 856.

[13] Antonio Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds.) *Continuity and Change in EU Law: Essays is Honour of Francis Jacobs* (OUP: 2008).

[14] See indicatevely Steven Greer, Janneke Gerards and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge University Press: 2018) 1, 27ff.

[15] G. F. Mancini, 'Safeguarding Human Rights: The Role of the European Court of Justice, in democracy and constitutionalism in the european union' in G.F. Mancini (ed) *Democracy and Constitutionalism in the European Union* (Hart Publishing: 2000) 1, 81; Greer, Gerards and Slowe (n 25) 293ff; see further Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed.) *The EU and Human Rights* (OUP, 1999) 859, 890.

[16] Consolidated Version of the Treaty on European Union [2016] OJ C202/13, arts 2, 3, and 6.

[17] Joseph H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal order of the European Communities', (1986) 61 Wash. L. Rev. 1103, 1111; though, for a counter-argument, see de Búrca (n 22).

EU has also been calling for the adoption of a European Prison Charter may seem, at best, peculiar – or, indeed, even unjustified, in the eyes of national authorities.

Building on this background, the contribution sets out to examine the rise of the Union as a penal actor. The analysis commences, in the following section, by outlining the contents and justifications behind an EU Prison Charter; section 3 summarises the legitimacy concerns that the adoption of such a Charter would (and does already) raise; while section 4 finally sheds light on the way forward, presenting a number of submissions that would allow the EU proposed action to become reality.

2 The contents and justifications of a European Prison Charter

The first question to be addressed revolves around defining the analysis own subject. To this end, the European Prison Charter is to be conceptualised as follows: a legally binding document, that would regulate all aspects of prison law across all 27 European member states.

To unravel this definition.

Firstly, the Charter would regulate 'prison law'. Prison law, in broad terms, may be sketched as the law defining all aspects of imprisonment. More specifically, it relates to the implementation of custodial sentences (*Strafvollzugsrecht*); in this sense, prison law is part and parcel of criminal law.[18] Additionally, it is interesting to note that, in the European legal sphere, custodial sentences are understood *lato sensu*, and include both pre- and post-trial detention. Post-trial detention follows a judicial order issued by a criminal court; its pre-trial counterpart, instead, refers to situation where unconvicted individuals have been detained for any other reason (typically by the police, pending trial). Indeed, the CJEU has adopted an autonomous concept of detention,[19] broadly construed as follows:[20]

> the concept of 'detention' […] must be interpreted as covering not only imprisonment but also any measure or set of measures imposed on the person concerned which, on account of the type, duration, effects and manner of implementation of the measure(s) in question deprive the person concerned of his liberty in a way that is comparable to imprisonment.

Accordingly, and in terms of scope, the Charter has been envisaged to include a rather holistic and wide range of provisions, regulating both material and procedural aspects of imprisonment, and expanding to both pre- and post-trial situations. Various provisions of the Charter would regulate the detainees right to access to a lawyer; right

[18] Dirk van Zyl Smit, 'Prison Law' in Markus D. Dubber and Tatjana Hörnle (eds.) *The Oxford Handbook of Criminal Law* (OUP 2015) 988.

[19] Valsamis Mitsilegas, 'Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice' (2020) 57 Common Market Law Review 45.

[20] Case C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] PPU JZ ECR I - 610, para. 47.

to healthcare, access to a doctor, and both internal and external medical services; the right to notify a third party of their detention; material conditions of detention and especially cell space and size; activities geared towards rehabilitation, education, and social and vocational reintegration; rules regulating the separation of prisoners; specific measures for vulnerable inmates; visiting rights; effective remedies enabling prisoners to defend their rights against arbitrary sanctions or treatment; special security regimes; measures promoting non-custodial (also known as alternative) sanctions; and the obligations of the state to inform prisoners of their rights.[21]

Secondly, the Charter would regulate prison law 'in European states'; this invites the question, which Europe? As already stated, the Charter has been suggested in Recommendations issued by both the European Parliament (EP)[22] and the Parliamentarty Assembly of the Council of Europe (PACE).[23] Hence, and if the Charter is adopted by the latter, it will be applicable across all 46 Council members; if, however, it is adopted by the EU, that number will be halved, as the EPC will only be binding across the EU 27 member states. Furthermore, the question of who adopts the Charter is relevant, as it would define not only the territorial scope of application, but also the Charter's legal nature, and, more importantly, the enforcement measures accompanying implementation. Hence, and if adopted by the EU, the Charter would (most likely, as is typical in the AFSJ) assume the form of a Directive: legally binding document, that stipulates a specific objective, yet allows national authorities to adopt whichever (legislative or not) measures they see fit.[24] Further, and if operating within the EU *acquis*, the Charter would be accompanied by all the enforcement mechanisms in the Union's arsenal: direct and indirect effect, state liability, infringement proceedings, CJEU and Commission monitoring and enforcement mechanisms would accompany it.[25] The CoE, on the other hand, as an intergovernmental entity, has far less powers to give effect to the Charter, and ensure effective implementation.[26]

Third and final, the Chater 'would' regulate prison law across European states. It would, potentially, though it does not yet, because it has not been adopted – at least, not in a legally binding manner. Instead, and in the context of the CoE, there have been

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[21] European Parliament, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (EPRS: 2017) 1, 165.

[22] Recommendation 2003/2188 of the European Parliament

[23] Recommendation 1656 (2004) of the Parliamentary Assembly.

[24] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 288.

[25] For a comprehensive run-down, see indicatively András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2017).

[26] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, art 46(2); Laurence R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125; and David Harris et al (eds.), *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (OUP, 2018, 4th edn).

responses endorsing the need and value of a Charter by the Committee of Ministers; further, the CoE has already adopted the European Prison Rules, which already cover most, if not all, of the topics which would be dealt with by the Charter – nevertheless, the European Prison Rules constitute soft-law, and are in no shape or form legally binding.[27] Within the EU, on the other hand, and besides the Parliament, the European Commision has also supported the crusade, and has even produced a Recommendation of its own, which, similarly to the European Prison Rules, covers all material and procedural aspects of detention, yet entails no binding effect nor justiciability.[28]

Nevertheless, a legally binding document on European prison law remains, so far, elusive.

Having thus outlined the possible content of the Charter, the analysis moves on to identify the justifications promoted behind its adoption.

As already stated, the concept is expressed in two key documents. These are Recommendation 1656 (2004) of the Parliamentary Assembly,[29] and Recommendation 2003/2188 of the European Parliament.[30]

Noting the rationale behind each proposal: at the outset, both Recommendations acknowledge that detention conditions and living standards in detention prove often inadequate, and undermine the protection of human rights in prisons.[31] PACE, in its recommendation, submits that "Living conditions in many prisons and pre-trial detention centres have become incompatible with respect for human dignity".[32] The EP, on the other hand, focuses primarily on the need to ensure the effective implementation of extradition or transfer policies,[33] and radicalisation concerns.[34]

It is interesting further to note that the EC Recommendation adopted recently the Parliament's justifications are mirrored, as the Commission also focuses on a mixture of principled and functional arguments.[35] Hence, and as regards functional arguments, the Commission's Recommendation states that "In the Union and, in particular, within the area of freedom, security and justice, Union specific minimum standards, applicable to

[27] Council of Europe, *European Prison Rules* (Council of Europe, 2006) 1.

[28] European Commission, Commission Recommendation of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions C(2022) 8987 final.

[29] Recommendation 1656 (2004) of the Parliamentary Assembly.

[30] Recommendation 2003/2188 of the European Parliament.

[31] For a holistic report, see Marcelo F. Aebi et al, *SPACE I - 2021 – Council of Europe Annual Penal Statistics: Prison populations* (Council of Europe: 2022).

[32] Recommendation 1656 (2004) para 4.

[33] Recommendation 2003/2188 of the European Parliament para E.

[34] ibid paras F, V, Q; see further Jörg Monar, 'Reflections on the place of criminal law in the European construction' (2022) 27 European Journal 356.

[35] Commission Recommendation C(2022) (n 39).

all Member States' detention systems alike, are required in order to strengthen mutual trust between Member States and facilitate mutual recognition of judgments and judicial decisions";[36] in addition, it makes explicit that common standards would facilitate the execution of mutual recognition instruments,[37] particularly European arrest warrants and transfer of prisoner requests.[38] Overall, the Commission concludes that vast divergences in national prison systems "appear unjustified in a common EU area of freedom, security and justice".[39] On the other hand, and as regards principled arguments, the Commission suggests that the need to approximate procedural and material conditions of detention stems from an abmition to safeguard individual rights,[40] prevent ill-treatment and violations of the prohibition of torture and inhuman or degrading treatment or punishment,[41] safeguard the safety of inmates and protect them from abuse and violence,[42] promote rehabilitation,[43] and prevent radicalisation – especially from terrorist and extremist groups.[44]

Furthermore, scholarship has supported such arguments. Indeed, EU scholars have argued for the necessity of EU legislation in the area of detention,[45] mirroring the reasons underlined above, focusing on both operative (rescue mutual recognition and trust in the AFSJ) and principled justifications (account for the place of individual in EU criminal law).[46] As regards the feasibility, arguments have been raised that Article 82(2) TFEU could be utilised as the legal basis.[47] This provision declares the following:

> To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of

[36] ibid para 18.

[37] ibid para 32.

[38] As occurring under Framework Decision 2002/584/JHA on the European arrest warrant, and Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty, respectively.

[39] Commission Recommendation C(2022) (n 39) para 14.

[40] ibid para 24.

[41] As safeguarded under the Charter of Fundamental Rights of the EU, Art. 4.

[42] Commission Recommendation C(2022) (n 39) para 26.

[43] ibid paras 26, 30.

[44] ibid para 30.

[45] Especially in the post-*Aranyosi* era, with the two-step approach provided there deemed insatisfactory; see Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* [2016] ECR I – 198; for a criticism, see indicatively Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 1 European Papers 311, 322ff.

[46] See indicatively Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 Eucrim 221; Leandro Mancano, 'Storming the Bastille. Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61; Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?' (2016) 3 European Papers 943; Papachristopoulos (n 61).

[47] Mancano (n 62); Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2020) 20 ERA Forum 327.

directives adopted in accordance with the ordinary legislative procedure, establish minimum rules […]. They shall concern: […] (b) the rights of individuals in criminal procedure.

In light of this provision, the argument is clear: harmonisation of detention is feasible, as it encompasses rights of individuals in criminal procedure (at both pre- and post-trial stage) – and the EU has an express legal competence to harmonise such rights, long as they serve judicial cooperation in criminal matters. Indeed, harmonisation seems necessary to safeguard mutual trust and mutual recognition.[48]

In addition, scholars have demonstrated how EU law itself seems to allow for the harmonization of both pre- and post-trial detention conditions, subscribing to a relatively broad notion of criminal procedure. Hence, as already noted, both European Parliament and Commission have adopted Recommendations calling for EU action in both procedural and material aspects of detention, without differentiating between pre- and post-trial stages of detention.[49] Further, the European Council, the EU institution comprised of heads of state or government responsible for defining the general political direction and priorities of the European Union, has supported implementation of the EPR.[50] In addition, several Directives explicitly state that their scope of application is to include the final conclusion of the case, which implies that EU institutions acknowledge the competence of the Union in both pre- and post-trial stages of criminal procedure.[51] Another point is that the EU has adopted various FDs that shape detention, regulating transfer of pre- and post-trial detainees.[52] Finally, the CJEU itself has adopted a broad definition of detention,[53] and stipulated rules on detention and prison conditions in third (non-EU) states.[54]

Ultimately, from the EU perspective, both scholars and legislative (the trinity of Parliament-Council-Commission) concur that a European Prison Charter seems both

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[48] For an analysis on Article 82(2) TFEU, see Irene Wieczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?' (2022) 28 European Journal on Criminal Policy and Research 465; Gert Vermeulen and Wendy De Bondt, *Justice, Home Affairs and Security: European and International Institutional and Policy Development* (Maklu 2015).

[49] Recommendation 2003/2188 of the European Parliament; Commission Recommendation C(2022) (n 39).

[50] European Parliament, Procedural Rights and Detention Conditions, Cost of Non-Europe Report of 2017 1, 68ff.

[51] Soo (n 63).

[52] Particularly Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L 327/27 ; 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L 190/1.

[53] *JZ v Prokuratura* (n 31), para. 47.

[54] Soo (n 63).

necessary for the continuous operation of the EU as an AFSJ and the unimpeded functioning of mutual recognition instruments; and legally feasible, on the basis of 82(2) TFEU.

3 Challenging the legitimacy of an EU Prison Charter

Yet member states remain hesitant to allow for the adoption of such a Charter to go ahead, arguing instead that detention (especially at the post-trial stage) escapes the scope of Article 82(2) TFEU. Further, it becomes clear that the EU has no explicit, freestanding competence to adopt legally binding standards in the field of detention 'in any of its forms'.[55] This reluctance persists in spite of discrepancies in detention conditions posing a hurdle to mutual recognition instruments.[56]

This section shall examine why the EPC, as proposed by the EU, have not been received as legitimate by the EU member states – nor will they, until the Union shifts its narrative discourse to reflect national interests at its very heart.

There are a few possible reasons (not mutually exclusive) which may be contributing to the reluctance in part of the states to allow for EU action in national prisons. These may be grouped into two broad categories: domestic, and EU-specific justifications. The former revolves around the place of prisons in state politics, and the capacity of states to implement reforms. The latter entails the Union's focus on mutual recognition, and the instrumentalization of prisons to promote the functioning of EU secondary law. Each of them shall be addressed in turn.

3.1 Domestic arguments: political will and capacity contraints

National authorities may be unwilling to concede to an adoption of an EU-wide binding document in prisons, due to political or management arguments.

From a political point of view, it is submitted that prisons serve as a tool in the state arsenal, used to control populations, secure legitimacy, and exert an image of control. Hence, the argument goes, it is within the states' interest to maintain prisons in their current state. In this sense, prisons are used by governors, to govern. Actual crime statistics and rates,[57] findings deriving from criminal justice and penology research and expertise,[58] human rights aspirations, even the perceptions of the public towards crime

[55] Pedro Caeiro, Sónia Fidalgo, João Prata Rodrigues, 'The evolving notion of mutual trust' (2018) Maastricht Journal of European and Comparative Law 689, 690.

[56] Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of Prisoners Framework Decisions', (2018) 25 Maastricht Journal of European and Comparative Law 704.

[57] Franklin E. Zimring, 'Imprisonment rates and the new politics of criminal punishment' (2001) 3 Punishment & Society, 161.

[58] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP: 2001) 1, 142ff.

risk,[59] all serve a secondary purpose. Instead, the primary purpose and objective of state actors, when regulating and enforcing prison policies, revolve around control and symbolism.

Further, and in this manner, states simultaneously foster and respond to punitiveness. Therefore, the official state line "a combination of an official political state's ideologies, policies, and programs of dealing with objects of the criminal justice system"[60] ends up fostering an overall culture of punitiveness "unspecified mix of attitudes, enactments, motivations, policies, practices, and ways of thinking that taken together express greater intolerance of deviance and deviants, and greater support for harsher policies and severer punishments".[61] Overall, a punitive state tends towards excessive punishment,[62] harsh and severe penalties,[63] cruelty,[64] and penal harm.[65]

Therefore, and on the basis of such findings, a European Prison Charter with binding effect and the enforcement mechanisms of the entire EU toolbox may not appeal to state authorities willing to tap into punitiveness, and craft a narrative of 'tough on crime', otherness, and control.

In addition, and even if states demonstrate the political will to comply with the procedural and material standards proposed by the EPC, they may simply find themselves in a position where they are unable to do so. In this sense, states may be unwilling to allow for a binding Directive on prison standards, as they are well-aware that they do not possess the resources necessary to give effect to the will of the European legislator. This holds especially true for member states suffering from the results of the Eurozone and debt crisis, inflation rates, and the global economic slowdown in the aftermath of the pandemic outbreak.

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[59] Susanne Karstedt and Rebecca Endtricht, 'Crime And Punishment: Public Opinion And Political Law-And-Order Rhetoric In Europe 1996–2019' (2022) 62 The British Journal of Criminology 1116.

[60] Besiki Kutateladze, 'Measuring state punitiveness in the United States' in Helmut Kury and Evelyn Shea (Eds.), *Punitivity - International Developments Vol. 1: Punitiveness - A Global Phenomenon?* (Bochum, Germany: Universitatsverlag Dr. Brockmeter, 2011) 151, 155.

[61] Michael Tonry, 'Determinants of Penal Policies' (2007) 36 Crime and Justice 1, 5.

