Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law

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PROSECUTING TORTURERS, PROTECTING “CHILD MOLESTERS”: TOWARD A POWER BALANCE MODEL OF CRIMINAL PROCESS FOR INTERNATIONAL HUMAN RIGHTS LAW

Mykola Sorochinsky*

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INTRODUCTION

International legal experts are calling on the Obama administration to prosecute officials of the previous administration for authorizing torture. They argue that it is the international obligation of the United States to investigate abuses and possibly also to prosecute officials who authorized the torture of detainees in the War on Terror. Around the same time that controversial “interrogation techniques” were being permitted and practiced by the United States, in the French town of Outreau thirteen individuals accused of child molestation spent sixteen to thirty-nine months in prison before being released when the key witness admitted that she had invented the whole story.

There is a connection between these two seemingly unrelated events. They both reflect the great concern with the rights of victims increasingly reflected in domestic and more recently international law. Although the calls for the prosecution of high-ranking U.S. officials for torture illustrate potential benefits of this rising concern for victims’

2. Craig S. Smith, French Pedophilia Case Falls Apart when Main Suspect Recants, N.Y. TIMES, May 20, 2004, at A5. In this case, one of the accused individuals improperly committed suicide and many lost custody of their children. Id.
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rights, the judicial witch-hunt against a large number of people in France—a country with established rule of law—suggests that there are also serious problems with it.

In the age of terrorism, human rights law globally suffers substantial setbacks. However, at the regional level, human rights law is now more relevant than ever. More cases are decided each year by regional human rights tribunals, particularly in Europe. More importantly, human rights law affects more areas of domestic legal systems than ever before—from trademark law to limits on corporal punishment of children. This growing complexity presents two challenges: first, the challenge of comprehension (or the increasing need to make sense of the ever-expanding case law in many substantive areas) and second, the challenge of responsibility (or the fact that human rights tribunals can no longer be viewed as merely delivering justice in individual cases).

This Article considers these challenges in two areas of human rights law seeing particularly fast growth: the rights of victims and accountability for gross human rights violations. Recent case law of two regional human rights courts has recognized a right of citizens to be protected from criminal attacks and, at least in certain cases, a right to have the perpetrators of such attacks criminally punished. This Article asks how these developments might influence domestic criminal justice systems’ jurisprudence and human rights law’s overall message.

It has long been a tradition in criminal justice theory to conceptualize developments in criminal law in terms of models of criminal process. Although much criticized, Herbert Packer’s two models of criminal


7. Significantly, the long-term effects of the cases decided today should be considered. In attempting to create remedies for victims of state-sponsored crime in particular cases, these courts may have undermined their more traditional commitment to due process for criminal defendants. See Part III infra (discussing cases).

process—his "due process" and "crime control" models—still retain validity and explanatory power. His due process model regards protection of the rights of the accused as the first priority of criminal law, even at the expense of efficiency in the criminal justice system. The crime control model, by contrast, prioritizes efficiency and speed in criminal procedure, with the goal of ensuring that criminal sanctions apply expeditiously to the guilty.

Packer's models and their implications have traditionally been the province of criminal justice academics, while developments in international human rights law have been mostly tracked by international lawyers. Today the continuing separation of criminal justice theory and international human rights law theory is increasingly difficult to justify. Jurisprudence of international human rights tribunals is, in many cases, given direct effect in the domestic legal systems of participating states—that is, victims' rights jurisprudence can be and is in fact applied by some domestic criminal courts.

10. Id. at 10.
11. In general, discussion of many criminal-justice-related problems, such as the role of victims, has been separate and distinct from human rights discourse, even though human rights law, particularly in Europe and the Americas, increasingly addresses such matters. See Jonathan Doak, Victims' Rights, Human Rights and Criminal Justice: Reconcepting the Role of Third Parties (2008) (criticizing the present lack of communication between the two areas of theory and practice and using human rights language to discuss the status of victims in the criminal justice system).
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This Article considers what values and basic choices the recent, victim-oriented international law imposes upon domestic criminal justice systems. In doing so, it looks at developments in the victims' rights and accountability jurisprudence of international human rights tribunals through the prism of Packer's models and, to a lesser extent, other models of criminal process developed in response to Packer.

In doing so, the Article reaches several conclusions. First, it concludes that all key international human rights instruments adopted through the end of the 1960s were based in large part on the values and concepts underlying Packer's due process model. To some extent this outcome reflected the general academic and reformist political consensus in Western democracies at the time.

The Article also shows, however, that beginning in the late 1970s the situation began to change, with the development of the academic study of victimology, the continuing dramatic rise of crime in most Western societies, and shifts in political consensuses from reformist to "tough on crime" policies, particularly in the United States and Great Britain. The ideas and practices that emerged in this era have been variously referred to as "penal punitivism," "new punitivism," and "new punitiveness." In this study, the term "penal optimism" is also used to refer to the paradigm underlying these developments, which is based on the assumption that criminal sanction is effective in reducing crime, providing justice, and protecting victims—in short, on the assumption that "prison works."
This trend was compounded in the 1980s, when domestic criminal justice systems in Latin America failed to provide justice to victims of human rights violations. The perpetrators of the crimes—many of whom were state agents—faced impunity, and ultimately international human rights courts had to extend support to the victims in their struggle for justice. Some of this history is recorded in the Inter-American Court of Human Rights case law reviewed in Part III of this Article. For example, in Velásquez-Rodríguez v. Honduras, the state of Honduras failed to investigate the disappearance of Mr. Velásquez in 1981. The disappearance was almost certainly committed by the country’s military and the Inter-American Court repeatedly urged Honduras to more vigorously investigate. Another example is Barrios Altos v. Peru, in which security officers responsible for murder were protected by amnesty laws specifically adopted to stop investigations against them. Various amnesties preventing prosecutions were also adopted in Brazil, Argentina, and Chile.

As a result, a strong victims’ rights and accountability jurisprudence has been developed by both the Inter-American Court and the European Court of Human Rights. The key idea behind this new jurisprudence is that victims of human rights violations have rights to the protection of criminal laws and to have the attacks against them vigorously and effectively investigated and prosecuted. The Inter-American Court also explicitly recognizes the right of victims to have perpetrators punished

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19. As described in more detail in Part III, infra, impunity is a state of affairs in which individuals who have committed serious human rights violations and international crimes (often state security forces) are shielded from prosecution, either by formal legal rules, such as one-sided amnesties, or by systemic failures of national criminal justice systems to bring them to justice. See, e.g., Thomas C. Wright, State Terrorism in Latin America 141 (2007); Joseph R. Crowley Program/Lawyers Comm. for Human Rights: Joint 1998 Mission to Turkey, Special Report: Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey, 22 Fordham Int’l L.J. 2129 (1999). Part IV(C), infra, shows that in many such cases the resources of the state punitive apparatus are aligned against victims and with criminal suspects, a situation for which Packer’s due process model fails to account.


23. See infra Part III.


or, as some authors refer to it, a “right to punishment.” The European Court, on the other hand, effectively requires member states to criminalize many forms of behavior in order to protect victims from private attacks on their life, dignity, and personal integrity.

Importantly, the human rights violations triggering these victims’ rights are not limited to political crimes or crimes committed by state agents. Rather, they increasingly include criminal offenses committed by ordinary citizens in non-political contexts.

International documents now recognize that victims have a number of procedural rights of participation in criminal proceedings concerning them, such as rights to take part in hearings and to be informed of the progress of proceedings. The recent recognition of victims’ rights in human rights law has reached far beyond these procedural rights, however, and appears to recognize a number of “substantive” rights of victims as well, including the right to have offenders punished. This Article concerns itself only with the latter trend because the procedural rights of victims are not, at least at this stage, in such direct conflict with the established notions of due process for criminal defendants as to question the viability of the due process model in human rights law.

The Article argues that the increased recognition of the substantive rights of victims in regional human rights law sends a mixed message to domestic criminal justice systems, which are required to implement expansive protections for victims while in theory retaining due process

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29. These include rights to receive information about the progress of the proceedings and of the disposition of their cases, to express their views and concerns, to obtain legal assistance, to avoid unnecessary delay, and to have their privacy and safety protected. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 6, U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985) [hereinafter U.N. Declaration of Basic Principles of Justice for Victims]. See generally DOAK, supra note 11, at 115-58.
31. This is not to say that such participation rights, in particular the right to participate at the sentencing stage, may not have serious implications for the accused. See, e.g., James Luginbuhl & Michael Burkhead, Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death, 20 AM. J. CRIM. JUST. 1 (1995) (presenting evidence that jurors are more likely to vote for a death sentence rather than life imprisonment when exposed to a statement describing the impact of the murder on the victim’s family). Nevertheless, given that sentencing in common law countries involves only convicted individuals, sentencing procedures do not directly challenge the due process values developed for the benefit of the accused, as opposed to those developed for the protection of convicted criminals.
guarantees for criminal defendants. At worst, this message may result in increased overall punitiveness in criminal justice systems, as the victims’ rights movement in the United States demonstrates. At best, it fails to deliver clear guidelines capable of guiding national authorities on how to structure their criminal justice systems and determine their priorities in the field. Ad hoc judgments that require national legal systems to conduct effective investigations and produce real results for particular victims serve as inadequate guides for addressing systemic problems in these legal systems.

Attempting to solve these doctrinal problems, this Article proposes a “power balance” model of criminal process in international human rights law. The merit of this model is that it prevents an extreme imbalance of power that risks leading to violations of the basic rights of the weak. The traditional due process model is essentially based on the same value of balance. However, its limitation lies in the assumption that state power is always aligned against the interests of the criminal defendant. This assumption is not always correct, especially in societies which do not have consistent rule of law. In such situations state institutions may actively or passively align themselves with the interests of offenders against the interests of victims.

The power balance model is more likely to prevent the abuse of the penal power against criminal offenders by preserving traditional, internationally recognized due process guarantees (the first element of the model) and at the same time creating additional incentives for active prosecution to counteract state alignment with the interests of the offender (the second element of the model). Implementation of the second element might, in practical terms, require greater empowerment of victims, in particular by providing them with additional procedural tools (such as the right to challenge a decision not to prosecute or the right to pursue civil remedies independent of the criminal prosecution) and resources to employ those tools (such as legal aid), rather than limitation of the rights of offenders. The second element may also require the creation of institutional incentives for prosecution of powerful actors, such as

32. See sources cited supra note 14.
34. There is of course a great deal of variation among states in terms of the protections they afford to criminal defendants, but some of the core guarantees recognized by all international human rights instruments include presumption of innocence, protection against self-incrimination, right to counsel, right to confrontation, protection against unreasonable searches, prohibition on retrospective criminalization, and guarantee against double jeopardy (non bis in idem). For an overview of these rights as recognized by the European Court of Human Rights, see EMMERSON ET AL., supra note 13, at 273, 348, 382, 440, 615.
In making this argument, Part I outlines Packer’s models and those of his successors and critics. Part II surveys the ideas and values underlying the criminal-justice-related provisions of key international human rights instruments and early European human rights jurisprudence, finding this law closely aligned with Packer’s due process model. Part III surveys recent jurisprudence in the Inter-American Court of Human Rights and the European Court of Human Rights, which recognize increasing rights for victims in human rights cases. Part IV considers the implications of this new, victim-oriented human rights jurisprudence, examining the tension it produces with existing, due-process-oriented international human rights instruments.

Part V concludes by suggesting that the due process and victims’ rights elements of the international human rights law can properly be understood as two aspects of the power balance model: both seek to address the same overarching concerns about appropriate balance of power and the potential for abuse that an excessive imbalance of power tends to produce. It is for this reason that the power balance model seeks not only to implement procedural checks on state penal power that will protect criminal defendants’ due process rights, but also to create incentives to exercise this power when necessary to intervene against those protected by the state.

I. MODELS OF CRIMINAL PROCESS

A. Due Process and Crime Control Models

In his pioneering work, Herbert Packer proposed two conceptual models to describe the function of the criminal process: the crime control model, which emphasized repression of criminal conduct and reduction in crime, and the due process model, which emphasized protection of individuals, primarily criminal defendants, from official oppression.

Packer argued that the shape of the criminal process is influenced by the answers the legal system gives to a set of basic questions regarding the purpose and values of criminal process. He sought to identify normative models that identified the basic values informing such choices.
Herbert Packer saw his models as an attempt to abstract two separate value systems that compete for attention during the criminal justice process. He suggested that his due process model can be visualized as an obstacle course and his crime control model as an assembly line in the movement of the criminal process to its logical conclusion: imposition of criminal punishment on the accused.

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

The key instrument limiting such abuse of power is the concept of legal guilt, which allows punishment of an accused only if pronounced legally guilty. The pronouncement of legal guilt is only possible where there is not only a factual finding supporting the guilt, but where this finding is also made through proper procedures. For example, the convicting tribunal must have jurisdiction, the statute of limitations may not have elapsed, and the accused may not have been previously convicted or acquitted of the same offense. The due process model seeks to create "a procedural situation that permits the successful assertion of defenses having nothing to do with factual guilt." It asserts that a factually guilty person may nonetheless be legally innocent. In fact, the due process approach is so averse to the possibility that an innocent person might be
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convicted that it sacrifices fact-finding precision and is prepared to accept the possibility that a substantial number of factually guilty defendants might be acquitted.52

Finally, another underlying feature of the due process model is skepticism about the morality and the utility of criminal sanction.53 It is this attitude toward the role of criminal law that underlies the procedural measures favored by the model.54

By contrast, the crime control model emphasizes efficiency in the processing of cases and in the application of criminal sanctions.55 In the crime control model, Packer notes, "the failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom."56 To streamline operations the crime control model favors informal procedures, such as the ascertainment of truth through initial, informal administrative investigation mechanisms, including interrogation.57 This essentially requires placing confidence in an initial evaluation of guilt by law enforcement officials and then relying de facto on the presumption of guilt.58

Although Packer mostly focuses on the procedural aspects of his models, procedural and substantive dimensions of the models are not always easy to distinguish. Packer included the full exposition of his models in his 1968 work, which was concerned primarily with substantive criminal law.59 As one of the key features of his due process model, Packer demonstrated skepticism about the morality and the utility of the criminal sanction.60

B. Models of Criminal Process and International Human Rights Law

Since Packer published his work, other models have been proposed to supplement or develop his dualist scheme.61 These include the victim

53. Packer, supra note 9, at 20.
55. Id. at 158.
56. Packer, supra note 9, at 9.
57. These informal methods can be contrasted against formalized and ritualized examination and cross-examination in a court. Packer, supra note 36, at 159; Packer, supra note 9, at 10.
58. Packer, supra note 36, at 160.
59. Id. at 153.
60. Packer, supra note 9, at 20.
participation model, the punitive and non-punitive victims' rights models, and the police model. Several models have been developed to describe choices and policies pertaining to particular aspects of criminal procedure, such as prosecutorial discretion. These proposed models reflected shifts in U.S. criminal policy, and to a certain extent that of other Western countries, after the liberalizing reforms of the 1960s and concomitant shifts in academic interests.

Despite the additions to and developments of his theory and its critiques, Herbert Packer's work remains the starting point of any discussion of ideology or basic principles underlying criminal process. One expression of this continued vitality and relevance is the recurrent criticism and effort to modify or extend his work.

Although developed to explain the dynamics of U.S. constitutional criminal procedure in the 1960s, Packer's models have acquired recognition far beyond U.S. law. They have been used in studies of European human rights norms concerning criminal procedure, national laws in European countries, Russian criminal procedure, and international human rights law. And, Packer's models, more so than the work of his

67. MacDonald, supra note 8, at 264–76.
68. Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 213–14 (1983) (noting that Packer's models lack specific procedural content and are concerned exclusively with which party, the state or the individual, should get the advantage in their adversarial contest); Damaška, supra note 52, at 574–77 (same).
69. Packer, supra note 9, at 2; Roach, supra note 63, at 682–84.
71. See, e.g., Vladimir N. Makhov & Mikhail A. Peshkov, Sostizatelnost Modeley Ugolovnogo Protsessa v SSRS [Competition of the Models of Criminal Process of the USA], 12 Gos. i Pravo 81 (1999).
successors and critics, are well-suited to the analysis of international human rights law.\textsuperscript{73}

In this Article, Packer's models are applied to both the procedural and substantive aspects of human rights jurisprudence. This approach is justified by Packer's own treatment of his models. The main thrust of the models is normative rather than descriptive,\textsuperscript{74} and it is in this light that they are used to analyze international human rights norms. This approach is all the more productive in the context of international law, given the fact that international human rights norms in most cases do not immediately direct the actions of domestic criminal justice actors. Rather, they usually serve as "norms for norms," attempting to shape legislative provisions and practices in domestic law, which in turn directly govern the behavior of actors in state criminal justice systems.

