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Struggle in favour of a criminal law as an 'ultima ratio'.
Critical observations on the criminalisation obligations arising from the jurisprudence of the European Court of Human Rights in the light of the principle of subsidiarity.

Abstract

If the use of criminal law requires that legislators carry out empirical tests to establish the inadequacy of other available enforcement systems and the necessity of resorting to the weapon of punishment, how can the Court impose direct criminalisation obligations without resorting to similar tests? The contribution seeks to ascertain whether the case law of the European Court of Human Rights on positive obligations of criminalisation can be considered compatible with the principle of ultima ratio, in the light of the not merely 'rhetorical' reading that should be given to it in individual domestic legal systems.

1. Criminal law as 'ultima ratio', between myth and reality.

Recourse to the weapon of punishment has always been held to be subject to specific limits. The reasons for this are intuitable: the intervention of criminal law, having always relied on punishments of unspeakable cruelty (it is worth remembering that the death penalty still survives undisturbed in many countries of the world), sanctions intrinsically detrimental to the most fundamental individual prerogatives, as well as liberticidal virtualities completely unknown to other branches of law (even when the fight against crime has intended to abandon the merely retributive orientation towards the 'doubling of evil')[1], requires, of necessity, particularly stringent conditions of use. According to a traditional teaching, to which the reconstructions set out in almost all the introductory texts to the study of our subject still bear witness, recourse to criminal law and to the armoury of sanctions that this branch of law generally makes use of should necessarily be subject to a series of limits and conditions.

To express this idea, recourse has been made to a truly impressive array of concepts (fragmentarity, subsidiarity, necessity, proportionality), which have almost all lent themselves in the prevailing

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1. As noted by *M. Donini*, Garantismo penale oggi, Criminalia (C) 2019, p. 393: "the intrinsic harmfulness of the criminal weapon makes it necessarily subject to a series of 'limits' universally provided for in all legislations". Regarding the necessary "limits" of criminal law see, within a truly endless bibliography: *T. Vormbaum*, "Politisches" Strafrecht, ZStW 1995, p. 750 et seq.; *U. Sieber*, Grenzen des Strafrechts, in ZStW 2007, p. 119; *W. Naucke*, Schwerpunktverlagerungen im Strafrecht, in KritV 1993, p. 137 et seq.; *I. Appel*, Verfassung und Strafe. Zu den verfasvasungsrechtlichen Grenzen staatlichen Strafens, 1998, *passim*; *D. Husak*, Overcriminalization. The Limits of the Criminal Law, 2009, *passim*; *P.H. Van Kempen/M. Jendly*, Overuse in the Criminal Justice System. On Criminalization, Prosecution and Imprisonment, 2019, *passim*; *L. Ferrajoli*, Il paradigma garantista. Filosofia e critica del diritto penale[2], 2016, p. 3 et seq., p. 26 et seq., p. 61 et seq., p. 209 et seq.; *M. Donini*, Per un codice penale di mille incriminazioni. Progetto di depenalizzazione in un quadro del "sistema", Dir. pen. e proc. (DPP) 2000, p. 1652 et seq.; *G.P. De Muro*, Ultima ratio: alla ricerca di limiti all'espansione del diritto penale, Riv. it. dir. proc. pen. (RIDPP) 2013, p. 1654 et seq.; *C.E. Paliero*, Pragmatica e paradigmatica della clausola di *extrema ratio*, Riv. it. dir. proc. pen. (RIDPP) 2018, 3, p. 1447 et seq.

criminal law vulgate, often in a confused and intermingled manner, to emphasise the cardinal idea that criminal law should tend to be employed 'as little as possible', only as a 'last resort', as the *ultima ratio* of the legal system (to be precise).[2]

Looking at the way in which these various limiting characters of criminal law have been declined in practice, it is not easy, however, to say what the real dogmatic-epistemological contents of each of the principles enunciated are, as well as the differences that really exist between them (if indeed there are any): is the *extrema ratio* a synonym of 'subsidiarity' and 'necessity'? Is 'necessity' a 'mirror complement' to the principle of subsidiarity? Are subsidiarity and proportionality overlapping concepts? Are we dealing with principles or mere guiding criteria? And if they are principles, what kind of principles are we really dealing with? Purely policy-driven principles or justiciable demonstrative principles?

These are just some of the questions that would obviously be asked of anyone wishing to approach the study of the aforementioned topic *funditus*.[3] The reader wishing to obtain answers, however, would in all likelihood be disappointed and disorientated by the 'complication' that dominates the subject, getting lost in a whirlwind of concepts, used with meanings that all too often do not coincide at all, which are almost always recalled in general and unitary discourses that would make it difficult for even the most attentive and astute of scholars to form a sufficiently precise and unambiguous idea of the relationships and differences that really exist between all these 'limits' of criminal law.[4]

The evident dogmatic disorientation that has occurred must certainly not have helped the concrete implementation of the ideal of criminal law as *ultima ratio*. An ideal that in its fundamental essence is, however, understood and shared by all, as much in Civil Law systems (think of the principle of *Subsidiarität* in the German legal system and the criterion of *Intervenciòn minima* in the Spanish one) as in Common Law systems (just look at the reference commonly made in Anglo-Saxon countries to the 'minimalist approach' and 'Criminal Law as a Last Resort'). Passing from words to deeds, indeed, one must bitterly note how the principle of *ultima ratio* has mostly remained a mere wish, a *de facto* unrealised aspiration, a "fairy tale" (and the metaphors could continue).

Almost invariably, in recent years, criminal law has been regarded by many legislators as the preferred, if not the exclusive, instrument of enforcement. And this, among other things, in the absence of any well-founded demonstration of the inability of the other means of enforcement theoretically employable to achieve the results that one usually aims to obtain by resorting to the weapon of punishment.

In fact, the current reality of penalisation in the world renders the image of an obsession, which has cleared the way for a mechanism of "integral penalization" caustically renamed "total criminal law" in Italian doctrine[5]: that of controlling and threatening with "the wooden gloves of criminal law"[6] the most various behaviours and, among these, also many actions that "the true character of