[62] Roger Matthews, 'The myth of punitiveness' (2005) 9 Theoretical Criminology 175.

[63] Mona Lynch, 'Theorizing punishment: Reflections on Wacquant's Punishing the Poor' (2011) 37 Critical Sociology 237; James Q. Whitman, *Harsh justice: Criminal punishment and the widening divide between America and Europe* (New York: Oxford University Press, 2003).

[64] Jonathan Simon, ''Entitlement to cruelty': Neo-liberalism and the punitive mentality in the United States' in Kevin Stenson and Robert R. Sullivan (Eds.) *Crime, risk and justice: The politics of crime control in liberal democracies* (Devon, England: Willan, 2001) 125.

[65] Todd R. Clear, *Harm in American penology* (New York: State University of New York Press, 2014).

In a nutshell, the position of the Greek government in response to the CPT report summarises this argument:[66]

> '[There are] well-known fiscal problems that our country [has been] facing [over] the past 1.5 years. We will not get into details, because we think it is self-evident that the lack of financial resources implies insurmountable obstacles to the implementation of an effective correctional policy, as with any other public policy'.

Indeed, and to ensure detention conditions match the required standards, national authorities may have to repair and refurbish old facilities, or construct new ones; hire the personnel necessary to operate these facilities; ensure the technological equipment is adequately updated; provide for all the required materials and supplies; arrange for training, educational, and vocational activities, and so on. Such initiatives come at a cost, and may have a considerable impact on the public budget – especially if the reforms necessary prove extensive, in order to deal with recurring, structural issues.[67]

On this note, it has been noted that domestic capacity arguments in truth align more to the administration, rather than the availability of funding *per se*.[68] In other words, it is not that the state lacks the money to ensure detention conditions align to the prescribed standards; rather, allocating resources to this end would mean taking away resources from some other objective, which, in the view of the state, takes priority over prisons. This holds especially true in states with a punitive, tough-on-crime policies, as indicated above. Further, and even if national authorities decide to allocate their budget towards improving conditions of detention, it may be that a weak, inefficient legal, judicial, or executive structure further delimits any capacity to comply – in this sense, institutional contraints.[69]

Overall, then, it is exactly the strengths of an EU-wide Prison Charter – namely, its coherence, and enforcement mechanisms – that may disincentivize states that lack the political will or capacity from agreeing with the EU institutions and scholars, and greenlighting the legislative process on the basis of Article 82(2) TFEU.

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[66] Council of Europe, Response of the Government of Greece to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 20 to 27 January 2011, CPT/Inf (2012) 2 4, 75.

[67] Papachristopoulos (n 61) 329.

[68] Sappho Xenakis and Leonidas K. Cheliotis, 'Carceral moderation and the Janus face of international pressure: A long view of Greece's engagement with the European Convention of Human Rights' (2018) 70 Law and Social Change 37.

[69] Nikos K. Koulouris, *Supervision and Penal Justice: Alternative Sanctions and the Dispersion of the Prison* (Athens: Nomiki Vivliothiki, 2009); Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 European Journal of International Law 205.

3.2 EU-centred arguments: instrumentalization of prisons

Furthermore, and besides these domestic arguments, the EPC proposal may invite considerations on the legitimacy of the Union to legislate in the area. These considerations may stem from the emergence of the EPC as a result of excessive, almost rogue-like spillover; and the instrumentalization of the individual in the name of security. Both of these considerations are linked, and shall hence be examined in conjunction.

Essential to the narrative is the role of the EU as an Area of Freedom, Security and Justice (AFSJ) 'without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to [...] the prevention and combating of crime.'[70] The emergence and overall functioning of the AFSJ has been well-documented, and escapes the scope of the present.[71] Instead, and for the purposes of this analysis, the following key points should be kept in mind. Firstly, the EU has the explicit competence to legislate in substantive or procedural criminal matters. Secondly, the justification behind this competence is twofold: ensure the frontier-less legal mosaic of EU states is safe against cross-border criminality; and enhance the effectiveness of EU law. [72] Thirdly, the area of so-called EU criminal law has expanded rapidly, with criminalisation (i.e. harmonisation of offences and sanctions) at EU level including a number of crimes.[73] This list, it should be further noted, is not exhaustive, but rather indicative, and may be expanded upon.[74] Overall, the competence of the Union in criminal matters, as evidenced by the ever-expanding legislative sum of EU criminal law, "is developing from a highly sensitive policy area into an important measure to tackle serious forms of crime on a common basis".[75]

Such findings, nevertheless, do not necessarily answer but rather re-kindle the original question: since EU criminal law and policy has been rapidly expanding, why would EU harmonisation of prisons (part and parcel of criminal law) be refused by member states?

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[70] Consolidated Version of the Treaty on European Union [2016] OJ C202/13, art 3 para 2.

[71] Instead, see indicatively Valsamis Mitsilegas, *EU Criminal Law* (2nd Ed., Hart Publishing: 2022); and A. Klip, *European Criminal Law* (4th ed., Interesentia Ltd, 2021).

[72] Krisztina Karsai and Liane Wörner, European Union and Council of Europe, in Kai Ambos and Peter Rackow (eds) *The Cambridge Companion to European Criminal Law* (CUP 2023), 5ff.

[73] For an overview, see TFEU art 83; and Athina Gianakkoula, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted: Future Perspectives and Proposals' (2015) 5 European Criminal Law Review 133.

[74] Peter Csonka and Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?' (2019) 4 Eucrim 261; also Kai Ambos, *European Criminal Law* (Cambridge University Press, 2018) 1, 320; and Jannemieke Ouwerkerk, 'Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?' (2012) 3 New Journal of European Criminal Law, 233.

[75] S.S. Buisman, 'The Future of EU Substantive Criminal Law Towards a Uniform Set of Criminalisation Principles at the EU level' (2022) European Journal of Crime, Criminal Law and Criminal Justice 161, 164.

At the outset, an argument would be that the EU has (and should have) no competence whatsoever to act in detention. In the words of the European Commission itself, "Criminal law as such is not a matter of Community (note: Union) competence but remains within the jurisdiction of the individual Member States".[76] While, as already seen, the EU has acquired some criminal law competence, it remains far from freestanding. Further, the realm of detention remains a prerogative of the sovereign state. In line with the Westphalian doctrine, the power to detain constitutes part and parcel of sovereignty, and the state retains its monopoly on violence.[77] Further, penal justice is very much linked to the notion of *locus*: "criminal justice should be local justice",[78] and notions surrounding delinquency are to be left up to the national governors. This is because, the argument goes, it is exactly these governors that know and relate to the identity of their people that comprise the state.[79] In the words of Garland, "the rituals of criminal punishment – the court-room trial, the passage of sentence, the execution of punishment [is] the formalized embodiment and enactment of the conscience collective"[80] – a collective which, by general consensus, and in a clear expression of the principle of subsidiarity, does not (should not?) belong to Europe, but rather the member states.

Further, and even if a broad reading of Article 82(2) TFEU provides, from a legal point of view, the EU with the competence to legislate in both pre- and post-trial detention, such an expansive reading invites considerations regarding spillover. In this sense, a broad reading allowing for the adoption of a EPC may be perceived as an intransparent method, unable to respond to the current aspirations of a democratic, legitimate, and transparent Union. Indeed, and if the objectives of the whole EU-acquis venture have not been clearly spelt out, and if the Union started with no competence or aspirations in regards to detention, yet ended up advocating for EU prison law, how can it be democratically legitimated? Consequently, national fears of being trapped in a system from which evasion would no longer be possible, and where integration is constantly reconstructed as a sequence of 'spillovers' and expansive competence interpretations, do not seem irrational – especially if one considers the nature of prisons as the *sanctum sanctorum* of Westphalian sovereignty.[81] In times of growing tension and

[76] European Commission, *Eighth General Report on the Activities of the Community* (1975) para 145.

[77] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in the Works of Jeremy Bentham 86-87 (John Bowring ed., 1962); see also David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990) 1, 67.

[78] Mireille Hildebrandt, 'European criminal law and European identity' (2007) 1 Criminal Law, Philosophy 57, 66.

[79] Samuli Miettinen, *Criminal Law and Policy in the European Union* (2012) Taylor & Francis Group 1, 9; Erik Luna, 'Sentencing', in Markus D. Dubber and Tatjana Hörnle (eds.) *The Oxford Handbook of Criminal Law* (OUP, 2014).

[80] Garland (n 104) 67; the *collective* consciousness define as "the totality of beliefs and sentiments common to average citizens of the same society".

[81] Renaud Dehousse, 'Rediscovering Functionalism' in Christian Joerges, Yves Mény and J.H.H. Weiler (eds.) *What Kind of Constitution for What Kind of Polity*? (RSC: 2000) 1, 195.

Euroscepticism, it remains imperative for the EU to avoid allegations of competence creep practices, so as to retain its legitimacy.[82] Consequently, current circumstances may call for a rather narrow reading of EU competence in detention, and refrain from legislating on such a contested and sensitive area.[83]

Finally, and in the exercise of its criminal competence, the EU has overall adopted a rather punitive approach. Every single EU criminal law approximation measure require the use of imprisonment, and imprisonment is the only measure provided by such measures.[84] The fact that EU criminal law legislates via minimum-maximum[85] rules should raise concern, rather than drown it. This is because the sole discretion left to the national authorities is to adopt more, rather than less, repressive criminal law.[86] Further, the minimum standards character of EU law in the field does not mean that this is not equally binding as other standards of EU law. On the contrary, "minimum standards must be interpreted broadly, to ensure the effectiveness of EU law in a field which is marked by considerable diversity between national legal systems".[87] Further, 'effective' sanctions in EU law seem to translate to sanctions achieving 'retribution and deterrence',[88] rather than rehabilitation.[89] Overall, EU criminal law so far enacted seems to promote the sword, rather than shield, function of criminal law, and has incited an effect of 'turbo-penalisation'.[90]

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[82] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) Yearbook of European Law 1, 7.

[83] Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 1, 29; Papachristopoulos (n 61) 329.

[84] See further Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury Publishing, 2019) 1, 55ff.

[85] See further Konstantinos Zoumpoulakis, 'From the Ground up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States' Discretion' (2020) 5 European Papers 1289.

[86] Irene Wieczorek, ΄The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice΄ (2021) Eur Law J. 378, 400, referring to D.B. Hecker, *Europaisches Stratfrecht* (Springer, 3rd edn, 2010), 371, cited in Petter Asp, *The Substantive Criminal Law Competence of the EU* (Stiftelsen Skrifter utgivna avJuridiska fakulteten vid Stockholms universitet, 2012) 1, 111ff.

[87] Valsamis Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice' (2019) Review of European Administrative Law, 130; referring to AG Bot, paras 32-33.

[88] Estella Baker, 'The emerging role of the EU as penal actor' in Tom Daems, Dirk Van Zyl Smit and Sonja Snacken (eds) *European Penology?* (Oxford: Hart, 2013) 77ff.

[89] Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal' (2019) 25 *Maastricht Journal of European and Comparative Law* 655.

[90] Els Dumortier et al, 'The rise of the penal state: What can human rights do about it?' in Sonja Snacken and Els Dumortier (eds) *Resisting Punitiveness in Europe: Welfare, Human Rights, and Democracy* (Abingdon: Routledge, 2012) 1, 107ff; Gaëtan Cliquennois, Sonja Snacken, and Dirk Van Zyl Smit, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11.

4 Discussion: the way forward

It seems, then, that the discussion has reached stalemate. On the one hand, EU institutions and scholars pushing for harmonization of detention and the creation of EU prison law, based on Article 82(2) TFEU, and with the incentive to ensure the functionality of mutual recognition instruments in the AFSJ. On the other, legitimacy concerns halting any attempts towards any legally-binding prison law at EU level – no less because such EU action would not be confined within a specific right or range of rights, but would have a profound impact on the entirety of prison law, a broad and far-reaching area of national sovereignty, including procedural, substantive, and material aspects of detention.

To break through, the following considerations could prove beneficial.

At the outset, the EU should not force its way to the objective. The game here is not one of power, but rather negotiation. To this end, and if hoping to achieve legitimacy, the EU should strive to uncover the common interests between Union, states, and people. Indeed, the current argument of mutual recognition instruments in the AFSJ is a perfectly valid and rational one; however, on a practical plane, such an EU-centred interest does not incite national governments (let alone public opinion, especially in a Europe where the public has litte knowledge of what the EU actually does) to subscribe to an abstract, wide project to harmonise prisons at supranational level. Instead, and to elicit the support necessary, there is a need to present specific benefits that would bridge the interests of EU, member states, and people.

To this end, and before embarking on a quest to litigate, the EU should consider alternative options, including soft-law ones, such as management and persuasion.[91] Of particular importance to this narrative should be the adverse impact of prisons in regard to national security, and financial wellbeing. Consequently, the EU should tap into secondary literature, and invite member states to consider that improving detention conditions shall have a positive effect at their own domestic legal order. Essentially, the EU needs to provide national political entities with, to put it parochially, slogans; and the slogan 'the EU relies on a mutual recognition framework, and we have improved conditions of detention to ensure the execution of European Arrest Warrants' may seem promising from the European point of view, yet seems less promising once one puts the national hat on. Instead, consider: 'improving detention conditions has allowed us to execute so many arrest warrants, resulting in the imprisonment of so many delinquents!', or; 'unruly prisons are a breeding ground for terrorism, we have improved conditions of detention, and thus secured safety in our own backyard!', or; 'prisons cost X number of Euros per day, we have improved conditions of detention thus saving taxpayer's money to be used for a better purpose!'

[91] Papachristopoulos (n 61).

Further, and besides arguments addressed to the member states and the EU *demos*, EU law itself should strive towards human rights, to achieve internal harmony. Indeed, a Union that adopts criminal policy advocating for criminalisation, punitiveness, and retribution, will understandably seen as less legitimate in its quest to regulate and enforce a EPC compared to a Union that strives for rehabilitation, and sees the individual in light of the values of *misericordia* and *dignitas*.[92] Accession of the EU to the ECHR, if possible in post 2/13 era, would be a welcome step to this direction, as it would signal the Union's commitment to human rights and individual-centred law-making.[93]

Finally, these words echo true today:[94]

> [...] it is a mistake to depict Europe as a kind of renaissance cathedral entirely designed by a powerfully-minded architect. To stick to religious architecture, one could say it is more like a medieval cathedral, patiently built by several generations of craftsmen with the materials available to them, in response to what they perceived as the needs of their time [...]
>
> Making a success of enlargement and preserving the `virtuous' character of European integration are noble aspirations. Their chances of success are dependent on our ability to conceive of ways to make them palatable to political leaders and public opinion alike.

With this in mind, it seems that the way forward, as forged so far by legal scholars arguing on the merits of a EPC based on a doctrinal, black-letter law analysis, will be paved further by the work of criminologists and compliance theorists. In this sense, the need for interdisciplinarity in EU methodology remains paramount.

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[92] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law', 48ff, in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016).
[93] *Opinion 2/13* (n 23).
[94] Dehousse (n 108) 195.

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THE UNCLEAR PICTURE OF THE *HABEAS CORPUS*? SOME GENERAL REMARKS ON REMOTE PRE-TRIAL DETENTION HEARINGS IN LIGHT OF THE SELECTED COUNTRIES' LEGISLATION AND THE ECHR STANDARDS

By Dawid Marko[*]

Abstract

This contribution attempts to determine the optimal scope of the use of remote court pre-trial hearings in the case of the participation of the suspect in incidental proceedings on detention on remand. In particular, while stating that remote hearings are not a value in itself, the conditions under which remote proceedings should be made dependent in the case of initial, extended and review custody proceedings are indicated. Moreover, the procedural remedies compensating the suspect person for remote participation in hearings, related to the possibility of effective participation, concerning the manner in which the decision to hold a hearing remotely is taken, as well as the procedural solutions relating to access to and contact with defence counsel or access to the case file, which requires certain references also to the technical side.

1 Introduction

Remote hearings[1] are not a new invention. Many jurisdictions have been using remote hearings, or a hybrid of in-person and remote hearings, for over three decades, justifying it with a mix of pragmatic and axiological rationales, mainly related to the efficiency of the justice system – reducing the need for transport, which is costly and contributes to environmental degradation, improving access to justice for those living in remote areas, attempting to reduce the trauma associated with giving evidence for vulnerable witnesses, minimising security risks associated with convoying individuals in custody, enabling access to experts who would otherwise be unavailable.[2] However,

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[1] The phrase "remote hearing" refers to the proposal by Richard Susskind (Richard Susskind, 'The Future of Courts' (2020) 6(5) The Practice: Remote Courts <clp.law.harvard.edu/knowledge-hub/magazine/issues/remote-courts/the-future-of-courts/> accessed 30 March 2023), and for the purpose of this article means procedural action of the court in which at least one of the participants (i.e. suspect) is not physically present in the courtroom and takes part in it remotely, using technical means enabling two-way and simultaneous transmission of images and sound, allowing visual, audio and verbal interaction.