In a sense, international human rights norms themselves serve as models with functions not dissimilar to those identified by Packer. They govern (or are at least supposed to govern) the decisionmaking and value choices that national authorities make in structuring their criminal procedure. Like Packer's models, international human rights norms do not necessarily prescribe decisions for every difficult issue that domestic legal systems confront. Rather, they provide minimum standards and, in some cases, general guidance on how to proceed beyond such standards toward more detailed norms. This can be seen as one of the expressions of the principle of subsidiarity which guides international human rights law.\textsuperscript{75}

II. THE TRADITIONAL DUE PROCESS MODEL IN INTERNATIONAL HUMAN RIGHTS LAW

A. Due Process Rights in the Main International Human Rights Instruments and Their Origins

This Part shows that since the adoption of the Universal Declaration of Human Rights, key human rights instruments have reflected the same

\textsuperscript{73} The models proposed by other authors seem not to be as well-suited for the purposes of human rights law. For instance, Griffiths' family model cannot be the basis for thoughts about criminal justice in the human rights context due to the necessarily legalistic nature of states' human rights obligations. John Griffiths, Ideology in Criminal Procedure or a Third "Model" of the Criminal Process, 79 YALE L.J. 359 (1970). The same can be said for the non-punitive victims' rights model. Due to these models' focus on informality and extra-legal procedures, they have not yet received recognition in binding international human rights instruments or in the jurisprudence of human rights tribunals. Roach, supra note 63.

\textsuperscript{74} Paul Roberts, Comparative Criminal Justice Goes Global, 28 OXFORD J. LEGAL STUD. 369, 377–79 (2008).

values as those underlying the due process model. For example, early international human rights law and theory imposed limits on what states could do to their own nationals.\(^7\) For a long time human rights advocates focused their efforts on promoting this negative understanding of what human rights meant in the field of criminal justice.\(^7\)

Nearly all basic international human rights instruments recognize a number of rights that have implications for criminal procedure. Some provisions specify that they apply only to the criminally accused while others are formulated in general terms but, based on their contents would appear to apply primarily to the accused.\(^7\)

It has been noted that the drafters of the major international human rights instruments assumed that only those accused of an offense were

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\(^7\) See, e.g., Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights 41 (2002) (noting that during the discussion of the Universal Declaration of Human Rights, one of its key drafters, René Cassin, argued that the danger of the age, which human rights protections were to address, was not that the state was not strong enough but that it was too strong); A.W. Brian Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention 602 (2001) (describing how the idea of rights as guarantees against one’s own government grew out of the experience of German occupation in continental Europe); Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 AM. U. L. REV. 1 (1982).

\(^7\) Compare Elizabeth Keane, An Irish Statesman and Revolutionary: The Nationalist and Internationalist Politics of Seán MacBride 182–85 (2006) (describing the early human rights movement and Amnesty International’s concern about politically motivated prosecution and the abuse of political prisoners in the 1960s) with Jared Wessel, Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication, 44 COLUM. J. TRANSNAT’L L. 377, 446–47 (2006) (describing how participants in the negotiations of the Statute of the International Criminal Court in the 1990s, which included dozens of human rights advocacy organizations, represented the interests of victims but none represented the interests of the potential accused). To be sure, this “negative” notion of rights was contested from the outset in the field of so-called social and economic rights, which explicitly imposed positive demands on states. See generally Glendon, supra note 76, at 58, 185–86 (describing the debates between Western and Soviet representatives about political and civil rights and economic and social rights before the adoption of the Universal Declaration of Human Rights); Philip Alston & Gerard Quinn, The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights, 9 HUM. RTS. Q. 156, 158–59 (1987).

entitled to protection during a criminal proceeding. Even those authors who see this situation as "antiquated" acknowledge that there is "no way round [sic] the fact" that the rights of defense enshrined in international human right instruments do not apply to the victim. For example, although the fair trial guarantee under Article 6 of the European Convention on Human Rights protects both parties, in criminal cases those protections are reserved exclusively for the accused.

Although, recent interpretations of the European Convention and the American Convention on Human Rights have read certain rights into these instruments for victims, in fact the text of neither convention includes any reference to such rights. Both instruments follow the Universal Declaration and the International Covenant in recognizing, at least explicitly, only the rights of criminal defendants. The same applies to the American Declaration of the Rights and Duties of Man and the African Charter on Human and Peoples' Rights. Perhaps the first international instrument dedicated explicitly to victims' rights in the criminal justice process was the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Many international instruments explicitly term some of the rights of criminal defendants as "due process rights." The European Convention on Human Rights and the American Convention on Human Rights have been consistently interpreted by the European Court of Human Rights.

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80. Id. at 38. Although said in the context of the European Convention, this statement rather adequately describes the ideology underlying other major international human rights instruments as well.
81. Id. at 36.
83. For a description of these interpretations, see infra Part III.
84. See id.
85. American Declaration of the Rights and Duties of Man art. XXVI, Apr. 1948, O.A.S. Res. XXX [hereinafter American Declaration], reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (1992) (referring to the "right to due process of law").
87. U.N. Declaration of Basic Principles of Justice for Victims, supra note 29; see also infra Part III.
88. See American Declaration, supra note 85, art. XXVI. Article 46 of the American Convention also mentions due process of law in the context of admissibility. It relaxes the rule requiring exhaustion of domestic remedies where it is found that domestic legislation does not afford due process of law. American Convention on Human Rights, supra note 82, art. 46.
and the Inter-American Court of Human Rights respectively as guaranteeing “due process” principles.

Therefore, although none of the human rights instruments or human rights cases mention Packer or his models by name, it would be fair to describe the international human rights law concerning criminal procedure as based on the due process model. To be sure, the due process model inherent in international human rights instruments has always been aspirational rather than achieved in practice. However, this does not make due process substantially different from most other human rights norms. Compliance with human rights law is a matter of perennial concern in human rights practice as well as in academia. The gap between principle and reality also brings the human rights due process model closer to Packer’s models, who also recognizes that they provide normative value systems rather than a description of existing social condition.

In addition to its focus on the rights of the accused, the traditional due process model had two other important components: (1) a preference for adversarial procedures and procedures in general as a way of protecting the rights of individuals and (2) a focus on limiting, rather than enhancing, state power. These two aspects are intimately connected since

90. Gutiérrez-Soler v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 98 (Sept. 12, 2005). Mr. Gutiérrez-Soler was accused of being involved in a kidnapping. He was apprehended by the police anti-extortion unit and, while in custody, was allegedly tortured for his confession by a police officer and his accuser. The Court found a violation of the American Convention and in doing so referred to its procedural guarantees as protecting the “due process of law.” Hilaire v. Trinidad & Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 148 (June 21, 2002); see also Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 160 (Sept. 7, 2004). In its 1999 Advisory Opinion discussing the rights of arrested foreign nationals to be informed about their entitlement to consular assistance, the Inter-American Court of Human Rights explicitly referred to the procedural guarantees established by the American Convention as “due process of law,” remarking that the due process of law, “with all its rights and guarantees, must be respected regardless of the circumstances.” The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 135 (Oct. 1, 1999) (Advisory Opinion OC-16/99).

91. Mansoor, supra note 72, at 265–66.

92. In this respect they may not be different from constitutional due process guarantees in most countries, including countries with established rule of law. John Boli, Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870–1970, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL 21, 72–73 (George Thomas et al. eds., 1987); Goldstein, supra note 41, at 1009–11.

both envision a "reactive," limited state that passively resolves private disputes, rather than an activist state that proactively manages social problems.\textsuperscript{94}

The reasons for this vision are historical and lie at the root of the concepts of criminal justice and human rights, as perceived in the middle of the 20\textsuperscript{th} century when the core international human rights instruments were negotiated. In most modern states crime is conceived first and foremost as a violation of the law's command. A procedural consequence of such an approach is that states take the primary responsibility for prosecuting criminals, while victims serve primarily as sources of information.\textsuperscript{95} Accordingly, up until the 1980s, criminal justice thinking in the West was dominated by the idea that the criminal justice process is a process of confrontation between the criminal and the state. It is still seen this way in practice, despite serious efforts to bring victims into the process.\textsuperscript{96}

Since the state is seen as infinitely more powerful than any one individual, the focus on limiting the power of the state to protect the individual in this confrontation appears natural. After all, the entire enterprise of human rights law was initially concerned to a large extent with limiting what nation-states can do to their own nationals.\textsuperscript{97} Nowhere is this attitude to rights as limits on state power as clear as in criminal law, which is the most potent tool of coercion the modern nation-state wields. All natural rights traditions—from earlier religious natural law theories\textsuperscript{98} to the works of French Enlightenment thinkers\textsuperscript{99}—stressed the importance of limitations on state power as a threat to natural rights.

\textsuperscript{94.} Mirjan R. Da\v{s}ka, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 73–82 (1986); Roach, supra note 63, at 692.

\textsuperscript{95.} Howard Zehr, Changing Lenses: A New Focus for Crime and Justice (1990) (expressing a view of criminal procedure that is common across the common law–civil law divide, although civil law jurisdictions tend to allow victims to participate in criminal proceedings more actively).


\textsuperscript{97.} Glendon, supra note 76, at 60 (discussing the insistence of René Cassin, one of the key drafters of the Universal Declaration of Human Rights, that this document should provide a way to limit the excesses of unbounded state sovereignty in domestic affairs, a concept which had prevented the international community from stopping the development of Nazism). See generally Hersch Lauterpacht, International Law and Human Rights (Archon Books 1968) (1950).


\textsuperscript{99.} Simpson, supra note 76 at 21.
According to the classical formulation by Max Weber, the state has a monopoly on the legitimate use of violence.\textsuperscript{100} Even in the early modern times kings viewed legitimate force, expressed most fully in the power to punish criminality, as their private tool of oppression and of problem solving.\textsuperscript{101} This outraged and frightened those who laid the groundwork of the modern concept of rights as limits on state power. Among them were the authors of the U.S. Constitution, who viewed abuse of criminal law as the epitome of all things tyrannical in the rule of the British king.\textsuperscript{102}

However, the need to limit the arbitrary use of state penal power by imposing procedural limits on its use is only one reason for the due process emphasis of human rights law. Another reason is the need to correct the natural imbalance of power in the criminal justice system. This imbalance is caused not only by the fact that the state is more powerful than any single individual confronting it but also by the fact that in the criminal justice field, an accused individual may not have adequate political protections. Criminal suspects are often marginalized and perhaps the most politically vulnerable constituency, even in strong democracies. While victims of crime are capable of exerting political pressure, at least in democratic regimes, criminals or even suspected criminals cannot always work through the political process to protect their rights. They need not be formally disenfranchised, as they are in many U.S. states,\textsuperscript{103} to be an unpopular group for any politician to defend. In this sense, criminals arguably are a "distinct and insular minority"\textsuperscript{104} underrepresented in the political process. Some criminals, notably terrorists, provide an extreme


\textsuperscript{101} Note that this use of criminal power to solve personal problems of politicians is not a purely historical phenomenon. It is still widespread in most developing countries and even highly developed Western democracies know examples of such abuse of penal power. For some of the numerous examples through ages and continents, see Lilia F. Shevtsova, \textit{Putin's Russia} 275–94 (Antonina W. Bouis trans., 2005) (discussing the prosecution of Russian tycoon Dmitri Khodorkovsky for threatening the regime of President Vladimir Putin); Richard D. White, Jr., \textit{Kingfish: The Reign of Huey P. Long} 111–12 (2006) (recounting examples of the use of state police by former Louisiana Governor Huey Long to fight his political opponents in the 1930s); Larry Catá Backer, \textit{Emasculated Men, EFFEMINATE LAW in the United States, Zimbabwe and Malaysia}, 17 \textit{YALE J.L. & FEMINISM} 37–46 (2005) (discussing politically motivated conviction of the former Deputy Prime Minister of Malaysia Anwar Ibrahim for sodomy).

\textsuperscript{102} Gene Healy, \textit{Introduction} to \textit{Go DIRECTLY TO JAIL: CRIMINALIZATION OF ALMOST EVERYTHING}, at vii, vii (Gene Healy ed., 2004).


\textsuperscript{104} United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).
example of this political exclusion. At this extreme level, criminals are seen as enemies to be defeated and even exterminated. They are seen as such a threat to the established order that they are deprived of the basic protections of that order.\textsuperscript{105}

Enforcement of constitutionally or internationally guaranteed rights by politically unaccountable tribunals (domestic or international) is often the most effective way to protect the basic interests of such politically disadvantaged and excluded groups.\textsuperscript{106} Criminal suspects are a very suitable group for such protection.\textsuperscript{107} On the other hand, human rights regimes are often better equipped to provide such independent, politically neutral review of domestic practices and to extend protection to politically excluded criminal suspects because human rights regimes are sometimes designed to play an anti-majoritarian role.\textsuperscript{108}

\textsuperscript{105} Since 1980 the concepts of “citizen criminal law” and “enemy criminal law,” proposed originally by Günter Jakobs, have gained currency in German and later Spanish and Latin American criminal law theory. Günter Jakobs, \textit{Bürgerstrafrecht und Feindstrafrecht}, in \textit{FOUNDATIONS AND LIMITS OF CRIMINAL LAW AND CRIMINAL PROCEDURE} 41 (Yuhsiu Hsu ed., 2003), available at http://www.hrr-strafrecht.de/hrr/archiv/04-03/index.php3?seite=6 (last visited Oct. 4, 2007). Essentially this concept also posits the existence of two models of criminal law and, to a lesser extent, criminal process. One, devised for “citizens” is characterized by all the hallmarks of traditional criminal law, such as presumption of innocence. Carlos Gómez-Jara Díez, \textit{Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants}, 11 NEW CRIM. L. REV. 529, 559 (2008). The category of “citizens” does not denote nationality but rather refers to common criminals, who pursue various criminal ends but stop short of aiming to destroy the democratic political order. The “Enemies Criminal Law,” on the other hand, is not a vehicle of punishment in the traditional sense but rather is a tool in the war waged by the polity against those who seek to destroy it, and who do not recognize the minimal authority of the punishing state. \textit{Id.} at 541–43. An obvious example of application of an enemy criminal law is the security measures used against “unlawful enemy combatants” in the United States. \textit{Id.} at 530–32. However, some authors have suggested that the paradigm of the “criminal as an enemy” has come to dominate general criminal law in the United States. See, e.g., Markus D. Dubber, \textit{Guerra y paz: Derecho penal del enemigo y el modelo de potestad de supervisión policial del Derecho penal estadounidense}, in \textit{1 DERECHO PENAL DEL ENEMIGO: EL DISCURSO PENAL DE LA EXCLUSIÓN} 684 (Cancio Meliá & Gómez-Jara Díez eds., 2006).

\textsuperscript{106} Javier A. Couso, \textit{The Impact of the Warren Court in Latin America}, in \textit{EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW} 239 (Harry N. Scheiber ed., 2007) (discussing the willingness of the Warren court in the United States to provide due process guarantees to protect criminal defendants, as one of such marginalized groups).

\textsuperscript{107} Franklin E. Zimring, \textit{The Weakest Link: Human Rights and the Criminal Offender in Modern Democratic Government}, in \textit{PUNISHMENT, PLACES AND PERPETRATORS: DEVELOPMENTS IN CRIMINOLOGY AND CRIMINAL JUSTICE RESEARCH} 106, 107 (Gerben Bruinsma et al. eds., 2004) (stating that “the serious criminal offender—the rapist and the robber—is the least attractive case for claims to limit government power, but he or she is, for that reason, the most important frontier for defending the limits on that power” because “the claim of human rights against government power is only as strong as its weakest link”).