2. Cf. *Paliero*, RIDPP 2018, p. 1449: "from a lexical point of view, it is necessary to premise how the [...] 'ultima ratio clause' [...] actually finds multiple correspondences in the technical-legal language, translating into different expressions and 'watchwords'. In a heterogeneous manner, in fact, the same concept (meaning) – to reduce the concept to an extreme synthesis in operationalisable terms: it is a question of pursuing the maximum containment of the use of punishment to the minimum threshold guaranteeing the necessary collective protection – corresponds to different terminological formulas (signifiers) widely diffused in our science: (principle of) subsidiarity, necessity, fragmentary nature, as well as – albeit in an accessory function – proportionality".
3. Just look at the many questions that are also raised by *N. Jareborg*, Criminalization as Last Resort (Ultima Ratio), Ohio State Journal of Criminal Law (OSJCL) 2004, 2, p. 526 et seq.
4. This difficulty has even caused some to doubt the viability of such conceptual mapping [cf. *N. Recchia*, Il principio di proporzionalità nel diritto penale. Scelte di criminalizzazione e ingerenza nei diritti fondamentali, 2020, pp. 62 et seq., that in view of the difficulty of "defining the individual concepts now referred to, for which doctrinal definitions abound that are far from overlapping", it would be "an inane attempt to clearly map the demarcation lines and overlaps between these different criteria, canons and principles"].
5. Picking up on the title of the latest work by *F. Sgubbi*, Il diritto penale totale, 2019, p. 23 et. seq.
6. How he defined them *R. Maurach*, Deutsches Strafrecht. Besonderer Teil, 1952, 100 et seq.

crime would not have and against which our fathers were satisfied with other modes of prevention"[7]. As has been very bitterly observed, therefore, in the modern world, "the space of individual freedom is progressively shrinking" and, "despite periodic decriminalisation, despite tendencies towards 'medicalisation' and 'administrativisation', the number of criminally relevant situations and relationships is constantly multiplying: to the point that, today, it is very rare to find conduct that can be said to be definitely outside the area of operation of criminal law".[8]

The fact that many jurisdictions make distorted and excessive use of the liberticidal arsenal of the criminal law obviously poses considerable practical problems, which tend to vary from system to system, but, in any case, are capable of compromising (in whole or in part) the possibilities that each system has of giving rise to a proper administration of justice. In Italy, for example, the machinery of justice – precisely because of the patently overcriminalisation situation in which the legal system finds itself – appears 'flooded', lacking sufficient means and manpower to celebrate and adequately judge the multitude of criminal trials that take place every year. And this determines, in cascade, a series of 'problems' that can no longer be ignored (inevitably exacerbated by the fetish of the mandatory nature of criminal prosecution, to which our system – rightly or wrongly – continues to remain stubbornly anchored).

2. Paving the way for the use of criminal law finally as a last resort.

The promiscuous and often rhetorical use that has been made of the *ultima ratio* principle, mixing it in an indistinct cauldron of numerous other concepts and criteria, including that of 'proportionality' (which would appear to have a scientific culture and a technical and practical scope that is in reality very different), must certainly not have helped to counter the expansionist drifts in criminal law that have been recorded in almost every country in the world.

Indeed, it must be bitterly observed that the principle of *ultima ratio* has so far been interpreted, in almost all legal systems, in a rather reductive manner.[9] This principle, actually, has been used, in the long years that separate us from its elaboration, for mostly argumentative purposes, devalued to the rank of a principle of mere "political direction" and, in any case, declined in a substantially negative key: according to the traditional readings that have been returned to us of it, in effect, the State should never have to prove positively the necessity of punishment and the inadequacy of other instruments with respect to each individual incrimination, being content to ascertain the mere non manifest sufficiency of the other available measures (with the residual problem, if anything, of understanding how to implement the appropriate checks in this sense)[10]. Even today, there are still authors who do not fail to preach the impossibility of attributing to the principle a more significant role than the stifling one – as a principle of mere "legislative ethics", substantially left to the "prudent appreciation of the legislator" – that has often been attributed to it so far.[11] Looking at the scholarly discussion taking place in the major European legal systems, it seems, however, that an awareness is

7. In these terms *F. Carrara*, Programma del corso di diritto criminale, 1872, § 17.
8. Cf. *F. Sgubbi*, Il reato come rischio sociale. Ricerche sule scelte di allocazione dell'illegalità penale, 1990, p. 11 et seq.
9. As noted by *M. Donini*, "Danno" e "offesa" nella c.d. tutela penale dei sentimenti. Note su morale e sicurezza come beni giuridici, a margine della categoria dell'"offense" di Joel Feinberg, Riv. it. dir. proc. pen. (RIDPP) 2008, p. 1557.
10. As observed by *M. Donini*, Sussidiarietà penale e sussidiarietà comunitaria, Riv. it. dir. proc. pen. (RIDPP) 2003, p. 1-2, §2.
11. For *M. Romano*, «Meritevolezza di pena», «bisogno di pena» e teoria del reato, in Riv. it. dir. proc. pen. (RIDPP) 1992, p. 41, the principle of subsidiarity or *extrema ratio* would merely be "one of the material canons of the criminal policy of contemporary systems". For *Jareborg*, OSJCL 2004, p. 521, the principle of *ultima ratio* would not be a constitutional principle, but a principle of legislative ethics. Similarly, *K.F. Gärditz*, Demokratizität des Strafrechts und Ultima Ratio- Grundsatz, JZ 2016, p. 641-644, 646-649, considers that compliance with the principle remains left to the prudent appreciation of the legislator, since the latter could always decide to consider it or not, within constitutional limits. Among older works, see also: *T. Hörnle*, Grob anstößiges Verhalten – Strafrechtlicher Schutz von Moral, Gefühlen und Tabus, 2005, p. 33 et seq.; *O. Lagodny*, Strafrecht von den Schranlen der Grundrechte, 1996, p. 531 et seq.

also slowly emerging among many interpreters that if he *ultima ratio* is not given the role of a truly justiciable principle as soon as possible, there is little hope of restoring a more rational face to criminal law, finally freeing itself from the annoying 'disease' of overcriminalisation.[12]

Indeed, it can certainly be acknowledged, as also recently highlighted by Jahn and Brodowski[13], that in recent years the debate on the possibility of reinterpreting the guarantees and limits of the *ultima ratio* principle from a "constitutional criminal law" perspective has undoubtedly gained momentum[14], precisely in an attempt to unhinge once and for all the deferential attitude that the constitutional jurisprudence of the individual European states has always adopted on the subject, making the *ultima ratio* a rather sterile principle, which hardly anyone could validly complain about being violated[15]. The orientation of criminal law to the Constitution, in fact, while not being able to represent in this matter the 'magic formula' capable of automatically making every problem disappear[16], would at least offer the advantage, compared to the classical formulation under natural law postulates of the theses concerning *ultima ratio*, of having the political capacity to bind the legislature and the criminal court[17] more intensively.