[2] Emma Rowden, 'Virtual Courts and Putting 'Summary' Back into 'Summary Justice': Merely Brief, or Unjust?' in Jonathan Simon, Nicholas Temple, Renée Tobe (eds), *Architecture and Justice Judicial Meanings in the Public Realm* (Ashgate Publishing 2013) 101ff; Anne Sanders, 'Video-Hearings in Europe Before, During and After the COVID-19 Pandemic' (2021) 12(2) International Journal for Court Administration <iacajournal.org/articles/10.36745/ijca.379> accessed 30 March 2023; Marieke de Hoon, Marianne Hirsch Ballin, Sofie Bollen, 'De Verdachte in Beeld: Eisen en Waarborgen voor het Gebruik van Videoconferentie ten Aanzien van de Verdachte in het Nederlandse Strafproces in Rechtsvergelijkend

the global scope and unprecedented impact of the Covid-19 outbreak have irreversibly changed justice systems by forcing not only the adoption of modern technology even in previously reluctant jurisdictions but also by causing a general increase in the level of familiarity with and confidence in these tools among criminal justice system practitioners, especially judges, on an unusual scale. In the post-pandemic era, one can assume that remote hearings should now not only be seen as an extraordinary measure but also as having the potential to be a reasonable alternative for physical appearance.

This also applies to hearings falling within the scope of Article 5 ECHR. However, pre-trial detention hearings have very unique peculiarity which is expressed not only in their fundamental rights' sensitive nature but also in the necessity to conduct a multifaceted, in-depth review of the lawfulness of the preventive measure under time pressure rarely encountered in other stages of the criminal process. Thus, while remote hearings generally hold a lot of promises, there are also some perils associated with them. It remains to be seen whether remote pre-trial detention hearings, as a specific response (in some jurisdictions) to the unique challenges posed by the pandemic, will become a permanent feature of criminal justice practice and whether such a transition is desirable. The fundamental question that seems to emerge is whether the right to be brought before a court means only physical or also remote participation and, if so, what conditions such participation is subject to.

For this reason, this study attempts to determine the optimal use of remote hearings in the case of the suspect's participation in incidental proceedings on remand in detention at the pre-trial stage of the criminal proceedings. The first part of the study provides a concise insight into how different, selected jurisdictions adopted remote remand hearings, in order to then, through the prism of similarities and differences, define areas that indicate the existence of certain threats making the picture of *habeas corpus* through the use of remote hearings not at all clear, or maybe even blurred. The second part of the study is devoted to the reconstruction of the fundamental right's standard on the remote participation of the suspect in criminal proceedings by analysing the guidelines on the use of videoconferencing in criminal matters formulated in case law and relating it to the specifics of pre-trial detention hearings. This section also analyses the most important legal, and rights-related challenges, particularly relating to the right to effective legal representation. Lastly, in the third part of the study, an attempt is made to formulate conclusions relating to the optimal scope for the use of remote detention hearings.

Perspectief' (2020) Report at the request of the Department of Legislation and Legal Affairs (DWJZ) of the Ministry of Justice and Security <open.overheid.nl/documenten/ronl-8b316f4d152076a27bcfc968c1086d8ec0d66b79/pdf> accessed 30 March 2023; Michael Legg, Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) UNSW Law Journal 126.

2 Setting the Scene: Remote Pre-trial Detention Hearings in Selected Jurisdictions

When comparing legislative solutions from different systems, it may appear that a seemingly uncomplicated issue, such as holding a hearing remotely, may be implemented in a completely different manner, even in states having common constitutional traditions, recognising the same fundamental rights or analogous general principles of criminal procedural law. The comparative study covered five legal systems: Polish, Norwegian, Ukrainian, New Zealand and French. While the similarities are visible, the far-reaching differences on fundamental issues are striking.

Primarily, while the suspect's personal participation seems to be the general rule, the glaring differences regarding the mere admissibility and scope of remote pre-trial detention hearings are remarkable. It is striking that only the Polish regulation[3] broadly allows for remote proceedings on remand in custody (either for the initial decision, as well as for the decision on the extension of the detention period or review hearings regarding both decisions). Moreover, under Polish law regime admissibility merely depends on the court's possession of appropriate technical means and the fact that the suspect is deprived of liberty (meanwhile, the only negative prerequisite is the suspect's disability). Against this background, other examined legal systems strongly favour the physical presence, particularly during the first hearing. In Norway, the court may decide that a hearing on the extension of the detention period may be held as a remote hearing with video transmission when the court finds it unobjectionable (*ubetenkelig*) in view of the purpose of the hearing and other circumstances, and the hearing would otherwise entail costs that are disproportionate to the importance of the accused attending (Article 185 § 4 of the Norwegian CCP[4]). Provisional regulations were in place during the pandemic period extending remote suspect participation also to an initial remand in custody hearing.[5] However, these provisions were subsequently clarified by the Norwegian Supreme Court which stated that the right to be brought before a court within the meaning of Article 5 ECHR is to be understood as a physical appearance before a court, and consequently, that this right does not suffer from exceptions (apart from the situation explicitly indicated by the Court where the suspect is "incapable" of attending due to illness).[6] The Ukrainian provisions also excludes the

[3] See Article 250 §§ 3b – 3h of the Polish CCP (The Act of 6 June 1997 – The Code of Criminal Procedure, consolidated text: Journal of Laws of 2022, item 1375 as amended). Remote pre-trial detention hearings appeared in the Polish legal order on 24 June 2020. Although this amendment was introduced by a special law aimed at counteracting the effects of the pandemic, these provisions do have not an episodic nature but are permanent.

[4] Lov om rettergangsmåten i straffesaker (Straffeprosessloven).

[5] Temporary Regulations of 27 March 2020 on "simplifications and measures within the justice sector to remedy consequences of the outbreak of Covid-19" (the Corona Regulations), FOR-2020-03-27-459.

[6] *A v Public Prosecution Authority* Order HR-2020-972-U (Appeals Selection Committee SCN). See also Eirik Holmøyvik, Benedikte Moltumyr Høgberg, Christoffer Conrad Eriksen, 'Norway: Legal Response to Covid-19', in Jeff King and others (eds), *The Oxford Compendium of National Legal Responses to Covid-19*

possibility of remote participation of the suspect in an initial custody hearing, allowing no exception even during the pandemic period – due to the recognition that both the Ukrainian Constitution and Article 5 § 3 ECHR require the physical presence of the suspect before the court.[7] By contrast, a remote court hearing to consider the request for the extension of detention is only possible if the suspect does not object. The New Zealand legislation takes a similar approach, considering suspect's remote participation inadmissible for this type of case, with a potential exception made with the consent of the suspect, evaluated on a case-by-case basis.[8] Two observations are therefore striking: the lack of uniformity on the fundamental issue and the strong belief that a suspect's presence before the court, especially in the case of an initial detention hearing, should be of a physical nature.

There is also a different approach to the prerequisites for remote remand-in-custody hearing. While the Polish regulation in principle does not specify any criteria that should be followed by the court in making its decision, the other provisions seem to make the admissibility of remote hearing subject to establishing the existence of a certain compelling reason that would allow such a form of proceedings, while at the same time formulating at least exemplary prerequisites to be considered in the decision-making process. Against this background, the question arises as to the limits of the procedural authority's discretion in deciding on a remote hearing and the optimal set of grounds that should be analysed in this context. Of particular relevance seems to be the consent of the suspect (lack of objection), which is clearly indicated by all the systems discussed (except Polish one), albeit with different implications. In some jurisdictions, it is of decisive, absolute character (e.g., in Ukraine for extended custody hearing) and relative character in others (New Zealand, France, Norway).

Significantly, all the examined systems recognise the need to adopt specific remedies to safeguard the effective nature of the defence provided to the suspect in relation to the detention hearing, however, in a different manner. While the principle appears to be the provision of a confidential channel of communication allowing the suspect to consult the defence counsel during the remote hearing (with the exception of Poland, which specifies a relative right to a break for the purpose of a telephone conversation), only the French system expressly suggests the need to adopt appropriate arrangements related to the access of the defence counsel to the case file in the situation where the defence counsel attends the hearing remotely.[9]

(OUP 2021) <oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e3> accessed 30 March 2023, paras 39-47.

[7] Oksana Kaplina, Svitlana Sharenko, 'Access to Justice in Ukrainian Criminal Proceedings During the COVID-19 Outbreak' (2020) 3(2-3) Access to Justice in Eastern Europe 115, 125-126; Rima Ažubalytė, Ivan Titko, 'Remote Criminal Trial – Fair Trial?' (2022) 8(2) International Comparative Jurisprudence 178.

[8] See Courts (Remote Participation) Act 2010 (sections 5-6 and 8-9).

[9] See Article 706–71 of the French CCP.

Moreover, only New Zealand's legal order explicitly recognises that a remote hearing involves very specific risks for the suspect related to the specifics of virtual presence and that any negative impressions should be addressed.[10]

Thus, it can be argued that the national overviews give the general impression of a lack of confidence in the admissibility of remote suspects' participation in the pre-trial detention hearings. It becomes necessary to consider the following issues. Firstly, does the right to be brought before a court necessarily imply a physical presence or is video link participation sufficient, and if so, under what conditions? Secondly, what concerns from the perspective of the rights of the defence become apparent in relation to the remote detention hearing and what remedies should be considered? Thirdly, what are other, specific perils that apply to remote pre-trial detention hearings that are not present in conventional hearings and how to mitigate them?

3 To Be Brought Physically or Virtually, that is the Question?

Article 5 § 3 ECHR stipulates briefly that anyone who has been arrested or detained must be brought promptly before a judge or other judicial officer. This provision raises the question of whether the right *to be brought before* a judge inherently requires physical presence or if remote participation satisfies this requirement. Given that the ECHR was drafted in 1950, it is unrealistic to expect that its authors anticipated the technological advancements of the present era. It is clear that it was assumed that the suspect would be physically brought before the court. However, despite the passing of decades, the case law of the ECtHR still does not offer a definitive response to the question. In *Schiesser*[11] ECtHR stated, "the procedural requirement places the 'officer' under the obligation of hearing himself the individual". In turn, in *Medvedyev and Others*[12] ruled that the purpose of the Article 5 § 3 ECHR is to ensure that arrested persons are *physically* brought before a judicial officer. Later case law reiterated the emphasis on the physical nature of bringing an individual before a judicial officer.[13]

On the other hand, in *Bergmann*[14] ECtHR stated that the text of Article 5 § 3 ECHR does not prescribe the precise procedural solutions that ought to be applied in accordance with the content of said provision. In doing so, the Court added that "what the text of Article 5 § 3 does require is that a person has to be brought promptly before a judge or other judicial officer after having been arrested or detained." Accordingly, the case law of the ECtHR on Article 5 § 3 does not provide any further guidance and, in particular, does not provide for further interpretation of the terms "physically", "brought before" or "hearing himself". As Serena Quattrocolo rightly observes, case law focuses on the

[10] Section 6(c) (n 8).

[11] *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979) para 31.

[12] *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010) para 118.

[13] See, among others, *Vassis and Others v France* App no 62736/09 (ECtHR, 27 June 2013) para 52; *Hassan and Others v France* App nos 46695/10 and 54588/10 ECtHR, 4 December 2014) paras 91-92.

[14] *Bergmann v Estonia* App no 38241/04 (ECtHR, 29 May 2008) para 45.

aspect of the "promptness" and prerogatives of the judge or other judicial officer rather than on the place or manner in which a remand-in-custody hearing should be organised.[15] Nevertheless, the case law does not explicitly prohibit the suspect's remote participation in this category of hearing, thereby complicating the resolution of the aforementioned dilemma.

To resolve the issue at hand, reference should be made to the objectives of Article 5 § 3. As the ECtHR has repeatedly pointed out, there is both a procedural and a substantive requirement. While the procedural requirement places the "judicial officer" under the obligation of hearing himself the individual brought before him, the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify the detention and of ordering release if there are no such reasons.[16] Hence, the fundamental aim of this institution is therefore protecting the individual against any arbitrary or unjustified deprivation of liberty and the essential feature of the guarantee embodied in Article 5 § 3 ECHR is precisely judicial control of interferences by the executive with individuals' right to liberty.[17]

It thus appears that the procedural requirement is entirely subordinated to the substantive one, to enable it to be implemented and to reach the whole aim of Article 5 § 3. The emphasis is therefore on shaping the proceeding in such a way that it enables the objective of protecting the individual from arbitrariness, and abuse of powers and mitigating the risk of ill-treatment to be achieved. Consequently, if video link participation makes it possible to achieve this result, if the remote hearing is organised in such a manner that the right to be brought before a court is preserved and is not impaired, but only the manner in which it is exercised is altered, it is not possible to dismiss the conclusion that a remote detention hearing, even first appearance, can satisfy requirements of Article 5 § 3 ECHR (and also § 4). It seems that similar conclusions are also reached in the literature.[18]As Evert-Jan van der Vlis observes, it is established in ECtHR's case law that the ECHR is "a living instrument which must be interpreted in light of present-day conditions"[19]. Moreover, in the *Bah* case the Strasbourg Court did not rule out the possibility of conducting a detention review

[15] Serena Quattrocolo, 'Participatory Rights in Comparative Criminal Justice: Similarities and Divergences Within the Framework of the European Law' in Serena Quattrocolo, Stefano Ruggeri (eds), *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe* (Springer Cham 2019) 463.

[16] Schiesser v Switzerland (n 11).

[17] *Aquilina v Malta* App no 25642/94 (ECtHR, 29 April 1999) para 47.

[18] Evert-Jan van der Vlis, 'Videoconferencing in criminal proceedings' in Sabine Braun, Judith L. Taylor (eds), *Videoconference and remote interpreting in criminal proceedings* (Guildford: University of Surrey 2011) 20; Quattrocolo (n 15) 465; Sanders (n 2) 19-20; Pierpaolo Gori, Aniel Pahladsingh, 'Fundamental Rights under Covid-19: A European Perspective on Videoconferencing in Court' (2021) 21(4) ERA Forum 561, 576.