\textsuperscript{108} In many cases, international human rights institutions have been envisaged as a means to prevent participating states from sliding into the worst forms of authoritarianism,
In effect, the traditional human rights approach to criminal justice assumes that a modern state wields an enormous penal power which, when used, is prone to abuse. Assuming enormous imbalance of power between a criminal defendant and the state law enforcement apparatus, it seeks to protect individuals from abuse of such power through procedural checks.

However, this approach fails to take account of the fact that widespread failure to exercise penal power may also constitute abuse—an oversight that is the most significant limitation of the traditional due process model in international human rights law. While the model envisages the possibility of abuse through the use of penal power, it fails to address that the state’s failure to restrain private or public-private violence may actually facilitate such violence. As Professor Daniel Brinks has shown in his analysis of police violence in Latin America, many criminal justice systems are resistant to claims brought by representatives of marginalized groups, especially if the alleged perpetrator belongs to a higher social class or is a state official.\footnote{See Brinks, supra note 33, at 117.}

B. The Traditional Due Process Approach and Its Implications for Victims

The due process model, which focuses exclusively on protecting the rights of the accused, involves certain tradeoffs—which often fall most even when domestic political factors favor such a result. Andrew Moravcsik argues that the European human rights system owes its existence to the desire of post-World War II, newly democratic European states to avoid sliding back to authoritarianism as a result of abuse of domestic democratic politics. In this sense, the European human rights mechanism was devised from the beginning as a counter-majoritarian mechanism of quasi-constitutional review.

Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe*, 54 INT’L ORG. 217 (2000). Moravcsik considered his findings relevant not only for Europe but for international human rights regimes in general. However, other human rights protection systems can also be seen as having a strong anti-majoritarian element characteristic of domestic judicial review systems. For example, in the early 1990s the Inter-American Commission reviewed petitions from Uruguay concerning amnesty laws adopted by the new democratic governments and barring prosecution of those involved in human rights abuses of the previous governments, even though the Uruguayan amnesty had been approved by national referendum. See Mendoza v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 & 10.375 (Uruguay), Inter-Am. C.H.R., Report No. 29/92, ¶¶ 2–7 (1992). Nevertheless, majoritarian support did not persuade the Commission of the amnesty’s legality, and the Commission agreed that domestic legality and legitimacy of the measures did not necessarily mean they complied with international law. Id. ¶ 31 (1993).

\footnote{See Brinks, supra note 33, at 117. Some authors see this resistance in class terms as a method of maintaining the exclusive access of certain classes to the benefits which are in theory supposed to be enjoyed by all. Mindie Lazarus-Black & Patricia L. McCall, *A Look at the Numbers, in Mindie Lazarus-Black, Everyday Harm: Domestic Violence, Court Rites, and Cultures of Reconciliation* 35, 36 (2007).}
heavily on the victims. The European case of Barberà v. Spain provides an example.

In Barberà, a group of Catalan separatists killed a prominent businessman while trying to extract a ransom from him. Several suspects were apprehended and convicted based on fairly strong evidence, including their own confessions. However, the European Court eventually ruled that their right to a fair trial had been violated by the Spanish authorities. The Court cited a number of procedural irregularities, including "the unexpected change in the court's membership immediately before the hearing opened, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public." Following this judgment, the applicants were acquitted by national courts and served only small portions of their sentences.

The European Court applied the traditional due process approach to this case: it sided with the unpopular defendants, protecting them from state institutions, which, given the prominence of the case, were perhaps overly eager to convict and punish them. The Court did so by requiring the state to adhere strictly to the procedures designed to make the trial fair. Characteristically, neither the applicants' factual guilt nor the concerns of the victims were given significant attention by the Court.

The case illustrates that the tension between the due process model and the rights of victims lies not in the conflict between the specific rights of the accused and those of the victims. Rather, it stems from the fact that the concept of legal guilt—central to the due process model—can operate effectively only if courts exclude from their deliberation the effect on victims, as the European Court did in Barberà.

Until the 1990s European human rights institutions concluded that the need to protect the rights of the accused made it impossible for them also to recognize substantive victims' rights under human rights norms. Although the Inter-American system has never had the opportunity to rule

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111. Id. ¶ 14, 16–19.
112. Id. ¶ 89.
113. After being sentenced in 1982 to thirty years for murder, Mr. Barberà and Mr. Messegué served their sentences under the open prison regime. Id. ¶ 8, 29. Mr. Jabardo, having been sentenced to six years for assisting armed gangs, had been released by the time the European Court decided the case. Id. ¶ 31. Following the judgment, the Spanish Constitutional Court quashed the applicants' convictions and released them. Barberà v. Spain, 285 Eur. Ct. H.R. 51, ¶ 5 (1994).
114. The Court mentions only in passing the efforts of the victim's son to extend the sentence of the murder's mastermind of the murder. Barberà, 146 Eur. Ct. H.R. at 7, ¶ 18.
115. For example, a substantive right might include a right to have the perpetrator of a crime found and punished, whereas a procedural rights might entail a right to be informed of the key procedural decisions or to participate in proceedings.
on the subject, European human rights institutions have consistently held that the victim of a crime has no right to have the perpetrator criminally punished. In *Perez v. France*, the European Court explained this approach by noting that the European Convention did not protect a right to "private revenge." 116

Although many human rights tribunals continue to protect the due process rights of unpopular defendants, especially in terrorism-related cases,117 recent international human rights law has developed a range of substantive rights for victims and corresponding positive obligations for states. These developments may lead one to question whether the due process model, which relies on marginalization of victims' concerns, still remains a valid tool for analyzing the current state of international human rights law.

III. THE VICTIMS' RIGHTS REVOLUTION AND THE NEW PUNITIVENESS IN INTERNATIONAL HUMAN RIGHTS LAW

A. Victims and the New Punitiveness in Domestic Politics and International Law

Recent developments in the international law of victims' rights and accountability for gross human rights violations cannot be fully understood without placing them in the context of domestic legal theory and practice—a context marked by greater attention to the interests of the victim.

Persistently growing crime rates and widely spreading victimization in developed nations in the post–World War II period triggered an academic interest in victimology,118 a discipline dedicated to the study of victims (in particular victims of crime) and victimization.119 In the United States and the United Kingdom in the early 1980s, the dominant paradigm shifted, moving from an emphasis on protecting defendants' civil

116. *Perez v. France*, 2004-1 Eur. Ct. H.R. 93, ¶ 70. For commentary on *Perez*, see *Trechsel*, supra note 79, at 36–38. The language used in *Perez* is strikingly similar to that of *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the leading U.S. Supreme Court case on point. In *Linda R.S.*, which is still good law in the United States, a mother claimed that the failure of the state of Texas to criminally punish the father of her child for failure to pay child support violated her constitutional rights. The Court found that she lacked standing because the remedy she sought, criminal punishment, was purely public in nature. *Id.* at 619.


rights and humanizing punishment to an emphasis on tough measures intended to control crime.  

This shift did not stay within academia or right-wing politics, but quickly gained currency and broader acceptance. The victims' rights movement played an important role in advancing this acceptance. The language of rights is very powerful in the American political discourse. Members of the victims' rights movement, as well as politicians who associated themselves with the movement, were able to employ this powerful language to advance increasingly punitive criminal justice policies. Although many due-process-oriented procedural guarantees for criminal defendants were not overturned, their existence did not prevent the development of a much more repressive substantive criminal law.

This dominance of the language of victims' rights coincided with shifts in the ideology of the left. Criminal law has traditionally been

120. ANDREW RUTHERFORD, TRANSFORMING CRIMINAL POLICY 14 (1996); Wacquant, supra note 14; Baker & Roberts, supra note 17.


124. However, the reach of some of these protections are being gradually limited. See, e.g., Herring v. United States, 129 S. Ct. 695 (2009) (holding that evidence obtained while executing an erroneously issued search warrant need not be excluded, as previously would have been required under the exclusionary rule).

viewed by left-leaning theorists as designed to reinforce the existing power structure of capitalist society. Therefore it has been viewed with suspicion as protecting the ruling classes and entrenching the unfair socioeconomic order. However, beginning in the late 1970s and early 1980s, many groups on the left that had traditionally supported restraint in the use of criminal punishment warmed up to the possibility that criminal law could be used as a tool of social reform to shift traditional balances of power and to protect the socially weak. Examples of and the reasons for this shift have been documented elsewhere. Here it suffices to review briefly some of the main domestic political and ideological forces shaping this shift.

Many feminist scholars and activists see criminal law as a tool for empowering women and changing their subordinated position. While Packer, a liberal, was concerned with decriminalization, today's liberals often advocate criminalization. The idea that the weak have to be

129. Packer, supra note 36, at 301–04.
Prosecuting Torturers has long been important to the political left and criminal law came to be seen as one way to do so.131

The new attitude toward crime control and punishment that these domestic developments helped to bring about is characterized by the active use of incarceration, skepticism about the possibility of rehabilitating offenders, generally increased punitiveness of sanctions, rising prison populations,132 the increased public profile of victims and their victimization, and politicization of crime control.133 These policies are most prevalent in the United States134 but as the above analysis shows, since the 1990s they also exist in some Western European countries.135

These developments gradually began to influence the way international human rights law conceived of the rights of victims. Three factors particularly facilitated this exchange of ideas between domestic politics and international thinking in this area: (1) the adoption of the U.N. Declaration on the Principles of Justice for Victims,136 (2) the challenges of transitional justice in the newly democratic Latin American countries,137

“[conveying] the impression” that they depict children pornographically—i.e., including computer-generated images of virtual children).

131. NILS CHRISTIE, A SUITABLE AMOUNT OF CRIME 38 (2004) (discussing this trajectory in the evolution of the drug control policy of the Swedish Social Democrats, who were initially suspicious about harsh punishment and preferred social reform measures as a way of controlling crime but later in the 1980s embraced increasingly punitive anti-drug policy, framing it as protecting the weak from exploitation by the illegal drug industry).


133. GARLAND, supra note 122, at 8–9, 11–13. Throughout this Article, this set of ideas is referred in its theoretical form as “new punitiveness.” See examples of this usage in Baker & Roberts, supra note 17, at 121, 132.


137. RUTI G. TEITEL, TRANSITIONAL JUSTICE 53 (2000).
and (3) general development of the concept of positive obligations of states in international human rights law.138

The United Nations Declaration on the Principles of Justice for Victims of Crime and Abuse of Power was adopted by the General Assembly in 1985.139 Although it was careful to proclaim the importance of non-punitive measures of support (for example compensation and social services) for victims rather than their right to punishment,140 it had the effect of drawing attention to the issue of victims' rights internationally.141

International human rights advocates, influenced in part by shifts in domestic ideology,142 were confronted in the late 1980s and early 1990s by the problem facing countries in Latin America, Africa, Asia, and Central Europe that were transitioning from authoritarian and totalitarian regimes to democracy. The question confronting new governments from Argentina to Rwanda was how to deal with the atrocities and systematic crimes committed by previous regimes, a field now known as "transitional justice."143 Human rights activists saw a need to hold individuals who had committed serious human rights violations accountable as a way of restoring confidence in the rule of law and preventing violations from occurring again. Unfortunately, accountability rarely materialized, with the guilty avoiding liability for even the worst crimes. International law was enlisted to help young democratic regimes (or at least less oppressive regimes) to deal with the pervasive problem that came to be known as "impunity."144

139. Declaration for Victims, supra note 136.
142. These shifts in domestic ideology, particularly on the left, are significant given that the general intellectual disposition of the people shaping international human rights law today tends to be left-wing humanitarian internationalism. Jared Wessel, Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication, 44 COLUM. J. TRANSNAT'L L. 377, 444–49 (2006).
143. TEITEL, supra note 137, at 1–3.
Prosecuting Torturers

The term “impunity,” developed in Latin America but now used around the world, refers to the lack of legal consequences for grave crimes and human rights violations.\(^{145}\) Impunity can be perpetuated de facto or de jure\(^{146}\) and in the latter case it can be the result of unfairly granted amnesties and pardons.\(^{147}\) Although identification of the problem as one of “impunity” focuses attention on the lack of criminal punishment, this lack of punishment is usually compounded by failures to grant compensation, identify those responsible, and ascertain the exact facts of the violations, or by a denial that a violation has been committed.

The third major factor shaping the new attitude of international human rights law to criminal law and punishment was the development of the idea that states have positive human rights obligations.\(^{148}\) The concept of positive obligations is particularly important in the field of economic and social rights,\(^{149}\) and was first widely recognized with the adoption of the International Covenant on Economic, Social and Cultural Rights.\(^{150}\) However, it has not been limited to social and economic rights and, as the following analysis shows, had profound implications for criminal-justice-related human rights law.\(^{151}\)

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146. This distinction is recognized in a definition of impunity proposed by Diane Or- entlicher:

> “Impunity” means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.


148. See, e.g., MOWBRAY, supra note 138.


151. The issue of positive obligations is also important in many other areas of international law, including for example in the business and human rights field, where states are said to have positive duties to protect their residents from violations of their rights by private actors. Special Representative of the Secretary-General on the Issue of Human Rights and
Today, the increased recognition of victims’ rights and the principles of accountability for gross human rights violations in international law is not limited to regional human rights tribunals. It is also evident in international criminal law, transitional justice, and a number of non-binding regional instruments. However, this Article focuses primarily on the regional human rights law in Europe and the Americas since regional human rights law often has the most immediate impacts on domestic legal systems in these regions, where such law is often directly enforceable as quasi-constitutional or even supra-constitutional law by domestic courts.


152. See generally Michael Bachrach, The Protection and Rights of Victims Under International Criminal Law, 34 Int’l L. 7, 10 (2000) (noting that “many steps, however limited, have been taken toward advancing victims’ rights under international criminal law”).


The subject of victims' rights in international law, even when narrowed to the jurisprudence of regional tribunals, is too broad to be exhaustively examined in this Article. Rather, this Article focuses on the rights of victims now recognized in human rights law that come most directly into conflict with the due process model and the rights of the accused—the "substantive" rights. The most advanced of these is the right of the victim to have the criminal punished.

The term "right to punishment" is rarely used in human rights law and scholarship. A more widely used term is "right to justice," which has a somewhat different meaning. This latter term is usually used in the context of transitional justice to describe the right of the victims of grave human rights violations to seek prosecution and punishment of those responsible. As is evident, this right is broader than a "right to punishment," because it presumably includes a right of access to some kind of legal process in which victims may present their claims, and in which the claims may be investigated with the purpose of imposition of criminal (as opposed to merely civil or disciplinary) sanctions, if the accused is found guilty.

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157. It is also rarely used in literature on criminal law and criminology, although some exceptions exist. Theodore Y. Blumoff, Justifying Punishment, 14 CAN. J.L. & JURISPRUDENCE 161, 196 (2001).

158. A concept of "grave" or "serious" violations of human rights is difficult to define, but it evidently includes such acts as extrajudicial killings, forced disappearances, and torture. See Douglass Cassel, Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities, 59 LAW & CONTEMP. PROBS. 197, 197 n.5 (1996).

159. See Impunity Guidelines, supra note 146, at 12, princ. 19. Another important recent document concerning these issues is the Remedy Guidelines, supra note 154. Cf. DOAK, supra note 11, at 175 (discussing the rights to justice of victims of common crime).

160. Principle 19 of the Impunity Principles describes the right to justice in the following terms:

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

Impunity Guidelines, supra note 146, at 12, princ. 19. The document characteristically omits the requirement of guilt to be proven, but the Remedy Principles pay more attention to the due process aspect:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.

Remedy Guidelines, supra note 154, ¶ 4 (emphasis added).
Jonathan Doak identifies the victims' rights to protection, participation, justice (including the right to truth), and reparation as distinct rights recognized today under various human rights instruments. This approach unwittingly subsumes the emerging and rather controversial right to punishment under the seemingly innocuous broader category of the right to justice. However, it is often difficult to draw a clear line between the right to punishment and the right to justice.