There is also widespread agreement on the extensive recourse to empirical evidence[18] that the principle of *ultima ratio* (or subsidiarity) would be able to impose on the legislature, which would be called upon to demonstrate both the insufficiency of the other enforcement instruments (civil and administrative) available, and, conversely, the absolute necessity of resorting to the criminal law. This with only the residual doubt as to whether, where the aforementioned evidence does not allow

12. Cf. *L. Greco*, Verfassungskonformes oder legitimer Strafrecht? Zu den Grenzen einer verfassungsrechtlichen Orientierung der Strafrechtswissenshaft, in: B. Brunhöber/K. Höffler/J. Kaspar/T. Reinbacher/M. Vormbaum (eds.), Strafrecht und Verfassung, 2013, p. 20, where it recognises that "if the principle of ultima ratio is not" to be "merely a sketch of the state philosophical doctrine of the social contract, but also a component deriving from the principle of the rule of law, it" must become "a real barrier of positive law participating in the normative power of the Constitution". Along the same lines, cf. *C. Prittwitz*, Das Strafrecht: Ultima ratio, propria ratio oder schlicht stra- frechtliche Prohibition? Zugleich ein Kommentar zu den Beiträgen von Klaus F. Gärditz und Matthias Jahn, ZStW 2017, p. 392 et seq., emphasised that it would be totally absurd and dangerous to let the legislature free itself from the sword of Damocles of constitutional justice in verifying the substantive validity of criminal provisions, because in a constitutional state based on the rule of law, the wisdom of the constitution should always be conveyed by the constitutional justice body and not by the legislature.
13. Cf. *M. Jahn/D. Brodowski*, Krise und Neuaufbau eines strafverfassungsrechtlichen Ultima Ratio-Prinzips, JZ 2016, p. 970.
14. How it registers *J.M. Silva Sanchez*, Malum passionis. Mitigar el dolor del Derecho penal, 2018, p. 42, in almost all European legal systems, one can discern "a developing line of thought that considers that the legal-criminal doctrines limiting the criminalisation processes", coming "from epochs preceding the constitutional rule of law", should "be overcome and integrated into the orientation of criminal law to the fundamental rights and values of the Constitution". The orientation of criminal law to the Constitution, as has been said, would in fact at least offer the advantage, compared to the classical formulation under the postulates of natural law of the theses concerning the ultima ratio, of having the political capacity to bind the criminal legislator and the criminal court more intensively to the principles of constitutional law [cf. *Greco* (fn. 12), p. 17 et seq.; F. *García de la Torre García*, Crisis del principio penal de ultima ratio ¿Debemos retomar la orientación constitucional del Derecho penal?, Anales de la cátedra Francisco Suárez (ACFS) 2021, p. 139 et seq.].
15. As noted by M. Donini, Principios constitucionales y sistema penal, Revista General de Derecho penal (RGDP) 2010, p. 13. But this is a widespread observation: *I. Appel*, Verfassung und Strafe. Zu den verfassungsrechtlichen Grenzen staatlichen Strafrechts, 1998, p. 99, 100, 142, 143, 178, 182, 407, 409, 415, 416, 540; *Jahn/Brodowski*, JZ 2016, p. 969; *J.A. Lascuraín Sánchez*, ¿Restrictivo o deferente? El control de la ley penal por parte del Tribunal Constitucional, InDret 2012, *passim*.
16. Cf. the precise reflections *Silva Sanchez* (fn. 14), p. 42 et seq.
17. As they observe, in particular, *Greco* (fn. 12), p. 17-18; *García de la Torre García*, ACFS 2021, p. 139 et seq.
18. The use of empirical tests is now considered fundamental, in the practical implementation of the ultima ratio principle, by interpreters from different cultural backgrounds: *W. Wohlers*, Derecho penal como ultima ratio ¿Principio fundamental del Derecho penal de un Estado de Dercho o principio sin un contenido expresivo proprio? (trans. ed. by N. Pastor Muñoz), in: R. Robles Planas (ed.), Límites al Derecho penal. Principios operativos en la fundamentación del castigo, 2012, p. 117; *J. Driendl*, Zur Notwendigkeit und Möglichkeit einer Strafgesetzgebungswissenschaft in der Gegenwart, 1983, p. 39 et seq.; *Jahn/Brodowski*, JZ 2016, p. 975 et seq.; *D. Benito Sánchez*, Evidencia empírica y populismo punitivo. El diseño de la política criminal, 2020, *passim*; I. *Berdugo Gómez de la Torre*, Prólogo, in: D. Benito Sánchez, Evidencia empírica y populismo punitivo. El diseño de la política criminal, 2020, p. 17 et seq.; *T. Aguado Correa*, El principio de proporcionalidad en derecho penal, 1999, p. 240; *J.M. Silva Sánchez*, Aproximación al derecho penal contemporáneo, 1992, p. 246; *M. Donini*, Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà, 2004, p. 85 et seq.; *C.E. Paliero*, Il principio di effettività nel diritto penale: profili politico-criminali, in: Studi in memoria di Pietro Nuvolone, I, 1991, p. 395 et seq.

for the dissipation of all uncertainties, it should be deemed more appropriate: (a) nevertheless leave to the latter the possibility of resorting to the criminal law, providing only that the choice can then be reviewed *ex post* by the organs of constitutional justice (or corrected by the legislature itself) in the event that 'evidence' arises as to the sufficiency of the other means of protection[19]; (b) or to let the maxim '*in dubio pro libertate*' prevail, thus rendering any rules introduced by the legislature per se contrary to the principle of *ultima ratio* and, as such, liable to be immediately declared unlawful[20].

A recourse to empiricism that, if in the past it had ended up arousing perplexity (so much that the idea put forward by some criminalists of making legislative intervention conditional on the prior performance of empirical checks was quickly branded by many as "unrealistic")[21], today appears difficult to dispute.

Indeed, the European experience in the application of the subsidiarity check (which obviously takes on a different meaning in this context, as it aims to ensure that the Union intervenes in a manner that respects the sovereign prerogatives of individual Member States)[22] has clearly shown us how the idea of being able to subordinate the validity of a legislative intervention to precise empirical checks is neither unrealistic nor even unfeasible. Indeed, if subsidiarity in the European sphere has been sublimated over the years – precisely through the identification of meaningful rules and accurate empirical checks that the European legislator would be obliged to follow in order to justify its intervention to the Member States and consequently be immune from censure by them or by the CJEU – into an unequivocally judicial demonstrative principle (at least on paper, since the CJEU has often continued to adopt a not inconsiderable attitude of self-restraint in the judicial implementation of the control entrusted to it)[23], it would probably be hypocritical to assume that the same outcome cannot