[19] *Tyrer v United Kingdom* App no 5856/72 (ECtHR 25 April 1978) para 31.

hearing with remote participation of the person deprived of liberty, albeit the case concerned immigration detention.[20]

Finally, although in the case law the physical participation of the accused at the trial stage should be perceived as the principle, determined by a set of guarantees under Article 6 ECHR, in particular § 3, the ECtHR allowed exceptions in favour of remote participation. In various cases,[21] the Court stipulated that the use of a video link in the proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that certain requirements are met. It appears that, at least initially, the Court used a three-step test. Firstly, whether the use of this communication technique in any given case pursues a legitimate aim. Case law has provided an extensive catalogue of such "compelling reasons" which include prevention of disorder, prevention of crime (the most serious), protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement (reducing the delays incurred in transferring detainees), which are essentially related to the fundamental issue – the need to fight organised crime efficiently. Secondly, whether the accused was able to follow the proceedings and to be heard without technical impediments. At this stage, the assessment must include the quality of the video link possibility to following the progress of the hearing or making oral remarks and putting questions to the participants in the proceedings when necessary. Thirdly, effective, and confidential communication with a lawyer was provided. It seems that these considerations can be successfully transposed to Article 5 §§ 3 and 4 ECHR hearings, although, the different specificity must be considered. Besides, as the ECtHR stated in *Imbriosca* case, requirements of Article 6 may also be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.[22]

Admittedly, the substance of this decision is based on the balance between the fundamental relevance of the defendant's personal presence and the need to combat serious, organised crime[23]. However, the weighing takes place on a case-by-case basis, so it is impossible to discuss an established hierarchy of values or a clear methodological approach.[24] But, in more recent jurisprudence the Strasbourg Court

[20] *Bah v the Netherlands* App no 35751/20 (ECtHR 22 June 2021) paras 40-45.
[21] *Marcello Viola v Italy (no. 1)* App no 45106/04 (ECtHR 5 October 2006) paras 63-67; *Asciutto v. Italy*, App no 35795/02 (ECtHR 27 November 2007) paras 62-73; *Grigoryevskikh v Russia* App no 22/03 (ECtHR 9 April 2009) para 83; *Sakhnovskiy v Russia* [GC] App no 21272/03 (ECtHR 2 November 2010) para 98; *Yevdokimov and Others v Russia* App nos 27236/05 and 10 others (ECtHR 16 February 2016) para 43; *Ichetovkina and Others v Russia*, App nos 12584/05 and 5 others (ECtHR 4 July 2017) para 45; *Bivolaru v Romania (no. 2)* App no 66580/12 (ECtHR 2 October 2018) paras 138–139, 144-145; *Dijkhuizen v the Netherlands*, App no 61591/16, (ECtHR 8 June 2021) paras 53-60.
[22] *Imbrioscia v Switzerland* App no 13972/88 (ECtHR 24 November 1993) para 36.
[23] Quattrocolo (n 15) 464; Marcello Daniele, 'Testimony Through Live Link in the Perspective of the Right to Confront Witnesses' (2014) 3 Crim LR 189; Gori, Pahladsingh (n 27) 574-577.
[24] Daniele (n 23) 194.

does not carry out the first element of the aforementioned test in an explicit manner, not to say that it even departs from it. For example, in the case of *Gennadiy Medvedev*[25], which did not involve organised crime, in addressing the applicant's allegations relating to the failure to provide for physical participation in the trial, the ECtHR merely noted that there was no evidence of the poor quality of the video link, and the applicant was able to present his case. Similarly, in the case of *Golubev.*[26] The Court recalls that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole. This tendency is noticeable not only in criminal matters. In *Jallow*[27], although formally referring to the *Viola* case and pointing to the need to seek a "legitimate aim", the Court basically focused on a general emphasis that in this case the remote hearing was expedient and efficient, and the applicant did not suffer a substantial disadvantage. However, it is particularly interesting that in this case, the Strasbourg Court asked itself whether the decision "to a decisive extent depends on the judges immediate impression of the parties through their physical presence". This also seems to be of great importance in remote detention hearings, especially for an initial appearance. Therefore, is the videoconference still a highly exceptional curtailment of fundamental rights, subject to careful balancing against competing interests?[28]

4 Rising the Shield: Right to Defence-Related Concerns

In *Schiesser,*[29] ECtHR stated that a lawyer's presence at the detention hearing is not mandatory. However, it becomes particularly relevant that the Strasbourg Court requires the consideration of whether the procedural arrangements for the conduct of the remote hearing respected the rights of the defence. Repeatedly, the ECtHR jurisprudence uses the argument that the restriction of the right should be *sufficiently counterbalanced* by the procedures followed by the judicial authorities, in order to preserve the essence of the rights.[30] It is therefore necessary to provide the suspect with a kind of defence shield.

As stated in the case of *Shulepov*[31], the exercise of the right to legal assistance takes on particular significance when the applicant communicates with the courtroom by video link. In this case, the ECtHR held that there had been a violation of Article 6 §§ 1 and § 3 (c) ECHR due to the failure to appoint counsel to an accused in a situation where the accused had remotely participated in the hearing and the prosecutor was in the courtroom in person – even though the accused had not requested it. This position was

[25] *Gennadiy Medvedev v Russia* App no 34184/03 (ECtHR 14 April 2012) paras 32-41; *Ichetovkina and Others* (n 30) paras 33-41.
[26] *Golubev v Russia* App no 26260/02 (ECtHR 9 November 2006).
[27] *Jallow v Norway* App no 36516/19 (ECtHR 2 December 2021).
[28] Similarily concludes Quattrocolo (n 15) 465.
[29] Schiesser v Switzerland (n 11) para 36.
[30] Daniele (n 23) 198.
[31] *Shulepov v Russia* App no 15435/03 (ECtHR 26 June 2008) paras 34-36.

reiterated by the court in later cases.[32] Thus, it appears that mandatory attendance of defence counsel at a detention hearing held remotely is an important procedural remedy to compensate the suspect for not being brought physically before the court. However, it is not so much the mere fact of being provided with a lawyer that is important, but the effective way the right of defence is to be exercised.[33]

Firstly, effective defence is impossible without the possibility for the defendant to communicate with his lawyer privately, confidentially, and out of hearing of third persons.[34] This issue becomes even more prominent in a situation where the suspect's participation in a detention hearing, unlike that of the defence counsel, is to take place remotely. It is completely natural that during the hearing the defence counsel and the defendant share observations. It is however problematic how to do this in the absence of their simultaneous physical presence in the same place. Thus, decisive consideration should be given to whether the domestic authorities made sufficient arrangements for the contact between the defence counsel and the suspect that ensured a trust-based relationship between them.

At the forefront is the requirement to provide a private, confidential consultation prior to the hearing.[35] In *Sakhnovskiy*[36] Strasbourg Court stated that the fifteen minutes for the defendant to consult with the newly appointed lawyer, just before the remote hearing began, given the complexity and seriousness of the case, was clearly not sufficient. Against this background, in the case of *Golubev,*[37] the Court declared that the mere fact that a defendant participating remotely in the hearing did not have the opportunity for ongoing consultations with his counsels located in the Supreme Court in person does not in itself establish a violation of the rights of the defence, since the defendant had an unfettered opportunity to consult with his counsels even before the hearing, in full confidentiality.

On the other hand, confidentiality, and ease of exchange of information between lawyer and client, both prior to and during the hearing, are particularly important. For the effective implementation of the right to confidential consultation of the suspect with the client in the case of a detention hearing taking place by video link, it is, therefore, necessary to provide a special channel of communication intended only for the defence counsel and the suspect. The case law of the ECtHR provides examples of lack of privacy, indicating that channels of contact should be adequately secured against any

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[32] *Grigoryevskikh v Russia* (n 21) para 92; *Slashchev v Russia* App no 24996/05 (ECtHR 31 January 2012); *Stafeyev v Russia* App no 32984/06 (ECtHR 8 December 2020).

[33] *Sakhnovskiy v Russia* (n 21) para 95; *Ichetovkina and Others v Russia* (n 21); *Yudin and Others v Russia* App no 34963/12 and 6 others (ECtHR 4 October 2022).

[34] *Öcalan v Turkey* [GC] App no 46221/99 (ECtHR ECHR 12 May 2005) para 133.

[35] Marcello Viola v Italy (n 21); Golubev v Russia (n 26).

[36] *Sakhnovskiy v Russia* (n 21) para 104; see also *Gorbunov and Gorbachev v Russia* App nos 43183/06 and 27412/07 (ECtHR 1 March 2016) para 37.

[37] Golubev v Russia (n 26).

attempt at interception, also where the defendant uses the videoconferencing system installed and operated by the State[38], as well as the tapping of a conversation between the defence counsel and the lawyer is excluded, as happened in *Zagaria*.[39]

The Strasbourg Court has also provided some suggestions for desirable arrangements. Although the ECtHR has not examined in detail the technical solutions adopted, it has accepted the provision of consultation during the remote hearing itself via a secured telephone line.[40] In contrast, the judgement in *Modarca*[41] case hints at the fact that consultations must be characterised by a certain level of comfort and must provide an opportunity for normal discussion and work with documents. Moreover, the ECtHR has positively evaluated the "dual defence" approach.[42]

Secondly, from a praxeological point of view, access to the case file, namely the documents in the content of which the prosecution seeks a "probable cause" for pre-trial detention, is crucial for the exercise of the right to defence at the pre-trial detention hearing stage. On the basis of Article 5 § 4 ECHR, the Strasbourg Court has repeatedly reiterated that a certain degree of access to the case file if only to such an extent as to afford the detainee an opportunity to effectively challenge the evidence on which his detention was based, may in certain instances be envisaged in proceedings concerning a review of the lawfulness of detention on remand.[43] In other words, both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[44]

It becomes evident that specific provisions are required to enable access to the case file during remote pre-trial detention hearings. Practical difficulties are likely to arise, particularly when the newly appointed defence counsel is expected to familiarise himself with the case file submitted with the application for detention on remand and subsequently consult with the suspect in a detention facility. This process can be time-sensitive, with the application often requiring a decision within a short period of time. In such situations, the file may only become accessible moments before the hearing, rendering it difficult for the defence counsel to study the materials in detail. The French solution provides a noteworthy approach to this issue, requiring that a copy of the entire case file be made available to the defence counsel, along with the suspect,

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[38] ibid.

[39] *Zagaria v Italy* App no 58295/00 (ECtHR 27 November 2007) para 36; *Yudin and Others v Russia* (n 33) paras 41-44.

[40] *Marcello Viola v Italy*; *Sakhnovskiy v Russia* (n 21).

[41] *Modarca v Moldova* App no 14437/05 (ECtHR 10 May 2007).

[42] *Marcello Viola v Italy*; *Sakhnovskiy v Russia* (n 21). See also Vânia Costa Ramos and others, 'European Criminal Bar Association (ECBA) Statement of Principles on the Use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World' (2021) 12(3) New Journal of European Criminal Law 476, 489 (para 70).

[43] *Lamy v Belgium* App no 10444/83 (ECtHR 30 March 1989) para 29; *Chruściński v Poland* App no 22755/04 (ECtHR 6 November 2007) para 55.

[44] *Gabor Nagy v Hungary (No. 2)* App no 33529/11 (ECtHR 11 February 2014) para 88.

attending the remote hearing from the detention facility. The digitisation of case files in certain legal systems has made remote access to remand applications and related evidence more feasible, thus facilitating the balancing of the distorted proportion of powers in such proceedings. However, this is not yet a standard practice everywhere, although it should be advocated as a solution to the identified difficulties.[45] Additionally, it appears that the prosecution, rather than the court, should bear the responsibility of providing copies, even if digital.[46]

Thirdly, the matter of the appearance of the defence counsel in a remote pre-trial detention hearing requires separate consideration. Besides dual defence, there are two possibilities: the defence counsel participating remotely alongside the suspect from the detention facility or appearing physically in court. The first solution offers the undeniable advantage of enabling ongoing, confidential, and unrestricted communication, without the need for specific technical arrangements. Additionally, in the case of court-appointed defence counsel, direct physical contact allows for the establishment of a relationship built on trust to a greater extent. Such trust is pivotal for an effective defence, ensuring confidence in the chosen defence strategy, the voluntary nature of the client's choices, and the preparedness of the client to address the court. However, the first solution also carries the drawback of placing the passive party in an inferior position compared to the active party (remote participation versus physical presence), giving rise to risks and challenges described in another section.

Practically, it is likely that the defence counsel will opt for a two-fold approach: consulting the client in person before attending the courtroom physically. This strategy aims to counterbalance and mitigate the risks associated with remote participation by the client. Moreover, the defence counsel's decision to participate remotely alongside the suspect is unlikely to pose significant risks related to technical issues, such as connection interruptions, and poor quality affecting the strength of the defence counsel's voice.

Hence, it should be acknowledged that the arrangement for the appearance of the defence counsel should be a consequence of the procedural arrangements made in each legal order regarding pre-hearing lawyer-client consultation and communication during the hearing itself. However, it is not appropriate to compel the defence counsel to appear in court against his own will or that of his client.

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[45] Costa Ramos (n 42) 491 (para 51).

[46] These observations gain further support from EU secondary law. While the regulation of pre-trial detention hearings, including remote ones, is not explicitly addressed in EU law, certain aspects fall within the scope of the EU legal framework. This applies to both access to legal representation in relation to the pre-trial detention hearing (Directives 2013/48 EU and 2016/1919) and access to the case file (Article 7 Directive 2012/13/EU, see also recital 30).

5 Lowering the Sword: Specific Challenges of Remote Participation

If there exists a compelling reason to avoid physically bringing the suspect before the court, and the technical arrangement in a given legal order enables the suspect's effective and efficient participation, it is worth posing a slightly provocative question: what exactly justifies the relevance of the suspect's physical presence?

Academia and criminal process practitioners typically view the significance of physical presence as self-evident and firmly anchored in the values underpinning the principles of immediacy, orality and adversariality. However, addressing this question requires going beyond the realm in which lawyers usually navigate. Consideration must consider extra-legal factors, flowing from specific behavioural, communicological and proxemic conditions, which may have very far-reaching consequences from a legal perspective.

Primarily, a face-to-face conversation is considered to be the most effective and comprehensive way of conducting communication and dialogue.[47] This is because only such a form of communication allows for the swift transfer of verbal, physical, contextual, intentional and non-intentional dimensions of communication.[48] Therefore, on psychological grounds, from the beginning of the introduction of technological innovations in the sphere of interpersonal communication, questions have been raised about the equivalence of such forms of communication with face-to-face conversation. These studies lead to unsatisfactory conclusions. Firstly, videoconferencing limits the experience of communication caused by non-verbal eye contact ("shifted eye contact"), which reduces trust in communication, exacerbates cultural differences[49] and leads to the possibility of altered judgement. [50] Secondly, research has shown that camera settings (different angles) and lighting for the judge's perception of the person being questioned matter, and ultimately, it substantially limits opportunities to capture non-

[47] Jo Hynes, Nick Gill, Joe Tomlinson, 'In Defence of the Hearing? Emerging Geographies of Publicness, Materiality, Access and Communication in Court Hearings' (2020) 14(9) Geography Compass 7; Sabine Braun and Judith L. Taylor, 'Video-Mediated Interpreting in Criminal Proceedings: Two European Surveys' in Sabine Braun and Judith L. Taylor (eds), *Videoconference and Remote Interpreting in Criminal Proceedings* (Intersentia 2012) 70.

[48] Krešimir Kamber, 'The Right to a Fair Online Hearing' (2022) 22(2) Human Rights Law Review <academic.oup.com/hrlr/article-abstract/22/2/ngac006/6548151?redirectedFrom=fulltext#no-access-message> accessed 30 April 2023 8-9.

[49] Hynes, Gill, Tomlinson (n 56) 6-8; Yvonne Fowler, 'Court Interpreting in England: What Works? (and for Whom)? How Interpreted Prison Video Link Impacts upon Courtroom Interaction' (2016) 3(2) Language and Law/Linguagem e Direito 139-140.

[50] Mark Federman, 'On the Media Effects of Immigration and Refugee Board Hearings via Videoconference' (2006) 19(4) Journal of Refugee Studies 433ff; Niclas Kaiser, Kimberly Henry, Hanna Eyjólfsdóttir, 'Eye Contact in Video Communication: Experiences of Co-creating Relationships' (2022) 13 Frontiers in Psychology <www.frontiersin.org/articles/10.3389/fpsyg.2022.852692/full> accessed 30 April 2023.

verbal cues,[51] and, at the same time, has a negative impact on defendants because it results in depersonalising the interaction between those present in the courtroom and the defendant in front of the camera, reducing the opportunity for interaction between the defendant and defence counsel and the quality of their communication, as well as, reducing the involvement of the defendant in the proceedings.[52] Thirdly, "distortions based on lighting, the setting from which a defendant appears, the audio feature of the videoconference platform, and may lead a judge to perceive a defendant as less credible or more dangerous."[53] This threat is demonstrated by subsequent studies. In 3 out of 6 of the courts surveyed with jurisdiction over immigrant cases, judges changed their previous assessment of the credibility of the testimony, based on a videoconference hearing, after re-examining the same person in a conventional manner.[54] Other studies suggest that videoconferenced witness statements from minors are assessed as less detailed, consistent, reliable and honest.[55] For this reason, the literature indicates that videoconferencing, despite subsequent improvements, cannot be compared to face-to-face contact in face-to-face time. The in-person contact in particular is important for the defendant to build his credibility.[56]

Secondly, courtroom participation is associated with a formal ceremony and a solemn ritual that involves spoken words, gestures, attire, and spatial arrangements or even architecture, all of which carry meaning. Symbolism and proxemics influence the appropriately imposed hierarchy of roles played by the participants in the proceedings, affect the feelings of uncertainty and stress of the interviewed persons, as well as affect the participants by triggering certain emotions and behaviour. This is of particular

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[51] G. Daniel Lassiter and others, 'Videotaped Confessions: Panacea or Pandora's Box?' (2006) 28(2) Law and Policy 192, 195-201; Amy Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video-Conferencing in Civil Trials in Ontario' (2012) 50(2) Osgoode Hall Law Journal 429, 445; Rowden (n 2), Hynes, Gill, Tomlinson (n 47).

[52] Anne Bowen Poulin, 'Criminal Justice and Videoconferencing Technology: The Remote Defendant' (2004) 78(4) Tulane Law Review 1089, 1118; Legg, Song (n 2).

[53] Robin Davis and others, 'Research on Videoconferencing at Post-Arraignment Release Hearings: Phase I Final Report' (2017) ICF International <www.ojp.gov/pdffiles1/nij/grants/248902.pdf?> accessed 30 March 2023, 5-6.