The same can be said about the right to have criminal prohibitions in place or to have crimes against a person effectively investigated. For example, although human rights tribunals sometimes insist that the state duty to investigate effectively is one of “process rather than result,” it often appears that the test for the effectiveness of the process involves, to a large extent, considering whether the desired result has been or could have been achieved.

Because of the close interconnectedness of these rights to punishment, justice, effective investigation, and criminal prohibition, they are considered in this Article together as a set of evolving substantive rights of victims in human rights law.

B. The Dark Side of Progress: New Victims' Rights and the Erosion of Due Process Values

1. Latin America

The Inter-American system of human rights protection is of particular interest in the context of this Article because, unlike other international human rights institutions, from its very beginning it developed a decidedly victim-oriented jurisprudence and was open about its departure from a due process orientation.

One factor in forming this focus on victims was undoubtedly the historical period when it came into being. During the late 1980s and 1990s, many OAS member states struggled with the consequences of the brutal civil conflict and state-orchestrated violence that had characterized the previous decades, as well as the subsequent problems of impunity.

Significantly, as outlined above, the 1980s saw the rise of victimology in international institutions, and academia, and policy solutions in

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161. The right to protection includes protection from both primary victimization, resulting from crime itself, and secondary victimization, resulting from traumatic experiences in the process of investigation and trial (e.g. humiliation, lack of respect for privacy, and witness intimidation). DOAK, supra note 11, at 51.

162. Id. at 180.

the major western states. As a consequence, human rights institutions in the Americas never went through a defendant-focused stage. However, ironically, the Inter-American institutions had to apply basic texts that were the product of a different age when the scholarship indeed did focus on the rights of criminal defendants rather than on the rights of victims.

In a string of decisions stretching from Velásquez-Rodríguez v. Honduras to Albán-Cornejo v. Ecuador, the Inter-American Court has recognized the right of victims to have crimes against them vigorously investigated and, at least where the person responsible has been identified, to have such person punished. This right extends to crimes against personal and physical integrity committed by state agents and private actors. The Court has also recognized that some barriers to prosecution violate the American Convention on Human Rights if they unfairly restrict these rights of victims.

a. Duty to Investigate the Crimes of State: Velásquez-Rodríguez and Barrios Altos

In its pioneering decision in Velásquez-Rodríguez v. Honduras, the Inter-American Court of Human Rights adopted a broad interpretation of the state obligation to “ensure” the enjoyment of rights guaranteed by the American Convention. As in many cases in the Inter-American system, the case concerned a crime of state: a forced disappearance as part of a campaign of terror sponsored by state security forces.


165. The institutions had to apply the American Convention on Human Rights, supra note 82, and occasionally the American Declaration, supra note 85.


168. See Velásquez-Rodríguez, 1988 Inter-Am. Ct. H.R.

169. Article 1 of the American Convention requires states parties to the Convention to respect and ensure to all persons within their jurisdiction specific rights and freedoms guaranteed by the Convention. See American Convention on Human Rights, supra note 82, art. 1.

In one of the Court’s most influential decisions, the obligation to “ensure” rights was interpreted to include the duty to investigate and punish any violation of the rights recognized by the Convention. This duty to punish, in Court’s view, was part and parcel of the general positive obligation of states to prevent violations of rights under the Convention. Moreover, the Court indicated that the punishment must be “appropriate.”

The Court did not mention any limitations as to exactly which rights under the Convention imposed these positive obligations. Nor did the Court add any caveats to limit the application of this interpretation of the obligation to “ensure” to any particular group of rights. Instead the case laid out principles that were further developed by the Court in later cases.

Velásquez-Rodríguez involved de facto impunity, since national law prohibited the acts that occurred but the law was not enforced. Later, however, the Inter-American Commission and Inter-American Court also had to deal with de jure impunity, which arose when many Latin American governments granted broad amnesties to persons who had committed crimes against humanity and gross violations of human rights. There were several types of amnesties, including those granted by the regime responsible for human rights violations while still in power (the so-
Prosecuting Torturers called “self-amnesties”), and those granted by the regime that was established after the transition from military to democratic rule. Amnesties could also be enacted by an old regime but accepted by the new regime as part of the process of transition. In the 1990s, the Court and the Inter-American Commission faced claims challenging such amnesty laws.

This was the context of the next major Inter-American case that developed the doctrine of the right to punishment, Barrios Altos v. Peru. Barrios Altos arose from the activities of state-sponsored anti-terrorist units during the rule of Peruvian President Alberto Fujimori. In 1991, one such unit committed a mass killing of individuals apparently thought to be terrorists or terrorist sympathizers. An investigation linked the crime to certain officials in the state security services and a criminal prosecution was opened against them. In order to protect the security personnel from prosecution the legislature adopted a law providing for a blanket amnesty of all persons connected to the security services implicated in the case. Eventually this law was challenged by the Inter-American Commission before the Inter-American Court of Human Rights.

The Court held that self-amnesties, enacted by a political regime to relieve its own agents from liability for their crimes, violated the American Convention: not only Articles 4 (right to life) and 5 (right to humane treatment) but also Articles 8 (right to a fair trial) and 25 (right to judicial protection). As in Velásquez-Rodríguez, the Court relied on a

174. Barrios Altos, 2001 Inter-Am. Ct. H.R. (ser. C), ¶¶ 2(i), (k), (m) (labeling the Peruvian amnesty law at issue a “self-amnesty” which, the Court held, was impermissible under the American Convention).
177. Consuelo, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 (Argentina), Inter-Am. C.H.R., ¶ 41; Mendoza, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375 (Uruguay), Inter-Am. C.H.R., ¶ 46, 49.
178. Barrios Altos, 2001 Inter-Am. Ct. H.R.
179. Id. ¶ 2.
180. Article 25 of the American Convention on Human Rights reads:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

American Convention on Human Rights, supra note 82, art. 25.
broad reading of the general obligation of states to respect and ensure rights under the Convention and, more importantly, to give domestic effect to all of the Convention rights and freedoms.\textsuperscript{181} The case demonstrated the Court's willingness to strike down and set aside technical procedural barriers to prosecution and punishment established by domestic laws.

Initially it seemed that the rationale behind Velásquez-Rodríguez and Barrios Altos only applied in the context of systematic, state-orchestrated, mass violations of human rights, where victims were denied not only the right to have their offender punished but also the even more basic right to have violations diligently investigated. However, cases such as Bulacio v. Argentina\textsuperscript{182} and Albán-Cornejo v. Ecuador\textsuperscript{183} have shown that recognition of victims' right to punishment extends beyond mass human right violations by state actors, and applies to individual and private violations as well. Moreover, the Bulacio case has highlighted how this newly recognized right to punishment can come into conflict with more traditional due process rights of the accused.

b. Victims' Rights Confront Due Process: Bulacio v. Argentina

Seventeen-year-old Walter Bulacio was picked up by the police in a massive sweep in front of a stadium, where he planned to attend a rock concert. While detained, he was beaten and later died from his injuries.\textsuperscript{184} The officer responsible for his death was identified as police captain Miguel Angel Espósito. Although the incident occurred in 1991, it was followed by an extraordinarily protracted procedure against Mr. Espósito, with numerous in limine and interlocutory appeals, and was not resolved until 2002 when the charges were dismissed because the statute of limitations had run.\textsuperscript{185}

After the Inter-American Commission on Human Rights lodged the application against Argentina with the Inter-American Court, the family of the deceased, the state and the Commission reached a friendly settlement. In the agreement, the state acknowledged that it had violated the American Convention by detaining Walter Bulacio without sufficient legal grounds, causing his death, and failing to investigate the death

\begin{footnotes}
\footnotetext[181]{Id. art. 2.}
\footnotetext[184]{HUMAN RIGHTS WATCH, POLICE VIOLENCE IN ARGENTINA: TORTURE AND POLICE KILLINGS IN BUENOS AIRES 44–45 (1991).}
\footnotetext[185]{Bulacio, 2003 Inter-Am. Ct. H.R., ¶ 3, ¶ 25.}
\end{footnotes}
within a reasonable time-period. The parties, however, also asked the Inter-American Court to rule on certain points of law in the case.

Complying with this request, the Court again reaffirmed that states parties to the American Convention have a duty to investigate human rights violations and to punish those responsible. The Court held, more broadly, that effective enjoyment of human rights under the Convention required that states take measures to punish deprivations of the right to life and other human rights violations. In doing so, the Court again equated the duty to investigate alleged violations of human rights, a duty established by its previous case law, with the duty to punish alleged perpetrators. Significantly, the court acknowledged that the duty to punish applied not to a massive, state-ordered violation but to an isolated act by a police officer acting without political motivations or command from above.

Addressing the procedural aspects of the case, the Court noted that Mr. Espósito's defense counsel filed a substantial number of motions preventing the proceedings from progressing toward their "natural culmination." It is not entirely clear what this "natural" culmination was understood to be but, given the Court's recognition of the right to punishment, the natural culmination would appear to be conviction and punishment of the accused.

The Court stated that exercise of the defense rights in this case amounted to abuse of rights. The Court then delivered an argument which can be seen in many ways as the culmination of the recent Inter-American jurisprudence regarding victims' rights and their impact on the rights of the accused. It stated:

This manner of exercising the means that the law makes available to the defense counsel has been tolerated and allowed by the intervening judiciary bodies, forgetting that their function is not exhausted by enabling due process that guarantees defense at a trial, but that they must also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.

186. Id. ¶ 33.
187. Id. ¶ 32.
188. Id. ¶ 110.
189. Id. ¶ 111.
190. Compare id. ¶ 112 (speaking of "effective investigation" of the alleged violations) with id. ¶ 111 (stating that effective enjoyment of rights is possible only where violations are "punished").
191. Id. ¶ 113.
192. Id. ¶ 114 (emphasis added).
The Court then faced the issue of balance between the rights of the accused and the rights of victims head-on, concluding that the way to guarantee the rights of victims was to limit, where necessary, the due process rights of the accused. In the Court's view, domestic criminal judges had a duty to direct criminal proceedings in a way that would ensure that delays and hindrances (related to the exercise of the rights of the accused) would not lead to "impunity."\(^{193}\)

Perhaps even more strikingly, the Court held that the statute of limitations or "any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are [sic] inadmissible."\(^{194}\)

In practical terms this judgment of the Inter-American Court meant that the case against captain Espósito had to be reopened. In Argentina judgments of the Inter-American Court have constitutional status and are incorporated into the domestic legal order. Taking guidance from the judgment of the Inter-American Court, the Argentinian Supreme Court of Justice reinstated charges against Mr. Espósito. Even as it did so, the Argentine Court found that reinstatement of charges might violate the national constitutional right of Captain Espósito to be tried within reasonable time. The Argentine Court noted that in practical terms the resolution of this case meant the need to subordinate the traditional rights of the accused under the national constitution to the rights of the victims recognized by the Inter-American Convention.\(^{195}\)

_Bulacio_ highlights the tension between due process and victims' rights in international human rights law. But how broad is its reach? To what categories of cases should its principles—which put concerns about the rights of victims decidedly above procedural rights of the accused and procedural barriers to prosecution—apply? These principles, enunciated most explicitly in _Bulacio_ but based on previous developments in _Velásquez-Rodríguez_ and _Barrios Altos_, could be interpreted in a limited fashion. In this limited interpretation the "strong" victims' rights would only apply to the cases where the alleged criminal was a state agent, even acting without specific state authority (as in _Bulacio_).

However, subsequent developments of the case law make this limited interpretation difficult to sustain. Specifically, the Court's holding in _Albán-Cornejo v. Ecuador_ makes clear that the Court is willing to extend

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193. _Id._ § 115.
194. _Id._ § 116. The Court founded these conclusions on its broad reading of Articles 1 (obligation to respect and ensure) and 2 (obligation to give domestic legal effect to the Convention rights) of the American Convention, in conjunction with Article 25 (right to judicial protection), which the Court interpreted, as in _Barrios Altos_, to guarantee to the victims the right to have their offenders criminally punished.
the rationale underlying Bulacio beyond the crimes of state agents and “political” crimes to at least some common crimes, and even criminal negligence.  

c. Beyond Crimes of the State: Albán-Cornejo v. Ecuador

Albán-Cornejo v. Ecuador arose from a medical malpractice case. When the applicants’ daughter died while hospitalized, the applicants attempted to bring civil, disciplinary, and criminal cases alleging malpractice against the doctors involved. The Inter-American Court’s judgment concerned primarily the progress of criminal charges against the doctors. The Court held that failure by the Ecuadorian authorities to investigate allegations in a criminal complaint in a timely manner and failure to institute criminal proceedings against the suspects constituted violations of Articles 8(1) and 25(1) of the American Convention. The Court also found that the lack of an effective investigation constituted inhumane treatment of the applicants.

One of the bases for the Court’s decision was that Ecuadorian law and practice did not allow private parties (the applicants) to press charges against the doctors even though the authorities showed no enthusiasm to investigate the malpractice.

In this context the Court reiterated that the duty to investigate alleged violations of human rights, a duty recognized since Velásquez-Rodríguez, must be discharged “in a serious manner, not as a mere formality.” The Court held that state authorities must take official initiative in such investigations and may not rely on prodding, procedural initiative, or evidence supplied by the victim or her next of kin. Further, the public body in charge of the investigation must take all such steps and make all such inquiries as may be necessary to achieve the goal of the investigation. An investigation falling short of these standards would not be deemed effective under the American Convention.

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196. This trend in the Inter-American jurisprudence has generated some internal debate at the Inter-American Commission on Human Rights. The Commission has been attempting to refrain from expanding its interpretations concerning the duty of states to investigate and punish crimes beyond those associated with state authorities. Interview with Paolo G. Carozza, Chairman, Inter-American Commission on Human Rights, at Notre Dame Law School, South Bend, Ind. (Nov. 6, 2008).


198. Id. ¶ 50.

199. Id. ¶ 3.

200. Id. ¶ 62.


Although Albán-Cornejo did not directly require punishment of human rights violations, the judgment did make it clear that criminal sanction is essential to the protection of rights under the Convention. While formulated in procedural rather than result-oriented terms, the duty to investigate remains largely result-oriented: the test seemingly applied by the Court assessed whether the investigation at issue was conducted in a manner that would result in punishment. Albán-Cornejo also completed the process of expansion of positive duties of states in the criminal justice field from the area of state crime into the sphere of common criminality.

This robust and progressively developing jurisprudence has led to the agreement within the Inter-American system that victims of human rights violations and their next of kin have an enforceable, substantive right to ensure that perpetrators are criminally punished. This right appears to apply not only to violations committed by state agents, but also, as Albán-Cornejo suggests, to violations of American Convention rights by private actors.

2. Europe

In several lines of cases analyzed in this section, the European Court of Human Rights recognized a number of substantive victims’ rights, including rights to protection from attacks on life and on personal integrity and the right to demand effective investigation capable of leading to identification and prosecution of the perpetrator. The Court also recognizes the duty of the state to take proactive measures to protect life when there is a specific threat of criminal attack. The European Court does not explicitly require states to punish human rights violations. Like the Inter-American Court, it eliminates legal barriers to criminal liability for serious human rights violations, such as statutes of limitation, which it sees as unfair to victims. In a line of decisions that has no direct parallels in the Inter-American practice, the European Court also requires criminalization of certain forms of behavior to pro-

203.  Id. ¶ 135.
204. Carlos Ayala Corao, Remarks at the Third Thematic Conference on Human Rights and International Criminal Law, Utrecht University, Utrecht, Neth. (Sept. 20, 2008); Basch, supra note 26, at 212.
tect individuals from private criminal attacks on their rights. This Section first examines the European duty to criminalize and then looks at victims’ rights to effective investigation and prosecution.

a. An Expanding Duty to Criminalize

i. Protection of Life and Physical Integrity: *Osman v. United Kingdom* and *A. v. United Kingdom*

In 1998 the European Court first pronounced that the state has a duty not only to abstain from arbitrarily taking lives but also to take “appropriate steps” to safeguard the lives of individuals within its jurisdiction. In *Osman v. United Kingdom*, the Court clarified that these appropriate steps must include, first and foremost, imposition of a criminal law network that provides effective punishments to deter the commission of violent crimes.