19. Cf. *Wohlers* (fn. 18), p. 117; *H.-L. Günther*, Die Genese eines Straftatbestandes. Eine Einführung in Fragen der Strafgesetzgebungslehre, JuS 1978, p. 8-11; *Appel* (fn. 15), p. 588; *P. Noll*, Gesetzgebungslehre, 1973, p. 146 et seq.; *F.-J. Peine*, Systemgerechtigkeit. Die Selbstbindung des Gesetzgebers als Maßstab der Normenkontrolle, 1985, p. 136; *G. Stächelin*, Strafgesetzgebung im Verfassungsstaat, 1998, p. 200 et seq.; *A. Nieto Martín*, Saudade of the constitution: The relationship between constitutional and criminal law in the European context, New Journal of European Criminal Law (NJECL) 2019, p. 31.
20. Cf. *W. Hassemer*, Theorie und Soziologie des Verbrechens. Ansatze zu e. praxisorientierten Rechtsgutslehre, 1973, p. 200; *H. Jäger*, Strafgesetzgebung als Prozeß, in: Festschrift für Ulrich Klug zum 70. Geburtstag, I, 1983, p. 83 e 91 et seq. (with further references).
21. Cf. the criticism by *L. Gardocki*, Das Problem des Umfangs der Straflarkeit in der polnischen Gesetzgebung, Rechtsprechung und Strafrechtslehre, in: K. Lüderssen e a. (eds.), Modernes Strafrecht und ultima-ratio Prinzip, 1990, p. 18; *Jareborg*, OSJCL 2004, 526 et seq.
22. Cf. *G.A. Bermann*, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, Columbia Law Review (CLR) 1994, p. 331-334; *P.D. Marquardt*, Subsidiarity and Sovereignty in the European Union, Fordham International Law Journal (FILJ) 1994, p. 617 et seq. The idea that the normative essence of subsidiarity resides in its ability to regulate relations between systems according to an anti-sovereignist and anti-hierarchical logic has, however, been developed by many in doctrine: *C. Millon Delsol*, Il principio di sussidiarietà, 2003; *F. Gentile*, Che cosa si intende per sussidiarietà, Non profit (NP) 1999, p. 639-648; *F. Gentile*, Sovranità e sussidiarietà nella prospettiva della riforma delle istituzioni italiane, Non profit (NP) 2001, p. 309-320; *F. Gentile*, Il principio di sussidiarietà nell'ordinamento dell'Unione europea e nell'ordinamento italiano, Critica penale (CrP) 2004, p. 235-260; *A. D'Atena*, La sussidiarietà tra valori e regole, Diritto e giurisprudenza agraria, alimentare e dell'ambiente (DGAAA) 2004, 69-71; *A. D'Atena*., Modelli federali e sussidiarietà nel riparto di competenze tra Unione europea e Stati membri, Diritto dell'Unione europea (DUE) 2005, p. 13-34, and *N. MacCormick*, La sovranità in discussione, 2003, *passim*; *F. Vecchio*, Primacía del Derecho Europeo y salvaguarda de las identidades constitucionales. Consecuencias asimétricas de la europeización de los contralímites, 2015, p. 97.
23. Even though the amendments introduced in 2007 made the premise of the principle's (at least theoretical) justiciability difficult to challenge, there is still a real and pressing risk that in practice the CJEU's judgement may slip into tautology or give rise to only partial assessments of compliance with the principle [as noted by *A. Bernardi*, La competenza penale accessoria dell'Unione Europea: problemi e prospettive, in Dir. pen. cont. (DPC) 2012, p. 71]. This is demonstrated by the far from convincing arguments used in some recent cases [*Court of Justice of the European Community* (CGEC) 12.7.2005, cases 154-155/04 (*Alliance for Natural Health e a.*); *European Court of Justice* (ECJ) 8.6.2010, case 58/08 (*Vodafone*); *Tribunal* (T) 25.4.2013, case 526/10 (Inuit); *European Court of Justice* (ECJ) 4.5.2016, case 477 and 547/14 (*Pillbox e Philip Morris Brands*); *European Court of Justice* (ECJ) 4.5.2016, case 358/14 (*Polonia/Parliament and Council*); *European Court of Justice* (ECJ) 6.6.2019, case 264/28, (*P.M. e a./Ministerraad*)] and the lack of judicial annulments based on non-compliance with the principle of subsidiarity that one is still forced to record in this area today. However, it should be noted that this last point seems to have been affected by the fact that "the positive effect of the principle of subsidiarity on the Union's legislative output" now "already occurs in the phase preceding the presentation of a proposal, since for years the Commission has been using numerous preparatory and consultation

be reached just as effectively in the area of national criminal law, where the need for a more 'parsimonious' intervention based on plausible empirical evidence is even more strongly felt.

3. The many reasons behind the expansion of criminal law.

The causes that have led individual legal systems not to be compliant with the principle of *ultima ratio*, however, obviously have little to do with the reductive interpretation of the principle itself that has been given in almost all the main European and international legal systems: If the principle in question has certainly not worked as a 'vaccine' against overcriminalisation (which does not mean, however, that it could not work, as we have said, where finally filled with a 'culture' of empirical verifications and assisted by the unavoidable garrison of 'justiciability'), the 'virus' has clearly ended up spreading for different reasons.

Indeed, historical-institutional and ideological-institutional causes have contributed in the first place to the disproportionate expansion of the area of criminal relevance that has been recorded in almost all modern legal systems, such as: (a) the transition – which almost all contemporary legal systems have undergone – from the form of the 'absolute state' to that of the 'rule of law', which entailed around the 18th century the criminalisation of police offences; (b) the transformation faced by the 'rule of law' states themselves, which have gradually taken on more and more the guise of 'social' or so-called 'interventionist' states (which evidently led to a marked accentuation of the tendency towards criminalisation, since they thus came to preside with criminal sanctions over many areas of everyday life that had previously been left entirely to the monopoly of private autonomy).[24]

A significant role, then, was certainly played by certain factors intrinsically linked to the incessant technological and scientific evolution that affected many countries during the 19th and 20th centuries[25], since 'modernisation': (a) on the one hand, it has favoured the emergence of new goods considered to be in need of and deserving of protection, as well as the subjection to punishment of new forms of aggression to pre-existing juridical goods (in nature or in socio-cultural reality); (b) on the other hand, it has amplified that constant feeling of insecurity (already in itself felt within modern societies, also due to the uncompromising media conditioning often operated in exacerbating the gap between the 'real' and the actually 'perceived' rate of justice)[26] which has inappropriately made the criminal law the lousy 'panacea' to which legislators resort whenever they feel they have to 'cure' some 'evil' (rightly or wrongly) deemed to be hanging over the community[27].

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documents (so-called green, white or blue papers, impact assessments), in which the problems relating to the necessity and appropriateness of a new legislative act are analysed in detail in the light of the principle of subsidiarity" (so that it is now the legislator himself who, pressed by the justiciability of the principle, takes preventive care to ensure that his intervention is truly 'subsidiary') [cf. *G. Tesauro*, Manuale di diritto dell'Unione europea (ed. by P. De Pasquale and F. Ferraro)[3], I, 2020, p. 68-70].