[54] United States Government Accountability Office, 'Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges' (2017) Report to Congressional Requesters <www.gao.gov/assets/gao-17-438.pdf> accessed 30 March 2023, 55.

[55] Holly K. Orcutt and others, 'Detecting Deception in Children's Testimony: Factfinders: Abilities to Reach the Truth in Open Court and Closed-Circuit Trials' (2001) 25(4) Law and Human Behavior 339, 357-358, 366; See also: Gail S. Goodman and others, 'Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors Decisions' (1998) 22(2) Law and Human Behavior 165, 195-96; Karolina Dukała, Marta Fryda, 'Psychologiczne i Prawne Aspekty Przesłuchania z Wykorzystaniem Wideokonferencji' in Kinga Tucholska, Małgorzata Wysocka-Pleczyk (eds), *Człowiek Zalogowany 3: Różnorodność Sieciowej Rzeczywistości* (Biblioteka Jagiellońska 2014) 22-23.

[56] Edie Fortuna Cimino, Zina Makar, Natalie Novak, 'Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process' (2014) 45(1) University of Baltimore Law Forum 57; Jenia I. Turner, 'Remote Criminal Justice' (201) 53(1) Texas Tech Law Review 197.

relevance in court proceedings, where the participant is vis-a-vis the court, usually a bit down the line, facing his or her procedural opponent, which generates a specific communication arrangement, often resulting in a sense of discomfort and loss of control.[57] For this reason, it is pointed out that by simple shifts of place, location or ornamentation, a person's position within the space can transform them from the margins to being at the centre of the action taking place, it can enlarge or curtail their voice and it can convey respect and dignify a person, or alternatively, degrade them.[58] This change may entail difficulties faced by the judge in guaranteeing the proper conduct of procedural actions, including the keeping of order, as indicated by empirical evidence[59], as well as a possible (negative) change in the public's view of the court and, consequently, an undermining of the social legitimacy of the (remote) judiciary.[60]

Finally, studies have shown that defendants who were questioned by videoconference received noticeably higher bail amounts than defendants who were questioned in the courtroom (depending on the crime, the difference ranged from 54% to 90%)[61]. The literature has also focused extensively on asylum cases due to the crucial role that credibility plays in judges' assessments during these hearings. A review of more than 500,000 asylum removal hearing outcomes in the U.S. indicates that the use of video links "roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum."[62] Moreover, the U.S. immigration courts were significantly more likely to order the deportation of detainees who attended court remotely than detainees brought physically to court.[63]

In conclusion, the above threats can be structured into two overlapping dimensions. On the one hand, it is possible to refer to a certain limited perception bias. The conditions presented above for the remote participation of the suspect in a detention hearing result in impaired perception, and inability to follow non-verbal cues or gauge demeanour, which limits the judge's assessment of the defendant's arguments and the risk of ill-treatment in the end. On the other hand, the specific conditions linked to the remote participation affect how a defendant is perceived by the court and may make a judge more likely to perceive such an individual as a threat, which is prejudicial to the right

[57] Weronika Świerczyńska-Głownia, *Komunikowanie z perspektywy sali sądowej* (Instytut Dziennikarstwa, Mediów i Komunikacji Społecznej 2019) 145-163.
[58] Rowden (n 2) 108-109.
[59] Kamber (n 48) 9.
[60] Emma Rowden, Anne Wallace, 'Remote Judging: The Impact of Video Links on the Image and the Role of the Judge' (2018) 14(4) Int'l J L Context 504.
[61] Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions," Journal of Criminal Law and Criminology 100 (2010): 877-878, 900
[62] Frank M Walsh, Edward M. Walsh, 'Effective Processing or Assembly-Line Justice - The Use of Teleconferencing in Asylum Removal Hearings' (2007) 22 Georgetown Immigration Law Journal 259.
[63] Ingrid V. Eagly, 'Remote Adjudication in Immigration' (2015) 109(4) Northwestern University Law Review 933, 934.

to a presumption of innocence and may result in in a more severe reaction than when the suspect appeared in person.

6 Concluding Remarks

The traditional emphasis on physical presence in court stems from historical and procedural considerations. Physical presence has long been considered a fundamental aspect of judicial proceedings, as it facilitates direct and tangible interaction between the suspect, defence counsel, opposing parties and the court. It allows for non-verbal communication, such as body language and demeanour, which can influence the perception of credibility and truthfulness. Of course, remote participation can offer certain advantages. However, is a virtual presence sufficient to fulfil the objectives of Article 5 §§ 3 and 4 ECHR?

6.1 Physical Presence as a Starting Point?

At first sight, it can be concluded that it is not possible to dismiss the thesis that video link satisfies the requirements of Article 5 ECHR. Nevertheless, in the context of a detention hearing, the physical presence and direct, face-to-face contact of the suspect with the judge is invaluable. The limitations related to remote participation discussed above affect too far the possibility of achieving the objectives set for the institution of *habeas corpus*. Therefore, the conclusion should be made that detention hearing in the physical presence of the suspect should remain and always be the rule in all those cases where the suspect is brought before the court for the first time (e.g., the initial decision on detention on remand).

The institution embodied in the term *habeas corpus* realises two socially crucial functions, namely, to safeguard and guarantee the rights of the person deprived of liberty by the necessity to control the lawfulness of the arrest and detention and to effectively prevent ill-treatment and torture. The judge, as representative of the judiciary, therefore, becomes the first, vital element, protecting the individual from arbitrariness and abuse of power by state agents, which is what the suspect brought before the latter is aware of and awaits. So, it is important to realise that the role of the judge during the initial detention hearing is not easy at all. The judge is under the immense pressure of time, argumentation, and expectations of the prosecution and, in the meantime, must find in himself a very high degree of criticism of the position of state representatives and show equal interest not only in what is in the case file but also what (and how) the suspect will present in his defence at the hearing. The limitations associated with video link participation, therefore, deprive the judge to an important extent of the instruments that the judge is able and must use, thereby, directly, and indirectly, limiting the judge's ability to effectively perform the two functions indicated above.

Limitations of a direct nature are related to the limited perception of the judge. The decision as to whether the factual and procedural grounds for depriving the suspect of

his liberty for the duration of the proceedings have been met is not something usual and routine and certainly does not lead to a mechanical check of the prerequisites. A decision of this kind requires a cautious and thorough assessment of the true moral fibre of the suspect.[64] The judge must therefore gauge demeanour and capture non-verbal cues. Not only what the suspect says, but also eye contact and all other non-verbal elements are important. It is difficult to provide an exhaustive list of these elements here, especially as these elements are variable and, in practice, everything from vocabulary to tattoos on visible body parts (whether they are artistic or perhaps indicative of membership in a particular criminal group) can be helpful. Direct contact between the judge and a suspect with a low IQ or psychological issues or mental disabilities is also particularly significant. Moreover, it is of major importance not only for assessing the credibility and truthfulness of the suspect but also for the prevention of torture. The early stages of detention are, without a doubt, the most important moments for the prevention of torture. It is not just a question of hearing claims of torture, but of being able to spot any signs of torture, ill-treatment, or abuse. Behaviour and manner of expression can also tell a lot about physical and psychological well-being. In addition, the preventive and deterrent effect of the court's scrutiny is important. Law enforcement authorities must reckon with the obligation to physically bring the suspect to court and, consequently, that the court may see symptoms of ill-treatment. Remote participation may deprive the benefit of this effect. There is also always some uncertainty regarding who exactly is in the room with the suspect, especially if the defence counsel is present in the courtroom.

Indirect limitations, on the other hand, show that the judge may become less objective and may treat the suspect, whom he or she does not quite consciously perceive in a sort of "dehumanised way", in a far harsher manner than if the suspect had appeared in the courtroom in-person.

Moreover, in contemporary criminal procedure, albeit to a different extent in various national systems, the pre-trial stage becomes even more important as the evidence gathered at this stage may never reach the trial stage due to the extensive use of plea bargaining and out-of-court disposals. For this reason, it also becomes important to ensure that the suspect at this stage has an effective opportunity to comment on the evidence gathered – before the court.[65]

Thus, the result of a pre-trial detention hearing to a decisive extent depends on the judge's immediate impression of the parties through their physical presence. Hence, the participation of the suspect in the initial detention hearing should necessarily be

[64] Costa Ramos (n 42) 487 (para 53).
[65] Similarily, ibid. 481 (para 22).

combined with a physical appearance before the court.[66] The risks associated with a suspect's remote presence are disproportionately higher than the benefits.

6.2 Possible Exceptions?

It can be argued that remote hearing may be an optimal solution for the first detention hearing (initial appearance) in two situations: (a) where the alternative to remote participation in a remand hearing is not to be brought before a judge at all (within a reasonable time) – e.g., cases of custody on board seagoing vessels or in overseas territories, where access to a judge may be significantly restricted, or the suspect's serious illness; (b) where the suspect waives physical participation or consents to a remote hearing.[67]

There are no convincing arguments for (the first) remote hearing when a risk of public disorder or flight has been identified. Such risks can be countered, if only by hearing the suspect at a place of detention. Moreover, the more serious the charge, the higher the risk of harm to the suspect and consequently the need for direct, physical contact.

Remote hearings may also be conducted on extension of detention on remand period or an interlocutory appeal against a decision to impose or to prolong detention on remand or motion to release. The ECtHR has held Article 5 § 4 ECHR does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention but that it should be possible to exercise the right to be heard at reasonable intervals.[68] Moreover, the procedural guarantees of Article 5 § 4 ECHR are respected in circumstances where a detained person was already present before the first-instance court which ruled on his request to be released but then did not appear again before the second-instance court in the appeal proceedings.[69] Against this background, in cases where neither the detained person nor his lawyer had appeared but the public prosecutor had been present at the hearings, ECtHR considers that there has been a violation of the principle of equality of arms.[70] Thus, video link participation can be a significant improvement wherever the court limits itself to contact with the lawyer forgoing the order to bring the suspect to court.

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[66] The same position is held by ECBA. Ibid. 487 (paras 51-55). Similarly, the Human Rights Committee in relation to the content of Article 9(3) of the International Covenant on Civil and Political Rights – ICJ, 'Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards' (2020) 10-13, <www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf> accessed 30 March 2023.

[67] The Strasbourg Court explicitly extended the right to waive personal participation to remote hearings. See *Dijkhuizen v the Netherlands* (n 21) para 60.

[68] *Knebl v the Czech Republic* App no 20157/05 (ECtHR 28 October 2010) para 85.

[69] *Depa v Poland* App no 62324/00 (ECtHR 12 December 2006) paras 48-49; *Włoch v Poland*, App no 27785/95 (ECtHR 19 October 2000) paras 129-131.

[70] *Samoilă Cionca v Romania* App no 33065/03 (ECtHR 4 March 2008) para 74.

6.3 Decision-Making Procedure

As is clear from the ECtHR case law discussed above, videoconferencing may only be used if it serves a legitimate purpose and if sufficient safeguards are in place to guarantee the rights of the suspect. The decision should therefore be based on a mechanism that balances the sacrifice of the suspect's rights against other relevant interests. The optimal solution seems to be an overall, individual, judicial thorough assessment of the necessity of conducting a remote hearing in a given case, interpreted in the light of the risk and alternative procedural remedial measures available.

It is difficult to construct an exhaustive, closed catalogue of factors to be taken into account, nevertheless, it seems that it should consider such factors as, among others, the possible presentation (and the relevance) of the specific evidence, the number of participants involved, the disadvantages of suspect's attendance in person, including suspect's vulnerability, quality of transmission, parties views, what alternatives are available and to what extent they should be preferred.

The legislation should clearly establish the physical participation principle and indicate that only particularly justified circumstances may be the basis for a derogation. Excessive discretion should be prevented. As the ECtHR stated, "the primary purpose of procedural rules is to protect the defendant against any abuse of authority, and it is, therefore, the defence which is the most likely to suffer from omissions and lack of clarity in such rules.". For this reason, the need for unambiguous legislation is clearly emphasised, which is justified by legitimate expectations and legitimacy. [71]

The decision on the suspect's remote participation in pre-trial detention should be open to possible review before a competent authority in accordance with national law.[72]

6.4 Procedural Arrangements to Counterbalance Participation by Video Link

It is necessary to enable the suspect to exercise the right to attend, hear and follow the proceedings by replicating the conditions of the conventional hearing – appropriate transmission quality, different camera angles (everyone can see everyone) and appropriate framing. It is particularly important to enable the judge to perceive non-verbal cues as much as possible, viewing the whole figure, not just the face of the suspect (on the technical side, the aim should be to transmit as much as possible reflecting the true-life experience) – so that the right is not lost, but only exercised in a different way, while allowing the judge to achieve the purpose of Article 5 §§ 3 and 4 ECHR.

[71] Ažubalytė, Titko (n 7) 193; European Commission for the Efficiency of Justice (CEPEJ), 'Guidelines on videoconferencing in judicial proceedings (2021) 11.
[72] Ibid.

The method of transmission should disable (or at least reduce) the prejudice bias effect – including an appropriate arrangement of the interior where the suspect is staying, guaranteeing appropriate clothing for the time of the hearing.[73]

The realisation of the right to (effective) legal representation is also of exceptional importance. Remote participation should be compensated by providing the defendant with the obligation to: (a) appoint a defence counsel, even if the nature of the case did not require it under domestic law; (b) allow defence counsel to prepare for the defence – guarantee that case files are made available prior to the hearing (e.g. digitalised); (c) allow defence counsel to consult with the defendant before the start of the detention hearing (in adequate time) – is particularly relevant in cases of court-appointed defence counsel; (d) provide an effective channel of communication during the hearing – the guarantee of a free and confidential conversation between lawyer and suspect, without risk of tapping.

The issue of dual defence, i.e. legal assistance at both the courtroom and the suspect's location, appears to be particularly desirable when the proceedings are exceptionally complex and the charges are very serious, as well as in cases of the vulnerability of the suspect. This raises several practical shortcomings, such as ensuring access to the case file for both lawyers in different locations and allowing them to consult each other during the hearing in order to coordinate the defence. The question also arises as to whether the state should cover the costs of the second defence counsel. It seems so, since it is difficult to accept a situation in which the possibility to use dual defence will depend solely on the level of wealth of the suspect.[74]

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[73] De Hoon, Hirsch Ballin, Bollen (n 2) 38.
[74] De Hoon, Hirsch Ballin, Bollen (n 2) 40.

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THE NEGATION OF THE RIGHT TO LIBERTY IN THE CRIMINAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT

By Aze Kerte Amoulgam[*]

Abstract

The right to interim release of persons prosecuted for charges of serious international crimes within the primary jurisdiction of the ICC is not realizable in the current state of ICC law and its restrictive interpretation and application adopted by the judges. This paper highlights the difficulties that arise successively at the time of the limitation of liberty at the beginning of the proceedings, the request for provisional release and the reparation of the violation of the right to liberty. The level of proof and its mode of administration, the systematic consideration of the seriousness of the crimes and the heavy penalty incurred as flight factors, the choice not to consult the States, a restrictive formulation of the right to be judged within a reasonable time or released, the reluctance and refusal of States to receive persons likely to benefit from provisional release are among other obstacles that prevent suspects and accused from obtaining their interim release. All of the claims for compensation for violation of the right to liberty have also failed despite the long years of detention before acquittal because of the requirement of grave and manifest miscarriage of justice.

1 Introduction

There is a paradox in the ICC's practice of pre-trial release. It grants it to suspects and accused prosecuted for offences against the administration of justice[1] that fall within its jurisdiction only incidentally,[2] and refuses it for the serious international crimes for which it was created.[3] For these serious crimes, it has not granted any provisional release despite multiple requests from suspects and accused,[4] except for the questionable case of Gbagbo and Blé Goudé.[5]

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[1] *The Prosecutor v Paul Gicheru*, (2021) ICC-01/09-01/20-90-Red2, Decision on Mr Gicheru's Request for Interim Release, ICC Pre-Trial Chamber A, para 1. See also ICC, Press Release, « Aimé Kilolo Musamba, Narcisse Arido and Fidèle Babala Wandu released from ICC custody", (23 October 2014), online: <www.icc-cpi.int/news/aime-kilolo-musamba-narcisse-arido-and-fidele-babala-wandu-released-icc-custody> accessed 20 June 2023.

[2] Rome Statute of the International Criminal Court (18 July 1998), (Rome Statute) art. 70.

[3] Ibid, art. 5.

[4] « Defendants International Criminal Court » <www.icc-cpi.int/defendants?defendant_fulltext=&field_case_name_colloquial=All&page=0> accessed 20 June 2023.