Moreover, the Court recognized that in certain well-defined circumstances the state has a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The Court acknowledged that the imposition of such a duty on states could potentially cause a clash with due process guarantees and the right of citizens to respect of their private and family life.

The Court has also recognized a duty to protect in the context of Article 3, which prohibits torture and inhuman and degrading treatment, stating that the state has a duty to protect children from criminal actions of their parents, even within their own homes. In *A. v. United Kingdom*, the European Court held that the defense of “reasonable chastisement,” which could be offered in response to a charge of assault under English law, was too broad to adequately guarantee to children the...
right to be free from inhuman and degrading treatment in the form of corporal punishment.\(^\text{216}\)


The seminal case establishing a duty to criminalize attacks on the private life of individuals by other private individuals is \textit{X. & Y. v. Netherlands}.\(^\text{217}\) In \textit{X. & Y.}, a father brought a criminal complaint alleging that the defendant had sexually abused his mentally disabled daughter. The complaint was dismissed, however, due to a loophole in Dutch criminal law: as the victim was over sixteen years of age, she was legally required to bring the complaint herself rather than through her representatives, but was unable to do so since she was mentally incompetent.\(^\text{218}\)

In the Court's opinion, Article 8 required states not only to abstain from interference with the private life of individuals (a negative obligation), but also to adopt measures designed to secure respect for private life, even in the sphere of relations between private individuals (a positive obligation).\(^\text{219}\) The next question faced by the Court was whether civil remedies available under Dutch law (i.e., damages and injunctions) provided sufficient recourse to the victim. While noting that there were different ways of ensuring respect for private life and that criminal law was not "necessarily the only answer,"\(^\text{220}\) the Court found that the civil protections available in this case were insufficient. The Court reasoned that in cases like this effective deterrence was "indispensable" and could be achieved only through criminal law provisions.\(^\text{221}\) Therefore the Court found a violation of Article 8 of the European Convention.

Article 8 was applied similarly in the more recent case of \textit{M.C. v. Bulgaria}.\(^\text{222}\) In \textit{M.C.}, the applicant accused a male acquaintance of raping her. After an extensive investigation, the prosecutor dismissed the criminal complaint. In the prosecutor's view, it was impossible to establish the


\(^{219}\) \textit{Id.} ¶ 23. It has been noted by commentators that the European Court of Human Rights in this case applied the German constitutional doctrine of \textit{Drittwirkung} (or third party effect), under which private parties receive protection of the Constitution against violations of rights by other private parties. However, the European Court in \textit{X. & Y.} did not specifically invoke the doctrine. George P. Fletcher, \textit{Justice and Fairness in the Protection of Crime Victims}, 9 Lewis & Clark L. Rev. 547, 552 (2005).


\(^{221}\) \textit{Id.} ¶ 27.

crime of rape under Bulgarian law given the evidence in the case. Proof of rape under Bulgarian law at the time required a showing that the victim was coerced into sexual intercourse by physical force or threats\(^2\) or that the victim was incapable of defending herself.\(^2\) There was no evidence of physical violence. Instead, the evidence in the case consisted of the applicant’s and defendant’s conflicting accounts: the former insisted that coercion was used, while the latter claimed that the applicant gave her consent.\(^2\)

The European Court found a violation of Article 3 (prohibition of inhuman and degrading treatment)\(^2\) and Article 8 (right to respect for private life). The Court held that, in accordance with contemporary standards and "trends" in this area of jurisprudence, a member state’s positive obligations under Articles 3 and 8 required "penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."\(^2\) Essentially this holding could be understood to require member states to criminalize all non-consensual sexual acts.

iii. Prohibition of Forced Labor: Siliadin v. France

One of the most recent developments in this line of cases is Siliadin v. France in which an applicant successfully argued that French criminal law provided insufficient and ineffective protection against "servitude."\(^2\)

The applicant, a fifteen-year old Togolese national, resided in France illegally\(^2\) and worked as a domestic servant for a married couple with four children. Subject to an agreement approved by her family, the applicant worked without payment for her services,\(^2\) allegedly in exchange for a promise that the couple would help regularize her immigration status.\(^2\) When discovered, the "employers" were charged with several crimes, including "obtaining services from an individual without payment by taking advantage of that person’s vulnerability or state of dependence" and "subjecting an individual to working or living

\(^{223}\) Id. ¶ 64.
\(^{224}\) Id. ¶ 74.
\(^{225}\) Id. ¶¶ 11–31. Under Bulgarian law, consent was a defense if victim had reached the age of fourteen years, unless an older victim "could not grasp the meaning of the events owing to a mental disorder." Id. ¶¶ 72–73.
\(^{226}\) Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." ECHR, supra note 13, art. 3.
\(^{229}\) Id. ¶ 10.
\(^{230}\) Id. ¶¶ 14–15.
\(^{231}\) Id. ¶ 17.
conditions incompatible with human dignity by taking advantage of the person's vulnerability or state of dependence."232

Initially the French lower court found the defendants guilty on both charges, sentenced them to twelve months of imprisonment, and awarded the applicant civil compensation. Although the appellate court reversed the conviction and denied civil compensation, the French Court of Cassation later quashed the reversal with respect to the civil damages and remanded the case. Ultimately the lower court found that the defendants had indeed obtained services without payment by exploiting the victim's vulnerable or dependent state, but that they had not submitted Ms. Siliadin to working in conditions "incompatible with human dignity."233 The court did not reinstate the criminal penalties and awarded only civil compensation.234 Ultimately the decision amounted to a civil finding of fact and an order to pay compensation, rather than a criminal conviction of the "employers" under French procedural law.235

On further appeal, the European Court held that France had violated Article 4 of the Convention (prohibition of slavery and forced labor).236 In so finding the Court relied in part on its previous cases, discussed above, which imposed on states the affirmative duty to criminalize certain conduct.237 Also of import to the Court's decision was the fact that

232. *Id.* ¶ 20.
233. *Id.* ¶¶ 26-27. In a separate civil action, the applicant was also awarded back pay for the services rendered. *Id.* ¶¶ 44-45.
234. *Id.* ¶ 139.
235. *Id.* ¶ 146.
236. Article 4 of the European Convention reads:
   1. No one shall be held in slavery or servitude.
   2. No one shall be required to perform forced or compulsory labour.
   3. For the purpose of this article the term "forced or compulsory labour" shall not include:
      a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
      b. any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
      c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
      d. any work or service which forms part of normal civic obligations.
the applicant was a minor, which in the Court’s view entitled her to a particularly vigorous protection of law.\(^ {238} \) The Court found that Article 4 of the Convention imposed positive obligations on member states to criminalize and obtain “effective prosecution” of “any act aimed at maintaining a person in such a situation” constituting servitude, forced, or compulsory labor.\(^ {239} \)

In the Court’s view, the French system was flawed in that its criminal law did not completely prohibit servitude and forced labor; the prohibitions that did exist were too limited and failed to cover all possible forms of exploitation.\(^ {240} \) Because the court had overturned defendants’ convictions and only had required them to pay civil compensation, the Court found that “the applicant . . . was not able to see those responsible for the wrongdoing convicted under criminal law,” as the Court believed the Convention required.\(^ {241} \)

The prohibition on forced labor has been the last addition to the prohibitions which, according to the European Court’s case law must be reinforced by criminal sanction. However, the state of the Court’s case law would suggest that this requirement of criminalization could well be extended in the future to other areas, for instance freedom of religion.\(^ {242} \)

iv. Implications of the Duty to Criminalize for Models of Criminal Process

The European Court of Human Rights has developed a robust jurisprudence regarding the positive obligation of states to criminalize and punish certain conduct. This is somewhat surprising because criminalization decisions are supposed to be based heavily on societal moral standards and attitudes.\(^ {243} \) Arguably, it is not easy to find international consensus over such standards and particularly in borderline cases.

In part, the willingness of the Court to expand the European duty to criminalize can be explained by the fact that obligations to criminalize are widespread in international law in general. However, the approach of the European Court appears to be unique. In particular, the Court’s willingness to expand the European Convention’s applicability to private

\(^ {239} \) Id. ¶ 112.
\(^ {240} \) Id. ¶¶ 141–42.
\(^ {241} \) Id. ¶ 145.
\(^ {242} \) The Court has recognized that the rights protected by Article 9 (freedom to have and to manifest one’s religion) of the European Convention may impose positive obligations on a state. ECHR, supra note 13, art. 9. The Court has not yet imposed on member states the duty to criminalize violations of this right, but gave its approval to criminal measures used by Austria to ensure protection of this right in Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) (1994), reprinted in 19 Eur. H.R. Rep. 34 (1995).
relations stands in contrast to resistance of general international law to recognize such applicability.244

However, the reasons behind development of this jurisprudence are perhaps less significant than the effects of the new direction this jurisprudence is taking: toward a readiness to accept uncritically that criminal law is often the best way to ensure protection of individual rights. The European Court's optimism about the role of criminal law is similarly visible in the case law of the Inter-American Court.

What makes the approach applied by the European Court different from that of the Inter-American Court is that the former requires states to adopt generally applicable criminal laws. The Inter-American Court, by contrast, appears also more forcefully to require prosecution and punishment of guilty individuals. For this reason, criminalization case law of the European Court may appear not to call into question the traditional due process model of criminal process. However, the values underlying the due process model may be threatened by the European case law, which represents a shift in attitude in favor of criminal law and criminal punishment and which may erode the fidelity of states to due process values. European human rights law operates on the assumption that special consequences follow from a charge or a law being labeled "criminal," as the European Court demonstrated in Engel v. Nether-
lands.245 It noted:

In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so . . . .246

This passage shows that the essential feature of being "criminal" is an association with punishment. This is perhaps a rather obvious point that is nevertheless worth recalling. Under European human rights law, to have a "criminal" law means to have punitive law. Therefore implicit in decisions requiring criminalization is an endorsement of criminal punishment—as opposed to other forms of legal regulation—as a means of protecting human rights. The due process model of criminal process is,

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246. Id. ¶ 82.
at its core, skeptical about the moral propriety and desirability of criminal punishment as a method of social regulation. For this reason, the optimism about criminal law reflected in the European Court’s recent case law may undermine its commitment to due process values in general.

b. The Duty to Investigate and The Duty to Prosecute

In addition to the line of decisions requiring criminalization, the European Court has also recently developed expansive case law requiring states to investigate and prosecute serious human rights violations. This case law, despite its more cautious and nuanced attitude, is strongly reminiscent of the victim-centered decisions of the Inter-American institutions.

The European Court of Human Rights first recognized a state duty to investigate killings committed by state agents—stemming from Article 2 of the European Convention (right to life)—in McCann v. United Kingdom. However, since this procedural duty was not central to the McCann decision, the duty received more expansive treatment in Aksoy v. Turkey. In Aksoy, the Court considered an applicant’s claim of multiple human rights violations by the Turkish authorities; specifically, he claimed that he had been detained for fourteen days without presentation to a judge and that he been tortured, based on the suspicion that he was involved in PKK (Kurdish underground party and terrorist organization) activities. The European Court eventually found violations of Articles 3 (freedom from torture), 5 (right to personal liberty) and 13 (right to effective remedy) of the Convention.

Analyzing the violation under Article 13, the Court noted that the scope of obligations under Article 13 depends on the nature of the substantive right violated. Because the right involved in this case (the right to be free from torture) was one of the most fundamental of rights, the Court imposed a requirement of “thorough and effective investigation.”

247. Packer, supra note 9, at 20.
250. Id. ¶ 64 (Article 3), 78, 84 (Article 5), 100 (Article 13). Mr. Aksoy also alleged a violation of Article 6(1) (right to a fair trial), but the Court refused to rule on this claim because the applicant failed to even attempt to file a civil lawsuit. By doing so, the Court in effect accepted that Article 6(1) was inapplicable to criminal charges brought by a victim and only guaranteed “right to a court” in civil matters. Here the difference with jurisprudence of the Inter-American Commission and the Inter-American Court of Human Rights is apparent. It was mentioned—but was not dispositive for the Court—that according to Mr. Aksoy, under the Turkish law and practice he could not successfully seek civil damages given the failure of the public prosecution to investigate. Id. ¶¶ 90, 93.
251. Id. ¶ 98.
252. Id.
Accordingly, in a claim concerning Article 13 (right to effective remedy), where an individual has an arguable claim that he has been tortured by agents of the state, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation. This investigation must be capable of leading to the identification and punishment of those responsible and must allow for effective access for the complainant to the investigatory procedure.\(^5\)

The standard of appropriate state behavior in such cases includes: (1) effective investigation, (2) capable of leading to (3) identification and (4) punishment of (5) those responsible and (6) effective access of the victim to the investigatory procedure.\(^2-\) The right has to be effective in practice and theory and this, according to the Aksoy judgment, means that exercise of this right must not be hindered by the acts or omissions of the state authorities.\(^25\) Elsewhere, the Court also added the requirement of "promptness and reasonable expedition" in investigation.\(^5\)

The Court on multiple occasions stressed that the obligation of effective investigation "is not one of result, but of means." That is, a state must take all reasonable steps available to secure the evidence concerning an incident.\(^257\) In its more recent judgments the Court expanded application of this rule to violations of other Articles of the European Convention, including violation of the right to personal freedom in cases involving forced disappearances committed by military forces\(^2\) and violation of the right to life in fatal police beatings.\(^29\)

In subsequent cases the Court also developed numerous requirements that the procedure of investigation has to meet in order to satisfy the Aksoy standard. For example, investigating officials are required to be impartial and both de jure and de facto independent of state agents suspected of the violation.\(^260\) Additionally, the investigation should be subject to some degree of public scrutiny, including the victim's right to be involved in the proceedings in order to effectively safeguard her inter-

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253. Id. (emphasis added).

254. This rule, like rules formulated by Inter-American human rights institutions, does not require states to prove the guilt of those identified as perpetrators of human rights abuses. However, in contrast to the Inter-American system, the approach of the European Court seems to be more consistent, because it does not require (at least on its face) states to actually punish those responsible, focusing instead on investigation capable of bringing about punishment. Id. 255. Id. ¶ 95.


259. See Anguelova, 2002-IV Eur. Ct. H.R.

Moreover, in several cases, the Court pointed to a failure to collect specific evidence (such as an autopsy, additional witnesses, or forensic evidence) and found the state in violation on this account. In short, the procedural requirements developed by the Court are elaborate and detailed.

The Court, facing in case after case a failure to investigate crimes committed by the security personnel and the police, spells out one procedural requirement after another. The Court’s reasoning suggests, however, that the Court is trying to achieve a substantive goal in formulating these procedural requirements: the effective protection of the individual rights in question (right to life, right to personal integrity etc.). But does an investigation which was effective enough to result in identification of the accused satisfy the requirement of the effective remedy under the Convention if this accused eventually goes unpunished?

Abdülsamet Yaman v. Turkey, a case with strong parallels to Bulaçcio v. Argentina, suggests not. Mr. Yaman, a Kurdish political activist, was detained and allegedly tortured in a Turkish prison in 1995. After his release he filed a criminal complaint in connection with his alleged mistreatment. When the prosecutor failed to open an investigation finding insufficient evidence of the crime, the applicant filed his complaint with the European Commission on Human Rights, after which the investigation was reopened and six police officers were charged with torture. In 2000 Mr. Yaman moved to Germany. In the meantime the Turkish court held twenty-three hearings in the case of the accused police officers. The applicant’s absence was apparently a problem for the Turkish court and it tried to call the applicant as a witness from 2000 through 2003. Apparently the Turkish office responsible for procedure before the European Court of Human Rights failed to inform the local court that Mr. Yaman had moved to Germany. Partially because of this delay, the Turkish court eventually found in 2003 that prosecution of the police officers was time-barred.

261. This right includes, for example, the right to be informed about key procedural decisions, such as a decision not to prosecute. See Gilec v. Turkey, 1998-IV Eur. Ct. H.R. 1698 ¶ 82.
264. Id. ¶ 11.
265. Id. ¶ 29–33.
266. Id. ¶ 21.
267. Id. ¶ 34.
268. Id. ¶ 58.
269. Id. ¶ 38.
The European Court found violations of both Article 3 (torture) and Article 13 (lack of domestic remedy). Unlike the Inter-American Court in *Bulacio*, the European Court did not make broad claims to the effect that any barrier to prosecution was invalid. Rather, the judgment suggests that the court was concerned that the law had been manipulated to relieve the state agents from punishment—or that the state had acquitted itself.