24. Cf. *C.E. Paliero*, Minima non curat praetor. Ipertrofia del diritto penale e decriminalizzazione dei reati bagatellari, 1985, p. 3 et seq.
25. Cf. *F. Stella*, Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime[3], 2003, p. 515 et seq. It points out the importance of technicalisation, bureaucratisation and the spread of complex relational contexts in widening the range of negligence liability hypotheses, then, also *D. Castronuovo*, La colpa penale, 2009, p. 50 et seq.
26. On this point, we refer to the acute reflections made by *G. Giostra*, Prima lezione sulla giustizia penale, 2020, p. 28 et seq. As the author does not fail to point out, "judicial information, at least at present, is a mirror that does not merely reflect the procedural events recounted, but often sends back a distorted image". It frequently "affects the reality represented, modifying it". This mainly derives from the "inadequate professionalism of the judicial reporters" who (albeit with praiseworthy exceptions) "favours an information-spectacle, which tends to present the facts in a personalistic and sensationalistic form, often with serious adulteration of the value of certain acts or certain moments of the judicial assessment". But also the "macroscopic temporal misalignment" between "the highlight of the criminal proceedings" and "the highlight of the judicial information", the fact that "the attention of the media" is "focused only on the first acts of the proceedings", charging them with "an "improper probative meaning and a reliability that they should not have", as they come mainly "from the investigative body", contribute to the development of "a guilt-ridden orientation in the public opinion". On this point see also *V. Manes*, Giustizia mediatica. Gli effetti perversi sui diritti fondamentali e sul giusto processo, 2022, ch. II, § 3.
27. The role played by insecurity and fear in the overcriminalisation witnessed in modern societies has been highlighted recently, e.g., by the French sociologist *D. Fassin*, Punire. Una passione contemporanea (trans. ed. by L. Alunni), 2018, p. 15 (where it is

They have not failed to contribute to the expansion of the area of criminal relevance, then, also reasons that seem more closely connected to the emergence of new phenomena, such as the symbolic[28] and sometimes emphatically populist[29] use of criminal law that modern states have increasingly come to make. Convinced that the phenomenon of criminalisation could be supported by social consensus[30], the legislators of various states have, in fact, increasingly and with ever-increasing vigour, relied on criminal sanctions as the first and only rationale for intervention, in the belief that they could appease collective anxiety and obtain a return in terms of image from the protection afforded (i.e. by resorting to the paradigm of the 'maximum means for the minimum purpose') to the irrational fears of the citizen-voters[31].

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correlated with penal populism). The sense of insecurity that technological evolution has generated in the community (but not only, as there are many factors that can contribute to this feeling) [as rightly observed by *Z. Bauman*, Paura liquida, 2008, p. 7 et seq., "the most frightening thing is the ubiquity of fears", the fact that "they can come out of any corner or crevice of our home or planet"], and which undoubtedly represents a factor in the expansion of criminal law (to the extent that the legislature makes 'populist' choices guided by common feeling and aimed at pleasing the masses in their 'felt' need for protection) [not by chance *A. Garapon/D. Salas*, La République pénalisée, 1996, *passim*, considered the inflation of the criminal law instrument as a sign of the crisis of representative democracy and the emergence of a "democracy of opinion", in which "what is exalted is the emotional perception of the subject re-purposed to its most basic emotions: fear and resentment"], in fact, it is not always rationally founded either. Fear, as an irrational 'feeling', indeed, affects the perception of the world and guides human behaviors, but it does so regardless of the existence of a real threat or danger. This is what is often referred to as "derived" or "second-degree" or even "socially and culturally recycled" fear. A fear that feeds insecurity and vulnerability and that reproduces itself in a process of autopoiesis that makes one perceive as always present and alive the danger of being attacked and threatened from all sides: firstly, in one's own body and possessions; then in the stability and reliability of the social order to which one belongs; finally, in one's position in the world (from a religious, class, gender or identity point of view) [*Bauman* (fn. 27), p. 5 et seq.]. It is fear, therefore, that operates as a powerful factor in the expansion of criminal law, since politics, which is imbued with that same fear [indeed, as noted by *M. Donini*, Sicurezza e diritto penale. La sicurezza come orizzonte totalizzante del discorso penale, in: M. Donini/M. Pavarini (eds.), Sicurezza e diritto penale, 2011, p. 11 et seq., "the more it is realised that many risks are inevitable, the more the anxiety to control them grows"], it decides to resort, with increasing frequency, to criminal law and its force. The state, in effect, no longer showing itself capable of protecting its citizens preventively from the most varied dangers, especially those that undermine the security that the welfare state had promoted, decides to re-present itself 'a posteriori' as the guardian of their security, by means of the immoderate recourse to the weapon of punishment. Thus, in fact, it ends up manipulating and governing this fear (which the citizens themselves, often, generically associate with the "commission of crimes", with "criminals") [probably also because of the mass media representation given of them: cf. *J. Bourke*, Paura. Una storia culturale, 2007, p. 335 et seq.; as well as the many contributions published in the volume *G. Forti/M. Bertolino* (eds.), La televisione del crimine. Atti del convegno «La rappresentazione televisiva del crimine», 2005, *passim*; *V. Manes* (fn. 26), ch. I, § 5.1], making it one of the main legitimizing reasons for state punitive intervention [on the relationship between fear and criminal law in modernity, cf. also: *R. Cornelli*, Paura della violenza e crisi del sistema penale moderno, Filosofia politica (FP) 2010, p. 71; *F.E. Zimring/G. Hawkins*, Crime Is Not the Problem, 1997, *passim*; *J. Simon*, Il governo della paura. Guerra alla criminalità e democrazia in America (trans. it ed. by A. De Giorgi), 2008, *passim*; *C.R. Sunstein*, Il diritto della paura, 2010, *passim* and p. 53-72; *M.L. Lanzillo*, Paura. Strategie di governo di una «strana passione», Filosofia politica (FP) 2010, p. 29 et seq.].