[5] ICC, Press Release, "ICC Appeals Chamber amends the conditions of release of MM. Gbagbo and Wheat Goudé" <www.icc-cpi.int/news/icc-appeals-chamber-amends-conditions-release-mm-gbagbo-and-ble-goude> accessed 20 June 2023.

As a general rule, the accused are kept in detention throughout the trials despite the long time they take. For example, Bemba has spent over ten years in pre-trial detention in Scheveningen jails,[6] Al Hassan has already served more than four years in pre-trial detention since his transfer to the ICC on 31 March 2018,[7] Laurent Gbagbo and Charles Blé Goudé respectively seven years and two months and nearly five years, Germain Katanga more than six years,[8] Thomas Lubanga Dyilo about eight years and nine months,[9] Mathieu Ngudjolo Chui four years and ten months,[10] Bosco Ntaganda[11]and Dominic Ongwen more than six years.[12]

Yet the right to liberty, which is based on the principle of the presumption of innocence,[13] is enshrined in international human rights conventions[14] and has been internalised and practised for many years by States. It implies, among other rights, the right to appear free during the criminal trial, the right to be tried within a reasonable time or released, and the right to compensation for unlawful detention.

If the right to liberty is internationally recognised as a fundamental right, why interim release is not granted by the ICC for the accused persons prosecuted for serious crimes within its jurisdiction? Can we expect progress in this area in the next few years? The answers to those questions are found in the prevalence of detention over free appearance at the beginning of the proceedings, the shortcomings of the law of the ICC on interim release and its interpretation and application by the ICC judges, and the insurmountable obstacles to the reparation of the damages caused to the innocent detainees.

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[6] CPI, Communiqué de presse, « Affaire Bemba et al. : M. Bemba en liberté provisoire en Belgique en attendant une décision finale sur la peine », (15 juin 2018) <www.icc-cpi.int/Pages/item.aspx?name=pr1394&ln=fr> accessed 20 June 2023.

[7] ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Situation in Mali* (Case Information Sheet, ICC-PIDS-CIS-MAL-02-010/20_Eng, 2020) 1.

[8] ICC, *The Prosecutor v. Germain Katanga* (Situation in the Democratic Republic of the Congo, Case Information Sheet , ICC-PIDS-CIS-DRC-03-014/18_Eng, 2018) 1.

[9] ICC, *The Prosecutor v. Thomas Lubanga Dyilo* (Situation in the Democratic Republic of the Congo, Case Information Sheet , ICC-PIDS-CIS-DRC-01-016/17_Eng, 2017) 1.

[10] ICC, Press Release, "Ngudjolo Chui case: ICC Appeals Chamber confirms the acquittal decision", (27 February 2015) <www.icc-cpi.int/news/ngudjolo-chui-case-icc-appeals-chamber-confirms-acquittal-decision> accessed 20 June 2023.

[11] "Ntaganda case" <www.icc-cpi.int/drc/ntaganda> accessed 20 June 2023.

[12] "Ongwen case" <www.icc-cpi.int/uganda/ongwen> accessed 20 June 2023.

[13] Universal Declaration of Human Rights (1948), art. 11; International Covenant on Civil and Political Rights (1962), (ICCPR) art. 14(2); Convention on the Rights of the Child (1989), art. 49; Rome Statute (n 2), art. 66.

[14] ICCPR (n 13), art. 9; European Convention on Human Rights (1950), art. 5(3); American Convention on Human Rights (1978), art. 7(5); African Charter on Human and Peoples Rights (1981), art. 6.

2 The Prevalence of Detention over Free Appearance at the Beginning of the Proceedings

At the beginning of the proceedings, the arrest warrant is more often delivered than the summons to appear. The chance is rarely given to a suspect to appear freely and voluntarily. Moreover, even when acquitted at the end of the trials, the accused can be kept in jail during appeal.

2.1 The triumph of the arrest warrant over the summons to appear

The study of the restrictions admitted to the right to liberty of suspects and accused in the system of the International Criminal Court shows some obstacles concerning their impact on the effectiveness of the right to liberty. The warrant of arrest is the means used by the Pre-Trial Chamber at the request of the Prosecutor to seize the suspect and place him or her in detention for the purpose of the proceedings.[15] A warrant of arrest is issued when there are reasonable grounds to believe that crimes within the jurisdiction of the ICC have been committed and it appears necessary to detain the person suspected of having committed these crimes.[16] These two conditions of the article 58(1) of the Rome Statute are cumulative. The necessity of the detention is assessed on the base of the alternative criteria of the risk of absconding, of undermining the investigation and the procedure and of continuing the commission of the crimes.[17] The major problem with the procedure for issuing the arrest warrant in relation to the right to liberty is that it takes place *ex parte*, in the presence of the Pre-Trial Chamber and the Prosecutor and in the absence of the person concerned.[18] It is not an adversarial procedure, and the suspect cannot defend his or her right to appear voluntarily and freely.[19] The Court will therefore more often issue arrest warrants than summonses to

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[15] Rome Statute (n 2), art. 58(1).

[16] Ibid.

[17] *The Prosecutor v Jean-Pierre Bemba Gombo*, (2008) ICC-01/05-01/08-73, Decision on application for interim release, ICC Pre-Trial Chamber III (*Decision on application for interim release*), para 59. See also *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, (2008) ICC-01/04-01/07-572, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, ICC The Appeals Chamber (*Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release*), para 21; *The Prosecutor c Jean-Pierre Bemba Gombo*, (2009) ICC-01/05-01/08-403, Decision on Application for Interim Release, ICC, Pre-Trial Chamber II (*Decision on Application for Interim Release*), paras 44, 50.

[18] *The Prosecutor v Omar Hassan Ahmad Al Bahsir ("Omar Al Bashir")*, (2009) ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC, Pre-Trial Chamber I, para 5. See also *The Prosecutor v Bahr Idriss Abu Garda*, (2009) ICC-02/05-02/09_2, Summons to Appear for Bahr Idriss Abu Garda, ICC, Pre-Trial Chamber I (*Summons to Appear for Bahr Idriss Abu Garda*) para 4.

[19] *Situation in the Republic of Kenya*, (2011) ICC-01/09-42, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application

appear. Eight summonses to appear and 48 arrest warrants were issued over 45 defendants charged with serious crimes (106.67% of warrant of arrest: 2 warrants of arrest are issued for Al-Bashir, Abd-Al Rahman and Al-Werfalli).[20]

In addition, the standard of proof to deliver a summons to appear is higher than the one required to issue an arrest warrant. While chambers (and the Statute) require evidence of apparent necessity to issue an arrest warrant, they require sufficient appearance guarantees to issue a summons to appear.[21] The expression of a will to appear voluntarily by the suspect will generally not be enough to convince them.[22]

If we consider that the suspect is presumed innocent and that at this level of the procedure freedom is the rule and detention the exception, the option of the summons to appear should be studied as a priority. And to better guarantee this right, even if the suspect does not take part in the proceedings, the judges should perhaps invite the Office of the Public Council for the Defense to intervene in the respect of confidentiality.

2.2 Possible detention after acquittal: a violation of the right to liberty

Another restriction admitted to the right to liberty is the continued detention of a person acquitted at the end of the trial phase during the appeal procedure. Such a restriction is possible under the Rome Statute if there are exceptional circumstances and depending on the risk of absconding, the seriousness of the crime and the chances of the appeal to be successful.[23] This provision is incompatible with internationally recognized human rights which do not provide for the possibility of keeping an acquitted person in custody. The European Court of Human Rights confirms this approach by specifying that there are limited grounds for restriction of liberty listed in Article 5(1) of the European Convention for the Protection of Human Rights.[24] The same reasoning was followed by the Specialized Chamber of the Supreme Court of Kosovo to declare unconstitutional and not in conformity with the European

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under Article 58(7)', ICC Pre-Trial Chamber II (*Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)'*), para 23.

[20] « Defendants International Criminal Court » <www.icc-cpi.int/defendants?defendant_fulltext=&field_case_name_colloquial=All&page=0> accessed 20 June 2023.

[21] Summons to Appear for Bahr Idriss Abu Garda (n 18), para 20. See also *The Prosecutor c Ahmad Muhammad Harun (« Ahmad Harun ») and Ali Muhammad Ali Abd-Al-Rahman (« Ali Kushayb »)* (2007), ICC-02/05-01/20-17, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC Pre-Trial Chamber I (*Decision on the Prosecution Application under Article 58(7) of the Statute*), paras 117-18.

[22] *Situation in Darfour (Sudan)*, (2007), ICC-02/05-56, Prosecutor's Application under Article 58(7), ICC Pre-Trial Chamber I (*Prosecutor's Application under Article 58(7)*), paras 275-76.

[23] Rome Statute (n 2), art. 83(3)(c)(i).

[24] *Khlaifia and others v Italy App no*16483/12 (ECtHR 15 December 2016), para 88.

Convention on Human Rights such a measure envisaging the deprivation of liberty of an acquitted person.[25]

The broad interpretation of article 81(3)(c)(i) adopted in Gbagbo and Blé Goudé which allowed the Appeals Chamber to apply conditions to the release of acquitted persons in the presence of 'compelling reasons' is equally abusive.[26] An acquitted person should simply be released unless there are other reasonable grounds that they committed other crimes separate from those for which they were acquitted.[27]

3 Interim Release: An Impossible Mission?

Once the warrant of arrest is issued and the suspect arrested and presented to the ICC, he or she can exercise his right to ask the judge of the Pre-Trial Chamber to be released with or without conditions during the proceedings. This right can be exercised on the basis of article 60 of the Rome Statute, which provides for four legal regimes for requests for provisional release: the first request for interim release, the periodic review of the detention, the review of detention after the confirmation of charges and the liberty pending trial for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.[28] In addition to these four legal regimes of provisional release, there is a fifth regime emanating from case law of the ICC, namely provisional release on humanitarian grounds.

3.1 Interim release assessed on the criteria of the arrest warrant

The first three release regimes have the same assessment criteria as the warrant of arrest, namely the reasonable grounds that crimes within the jurisdiction of the ICC

[25] *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, (2017) KSC-CC-PR-2017-01/F00004, Specialist Chamber of the Constitutional Court (*Judgment on the Referral of the Rules of Procedure and Evidence),* para 205. 'On this basis, the Court finds that, regardless of the circumstances, the continued detention of an acquitted person pending the determination of the appeal against his or her acquittal in the absence of reasonable suspicion of his or her having committed a separate criminal act in respect of which a charge has been laid, is not foreseen by law and does not fall under one of the permissible grounds for deprivation of liberty. Consequently, the Court concludes that Rule 158(2) is not in compliance with the Constitution.'

[26] *The Procureur v Laurent Gbagbo and Charles Blé Goudé*, (2019) ICC-02/11-01/15-1251, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, ICC The Appeals Chamber (*Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute*), para 55.

[27] *Judgment on the Referral of the Rules of Procedure and Evidence (*n 25).

[28] *Rome Statute* (n 2), art. 60.

have been committed and the apparent necessity to detain the suspected or accused person.[29] They also have their own rules.

The first application for provisional release, which may be introduced orally at the first appearance or subsequently in writing, is a *de novo* examination of the conditions of article 58(1).[30] The suspect has for the first time the opportunity to challenge the reasons for his or her detention and to request his or her free appearance; this requires the chamber seized to re-examine all the conditions. The periodic review, which takes place at least every 120 days[31] after the first review or after any following previous decision,[32]

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[29] Ibid, art. 60(1) and (2). The Statute refers to the conditions of art. 58(1).

[30] *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, (2020) ICC-02/05-01/20-115, Decision on the Defence Request for Interim Release, ICC Pre-Trial Chamber II (*Decision on the Defence Request for Interim Release*), paras 24-25. See also *The Procureur v Laurent Koudou Gbagbo*, (2012) ICC-02/11-01/11-278, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", ICC The Appeals Chamber (*Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"*), paras 22-28.; *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, (2015) ICC-01/05-01/13-970, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for provisional release'", ICC The Appeals Chamber (*Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for provisional release'"*), para 24.

[31] *Rules of Procedure and Evidence* (2002), (RPE) rule 118(2). See also *The Prosecutor v Jean-Pierre Bemba Gombo*, (2010) ICC-01/05-01/08-843, Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, ICC Pre-Trial Chamber III (*Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence*), para 52.; *The Prosecutor v Jean-Pierre Bemba Gombo*, (2008) ICC-01/05-01/08-321, Decision on Application for Interim Release, ICC Pre-Trial Chamber III (*Decision on Bemba's Application for Interim Release*), para 29.

[32] *The Prosecutor v Laurent Gbagbo*, (2014) ICC-02/11-01/11-718-Red, Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, ICC Trial Chamber I (*Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute*), para 31. 'The Chamber recalls the following applicable law regarding interim release:
(e) Under Article 60(3) of the Statute, a chamber may modify its previous ruling on detention, release or conditions of release if 'it is satisfied that changed circumstances so require'. The previous ruling on detention refers to the initial decision made under Article 60(2), as well as any potential subsequent modifications made to that decision under Article 60(3) of the Statute. A chamber is not obliged to undertake a de novo review of the conditions underpinning detention.
(f) Changed circumstances mean a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a chamber that a modification of its prior ruling is necessary. If there are changed circumstances, a chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention. If, however, a chamber finds that there are no changed circumstances, it is not required to further review the ruling on release or detention. When

has a more limited scope.[33] It consists of verifying whether there are changed circumstances which justify the seized chamber changing its previous ruling on the detention.[34] Changed circumstances mean '(…) either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary'.[35] The 120-day period is not enforceable against the detainee or the Prosecutor, who may submit their request for review at any time.[36] This periodic review is carried out until the confirmation of the charges and continues in the interests of justice until the opening of the trial.[37] After the opening of the trial, the review is no longer automatic; it takes place at the request of the detained person, the Prosecutor and on the initiative of the Trial Chamber.[38]

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addressing changed circumstances, the Prosecution does not have to re-establish the same underlying facts if these facts continue to apply.

(h) In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and none are self-evident, the chamber's discretion to consider conditional release is unfettered' [references omitted].

[33] Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'" (n 30), para 23.

[34] *The Prosecutor v Laurent Gbagbo*, (2012) ICC-02/11-01/11-291, Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, ICC Pre-Trial Chamber I (Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute), para 33.

[35] *The Prosecutor v Jean-Pierre Bemba Gombo*, (2009) ICC-01/05-01/08-631, Judgment on the appeal ofthe Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", ICC The Appeals Chamber (Judgment on the appeal ofthe Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"), para 60.

[36] *The Prosecutor c Jean-Pierre Bemba Gombo*, (2009) ICC-01/05-01/08-403, Decision on Application for Interim Release, ICC Pre-Trial Chamber II (*Decision on Application for Interim Release*), para 31.

[37] *Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute* (n 32), para 31. See also *The Prosecutor v Laurent Gbagbo*, (2015) ICC-02/11-01/11-808, Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, ICC Trial Chamber I (*Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute*), paras 24-25.

[38] *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, (2022) ICC-02/05-01/20-724, Decision on the Defence's submissions on the review of detention, ICC Trial Chamber I (*Decision on the Defence's submissions on the review of detention*), paras 9-10. 'The Chamber reiterates that review of detention after the start of trial is not automatic and that a hearing would only be warranted if the Defence states that, there are new circumstances that militate in favour of provisional release of the accused.' See also *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, (2017) ICC-02/11-01/15-846, Decision on Mr Gbagbo's Detention, ICC Trial Chamber I (*Decision on Mr Gbagbo's Detention*), para 10.; *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, (2018) ICC-02/11-01/15-1156-Red, Decision on Mr

Being all based on the conditions of article 58(1), these three legal regimes for the review of detention involve practically the same problems relating to the right to liberty. An analysis based on the same criteria and the same level of proof as the arrest warrant hardly leads to results other than continued detention.

Insufficient consideration by judges of the principle of presumption of innocence and its corollary, which makes liberty the rule and detention the exception, generally does not allow granting interim release either. The presumption of innocence is '(…) a subjective right guaranteeing everyone the protection of individual freedom (…)'.[39] Continued detention must be assessed through the presumption of innocence[40] and a long period of preventive detention can be seen as a violation of the right to be presumed innocent,[41] as it empties it of its content.[42] Human rights mechanisms have drawn consequences from this principle, in particular that provisional detention should be as short as possible[43] and that all alternative measures must be envisaged and declared insufficient before resorting to provisional detention.[44] However, within the framework of the ICC, the presumption of innocence is only rarely invoked by judges, and even when it is, the consequences on provisional detention are not sufficiently drawn to lead to release.[45]

One can also criticize the ICC judge for applying a double standard of proof of continued detention based on an apparent necessity and a requirement of sufficient guarantees to grant provisional release and which is similar to a reversal of the burden

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Gbagbo's Request for Interim Release, ICC Trial Chamber I (*Decision on Mr Gbagbo's Request for Interim Release*), para 32.