Moreover, the Court was concerned not merely with procedure. Despite its procedural rhetoric the Court appears to have been genuinely seeking *justice*, in the sense of obtaining the *punishment* of those responsible. After repeating the *Aksoy* standard for *effective investigation* and finding that the state had failed to meet it through improper delay, the Court raised a substantive objection to the resolution of the case:

> Where a State agent has been charged with crimes involving torture or ill treatment, it is of the utmost importance for the purposes of “effective remedy” that criminal proceedings and *sentencing are not time-barred* and that the granting of an amnesty or pardon *should not be permissible.*

The Court noticeably changed the focus of its discussion from “effective investigation” to “effective remedy”: certain barriers to prosecution violate the European Convention not because of procedural irregularities but *ipso facto*, because they facilitate impunity and because punishment is seen as the essential objective in application of human rights law. There are evident parallels here with the approach of the Inter-American Court in *Barrios Altos* and *Bulacio*.

3. Two Regional Systems: A Comparison

In summary, the two regional human rights systems display different styles and approaches in their victim-oriented jurisprudence. Despite these differences, the general trend toward placing an increasing emphasis on the substantive rights of victims is clear.

The Inter-American case law recognizes the right of the victim of a human rights violation to obtain punishment of the perpetrator. The conflict of this right with the due process model is clear: if there is an enforceable substantive right to punishment belonging to victims, then meaningful due process orientation of the criminal procedure as a whole is called into question. The enforceable right to punishment, especially as interpreted in *Bulacio*, requires that procedural guarantees of the rights of the accused do not stand in the way of achieving substantive

270. *See id.* ¶ 54.
271. *Id.* ¶ 55 (emphasis added).
justice for the victim. While there can be many ways to attempt to reconcile these conflicting rights, it is clear that they are in direct tension.

The directness and relative consistency of Inter-American Court's approach make it a particularly attractive subject for comparison with the case law of the European Court, which is often very nuanced and lacks an obvious, "general trend." The more direct Inter-American case law may reflect a general movement in international human rights law toward victim-centered models of criminal justice and new punitiveness.

In Europe, the Court of Human Rights acknowledges that effective protection of the right to life, the right to humane treatment, the right to be free from slavery, and the right to respect for private and family life requires the state to criminalize behavior violating such rights. The Court also recognizes the right of the victims of human rights violations to have violations investigated and to have the suspects prosecuted. Where the perpetrators are state agents, the Court also prohibits some impediments to prosecution, such as statutes of limitation.

The problematic nature of the recent European case law is less obvious than the tensions inherent in the Inter-American judgments. The European Court is less willing than the Inter-American Court to declare the substantive nature of the victims' rights recognized in its recent jurisprudence. It focuses on the procedural aspects of these rights and, more so than the Inter-American Court, allows special treatment in cases in which the perpetrator is a state official. These aspects of the European Court's case law seek to avoid conflict with the traditional due process approach. The Court also does not speak explicitly of a right to punishment.

However, the optimism about criminal law and its power to protect victims certainly pervades some decisions of the European Court, such as *Siliadin v. France*, in which the Court displayed a preference for criminal sanction as a way of addressing certain social problems.²⁷² Although perhaps less obviously than in Inter-American decisions like *Bulacio*, the European Court's preference for criminal law is in direct tension with the skepticism of criminal sanction that underlies the due process model.²⁷³

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²⁷³ Packer, supra note 36, at 170.
IV. MAKING SENSE OF THE VICTIMS' RIGHTS REVOLUTION IN HUMAN RIGHTS LAW

A. The New Human Rights Law: Toward a Punitive Victims' Rights Model?

Of course, recognition of the rights of victims does not necessarily require limitation of the rights of defendants. However, even victims' rights "enthusiasts" recognize that at least some conflict exists between the rights of victims and the rights of criminal defendants. In theory, specific holdings in cases like Bulacio, Albán-Cornejo, and Siliadin can be reconciled with the due process principles, in that their holdings nowhere require conviction at all costs or punishment of the innocent. However, it is the values underlying the recent practice of the Inter-American and the European Courts rather than their specific holdings that are most in conflict with the traditional due process model in human rights law. It is this shifting set of values informing human rights jurisprudence that raises the most acute concern about the sustainability of the due process model in international human rights law.

As described in Part II, the due process model is based on fear of a strong state inappropriately using its powerful penal apparatus against much less powerful individuals. To protect these individuals, criminal justice systems applying the due process model impose procedural checks on the exercise of the power to punish. These checks require strict observance of procedures, sometimes even at the expense of substance: factually guilty individuals can be acquitted if necessary to protect the rights of the accused generally. What makes this limiting and procedural attitude sustainable is an acceptance that the evils of crime may need to be endured in order to preserve due process protections. In the famous words of William Blackstone, it is better that ten guilty persons escape, than that one innocent suffer.

A panoply of criminal justice standards is driven by an implicit assumption that no matter how serious the criminal threat, the power of states to address these threats should be constrained. Any invocation of the criminal law is seen as a potential threat to civil liberties rather than a means to protect them. In this context even minor procedural violations that create doubt about whether the rights of an accused have been properly protected are seen to violate the right to a fair trial, and require acquittal of a factually guilty party—a result not seen as drastic given the underlying skepticism about punishment as an effective means of pre-

274. See Jonathan Doak, The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals, 23 LEGAL STUD. 1, 2 (2003).
275. WILLIAM BLACKSTONE, 4 COMMENTARIES *352.
venting crime in the first place. Moreover, the realization that criminal punishment and criminal law in general have costs is essential to the political survival of the due process model, since the natural instinct of the ordinary citizen is to demand more not less punishment and more order rather than “liberty” for criminals. This realization must produce certain restraint and skepticism in the attitudes toward criminal law and reluctance to its use if the model is to be sustainable.\^276

Although human rights courts may acknowledge due process concerns,\^277 it is clear that they often see other priorities as more important. First, they increasingly require exercise of state penal power against perpetrators, in favor of protecting victims from human rights abuses. Second, to a much greater extent than traditional due process would allow, the new human rights law stresses efficiency over process. This brings it closer to the traditional crime control values described by Packer.\^278 Finally, human rights courts today often favor the use of criminal law to address social problems which they see as important, even beyond the areas of traditional crime or traditional human rights concerns.\^279 The doubt about desirability and effectiveness of criminal punishment is replaced by enthusiasm and indeed demand for such punishment.

Therefore the “message” of the recent case law—that is, its expressive content—communicates values distinctly different from traditional due process values. In doing so this case law quite clearly undercuts the viability of the traditional due process model, or at least demands a very serious correction of the model. But what alternative to the traditional due process model does this new case law advance?

B. The Dangers of the New Victim-Oriented Human Rights Law

Although the two regional human rights systems are moving from the traditional due process model toward a more punitive victims’ rights model, these courts fail to acknowledge the inherent conflict between

\^276. Packer, supra note 9, at 20 (arguing that underlying the due process model is skepticism about criminal punishment as an appropriate tool of social control, which is seen as too cruel or ineffective to be deployed often). Packer commented that such doubts about the ends for which the power to punish “is being exercised create pressure to limit the discretion with which that power is being exercised,” using due process barriers to conviction. Id.


\^278. See Packer, supra note 36, at 158.

due process values and the new rights of victims. This "revolution in the dark" can potentially have a number of serious consequences.

1. Strengthening the Legitimacy of Repressive Anti-Crime Policies

Although states have a duty to protect the rights of both the criminally accused and victims, policies favoring one group inevitably harm the other. As Part II showed, domestic political pressures normally favor harsher measures while international human rights law plays a restraining role. However, if international law is shifting toward prioritizing the rights of victims, the moderating influence of international law is likely to be undermined.

Domestic experience suggests that this possibility is not purely hypothetical. The fact that punitive policies can be written in human rights language is not surprising nor is it particularly new. Human rights language is one of the most powerful mediums for communicating political ideas in many countries today, and its potential in this respect should not be underestimated. Human rights law often operates through "framing": the persuasive effect of a message in some way contrary to the attitudes of the "persuadee" is increased if the message is strategically framed to connect to and resonate with already accepted norms. In this case punitive ideas could be more acceptable to a broader audience if they were linked to the already accepted language of rights. There is already some evidence that the message of the Inter-American Court of Human Rights is seen as a punitive one, directed against the due process rights of the accused. The current international victims' rights discourse in the field has succeeded or is close to succeeding in arming crime control advocates with the language of rights instead of the more traditional language of law and order.

This trend is particularly unfortunate given that regional human rights institutions in Europe and Latin America serve a number of criminal justice systems that have systemic problems with humane treatment

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281. DUBBER, supra note 14, at 1–2 (noting that the very first victims' bill of rights in the United States inserted into the California Constitution in 1982 made explicit the connection between victims' rights and the War on Crime); Roach, supra note 63, at 703.


283. Goodman & Jinks, supra note 93, at 636 (citing KECK & SIKKINK, supra note 93, at 17–18).

of suspects and convicts.\textsuperscript{285} The victims' rights case law is unlikely to advance the work of regional systems in this humanizing effort.

2. Sending a Mixed Message About Due Process

There is a significant distinction between a shift toward a victims' rights orientation in domestic legal systems in, for example, the United States, Canada, the United Kingdom, and other Western and non-Western countries with strong traditions of legality and rule of law and the same shift in international human rights law generally. In these countries with strong rule of law traditions increased protection of victims' rights occurs within criminal justice systems that have entrenched protections for the rights of the accused.\textsuperscript{286} Internationally, however, improved protection for victims' rights can significantly undermine the already feeble protections afforded criminal suspects in domestic legal systems that disregard very basic elements of due process for criminal defendants—for example, those systems that engage in torture to extract confessions or conduct extra-judicial executions. In many legal systems due process rights of the defendant have not been sufficiently established, recognized, or protected and domestic courts may see the new case law as legitimating their existing disregard for the rights of suspects.\textsuperscript{287}

Regional human rights institutions acknowledge the value of a due process approach but at the same time advance rights of victims that are in tension with traditional due process values. This creates a certain cognitive dissonance—a phenomenon that occurs when a person's actions do not correspond to her pronounced ideas or principles. Studies show that the result is often a shift in the person's attitudes, so that her beliefs begin to reflect her actions.\textsuperscript{288} There is a risk that, as a result of these seemingly isolated strands of victims' rights jurisprudence, entire


\textsuperscript{287} For some examples of the brutal methods often practiced in such countries as Ecuador and Colombia, see Gutiérrez-Soler v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 98 (Sept. 12, 2005); Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 160 (Sept. 7, 2004); Brinks, supra note 33 (describing the incidence of extrajudicial killings of perceived criminals by the police in preference to formal investigation, trial, and sentencing); Nigel Rodley, Torture and Conditions of Detention, in THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 25, 28-36 (Juan E. Mendez et al. eds., 1999).

\textsuperscript{288} Leon Festinger, A Theory of Cognitive Dissonance 264 (1957).
regional human rights systems may begin to adopt a more punitive approach.

Although it is possible that particular, narrow holdings in such cases as Bulacio, Albán-Cornejo, and Siliadin can well be reconciled with respect to due process rights of the accused, they are nevertheless likely to create some cognitive dissonance about which model of criminal justice they represent.\textsuperscript{289} In other words, regional human rights systems cannot count on domestic criminal justice systems to be able to process all the finesse and qualifications of the Courts' positions in particular cases, where the overall message of the system seems to be that member states have to strengthen protections for victims. Given that little guidance is offered on how to reconcile victim protection with preservation of due process guarantees and given also that many domestic justice systems have little experience in respecting the rights of the accused, this message of empowerment for victims might come across as the message that the rights of the accused can and perhaps even should be limited.

3. Empowering States Rather than Victims

Recognition of a state duty to protect individuals from attacks on their rights by other private actors exposes to government regulation essentially all spheres of social life that were traditionally thought of as private, not only allowing but \textit{requiring} state intervention. This is not necessarily a desirable outcome for those concerned about protection of individual rights from government interference.\textsuperscript{290} For example, the creation of the European constitutional duty to criminalize exposes many spheres of private life not to "soft" regulation along the lines of family or contract law but rather to blunt commands and prohibitions of criminal law backed by the possibility of criminal punishment. In other words, human rights law mandates the use of the most intrusive forms of government intervention\textsuperscript{291} into the private sphere without giving gov-

\textsuperscript{289} For a view of models of criminal process as "normative guides to what values ought to influence the criminal law," see Roach, supra note 63, at 672.

\textsuperscript{290} Timothy Macklem, Vriend v. Alberta: Making the Private Public, 44 McGill L.J. 197, 208, 225–27 (1999). For instance, if domestic violence is seen as a human rights violation, then new legislation and proactive measures are necessary in the domestic sphere to protect women from this violation. Dorothy Q. Thomas & Michele E. Beasley, Domestic Violence as a Human Rights Issue, 58 Alb. L. Rev. 1119, 1129 (1995) (arguing that "if violence against women in the home is inherent in all societies, then it can no longer be dismissed as something private and beyond the scope of state responsibility"). In most cases, such intervention might be obviously necessary and uncontroversial. However, too zealous an effort to protect certain values might undermine other values.

\textsuperscript{291} As previously discussed, constitutional restraints on criminalization are an important guarantee of basic rights and freedoms because the power to criminally investigate and punish is the ultimate, most serious power that the state can exercise over an individual. Authors of the U.S. Constitution viewed identified tyranny with abuse of criminal law by the
ernments the authority to devise other, less intrusive legal measures. Admittedly, legal regulation designed to protect rights almost inevitably restricts the freedom of others in some way. But criminal law wields as its tools the most severe restrictions on individual freedom and for this precise reason is to be used with restraint. Uniform criminalization rules might be especially dangerous if adopted on the international level without taking into account local cultures and circumstances of local life.

Excessive reliance on law might even undermine genuine efforts to solve the social problems that the law seeks to address. For example, the concern is often expressed that criminalization is treated as the only way to address certain social problems, rather than as a supplement to social and economic measures. The European Court of Human Rights, which has extensive criminalization jurisprudence, has no track record of recommending extensive social measures to address certain structural problems affecting the European Convention rights in member states. In other words, the Court is putting too much emphasis on and faith in criminal law measures as a way of securing rights under the European Convention.

It has also been argued that criminalization might actually disempower victims because once an act is made a crime rather than a civil wrong, a victim might lose control over its prosecution, since in most legal systems the control over prosecution would shift to the state.
Moreover, punishment of the offender, even if achieved, might not rem-
edy the situation of a victim in a concrete, tangible way. Enforcement by
public prosecutors might also empower the prosecutors rather than vic-
tims.\footnote{Donna M. Gitter, Comment, French Criminalization of Racial Employment Dis-
crimination Compared to the Imposition of Civil Penalties in the United States, 15 COMP. LAB.
L.J. 489 (1994) (criticizing on these and other grounds the French legislation that criminalized
racial employment discrimination rather than making it a civil cause of action, as the United
States law does); Deborah Gartzke Goolsby, Comment, Using Mediation in Cases of Simple
Rape, 47 WASH. & LEE L. REV. 1183 (1990); Nora West, Note, Rape in the Criminal Law and
(arguing for treatment of non-violent acquaintance rape in most cases primarily as a tort rather
than as a crime); Press Release, Catharine A. MacKinnon & Andrea Dworkin, Statement Re-
garding Canadian Customs and Legal Approaches to Pornography (1994), available at
http://www.nostatusquo.com/ACLU/dworkin/OrdinanceCanada.html (last visited Oct. 4,
2009).
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4. Appearing Inconsistent

The increased recognition of victims’ rights combined with contin-
uing commitment (in theory) to the traditional due process approach
creates at least an appearance of inconsistency. Legitimacy in human
rights systems requires that the systems do not violate, or even appear to
violate, their own principles. Legitimacy is particularly important for
human rights tribunals whose power to affect government behavior de-
pends crucially on the force of their moral authority, which in turn
depends in large part on coherence.\footnote{THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3, 15–19, 135–
42 (1990).} Any appearance of a lack of integ-
rity undermines this authority and is dangerous for the long-term
interests of human rights’ protection. Legitimacy becomes gradually
more problematic as human rights courts develop their jurisprudence and
in doing so depart from the clear textual authority of major international
human rights instruments.\footnote{Laurence R. Helfer, Overlegalizing Human Rights: International Relations Theory
and the Commonwealth Caribbean Backlash Against Human Rights Regimes, 102 COLUM. L.
REV. 1832, 1854–55 (2002) (describing the process of “overlegalization” which consists in
part of international institutions reading into treaty texts additional obligations which states
parties did not anticipate when agreeing on these texts). Overlegalization, according to Helfer,
may lead to backlash undermining the states’ willingness to participate in international ar-
rangements. Id. at 1836.}

The Inter-American Court of Human Rights, for example, already
stands accused of developing a system of jurisprudence akin to the sys-

\footnote{Basch, supra note 26, 217–21. Admittedly the concept of enemy criminal law is
only selectively applicable here. There is a parallel between the current trends in international

surrounding the enemy criminal law acquire currency by invoking human rights rhetoric, primarily through the so-called right to security. To protect its legitimacy the system must be able to show a principled basis for this differential treatment. International human rights adjudication will fail to be an effective guide in domestic criminal justice reform unless it addresses the issues facing domestic criminal justice systems as a whole and not just on a case-by-case basis. It should not, as it currently does, create different rules for different people without articulating the general principles which would provide meaningful guidance for criminal justice systems and their reform.