28. On the symbolic role of criminal legislation: *B. Hafke*, Die Legitimation des staatlichen Strafrechts zwischen Effizienz, Freiheitsverbürgung und Symbolik, in: Festschrift Roxin, 2001, p. 955 et seq., who considers this role to be at the antipodes of a rational and efficient criminal law; *W. Hassemer*, Das Symbolische am simbolischen Strafrecht, in: Festschrift Roxin, 2001, p. 1001 et seq.
29. On this distorting phenomenon recognisable in the most recent criminal law legislation (Italian and foreign), which conceives of criminal law as an instrument aimed at the pursuit of objectives of an essentially political nature and which "implies the construction of a potestas puniendi in which the symbolic, emotional and irrational component of the people's need for punishment takes over from punitive rationality" [thus *F. Forzati*, Il congedo dell'ultima ratio fra sistema sanzionatorio multilivello e penale totale: verso la pena come unica ratio?, Arch. pen. (AP) 2020, p. 47], cf.: *M. Donini*, Populismo penale e ruolo del giurista, Sis. pen. (SP) 2020, *passim*; *M. Donini*, Populismo e ragione pubblica, 2019, *passim*; *R.E. Barkow*, Prisoners of Politics, 2019, *passim*; *E. Amati*, L'enigma penale. L'affermazione dei populismi nelle democrazie liberali, 2020, p. 22 et seq.; *E. Amati*, Insorgenze populiste e produzione del penale, disCrimen 2019, p. 1 et seq.; *E. Amodio*, A furor di popolo. La giustizia vendicativa gialloverde, 2019, p. 1 et seq.; *L. Ferrajoli*, Il populismo penale nell'età dei populismi politici, Quest. Giust. (QG) 2019, p. 79 et seq.; *V. Manes*, Diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione, Quest. Giust. (QG) 2019, p. 86 et seq.; *G. Insolera*, Il populismo penale, disCrimen 2019, p. 1 et seq.; *E.J. Prats*, Los peligros del populismo penal, 2011, *passim*; *D. Salas*, La volonté de punir. Essai sur le populisme pénal, 2010, *passim*; *J. Pratt*, Penal Populism, 2007, *passim*; *G. Fiandaca*, Populismo politico e populismo giudiziario, Criminalia (C) 2013, p. 95 et seq.; *D. Pulitanò*, Populismi e penale. Sulla attuale situazione spirituale della giustizia penale, Criminalia (C) 2013, p. 123 et seq.; *L. Violante*, Populismo e plebeismo nelle politiche criminali, Criminalia (C) 2014, p. 197 et seq.
30. Cf. *C.E. Paliero*, Consenso sociale e diritto penale, Riv. it. dir. proc. pen. (RIDPP) 1992, p. 866.
31. On this subject cf. *W. Wilson*, *Criminal Law*[7], 2020, p. 49 ("History confirms that the legislature, which is composed of real people

After all, political populism thrives in modern societies precisely because of a series of factors immanent in them that guide penal populism and turn punishment into a sort of "weapon for acquiring consensus at zero cost", and penal law itself into a fundamentally political weapon.[32] Factors such as, to name but a few: "the socio-economic crisis and marginalisation of the middle class, new geopolitical balances and massive migration flows", as well as "growing social insecurity" permeating almost all industrialized societies.[33]

In almost all legal systems, it is agreed that: a) the 'criminalising' thrust resulting from the phenomena mentioned should be appropriately counteracted; b) a scrutiny based on empirical verifications, in the light of the principles of subsidiarity/*ultima ratio* (as justiciable principles), would undoubtedly allow for the creation of a less populist and unnecessarily securitarian criminal law, a criminal law not based only on irrational fears, etc.

Also contributing to the unexpected expansion of criminal law in recent years, however, has been a further phenomenon that has not always been accompanied by a similar unanimous doctrinal stigmatisation[34], and which has therefore represented an even more insidious adversary for the principle of subsidiarity/*ultima ratio*: the emergence of a pervasive culture of protection of human rights, which in the framework of 'Greater Europe' (but not only here) has led to extensive and unexpected waves of 'criminalisation' and 'victimisation' from the dutiful protection accorded to them[35], since the principle of *ultima ratio* has so far appeared to have less 'staying power' in front of

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rather than penologists, is regrettably as likely to respond reactively to the instantaneous "moral panics" of voters as to satisfy the ethical and utilitarian restrictions on the use of state coercion for public purposes")

32. Cf. *T. Weigend*, Strafrecht und Zeitgeist, in Strafrecht und Kriminologie unter einem Dach. Kolloquium zum 90. Geburstag von Professor Dr.Dr.h.c. mult. Hans-Heinrich Jescheck, 2006, p. 62, which in the trend lines of current criminal law, recognises the instrumentalisation of criminal law, which risks becoming a cheap political tool.

33. Cf. *F. Forzati*, AP 2020, p. 40 (fn. 149) and 44 et seq.; *A. Manna*, Il diritto penale dell'immigrazione clandestina, tra simbolismo penale e colpa d'autore, Cass. pen. (CP) 2011, p. 457; *L. Risicato*, Diritto alla sicurezza e sicurezza dei diritti: un ossimoro invincibile?, 2019, p. 74 et seq.

34. As shown by *K. Engle*, A Genealogy of the Criminal Turn in Human Rights, in: K. Engle/Z. Miller/D.M. Davis (eds.), Anti-Impunity and the Human Rights Agenda, 2016, p. 42, "the correspondence between criminal prosecution and human rights has become so ingrained that expressing opposition to any particular international prosecution is sometimes seen as anti-human rights". It is not surprising, therefore, that alongside more critical stances [cf. e.g. *A. Bascuñán Rodríguez*, Derechos fundamentales y Derecho penal, Revista de Estudios de la Justicia (REJ) 2007, p. 47-54; *F. Caamaño Domínguez*, La garantía constitucional de la inocencia, 2003, p. 52 et seq.; *J.A. Lascuraín Sánchez*, ¿Cuándo penar, cuánto penar?, in: A. Lascuraín Sánchez/M.A. Rusconi (eds.), Proporcionalidad penal: fundamentos, límites, consecuencias, 2014, p. 285-328; *J.P. Mañalich Raffo*, La prohibición de infraprotección como principio de fundamentación de normas punitivas: ¿protección de los derechos fundamentales mediante el Derecho penal?, Revista derecho y humanidades (RDH) 2005, p. 245-249; but see also the heartfelt and agreeable defense of *L. Greco*, Por que inexistem deveres absolutos de punir, Católica Law Review (CLR) 2017, p. 122-123, 124 et seq. and *passim*, to the idea that there cannot, however, be absolute positive obligations of criminalisation, that is unconditional and binding, but only relative, that is always to be balanced with the other obligations incumbent on the State and conditional on the prior fulfilment of empirical verifications aimed at determining the necessity of resorting to the criminal law; for a review of the criticisms that have been made of positive obligations of criminalisation in doctrine, see also *M. Beijer*, The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations, 2017, p. 71-96 and, more succinctly, *M. Klatt*, Positive Rights: Who Decides? Judicial Review in Balance, International Journal of Constitutional Law (IJCL) 2015, p. 355-357], there have also been many 'openings' to positive obligations of a conventional or constitutional nature: see e.g. *G. Doménech Pascual*, Los derechos fundamentales a la protección penal, Revista Española de Derecho Constitucional (REDC) 2006, p. 355 et seq.; *M. Bustos Rubio*, Aporofobia, motivos discriminatorios y obligaciones positivas del Estado: el art. 22.4a CP entre la prohibición de infraprotección y la subinclusión desigualitaria, Revista Electrónica de Ciencia Penal y Criminología (RECPC) 2021, p. 17 et seq.; *E. Carmona Cuenca*, Derechos sociales de prestación y obligaciones positivas del Estado en la jurisprudencia del Tribunal Europeo de Derechos Humanos, Revista de Derecho Político (RDP) 2017, p. 1211-1238.