[39] Christine Lazerges, 'La présomption d'innocence en Europe' (2004) 26:1 Arch Polit Criminelle 125, 128. (my translation)

[40] *Bykov v Russie* App no 4378/08 (ECtHR 10 March 2009), para 62.

[41] *Cagas and al v Philippines* App no 788/1997 (HRC 31 January 2002) para 7.3; Cagas v Philippines, App no 788/1999 (HRC 2001), para 7.2; *Final Observations of the Human Rights Committee: Italy*, UN Doc CCPR/C/ITA/CO/5 (HRC 2006), para 14.

[42] *Gimenez v Argentine* App no 11. 245., (IACHR 1 March 1996).

[43] *General Commentary 35*, (HRC 16 December 2014); *Yvone Neptune v Haiti* (IACHR 6 May 2008), para 90; *Bayarri v Argentine* (30 October 2008), para 69; *Suarez Rosero v Ecuador* (17 November 1997), para 77; *Joblonski v Poland* App no 33492/96, (ECtHR 12 décembre 2000), para 79; *Chraidi v Germany* App no 65655/01 (ECtHR 26 October 2006), para 35; Bykov v Russie App no 4378/02, (ECtHR 10 March 2009), para 62.

[44] *Jablonski v Poland* (n 43), para 83., *Witold Litwa v Poland* App no26629/95 (ECtHR 4 December 1998), para 78.; et *Yvone Neptune v Haiti* (n 43) para 98.

[45] *The Prosecutor v Laurent Gbagbo*, (2012) ICC-02/11-01/11-180-Red, Decision on the «Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo», ICC Pre-Trial Chamber I (*Decision on the «Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo»*), para 42. 'At the outset, the Single Judge notes that article 60 of the Statute is a procedural safeguard against detention that does not comply with the Statute, in particular article 58(1) of the Statute, and internationally recognised human rights. The Appeals Chamber has previously emphasised that this regime "must be considered in the context of the 'detained person's right to be presumed innocent''.' (references omitted).

of proof.[46] This is a common problem with the arrest warrant process.[47] It is up to the detainee to prove that he or she will appear voluntarily and freely and that the circumstances have changed.[48] The Pre-Trial Chamber will often rely on the decision on the arrest warrant or the precedent decision.[49]

In addition, the interpretation of regulation 51 of the Regulations of the Court[50] according to which the Court has no obligation to seek the observations of the host State and the State on whose territory release is sought causes some difficulties relating to liberty pending trial.[51] Pursuant to this interpretation, when the Chamber determines

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[46] *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, (2020) ICC-02/05-01/20-177, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', ICC The Appeals Chamber (*Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'*), para 40.

[47] *Decision on the « Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo »* (n 45), para 53. See also *Decision on application for interim release* (n 17), para 59.

[48] *The Prosecutor v Jean Pierre Bemba Gombo*, (2008) ICC-01/05-01/08-323, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled «Decision on application for interim release», Dissenting opinion of Judge Georghios M Pikis, ICC The Appeals Chamber (*Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled «Decision on application for interim release», Dissenting opinion of Judge Georghios M. Pikis*), paras 1-5.

[49] *Ibid* aux para 6-8. See also *Decision on the Defence's submissions on the review of detention* (n 38), para 9. 'The Chamber reiterates that review of detention after the start of trial is not automatic and that a hearing would only be warranted if the Defence states that, there are new circumstances that militate in favour of provisional release of the accused..

[50] *Regulations of the Court* (26 Mai 2004), regulation 51. 'For the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released.'

[51] *Decision on application for interim release* (n 17), para 61. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, (2008) ICC-01/05-01/08-321, Decision on Application for Interim Release, ICC Pre-Trial Chamber III (*Decision on Application for Interim Release*), para 48; *The Prosecutor v Laurent Gbagbo*, (2013) ICC-02/11-01/11-417-Red, Second decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, International Criminal Court, Pre-Trial Chamber I, para 26; *Decision on the Defence Request for Interim Release*, (n 30), para 32. 'In the view of the Single Judge, while interim or conditional release cannot be granted unless State observations have first been requested, regulation 51 of the Regulations cannot be understood as requiring that observations must be requested even when the Chamber does not intend to grant interim release.'; *Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'* (n 46), para 52-62.; *The Prosecutor v Laurent Gbagbo*, (2014) ICC-02/11-01/11-633, Fifth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, ICC Pre-Trial Chamber I (*Fifth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute*), para 35.; *Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'* (n 46), para 60-62.; *The Prosecutor v Laurent Gbagbo*, (2012) ICC-02/11-01/11-180-Red, Decision on the «Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo»,

that no condition can contain the risks of article 58(1)(b), it does not consider necessary to hear the observations of the State wishing to receive the detainee and rejects the request for conditional release.[52] Judge Carmen Ibáñez Carranza disagreed with this approach for three reasons: first, a Vienna Convention-based interpretation[53] of the ordinary meaning of the text of regulation 51 of the Regulations of the Court does not impose conditions before collecting observations from the States concerned, contrary to the opinion of the majority according to which such observations are only collected if a release is considered;[54] secondly, the 'shall' used refers to an obligation to collect such observations, as in the French and Spanish versions;[55] third, she distinguishes consultations from observations[56] and clarifies that the observations of regulation 51 fall within the framework of the principle of complementarity, and the Appeals Chamber has in the past established in Bemba that it is impossible to grant a provisional release without the cooperation of the States.[57] In the same vein, a Trial Chamber held in a review after the confirmation of the charges in the Gbagbo case that '(…) In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the chamber to consider conditional release (…)'.[58]

ICC Pre-Trial Chamber I (*Decision on the «Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo»*), para 42.

[52] *The Prosecutor v Laurent Gbagbo*, (2013) ICC-02/11-01/11-417-Red, Second decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, ICC Pre-Trial Chamber I (*Second decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute*), paras 42-46.

[53] *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, (2020) ICC-02/05-01/20-177-Anx, Separate concurring opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', International Criminal Court, Judge Carmen Ibáñez Carranza (*Separate concurring opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'*), para 18.

[54] Ibid, 19.

[55] Ibid, para 20-21.

[56] Ibid, 22.

[57] Ibid, para 23. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, (2009) ICC-01/05-01/08-631-Red, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", ICC The Appeals Chamber (*Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*), para 107.

[58] *Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute* (n 32), para 31. 'The Chamber recalls the following applicable law regarding interim release:

(e) Under Article 60(3) of the Statute, a chamber may modify its previous ruling on detention, release or conditions of release if 'it is satisfied that changed circumstances so require'. The previous ruling on detention refers to the initial decision made under Article 60(2), as well as any potential subsequent

One of the major obstacles to interim release is the indispensable agreement of a State.[59] The ICC depends on the cooperation of States[60] and an expressed willingness and capacity by a State to receive the detained person and to apply the conditions for his or her release are essential to grant his or her request for release. Bemba[61] and Blé Goudé could not enjoy conditional release because of the reluctance of States.[62]

On another point, the method of evaluation generally adopted by the judges in matters of interim release can also constitute an obstacle on its effectiveness. Two methods have been observed, the first, which is mostly used, is based on the non-discretionary nature of the judge's decision associated with the alternative nature of the conditions of the article 58(1)(b), and the second is based on the analysis of all the relevant factors. The first method, more restrictive and mechanical, is not conducive to release. It consists of deciding on continued detention or release if the conditions of the article 58(1) are met or not. The subsidiarity of the three criteria of proof of the need for continued detention [Article 58(1)(b)] means that the existence of a single criterion is sufficient to justify the continued detention of the suspect or the accused; some formations of the Chambers have not continued the analysis when one of the conditions is met.[63] The second method, based on an analysis of all the factors, makes it possible to weigh on a balance the factors favorable and unfavorable to release and to apply conditions to the unfavorable factors to achieve a conditional release. The suspect will only be able to

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modifications made to that decision under Article 60(3) of the Statute. A chamber is not obliged to undertake a de novo review of the conditions underpinning detention.

(f) Changed circumstances mean a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a chamber that a modification of its prior ruling is necessary. If there are changed circumstances, a chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention. If, however, a chamber finds that there are no changed circumstances, it is not required to further review the ruling on release or detention. When addressing changed circumstances, the Prosecution does not have to re-establish the same underlying facts if these facts continue to apply.

(h) In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and none are self-evident, the chamber's discretion to consider conditional release is unfettered.' (references omitted)

[59] *Decision on the «Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo»* (n 45), para 50. See also *Decision on application for interim release* (n 36), para 50.

[60] *Decision on application for interim release* (n 36), para 49. Citing TPIY, *Le Procureur c/ Ljube Boskoski et consorts*, Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release, affaire N o IT-04-82-AR65.2, 28 september 2005.

[61] Ibid, para 48.

[62] « La CPI allège les conditions de mise en liberté de Laurent Gbagbo et Charles Blé Goudé », (28 mai 2020) <www.france24.com/fr/20200528-la-cpi-autorise-laurent-gbagbo-%C3%A0-quitter-la-belgique-sous-conditions> accessed 20 June 2023.

[63] *Decision on application for interim release* (n 36), para 50.

obtain his release in general, given the speculative nature of the risk indicators of article 58(1)(b),[64] if the Chamber applies conditions that can contain these risks.

This all-factor analysis is more favorable to interim release and more consistent with Article 9(3) of the International Covenant on Civil and Political Rights, which militates in favor of conditional release for the purposes of prosecution.[65] As an example, in Bemba, the Chamber weighed in the balance the elements militating for the liberation and the elements against and the former prevailed.[66] The risk of obstructing the proceedings was considered non-existent,[67] as was the risk of pursuing the commission of the crimes.[68] The risk of flight remains but has been assessed more fairly by balancing the factors favoring flight and the factors not encouraging flight. Thus, knowledge of the guilty verdict and the ability to raise funds were noted as risk factors on the one hand,[69] and the time of provisional detention equivalent to 80% of the sentence incurred and the possibility of applying conditions to the release were seen as mitigating the risk of absconding on the other.[70]

Finally, the systematic consideration of the seriousness of the charges and the heavy sentence incurred as indicators of the risk of absconding is the greatest obstacle to the interim release.[71] The ICC primarily has jurisdiction over serious international crimes that must cross a second threshold of gravity to be admissible.[72] As Judge Cuno Tarfusser says in a dissenting opinion, systematically taking into account the seriousness and the heavy sentence incurred as risk factors amounts to canceling the

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[64] *Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'* (n 46), paras 33, 40. '33 (…) when determining whether detention appears necessary under article 58(1)(b) of the Statute, "[t]he question evolves around the possibility, not the inevitability, of a future occurrence".' See also *The Prosecutor v. Laurent Koudou Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/1101/11-278-Red (OA) (the 'Gbagbo OA Judgment') (confidential version registered on the same day, ICC-02/11-01/11-278-Conf), para. 56; *Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release* (n 17), para 25.; *The Prosecutor v Laurent Gbagbo*, (2012) ICC-02/11-01/11-291, Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, ICC Pre-Trial Chamber I (*Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute*), para 47.

[65] ICCPR (n 13), art. 9(3).

[66] *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, (2018) ICC-01/05-01/13-2291, Decision on Mr Bemba's Application for Release, ICC Pre-Trial VII (*Decision on Mr Bemba's Application for Release*), para 24.

[67] Ibid au para 19.

[68] Ibid au para 20.

[69] Ibid au para 21.

[70] Ibid.

[71] *Decision on application for interim release* (n 17), paras 55-56.

[72] Rome Statute (n 2), para 4 preambule, art. 1, 5 et 17(1)(d).

possibility of interim release for those prosecuted for these crimes, which is contrary to the spirit of Article 60 of the Statute.[73] Yet this is what the ICC has chosen to do. Statistically, 100% of detainees prosecuted for offenses against the administration of justice (for which the maximum sentence is five years imprisonment)[74] benefited from interim release, while 100% of those prosecuted for serious international crimes are being held in provisional detention when arrested[75].

This set of elements makes the release with or without conditions of the persons provisionally detained for serious crimes by the ICC before a final decision more than unlikely.

3.2 The other legal regimes of interim release.

3.2.1 Interim release for delay: a particular restrictive wording of the Statute

The fourth release regime is liberty pending trial for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. [76] It is an independent regime that requires two cumulative conditions: an unreasonably prolonged provisional detention and the attribution of this inexcusable delay to the Prosecutor. The major limit of this formulation of the right to liberty consists in requiring the fault of the Prosecutor in the delay before pronouncing the release. Under international human rights law, a detained suspect or accused has the right to a trial within a reasonable time or released,[77] regardless of the fault of the Prosecutor. The wording of the Rome Statute therefore narrows the scope of this right. The Appeals Chamber has attempted to fill this void through a broad interpretation of article 60(3) of the Rome Statute. It distinguished two legal regimes of release for detention within an excessive time: the first is that of release for detention within an unreasonable time attributable to the Prosecutor governed by article 60(4),[78] and the second for detention within an

[73] *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, (2017) ICC-02/11-01/15-846-Anx, Decision on Mr Gbagbo's Detention, Dissenting opinion of Judge Cuno Tarfusser, ICC Trial Chamber I (*Decision on Mr Gbagbo's Detention, Dissenting opinion of Judge Cuno Tarfusser*), para 12.

[74] Rome Statute (n 2), art. 70(3).

[75] note 20.

[76] Rome Statute (n 2), art. 60(4).

[77] ICCPR (n 13), art. 9(3). 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release […].' See also European Convention on Human Rights (1950), art. 5(3); American Convention on Human Rights (1978), art. 7(5); African Charter on Human and Peoples Rights (1981), art. 6.

[78] *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, (2015) ICC-01/05-01/13-969, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, ICC The Appeals Chamber (*Judgment on Aimé Kilolo and others interim release*), para 1.

unreasonable time not attributable to the Prosecutor governed by article 60(3).[79] In the second hypothesis, the assessment could also be made on the basis of article 60(2).[80] It consists in evaluating the influence of time on the criteria of article 58(1)(b).[81] Furthermore, although adopting the criteria of the human rights mechanisms to assess the reasonable time, in particular the circumstances and the complexity of the case,[82] the length of the provisional detention practiced by the ICC does not allow to conclude that it respects the right to liberty of suspects and accused to a trial within a reasonable time.

3.2.2 Interim release on humanitarian grounds: a narrow option

Finally, the fifth and last legal regime of release, which does not appear explicitly in the texts of the ICC, is a production of case law. It allows the judge to grant release on humanitarian grounds. Even if the Rules of the Court only provide for the continued detention of sick persons during the period of care necessary to make them fit to take part in the trial,[83] the consistent case law of the Appeals Chamber provides for the possibility of release for medical conditions, either that the state of health has an impact on the risk factors of article 58(1)(b), or that the judge uses his or her discretionary power to take the state of health into account to grant conditional release.[84] The other hypothesis of release for humanitarian reasons results from the fact that the judge can rely on his or her inherent powers deriving from the Rome Statute to grant interim

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[79] *Ibid* au para 2. See also *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, (2015) ICC-01/05-01/13-970, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for provisional release'", ICC The Appeals Chamber (*Judgment on the "Decision on 'Mr Bemba's Request for provisional release''*), para 22.

[80] *Judgment on the "Decision on 'Mr Bemba's Request for provisional release''*, (n 79).

[81] *Judgment on Aimé Kilolo and others interim release* (n 78), para 3. 'The duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed under article 60 (3) of the Statute, in order to determine whether, all factors being considered, the continued detention "stops being reasonable" and the individual accordingly needs to be released. Such a determination requires balancing the risks under article 58 (1) (b) of the Statute that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.'

[82] Ibid, para 45. 'Interim release and the issue of the reasonableness of the period of detention are fact intensive and case specific. The Appeals Chamber recalls that it has already held that "the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case".'

[83] RPE (n 31), rule 135. Together with RC (n 50), Regulation 103. and Rome Statute (n 2), art. 64(8)(a).