Any appearance of inconsistency might undermine the perceived fairness and legitimacy of the human rights systems unless the value conflict inherent in the recent developments is confronted openly and resolved in some manner. Human rights systems cannot effectively perform their role as educators if they are themselves open to accusations of applying double standards, inconsistency, or ad hoc reasoning. In addition, the double standard is particularly damaging in a field of law where the idea of universality is so important for the moral power of law.

All of this suggests that we should cure the logical inconsistencies developing in the evolving human rights jurisprudence regarding victims’ rights and accountability for human rights violations before they raise suspicion that there is a conflict between principles and practice in human rights courts.

C. In Search of Reconciliation: Power Balance as the Value Underlying the Due Process and Victims’ Rights Models

Even if one recognizes the dangers of the punitive victims’ rights model for the development of international human rights law, one should also recognize the benefits and inevitability of recognition of victims’ rights in human rights law. Despite the concerns previously discussed, recognition of victims’ rights developed as an answer to very real problems facing international human rights systems. The central problem in...
this respect is impunity for those who order and perpetrate very serious human rights violations with state sanction or silent approval. 299

As the traditional due process model recognizes, abuse of the state power to punish is a significant source of human rights violations. However, weak criminal law institutions can undoubtedly also trigger abuses against human dignity. Extensive literature on failed states illustrates this. 300 Even though the exercise of coercive authority by law enforcement is the evil which a free society must accept, 301 it is the veiled threat of violence that helps make daily life nonviolent. 302

This means that the values essential to the protection of victims’ rights have to be accounted for, incorporated into the human rights jurisprudence, and reconciled with the rights of the accused. As the preceding discussion shows, not only particular procedural institutions and provisions, but the entire message and the value system underlying the human rights jurisprudence in due process and fair trial matters needs to be revised in a systematic way.

The rights of victims and the accused require balancing and reconciliation. Such balancing and reconciliation will be difficult unless the conflict is acknowledged and discussed openly rather than “swept under the rug” of general proclamations to the effect that everybody’s rights have to be respected. The right to have somebody punished, which is increasingly recognized by human rights courts, is difficult to reconcile with the right not to be wrongfully convicted, 303 which is sometimes directly acknowledged by human rights instruments. 304

In addition to a more open acknowledgment of the emerging conflict the effective reconciliation of these rights requires the development of an overarching model that can account for the conflicting values involved in protecting the rights of the accused and the rights of victims. This model

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299. For a number of reviews of theoretical and practical implications of impunity in different regions of the world, see IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, supra note 144. See also K.G. Kannabiran, The Wages of Impunity: Power, Justice, and Human Rights 2–12 (2004) (discussing the problem of impunity in India).


303. Mansoor, supra note 72, at 274.

304. Article 10 of the American Convention on Human Rights, supra note 82, provides that every person has the right to be compensated in accordance with the law in the event that he has been sentenced by a final judgment through a miscarriage of justice.
should also be able to address the unique needs of international human rights law (as opposed to domestic criminal law) in this field.

This Article proposes that such a model can be based on the considerations of power balance, which are in fact the underlying considerations of both due process and victims' rights models.

As shown in Part II, on the very basic level the due process model is concerned with more than simply the rights of individual defendants for their own sake. Because the state has such overwhelming power, the due process model seeks to even this imbalance out to the extent possible by imposing procedural barriers on the exercise of this power.

Therefore on this more basic level the due process model is concerned with the lack of balance of power between the state and defendant. This balance is difficult to achieve, even in theoretically adversarial proceedings based on the idea of equality. For this reason the due process theory believes that special measures are needed to remedy the de facto disparity that in most cases exists between the state and the individual accused.\footnote{305} For instance, Packer notes that confessions made in initial police custody are suspect under the due process model because at the moment of initial arrest the disparity of resources between the state and the individual is greatest.\footnote{306} He also notes that exclusion of such evidence is necessary to prevent police misconduct, in part because much of such misconduct and abuse will never be prosecuted and punished through ordinary criminal sanction.\footnote{307} So, in effect, the exclusionary rule protecting criminal defendants was designed to compensate for their powerlessness as victims of police abuse.

However, as many cases reviewed in Part III show, state coercive power can be and often is held captive to the essentially private interests of those in power and can fail to reflect genuinely public interest.\footnote{308} So the distinction between private and public interests is more complex than the traditional criminal process models—developed to describe the justice systems of developed rule of law countries—envisage.

Conflicts within the criminal justice system can occur not only between the state and the individual, as Packer's models assume, and not only between the state, the defendant, and the victim, as the victim-based models assume, but also between state-as-representative of the defendant and state-as-representative of the victim. That the state can represent the

\footnote{306. Packer, supra note 36, at 203.}
\footnote{307. Id. at 58.}
interests of the victim has long been acknowledged. However, state criminal justice institutions and their officials can in fact identify with the interests of the accused where he is closer to them by virtue of his position or social status than the victim. Professor Daniel Brinks in his empirically based work on police violence in Latin America has shown that such identification of key actors in the criminal justice system (police, prosecutors, and courts) with the interests of the accused can cause both factual and normative shifts in the way cases are processed in the system. The movement of such cases from the first formal complaint to conviction becomes much more difficult than in more ordinary criminal cases. According to Brinks, this occurs in part because in cases of police violence the interests of the criminal justice officials are aligned with the interests of the alleged offender rather than with the interests of the victim.

International human rights tribunals face these realities and implicitly understand them. Examples include the understanding of the Inter-American Court in Velásquez-Rodríguez that the state institutions of Honduras actually directed the people who kidnapped Mr. Velásquez. The state institutions’ interests, therefore, far from being focused on the punishment of the offenders, lay in their anonymity.

Similarly, in the Bulacio case the judgment of the Inter-American Court was perhaps based on the belief that the investigators and judges prosecuting Captain Espósito for killing Walter Bulacio had a vested interest in acquitting the Captain as one of their own. After all, it is possible that from the perspective of Argentine police, Captain Espósito’s only offense was that he had killed a middle-class youth rather than the usual victim of such incidents, a slum youth. The Argentinean justice system likely saw his punishment as the punishment of one of its own, for practicing the normal measures of crime control in Buenos Aires. Such punishment arguably was not in the interests of the system, if it seeks to continue to use such measures to control crime in the future. In other words, this jurisprudence of the Court can be seen as really about considerations of the balance of power and about the need to rem-

309. Victim Assistance: Exploring Individual Practice, Organizational Policy, and Societal Responses 130 (Thomas L. Underwood & Christine Edmunds eds., 2002). This institutional alignment of the interests of the state with the interests of victims as a group does not mean, however, that state prosecuting authorities always adequately represent the interests of individual victims. Davis, supra note 96 at 63–65.

310. Brinks, supra note 33, 2–3.

311. Id. at 26–27.


313. Id. ¶ 120.

314. Id. ¶¶ 90–95.
edy the excessive dominance of the accused over the criminal justice system.

There is a similar glimpse of the balance of power considerations in the following passage from the European Court’s decision in Gongadze v. Ukraine.315 In that case, the Court held that the lack of consideration and attention paid by the authorities to the wife of a kidnapped investigative journalist amounted to inhuman and degrading treatment under the European Convention. The Court stated:

The Court considers that the facts of the present case show that during the investigation, until December 2004, the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than by discovering the truth about the circumstances of the disappearance and death of the applicant’s husband.316

In other words, the Court found the balance of power anomalous: the state did not support the interests of the victim by trying to find her husband’s murderers but rather stood by the side of potential perpetrators, trying to exonerate them. This pattern is often repeated in cases of crimes committed by high-ranking officials.317 But it is not limited to such high-profile prosecutions: routine police violence cases follow the same pattern.318 The European Court implied that the state identified with the interests of those accused and in its investigation sought to exonerate rather than to punish them. The Court then sought to reverse this anomalous situation by holding that the victim’s rights had been violated.319

Such “anomalous” situations are not foreseen by the due process model. In modern states most actual use of force by the state is concentrated within the criminal justice system; other areas of regulation are merely reinforced by potential use of this organized violence.320 Unless specific control mechanisms are put in place, this force is likely to be

316. Id. ¶ 179.
318. BRINKS, supra note 33, at 31.
319. The European Court found a violation of the substantive and procedural aspects of Article 2, which required more effective investigation in order to protect the right to life. Gongadze v. Ukraine, 2005-XI Eur. Ct. H.R. 1 ¶¶ 171, 179-80. The Court also found that Ukraine violated Article 3 (prohibition of inhuman and degrading treatment) because the protracted procedures, uncertainty and lack of information about the criminal investigation amounted to degrading treatment of the applicant in the case (the wife of the dead journalist). Id. ¶¶ 185-86. The obligation to conduct effective investigation into the death under Article 13 (right to effective remedy) was also breached. Id. ¶ 192.
unleashed against those having least power within the state. To limit this possibility, classical criminal procedural rules set up a number of institutional barriers, in order to ensure that force is used not arbitrarily, but according to more or less fair rules prescribed by substantive penal law.\footnote{Eamonn Carrabine, \textit{Punishment, Rights and Justice}, in \textit{RIGHTS: SOCIOLOGICAL PERSPECTIVES} 191, 200 (Lydia Morris ed., 2006).} Among these rules are the presumption of innocence and the standard of proof (which favor the accused), equality of arms between prosecution and defense,\footnote{The principle of equality of arms is safeguarded by Article 6 (right to a fair trial) of the European Convention on Human Rights. According to the European Court of Human Rights, this principle means that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage \textit{vis-à-vis} his opponents. \textit{Dombo Beheer B.V. v. Netherlands}, 274 Eur. Ct. H.R. (ser. A) at 6, ¶ 34 (1994); \textit{see also} \textit{Neumeister v. Austria}, 8 Eur. Ct. H.R. (ser. A) at 4 (1968).} and separation of the prosecution from the decision-making function.\footnote{Borgers \textit{v. Belgium}, 214 Eur. Ct. H.R. (ser. A) at 21 (1992).}

It was hoped that these devices would help to put those less powerful (the accused) on the same level as those more powerful (the state) and produce fairer results. However, in situations where those without power seek to engage the criminal justice system on their behalf to enforce the rules of criminal law against more powerful individuals, these constraints are likely to combine with the natural distribution of power within the system to make it excessively difficult for the powerless to activate the system and to achieve successfully their aim: actual use of state force against powerful criminals.

V. THE POWER BALANCE MODEL OF CRIMINAL PROCESS IN INTERNATIONAL HUMAN RIGHTS LAW

A. Basic Elements of the Power Balance Model

Like the traditional due process model, the power balance model proposed in this Article seeks to prevent extreme imbalances of power in the criminal justice system leading to opportunities for abuse. However, it sees due process and victims’ rights as tools in achieving this ultimate end of balance rather than as ends in themselves. Since the “power” in the name of the model refers to the state coercive power and the ability to deploy it, due process guarantees and the rights of victims are reconciled to a certain extent: they are both mere tools meant to ensure that there is a relative balance in the use of this power. They are meant to ensure that this power of the state is not used excessively and at the same time that it is not underutilized to the detriment of the state’s less privi-
Prosecuting Torturers

leged citizens. There are three logical steps which ought to be made for the power balance model to work effectively in human rights law.

The first step is to acknowledge the significance of strong, effective state law enforcement institutions. This step is in no way revolutionary. The two faces of human rights—which on one hand place limits on state power and, on the other hand, impose positive requirements of state action—have long been acknowledged in international law. Similarly the power balance model assumes that the proper role of the state law enforcement apparatus is in even-handedness, which seeks to ensure equality of individuals in influencing state institutions rather than "hands-off" neutrality which permits the strong to abuse the weak without state interference.

The second step lies in reframing slightly the way the criminal justice system is imagined in international law. The traditional view of the criminal justice system assumes that the interests of the system are radically opposed to those of an accused and, similarly, that the system's repressive apparatus is positioned against the accused. However, when the accused is a police officer, minister, or head of state, who can count on the protection of state, this view of the criminal justice system may be inadequate: in this situation, state machinery may operate against the interests of the victim, who wishes to engage this system against the accused. The power balance model recognizes the influence that real actors have within the criminal justice process rather than relying on preconceived notions of a "powerful state" and "powerless accused," as the traditional model does.

The third step is to reframe our theoretical understanding of the underlying purpose of human rights law in criminal justice. The proposed power balance model would acknowledge that the purpose of human rights law is to reverse excessive imbalances of power between different actors in the domestic justice systems so as to minimize the potential for abuse of such power—whether through use or non-use. Further, it would acknowledge that where the state fails to protect individuals within its jurisdiction through the use of its coercive power, it facilitates the violation of rights by private actors.

The power balance model assumes that the way to protect these rights from being violated is to establish both institutional checks on state coercive power where it is likely that power would be abused and institutional incentives for the use of this power where the failure to use it may facilitate violations.

The first element of the power balance model—imposition of procedural checks—is based on traditional due process values and models, is

324. U.N. Human Rights Comm'n., supra note 244, ¶¶ 6, 8.
incorporated into constitutional and ordinary criminal law of most states that proclaim themselves to be democratic, and is expressed in the wording of the main international human rights instruments surveyed in Part II. The second element—institutional incentives—was developed by human rights tribunals largely through expansive interpretation of these international instruments under the influence of the victims’ rights movement and the movement against impunity.

In seeing the two elements as two complementary parts of an overarching concern about power imbalance, the model allows for informed and open discussion of these two trends in international human rights law. In addition to this explanatory power, however, the model might also have important prescriptive implications. It has the potential to reconcile many conflicting aspects of its two elements.

It is important to note that the “balancing” underlying the model is not passive but rather involves an active decisionmaker, who intervenes and structures the system in a way that restrains the excessively powerful and lends assistance to the politically or institutionally weak. In the tradition of Herbert Packer, a visual image would be useful to illustrate the underlying values and purposes of the model: this decisionmaker adds a weight to previously unbalanced scales, bringing them into equilibrium.

To a certain extent, the name of the power balance model is semantically related to the principle of equality of arms enshrined in Article 6 of the European Convention, the Inter-American Court’s and Commission’s interpretation of the American Convention, and in Article 14 of the International Covenant on Civil and Political Rights. However, the model is much broader in that it involves not purely procedural rights within any specific case already underway but also equality in the right to initiate proceedings. It is also concerned more with de facto equality than de jure equality.