35. Victimocentrism, which is often stigmatised in doctrine [see e.g., *V. Valentini*, Le garanzie liberali e il protagonismo delle vittime. Uno schizzo sistemico dell'attuale giustizia penale europea, ius17@unibo 2011, p. 97 et seq.; *E. Borja Jiménez*, Curso de Política Criminal[2], 2011, p. 68], at least if understood as the mere centrality accorded to the victim in the criminal process, is not necessarily an evil to be fought (just look at the so-called 'restorative justice' and at the recently emerging idea of replacing the punishment passively suffered by the perpetrator with an acted punishment, based on forms of reparation – performance-based or interpersonal – that benefit the victims: *M. Donini*, Le due anime della riparazione come alternativa alla pena-castigo: riparazione prestazionale vs. riparazione interpersonale, Cass. pen. (CP) 2022, p. 2027 et seq.). What should be stigmatised is the re-reading of the role of the victim that the 'lenses' of populism have given to us (of which modern 'victimocentrsim' seems to be only one of many iterations); a re-reading, indeed, that has often ended up 'wronging' the very interests (the real interests, often blatantly ignored)

the criminalisation impulses stemming from the ECHR (and from other charters of rights that may be able to produce similar positive obligations)[36].

4. The so-called "Sword Function" of Human Rights Law: a factor leading to further expansion of national criminal law.

As was first pointed out by Christine Van den Wyngaert – with a fortunate metaphor that still expresses the 'dual' nature of their relationship – human rights can serve as both 'sword' and 'shield' for criminal law[37], in the sense that: a) human rights can be seen as factors that can limit the area of criminal law and at the same time lead to its decisive expansion; b) conversely, "the criminal law" also "appears to be both a protection and a threat for fundamental rights and freedoms"[38].

A dichotomous use of the same element, which can also be expressed through the well-known concepts employed by German constitutionalist doctrine of *Abwehrrecht* and *Schutzpflicht*[39], which has given rise to a relationship between criminal law and human rights rightly described as 'ambivalent' and 'paradoxical'. If not in itself, at least in terms of the effects it is undoubtedly capable of producing ("more criminal law for all!"). Such effects, indeed, are in stark contradiction with the principle of *ultima ratio*[40] and with the interest that the Court itself has always manifested in the construction of an "autonomous notion of criminal matters". The latter notion, in fact, is notoriously aimed at avoiding undue 'label fraud' by Member States and at ensuring that individuals, therefore, enjoy the same guarantees of criminal law even for facts that are not formally qualified as such in domestic legal systems[41].

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of the victims, only leading to new waves of repression and punitive rigour [cf. *A. García-Pablos de Molina*, Tratado de Criminología[5], 2014, p. 113; *Benito Sánchez* (fn. 18), p. 165].

36. Cf. *M. Pinto*, Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law, Utrecht Journal of International and European Law (UJIEL) 2018, p. 179; *S. Manacorda*, Dovere di punire? Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto, in: M. Meccarelli/P. Palchetti/C. Sotis (eds.), Il lato oscuro dei Diritti umani, 2014, p. 341.
37. Judge Van den Wyngaert explicitly referred to international criminal justice, where human rights had in fact become 'offensive' (instead of defensive). The protection and restoration of victims' rights is indeed – in that field – the ground for prosecuting perpetrators of mass atrocities, instead of being a safeguard for the accused. The famous expression was part of a presentation given in 1995 at the XVe Journées d'études juridiques Jean Dabin, Louvain and subsequently published in *F. Tulkens/H. Bosly* (eds.), La justice pénale et l'Europe, 1996, *passim*, which has enjoyed great popularity over the years. It has in fact been taken up several times since then: *J.A.E. Vervaele*, Régulation et repression au sein de l'État providence. La function "bouclier" et la function "épée" du droit penal en déséquilibre, Déviance et société (DS) 1997, p. 120-122.
38. Cf. *F. Tulkens*, The Paradoxical Relationship between Criminal Law and Human Rights, Journal of International Criminal Justice (JICJ) 2011, p. 583 et seq.
39. Cf. *J. Dietlein*, Die Lehre von den grundrechtlichen Schutzpflichten, 1992, p. 112 et seq.; *P. Unruh*, Zur Dogmatik der grundrechtlichen Schutzpflichten, 1996, p. 76 et seq. The development of the ECtHR's jurisprudence about positive obligations has likely been influenced by the jurisprudence of the German Constitutional Court, which – starting from the well-known dual conception of fundamental rights not only as 'subjective rights' but also as 'principles' or 'objective values' that inform the entire legal system – has progressively assigned the State a series of positive obligations aimed at guaranteeing them. A review of the foundations and development of the construction of the Bundesverfassungsgericht is offered, with numerous bibliographical references on the status of the question of protective duties in German constitutional doctrine, by *C. Calliess*, Die grundrechtliche Schutzpflicht im mehrpoligen Verfassungsrechtsverhältnis, JZ 2006, p. 321-325; *E.-W Böckenförde*, Grundrechte als Grundsatznormen, in: E.-W Böckenförde (ed.), Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Vefassungsrecht, 1992, p. 159-175.
40. As recently observed by *Nieto Martín*, (NJECL) 2019, 33; *A. Nieto Martín*., El principio de proporcionalidad, in: R. Sicurella/V. Mitsilegas/R. Parizot/A. Lucifora (eds.), Principios generales del Derecho Penal en la Unión Europea, 2020, p. 180.
41. Thus *Manacorda* (fn. 36), p. 338 e 343, who: (a) on the one hand states that "the contradiction between the two roles played by human rights with respect to the criminal system is [...] more apparent than real since criminal law constitutes the instrument for the protection of legal goods which is based on the sacrifice of the individual's personal liberty"; "this tension is therefore ontologically inscribed in a liberal and democratic criminal system" and "the dual role of fundamental rights defines a field of forces which is consubstantial to criminal law"; b) on the other hand, however, it recognises that "the choice in favour of the criminal law response seems to lead Strasbourg jurisprudence to a curious contradiction. While it has endeavoured to construct an autonomous notion of 'criminal matters' in order to grant individuals similar guarantees in the case of penal sanctions and punitive sanctions with a repressive content, but of an administrative nature, the Court seems to forget its own teachings: "more

In fact, the traditional point of view – the one behind the introduction of the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR or simply 'the Convention') in 1950 – has always seen human rights as a protection for individuals against the abuses that any state could always come to make of its powers; a 'shield' for the accused, in short, against torture, the death penalty and, more generally, the risk of arbitrary punishments and unjust forms of detention.[42] Over the years, however, human rights have also come to assume a radically different role from the one traditionally attributed to them, and criminal law itself has slowly begun to be increasingly seen as a necessary tool for the protection of human rights, as a means to strengthen the rights of victims of human rights violations through an outsized expansion of its field of operation. Hence, as also mentioned, "as 'sword', human rights protect individuals *through* criminal law"[43], rather than *by* criminal law.