[84] *Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"* (n 30), para 84. See also *Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute* (n 64), para 64.

release, as Bemba benefited from on two occasions to participate in the funerals of his father and his mother-in-law.[85]

Despite the textual limits, it can be said that case law makes it possible to fill the void by resorting to internationally recognized human rights, at least concerning the rules. Their application does not always respect the principle of liberty and the exception of detention. Gbagbo, for example, was kept in detention even though the opinions of the experts were in favor of his release for the purposes of medical treatment.[86] In addition, Bemba was able to participate in the funerals of his parents thanks to the proximity of his place of detention to the place of the funeral in Belgium and his financial capacity to support all the expenses derived from travel[87]. Other African detainees whose families are in Africa and do not have the same financial capacity are unlikely to be able to benefit from this right to liberty.

4 The ICC Choice Not to Repair the Damage Resulting from the Detention of Innocent People

The Rome Statute of the ICC provides reparations in the form of compensation for the violation of the right to liberty of suspects and accused. The three types of compensation provided for in Article 85 are: a right to compensation for unlawful arrest or detention, a right to compensation following the reversal of a conviction for miscarriage of justice, and a possibility of compensation for damages resulting from detention in exceptional circumstances and at the discretion of the judges in the event of an acquittal and in the presence of a grave and manifest miscarriage of justice.[88] The procedure is carried out in two stages in the three cases, the decision on compensation following the decision establishing the illegality of the arrest or detention, the reversal

[85] *The Prosecutor v Jean Pierre Bemba Gombo*, (2009) ICC-01/05-01/08-437-Red, Decision on the Defence's Urgent Request conceming Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, International Criminal Court, Pre-Trial Chamber II (*Decision on the Defence's Urgent Request conceming Mr Jean-Pierre Bemba's Attendance of his Father's Funeral*), para 9. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, (2011) ICC-01/05-01/08-1099-Red, Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, ICC Trial Chamber III (*Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral*), para 13.

[86] *The Procureur v Laurent Gbagbo*, (2012) ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, ICC Pre-Trial I (*Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court*), para 69.

[87] The decisions granting interim release obliged Bemba to support all the expenses of his travel from Netherlands to Belgium. See *The Prosecutor v Jean Pierre Bemba Gombo*, (2009) ICC-01/05-01/08-437-Red, Decision on the Defence's Urgent Request conceming Mr Jean-Pierre Bemba's Attendance of his Father's Funeral at 6, International Criminal Court, Pre-Trial Chamber II.; *Le Procureur c Jean-Pierre Bemba Gombo*, (2011) ICC-01/05-01/08-1099-Red-tFRA, Décision relative à la requête de la Défense aux fins d'autorisation de Jean-Pierre Bemba à prendre part aux cérémonies de funérailles de sa belle-mère at 12, Cour pénale internationale, Chambre de première instance III.

[88] Rome Statute (n 2), art. 85.

decision or the decision establishing a grave and manifest miscarriage of justice.[89] In the absence of this primary decision, the various formations of the chambers have self-seized in the interest of justice to first decide on the illegality of the arrest or detention and the existence of a miscarriage of justice before ruling on the claim for compensation.[90]

The authors of the Rome Statute were not unanimous in awarding compensation for damages due to detention in the event of acquittal and the ICC judges leaned on the side of those who were against this idea. These 'legislators' have set several locks, namely exceptional circumstances, the discretion of judges and proof of a grave and manifest miscarriage of justice. According to the interpretation adopted by the chambers seized since Ngudjolo, a decision of acquittal is not equivalent to the decision establishing a grave and manifest miscarriage of justice.[91] The latter would be 'a certain and indisputable error committed in the administration of justice following, for example, an erroneous decision by a Chamber or abusive prosecution by the Prosecutor'.[92]

The chambers have praised article 85-3 providing for the possibility of awarding compensation to persons acquitted after detention as being a major advance in international criminal law and international human rights law, while adopting on the contrary an interpretation which makes it inoperative. The three compensation claims received were all dismissed for lack of grave and manifest miscarriage of justice.[93]

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[89] *Le Procureur c Mathieu Ngudjolo*, (2015) ICC-01/04-02/12-301, Décision sur la « Requête en indemnisation en application des dispositions de l'article 85 (1) et (3) du Statut de Rome », Cour pénale internationale, Chambre de première instance II (*Décision sur la « Requete en indemnisation en application des dispositions de l'article 85 (1) et (3) du Statut de Rome »*), para 13. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, (2020, ICC-01/05-01/08-3694) Decision on Mr Bemba's claim for compensation and damages, ICC Pre-Trial Chamber II (*Decision on Mr Bemba's claim for compensation and damages*), para 21.

[90] *Décision sur la « Requête en indemnisation en application des dispositions de l'article 85 (1) et (3) du Statut de Rome »* (n 89), para 16.

[91] *Decision on Mr Bemba's claim for compensation and damages* (n 89), para 33. 'The preparatory works leading to article 85(3) of the Statute make it clear that the reference to a grave and manifest miscarriage of justice was never meant to address situations falling within the scope of the dynamics inherent to the natural developments of criminal proceedings. Rather, it was meant to encompass scenarios of an exceptional nature, substantially differing from those that are typical of procedural phases of a trial and for which there are specific opportunities for review. The risk and possibility of errors, whether of fact or of law, is at the heart of the provisions setting forth the right to appeal. As such, the Appeals Chamber's finding upholding a ground for appeal cannot per se be equated to a miscarriage of justice, even less so to a grave and manifest miscarriage of justice within the meaning of article 85(3)'.

[92] *Décision sur la « Requête en indemnisation en application des dispositions de l'article 85 (1) et (3) du Statut de Rome »*, (n 89), para 45.

[93] Ibid, para 69. See also *Decision on Mr Bemba's claim for compensation and damages* (n 89), para 69. 'The Chamber finds that, irrespective of any consideration as to the merits of the Main Case, and without prejudice to its finding that no grave and manifest miscarriage of justice occurred, ten years is a significant amount of time to spend in custody, likely to result in personal suffering, which would

The Chambers missed the opportunity to give effect to the right to compensation. First, they should have considered a decision of acquittal, in particular following an appeal procedure, as the decision establishing the miscarriage of justice. In the travaux préparatoires, neither the Japanese proposal[94] nor those contained in the Zutphen report[95] provided for such restrictive conditions. In addition, the Rome Statute system has provided for a complex procedure, from the preliminary phase to the appeal phase through the confirmation of charges, to prevent light cases from falling through the cracks to go further. If, despite this, proceedings go as far as an acquittal on appeal, it seems to be a grave and manifest miscarriage of justice, attributable to the Prosecutor or to the Chambers. There is no need, in my view, to conduct any further proceedings to establish an error. The Chamber seized by Charles Blé Goudé affirmed that the compensation procedure is similar to a civil or administrative procedure.[96] As such, it is just necessary to prove a fact (the detention), a prejudice (the physical, moral and pecuniary damages), and the causal link between the fact and the prejudice. To proceed otherwise as the Court does is to refuse to assume its responsibility and to open the way to all abuses on the right to liberty.

In the Gbagbo and Blé Goudé case, for example, several indications show that the proceedings were somewhat forced until appeal. The first sign was the adjournment of the confirmation of the charges by the judges to allow the Prosecutor to provide more evidence, instead of pronouncing the non-confirmation of the charges.[97] During the trial, the trial judges caught up by ordering a no case to answer for insufficient

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trigger compensation in many national systems for violation of the fundamental fair trial right to be tried expeditiously. Whilst the statutory constraints, as illustrated in this decision, are such as to make it impossible for the Chamber to compensate this, it seems unquestionable that the Bemba case provides a case in point as to the seriousness of the consequences entailed by the absence of statutory limits as to the duration either of the proceedings or, even more critically, of custodial detention. The Chamber finds it urgent for the States Parties to embark on a review of the Statute so as to consider addressing those limitations; until then, it will be the Court's own responsibility to be mindful of the expeditiousness of the proceedings as a fundamental tenet of the right to a fair trial and to streamline its own proceedings accordingly.'; The Procureur v Laurent Gbagbo et Charles Blé Goudé, (2022) ICC-02/11-01/15-1427, Decision on Mr Blé Goudé's request for compensation, ICC Article 85 Chamber 85 (*Decision on Mr Blé Goudé's request for compensation*), para 52.

[94] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol II, A/51/22*, UN GA, 1996, p 54.

[95] *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13*, UNGA Preparatory Committee on the Establishment of an International Criminal Court, 1998, pp 138-140.

[96] *Decision on Mr Blé Goudé's request for compensation* (n 93), para 18.

[97] *The Prosecutor v Laurent Gbagbo*, (2013) ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute , International Criminal Court, Pre-Trial Chamber I [*Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*].

evidence and acquitting the defendants of all charges.[98] Once acquitted, Gbagbo and Blé Goudé have seen their liberty restricted during the appeal instead of an immediate release after acquittal provided for by the Statute.[99] It is only after their final acquittal on appeal that they have finally been released by the ICC.[100] What proof of error must still be provided to obtain compensation? It should be added that it still took several months of negotiation for the two individuals to be able to return to their country,[101] and that Charles Blé Goudé had not been able to enjoy his conditional release because no State wanted to welcome him.[102]

5 Conclusion

It is possible, starting from the problem and its causes, to propose solutions in order to improve the situation of the right to liberty of suspects and accused in the Rome Statute system. The first solution is a revision of the Rome Statute on priority issues concerning release, in particular the insertion of procedural time limits, the recognition of the right to be tried within a reasonable time or released, and the insertion of clauses of cooperation that are more binding on States. With regard to this last aspect, if the States have agreed to create an international criminal jurisdiction, we can draw from the spirit of criminal justice that they accept all the legal consequences, in particular respect for the right to liberty of the accused persons. They must therefore undertake to receive detainees during the prosecution, in the event of release pending trial, acquittal and even after having served their sentence. The Kingdom of Belgium (10 April 2014)[103] and

[98] "La Chambre de première instance I de la CPI acquitte Laurent Gbagbo et Charles Blé Goudé de toutes les charges" <www.icc-cpi.int/fr/news/la-chambre-de-premiere-instance-i-de-la-cpi-acquitte-laurent-gbagbo-et-charles-ble-goude-de> accessed 20 June 2023.

[99] *Le Procureur c Laurent Gbagbo et Charles Blé Goudé*, (2019) ICC-02/11-01/15-1251-Red2-tFRA, Arrêt relatif à l'appel interjeté par le Procureur contre la décision rendue oralement par la Chambre de première instance I en application de l'article 81-3-c-i du Statut at para 60, Cour pénale internationale, Chambre d'appel [*Arrêt relatif à l'appel interjeté par le Procureur contre la décision rendue oralement par la Chambre de première instance I en application de l'article 81-3-c-i du Statut*].

[100] *The Procureur v Laurent Gbagbo et Charles Blé Goudé*, (2021) ICC-02/11-01/15-1400, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, ICC The Appeals Chamber (*Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions*), paras 381-82.

[101] Aïssatou Diallo, « Côte d'Ivoire : Charles Blé Goudé de retour à Abidjan, avec quelles ambitions ? – Jeune Afrique », (26 novembre 2022) <www.jeuneafrique.com/1396099/politique/cote-divoire-charles-ble-goude-de-retour-a-abidjan-avec-quelles-ambitions/> accessed 20 June 2023.

[102] *Le Procureur c Laurent Gbagbo et Charles Blé Goudé*, (2022) ICC-02/11-01/15-1427-tFRA, Décision relative à la demande d'indemnisation présentée par Charles Blé Goudé at para 9, Cour pénale internationale, La Chambre constituée aux fins de l'article 85 (*Décision relative à la demande d'indemnisation présentée par Charles Blé Goudé*).

[103] «Belgium and ICC sign agreement on interim release of detainees» <www.icc-cpi.int/news/belgium-and-icc-sign-agreement-interim-release-detainees> accessed 20 June 2023.

Argentina (28 February 2018)[104] have signed cooperation agreements on interim release, and this should be encouraged for all States Parties to the Rome Statute. Normally, this commitment should flow naturally from the ratification of the Rome Statute so as to leave the judge free to decide on interim release and to leave the opportunity to the detained person to choose the territory where he or she wants to settle, all the States parties to the Rome Statute forming the fictitious territory of the International Criminal Court.

In addition to the revision of the Rome Statute, judges should take greater account of the presumption of innocence and its corollary, the principle that in criminal proceedings deprivation of liberty is not the rule but the exception. Such a perspective would lead to favoring interim release and to considering all options for its feasibility before deciding to detain, in accordance with internationally recognized human rights. It would also encourage granting interim release after the passage of a certain period, so that preventive detention does not turn into punishment.

One of the ways to achieve interim release is to apply the method of analyzing all the factors instead of the restrictive interpretation of the judge's non-discretionary power concerning the decision to release together with the alternative nature of the criteria of article 58(1)(b). The overall analysis balances the factors supporting and disfavoring release and applies conditions to the unfavorable factors to achieve a conditional release.

Also, unless they decide to make the article 85(3) non-operational, judges should consider a decision of acquittal as proof of a miscarriage of justice which implies reparation of damages, in particular when they maintain in preventive detention for a long period. The fact that the ICC judge is judge of itself makes the task particularly difficult. Perhaps one should think of an external remedy, as Bemba tried to do by suggesting an alternative binding arbitration under UNCITRAl Rules for his financial and material loss.[105]

If the reluctance of ICC judges to award compensation is justified by financial limitations, joint and several liability with States and the Security Council may be considered. The referring State could be held jointly and severally liable with the ICC for the compensation to be awarded to the acquitted person after detention. This option was envisaged during travaux préparatoires[106]. In the case of Gbagbo and Blé Goudé for

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[104] «Argentina and ICC sign agreements on Interim Release and Release of Persons, reinforcing Argentina's commitment to accountability and fair trial» <www.icc-cpi.int/news/argentina-and-icc-sign-agreements-interim-release-and-release-persons-reinforcing-argentinas> accessed 20 June 2023.

[105] *The Prosecutor v Jean Pierre Bemba Gombo*, (2020) ICC-01/05-01/08-3694, Decision on Mr Bemba's claim for compensation and damages at para 7, International Criminal Court, Pre-Trial Chamber II (*Decision on Mr Bemba's claim for compensation and damages*).

[106] UNGA Preparatory Committee on the Establishment of an International Criminal Court (n 95), p 140. The second paragraph of the Proposal 3 on compensation is written as follow: 'If a person was arrested

example, Côte d'Ivoire could be required to pay part or all of the damages claimed by Charles Blé Goudé. It is not excluded that States and the Security Council, which are political institutions, engage in abusive proceedings against opponents or undesirable persons. It would therefore be logical to involve them in the reparations process with the Prosecutor and the ICC. It is also possible to envisage the creation of a fund for the compensation of the persons concerned, open to voluntary contributions from States, international organizations, non-governmental organizations and individuals.

International criminal justice is not only the need to prosecute and convict, but also and above all the respect for the rights of all litigants at all stages of the procedure. It is not suitable for accused persons to be deprived of their right to liberty during long years of proceedings, and sometimes even after an acquittal. Some people acquitted by the ICTR cannot enjoy their freedom because no State is willing to receive them. Niger, which agreed to take them in, later changed its mind and ordered them to leave its territory. They are currently living under house arrest in Niger[107]. Counsels of suspects, accused and acquitted persons have to take diplomatic steps, sometimes assisted by the Registry, to find a host territory[108]. A global solution must be found to repair the image of international criminal justice whose mission is and remains noble and indispensable.

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or detained and the Trial Chamber finds that the arrest or detention were caused by a frivolous complaint not submitted in good faith, the Trial Chamber may order the complainant State after allowing it to present its arguments in the matter, to make compensation and to pay the costs of defence of the person so arrested or detained, in an amount to be fixed by the Trial Chamber'.

[107] Robin Philpot, « La débandade du Tribunal pénal international pour le Rwanda », *L'AUT'JOURNAL* (12 février 2022), online: <lautjournal.info/20220218/la-debandade-du-tribunal-penal-international-pour-le-rwanda> accessed 20 June 2023.

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Criminal law occupies a central role in the "prism" of human rights, given the relevant impact of trial and punishment on the personal sphere of individuals, which may be instrumentalised in the name of security claims for political purposes. It is no coincidence that during the Age of Enlightenment the main fundamental guarantees of criminal law were enshrined in human rights declarations, with an approach now widely accepted at an international level. In fact, the "dialogue" between national and supranational Courts in this domain has been a key element in contemporary times in the development of criminal law, leading not only to the implementation of fundamental guarantees – even through the redefinition of their field of application – but also to the promotion of criminalisation in order to protect certain human rights.

This volume builds upon the contributions to the X AIDP Symposium for Young Penalists, which was held on 27 and 28 October 2022 at the Department of Legal Studies of the University of Bologna. During five panels moderated by experts, young academics from eleven different countries discussed the current role of human rights in criminal justice.

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