The power balance model differs from the Packer models and other alternative models mentioned in Part I in its international orientation. It is particularly suitable for treatment of criminal justice problems in international human rights law rather than in domestic criminal procedure, in part due to its limited nature. The model does not prescribe uniform solutions as to how the entire system of criminal law and procedure should be structured but rather seeks to address those inequalities that domestic legal systems fail to see and balance. It does not require particular results but rather recommends structural changes that may make

domestic legal systems more capable of producing more equitable results. While following this principle of balancing would certainly be necessary in the domestic context, it would not be sufficient as the guiding principle of the adequate model of criminal process. The principle of balance is only concerned with correcting the most obvious imbalances of power and is not in itself sufficient to answer many of the key questions facing domestic criminal justice systems.

This might allow the power balance model to meet a unique challenge facing international human rights institutions: although international courts encounter a variety of legal systems and situations, they must address and respect the inner workings of each. They must also develop consistent, clear, and easy-to-communicate jurisprudence, in addition to addressing individual claims. It would appear that the limited nature of the power balance model would make it well-suited to meet the unique needs of international human rights tribunals.

Another distinctly internationalist aspect of the model is that it is targeted toward countries that have difficulty upholding the rule of law. While the due process model assumes a strong, well-functioning modern state, the power balance model recognizes that many states fall far short of this ideal. They struggle with corrupt, unaccountable, and undisciplined institutions. It is for such institutions that the power balance model works best. Unlike Packer's and other models, which assume that states work as they are supposed to work in liberal theory, the power balance model assumes that things fall apart.

B. Practical Implications of the Model and New Punitiveness in International Human Rights Law

The two elements of the power balance theory, the checks on the coercive power of the state and the incentives for use of the coercive power when the interests of offenders are aligned with the state, would have certain specific practical consequences.

The first element would require preservation of all the key aspects of the traditional due process protections for criminal defendants in all cases. The second element would require human rights institutions to distinguish between two categories of cases: (1) those in which the accused is an ordinary citizen, and (2) those in which the accused is a state official, security or police officer, etc.

328. The difference has been well illustrated in the empirical study of judicial response to police killings conducted by Professor Brinks. He identified significant differences in official reactions to alleged illegal killings committed by police officers between Uruguay, the country with substantially better developed government institutions, on the one hand, and other Latin American countries he studies, Argentina and Brazil. See Brinks, supra note 33, at 87–88, 184, 186, 192.
In the second category of cases, while traditional due process guarantees should be preserved (the first element of the model), structural measures that would put more force behind the efforts to prosecute the accused should also be implemented, since the perpetrators' interests are likely to be aligned with the interests of justice system officials.

In other words, where the second element is concerned, cases that correspond to the traditional view of the distribution of power in the criminal justice system (that is, involved a strong state aligned against a powerless criminal) would be treated differently from those cases in which the interests of the state are likely to be aligned with those of the criminal. In the latter category of cases involving crimes by official and unofficial state agents, international human rights tribunals should evaluate whether domestic justice systems have sufficiently introduced measures that remedy existing power imbalances and achieve actual equality of arms in procedures.

Measures that would increase the institutional force propelling investigation and prosecution comprise two groups: (1) creation of institutional mechanisms that would empower victims and provide them with necessary resources to pursue criminal and non-criminal remedies against the offenders and (2) creation of institutional incentives for state criminal justice institutions to pursue more actively the interests of victims in situations where the existing institutional biases would work against the victim and in favor of the offender.

The first group of measures might require the shifting of attention in some cases from criminal to civil, administrative, and disciplinary sanctions, which would allow more active participation of the victim in the process and remove certain barriers for application of sanctions (for example, longer statute of limitations periods). For example, professional associations of judges and prosecutors should be encouraged to discipline more often their members who facilitate impunity by, for example, refusing to investigate the crimes of security forces. Rules of res judicata and similar legal institutions, which in some countries prevent civil liability in case of unsuccessful criminal

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329. Gitter, supra note 294, at 526 (arguing that civil remedies may be more useful to victims because of the greater control the victim exercises over civil action than over criminal prosecution, and because civil standards of proof may be substantially easier for victims to meet).

Prosecution might need to be relaxed in order to allow victims to pursue civil and administrative remedies against offenders even if criminal prosecution is unsuccessful or stalled. Another possibility is opening of a supervening prosecution channel in cases where the normal procedure fails to produce an effective prosecution. Reopening of proceedings may in some cases run into constitutional problems, such as double jeopardy (\textit{non bis in idem}). These constitutional rules might have to be reinterpreted or relaxed to allow greater maneuvering for victims of human rights violations. But even such constitutionally unproblematic measures as providing victims with greater opportunities to appeal at the stages of preliminary investigation and the decision to prosecute could make a substantial difference in many cases.

Other empowerment measures could include expansion of legal aid programs for victims, and in particular victims of police and other state-sponsored violence. Procedural opportunities for victims to participate in investigation and trials should also be improved. Public interest groups representing and supporting victims of such crimes should be cultivated and funded.

The second group of measures might involve creation of separate bodies responsible for investigation of criminal allegations against police officers and security personnel, and establishment of goals for such offices as to the minimum overall number of prosecutions brought. Alternatively states could empower authorities outside the criminal justice system to investigate and charge crimes committed by the actors within the system, primarily police officers. For example, such limited powers could be granted to public oversight boards, human rights directorates, or commissions supervising the work of the police and military personnel, or to ombudspersons. Changing jurisdiction might also be advisable so that there is a procedure available for victims to require investigation and

\begin{itemize}
  \item \textit{See Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260} (discussing such restrictions in Turkish law).
  \item Jackson, \textit{supra} note 286, at 743 (noting that strong defense representation might more effectively reverse the balance in favor of prosecution in criminal cases than evidentiary rules).
  \item Brinks, \textit{supra} note 33, at 5, 27, 140, 246.
\end{itemize}
prosecution of certain crimes to be conducted by authorities in another region or with different administrative affiliation.

Some such measures are already being advised by human rights institutions facing problems of impunity for semi-official crimes. The Committee of Ministers of the Council of Europe which supervises the execution of judgments of the European Court of Human Rights has recommended to states a number of general measures that would facilitate prosecution of official crime. All of the measures advised by the Committee of Ministers appear to be in keeping with the power balance model. They encourage states to adopt institutional incentives to more effectively pursue investigations in cases where the suspected perpetrators are the agents of law enforcement and security forces and whose interests are aligned with the interests of the state against their (usually lower-class) victims. These measures also do not focus excessively on criminal law, but rather provide other accountability mechanisms and focus on prevention in addition to punishment.

These measures encouraging accountability should be implemented only in those cases where the alleged perpetrator of a crime is likely to be protected by the state criminal justice system. However, international institutions should not normally intervene in cases involving ordinary crime where the accused is not associated with the state or its law enforcement institutions. This is because in most common criminal cases, domestic political and organizational pressures normally will ensure that the power of the state outweighs that of the individual defendant.

The suggestion of different treatment of different categories of cases, victims, and offenders may be questioned as contradicting the principle of equality before the law. However, power balance model is based on the classical Aristotelian proposition of justice, which posits that similar

335. ECHR, supra note 13, art. 46.
336. For example, in cases where the European Court of Human Rights found violations of Articles 2 and 3 of the European Convention (right to life and right to freedom from torture, inhuman and degrading treatment respectively) the Committee has recommended and states have undertaken to implement a number of such measures. See, e.g., Committee of Ministers' 2007 Report, supra note 330, at 41 (instituting statutory compensation schemes for ineffective investigation of crimes as a general execution measure in Pereira Henriques v. Luxembourg); id. at 39 (revising laws to provide for longer statutes of limitations for cases of police abuse and torture, instituting general execution measures in the Batie v. Turkey group of cases); id. at 42-43 (introducing legislative reforms to limit parliamentary and other sorts of status-based immunities—for example, immunity of judges and prosecutors—constituting barriers to investigation of human rights violations, general execution measures in Gündür v. Turkey); id. at 36 (establishing independent civilian investigative units responsible exclusively for the prosecution of criminal offences committed by police officers and members of security forces, and instituting general execution measures in Maiko v. Slovenia); id. at 34 (firing supervising prosecutors for their failure to prevent torture, individual execution measures in Mikheyev v. Russia).
337. See supra Part II.
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cases should be treated similarly. The power balance model highlights the fact that certain categories of cases and defendants are not similar and are indeed strikingly different in important respects, and that doing justice in these cases requires this different treatment. However, this different treatment is based on the equal application of a uniform principle: the need to prevent and remedy extreme imbalances of power.

Application of the model would have wide implications for the way in which the state and its criminal justice machinery are conceived in international human rights law. The model moves away from end-result tests in victims’ rights cases before the human rights tribunals. Just as the limitations on the state coercive power imposed by the due process model are mostly procedural, the institutional incentives on the use of this power should be largely procedural as well. As a practical example of this procedural orientation, the rights of the accused are protected not by the abstract requirement that no innocent be convicted of any crime but rather by the procedural safeguards against mistaken convictions. Accordingly, no reasonable system of law may require that every criminal, even if he is labeled a human rights violator, be punished.\footnote{338. Statistical evidence of the number of prosecutions and convictions can be used to illustrate the efficiency of procedures, as the practice of the Committee of Ministers of the Council of Europe suggests. See, e.g., Committee of Ministers’ 2007 Report, supra note 330, at 35. For example, while supervising the execution of the judgment of the European Court of Human Rights in Mikheyev v. Russia, Eur. Ct. H.R. (2006), the Committee of Ministers requested that Russia produce statistical evidence of the use of sanctions against persons accused of violations to prove the effectiveness of such sanctions. Id.}

The power balance model also counsels against excessive reliance on criminal law in attempting to prevent the excessive imbalances and abuse of power against victims.

The first reason for this is the fact that criminal law and its procedures are primarily state—rather than victim—controlled and do not empower the victim or give her control. Criminal law, as it is conceived in most contemporary societies, is public law, and the responsibility for its administration lies overwhelmingly in the hands of state officials. Despite numerous efforts to increase the procedural role of victims and attention to their concerns, the fact remains that in most criminal justice systems the state has almost exclusive responsibility for the administration of criminal law.

In practical terms this means that the increased use of criminal sanction by necessity involves the need for larger criminal justice institutions. Stronger criminal justice institutions are in high demand in many societies. But where existing systems are prone to excessive use of power and poorly controlled, the addition of another, internationally mandated group of duties is unlikely to result in increased efficiency. It might lead,
instead, to more opportunities for abuse. Also, such measures fail to empower victims in meaningful ways or give victims greater control of the remedies they can pursue. It is for this reason that greater use of non-criminal, in particular civil tort sanctions, and more efficient disciplinary mechanisms should be at least considered before increased use of criminal law is recommended.

The second reason is more practical. Many of the procedural guarantees of criminal procedure, which the power balance model would be unwilling to sacrifice (see first element of the model), inevitably make it difficult to convict the defendant. Excessive reliance on criminal sanctions would require expansion of prosecution capabilities and would make accountability more difficult, whereas increased availability and reliance on civil sanctions makes accountability more likely.

C. How the Model Works: Applying the Power Balance Model to Actual Human Rights Cases

In addition to its explanatory role, the power balance model is prescriptive and seeks to provide guidance to international human rights institutions as to how to address dysfunctions and failures in domestic criminal justice systems while being coherent in their treatment of the rights of victims and the accused. To illustrate how the power balance model could be applied prescriptively in actual cases before international human rights institutions it might be useful to look at how the cases reviewed in Part III would be decided applying the principles of the power balance model.

In the Inter-American system the Velásquez-Rodríguez, Barrios Altos, and Bulacio cases would probably be decided the same way under the power balance model. In Velásquez-Rodríguez and Barrios Altos there was a very strong indication that the crimes in question were committed by state agents as a matter of state policy. In such cases the interests of the state were likely aligned with those of the accused, creating a severe power imbalance between the victim and the accused. The intervention of human rights law and institutions should be aimed at remedying this imbalance to the maximum extent possible. The holdings showed that human rights institutions can do so in two ways: by shaming national authorities into more actively investigating and prosecuting the crimes (Velásquez-Rodríguez) and by assisting national authorities to remove artificial barriers to prosecution erected by the perpetrators themselves that frustrate the criminal justice system (Barrios Altos).

Although the outcome in the Bulacio case would probably also have been largely the same under the power balance model, the reasoning would have been substantially different. Rather than holding that all re-
restrictions on prosecution were inconsistent with human rights norms, the Court would likely have limited its holding to the cases involving law enforcement personnel, who the model assumes the state favors. In doing so, it would have highlighted rather than camouflaged the need for special treatment in cases in which the criminal justice system identified with the interests of the offender, and would have avoided categorically invalidating all restrictions on prosecution.

The holding of the Inter-American Court of Human Rights in Albán-Cornejo likewise would have required substantial modifications to be consistent with the power balance model. Since the persons who allegedly committed malpractice in that case were not state agents and were not associated with the criminal justice system, the power balance model would not recommend that their case receive special treatment. However, the court would likely have found violation of the American Convention in the state’s failure to conduct disciplinary investigation or provide civil remedies.

The same principle would apply to the cases from the European human rights system. In such cases as Aksoy and Abdülsamet Yaman the European Court’s insistence on effective investigation and non-applicability of time-bars for prosecution was justified because perpetrators of the crimes were in all likelihood state agents. In those cases the interests of the state were likely aligned with those of the criminal accused and against the victim. Under a power balance framework, the European Court properly threw some weight behind the claims of the victim against the accused.

Siliadin v. France, by contrast, would have been decided differently in light of the power balance model. The balance established in the case by the national authorities appeared to be rather adequate. The case was investigated effectively, the victim’s accusations were taken seriously and vigorously prosecuted, her concerns were addressed, she received compensation, and substantial liability (even though of non-criminal nature) was imposed on the offenders. The European Court intervened only to require that a special criminal sanction be introduced for the offense of exploiting forced labor. However, this intervention was not necessary to preserve the balance of power between the victim and the accused under French law. Indeed, the European Court’s insistence on criminal rather than civil remedies for individuals exploiting forced labor may have created inequitable distributions of power. In Siliadin the Court sided not with the unpopular defendants but rather with the politically powerful prosecutors who benefitted from understandably strong public sentiment.

against human trafficking and exploitation of children, and it pushed for criminalization of certain activities where civil sanctions arguably would have been sufficient. Thus the Court seems to have expanded rather than remedied imbalances built into the domestic system.

In summary, many human rights cases would have similar outcomes if decided within the framework of the power balance model. However, the value of the power balance model lies not merely in the outcomes it would yield, but just as importantly in providing a consistent system of reasoning and a set of principles reconciling due process and victims’ rights. It provides a clear and principled basis for the different treatment currently afforded to cases of official and semi-official crime, on the one hand, and to common crime, on the other hand.

CONCLUSION

The recent expansion of human rights protections for the victims of human rights violations is overall a positive development. However, the increasing recognition of victims’ rights by international human rights courts appears to have gone too far. It has led courts to abandon or downplay their traditional commitment to due process for criminal defendants in favor of supporting increasingly punitive practices based on the assumption that criminal law can help solve pressing social problems. Historical experience, particularly in the United States, shows that once the language of human rights is appropriated by the advocates of “tough on crime” policies it leads to the development of increasingly punitive and repressive criminal justice systems. Once the ideas of victims’ rights gain enough political traction, respect for the rights of the accused tends to suffer. This Article calls attention to the recent pro-victim bias in international human rights law and the dangers it presents, particularly in advancing unjustified optimism about criminal law and criminal punishment as tools of social reform.

Recognition of this danger is a necessary—but not sufficient—precondition for putting international human rights law back on track. What is also needed is a clear path for moving forward: protecting victims’ rights while remaining faithful to due process values. The proposed power balance model offers one such path. It recognizes that the commitment of human rights law to the prevention of abuse of power underlies the seemingly irreconcilable concerns about due process for the accused and about the rights of participation and justice for victims. The model recognizes that the interests of state criminal justice institutions are often not opposed to the interests of the accused, as the
traditional due process model assumed, but are rather aligned with the interests of the criminal against the victim.

The power balance model remedies this blind spot of the due process approach while at the same time preserving its own key values. It stands for restraint and skepticism about criminal law in ordinary criminal cases and at the same time recommends vigorous effort to facilitate prosecution where the crimes of the state are concerned. It has implications for both international criminal justice and ordinary criminal cases.