The 'offensive' function of human rights cannot, however, be considered a fully-fledged 'original' function of human rights. It has only been attributed to them over time since the text of the ECHR has always seemed essentially 'silent' on the point.[44] For the most part, therefore, these were obligations that a handful of judges appointed by the governments of the almost fifty member states of the Council of Europe (in no way representative of the will of the people of those countries) derived by means of interpretation – not without disagreement[45] – from the text of the Convention: a) sometimes considering them to be implicitly deducible from some of its articles; b) in other cases, even developing them "on the basis of the ultimate purpose" attributed to the "Convention"[46].

Indeed, the jurisprudence of the ECtHR concerning the use of criminal law to protect human rights, which today appears to be substantially based on the theory of "horizontal applicability of human rights" and the doctrine of "positive obligations"[47], represents the fruit of a long hermeneutic evolutionary path, in which the Court has given shape to an enormous number of obligations for States, which has extended, in a markedly casuistic manner, to every branch of the legal system of the Council of Europe member states: civil, administrative, procedural, labour and, for what is most interesting here, criminal. Thus, if until a few decades ago, it was still debatable whether positive obligations could still be considered an 'exceptional' safeguard, limited to the protection of certain essential goods, today it seems impossible to deny that the ECtHR – for several years now – has

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criminal law for all!" is the watchword that risks characterising the mechanism of positive obligations, thus marking the decline of criminal matters and the paradoxical expansion by the Court of the more repressive law".

42. This point of view embodies the Western tradition on the rule of law and 'habeas corpus'. Similarly, cf. *M. Delmas-Marty*, Le paradoxe pénal, in: M. Delmas-Marty/C. Lucas de Leyssac (eds.), Libertés et droits fondamentaux, 1996, p. 369.
43. Thus *S. Paiusco*, Nullum Crimen Sine Lege, the European Convention on Human Rights and the Foreseeability of the Law, 2021, 47.
44. Even Article 2 of the ECHR, which protects the very fundamental right to life, does not state that "the taking of human life is punishable", but limits itself to stating that human life "shall be protected", and does not in fact seem able to impose, from a strictly lexical point of view, any obligation to criminalise abortion or euthanasia [see *A. Bonomi*, Il "limite" degli obblighi internazionali nel sistema delle fonti, 2008, p. 333, fn. 456], in the case of negligent homicide and, perhaps, even in the case of intentional homicide [with reference to negligent and intentional homicide see, however, the different position of *M. Chiavario*, La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale, 1969, p. 134 (in fn.), p. 141-144; *P. van Dijk/G.J.H. van Hoof*, Theory and practice of the European Convention on Human Rights[3], 1998, p. 297]. So true is it that some have not failed to emphasise the "creative" character of the jurisprudence developed by the Court in the interpretation of Article 2 ECHR [cfr. *F. Sudre*, Le droit à la protection de la vie, ou la version light du droit à la vie, in : M. Levinet (ed.), Le droit au respect de la vie au sens de l'article 2 de la CEDH, 2010, p. 278].
45. See e.g., the dissenting opinion of Judge Terje Wold to ECtHR 23 July 1968, nos. 1474/62 to 2126/64, Belgian Linguistic case; the partly dissenting opinion of Judge Matscher and the partly dissenting opinion of Judge Pinheiro Farinha, both to ECtHR 13 June 1979, no. 6833/74, Marckx v. Belgium. See also the dissenting opinions of Judge O'Donoghue and Judge Thór Vilhjálmsson, both to ECtHR 9 October 1979, no. 6289/73, Airey v. Ireland, and the dissenting opinions of Judge Sir Gerald Fitzmaurice to ECtHR 13 June 1979, no. 6833/74, Marckx v. Belgium, and to ECtHR 25 March 1978, no. 5856/72, Tyrer v. the United Kingdom. See, finally, the joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku, Power to ECtHR 1 June 2010, No.22978/05, Gäfgen v Germany, para. 5.
46. Cf. *V. Zagrebelsky/R. Chenal/L. Tomasi*, Manuale dei diritti fondamentali in Europa[3], 2016, p. 139.
47. Cf. e.g., *F. Tulkens*, (JICJ) 2011, p. 577.

progressively 'normalised' its jurisprudence on positive obligations.

Since the decision in *Marckx,* the ECtHR has indeed established that not only do states have 'negative obligations' not to interfere with individual's rights, but they also have 'positive obligations' to ensure effective protection of the provisions of the ECHR.[48] States are not only responsible for violations of Convention rights attributed to their agents, but even abuses committed by private individuals where the state failed to prevent the violations due to negligence or tolerance.[49] Both the horizontal effect and the theory of positive obligations have been clearly highlighted, then, from *X and Y v. Netherlands*, which is commonly seen as a leading judgment concerning the duty to protect human rights by means of criminal law. The point at issue was the inability of the applicant to open a criminal prosecution against the alleged rapist of his daughter, a minor with learning disabilities. Having criticised the shortcomings in the national legislation, the ECtHR held that in the case of wrongdoing against sexual integrity "effective deterrence is indispensable" and "it can be achieved only by criminal-law provisions".[50]

Similarly, in the case of *Osman v. UK*, states were required to adopt – in the words of the Court – "effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions".[51]

The principle expressed in the judgment *X and Y v. Netherlands* was then more recently confirmed – and specified – in the case *M.C. v. Bulgaria*, in which the Court intended to state that "any restrictive approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of sexual violence unpunished and thus jeopardizing the effective protection of individual sexual freedom", whereby Member States under Articles 3 and 8 ECHR are required to "criminalise and effectively prosecute any non-consensual act even in the absence of physical resistance on the part of the victim" (§166).[52]

In recent years, though, entirely similar phrases have appeared in many other cases, even in relation to rights other than the one at issue in *X and Y v. Netherlands*, as: (a) in *Paul and Audrey Edwards v. UK*, where the Court held that taking appropriate steps to safeguard the lives of those within the state's jurisdiction under Article 2 "involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person"[53]; (b) in *MS v Croatia (No. 2*), where the phrase was repeated in connection with Article 3 ECHR[54]; (c) in *Cestaro v. Italy*, where the Court held that for "an investigation to be effective in practice it is a prerequisite that the State has enacted criminal-law provisions penalizing practices that are contrary to Article 3"[55]; (d) in *Makaratzis v. Greece* and *Nachova v. Bulgaria*, 2004 and 2005, respectively, in which the respondent states were condemned by the Court for the excessive breadth of the existing legislation on the lawful use of weapons by the police, with a correlative insufficient protection of the right to life of citizens under Article 2 ECHR[56]; (e) in *Kiliç v Turkey*, where the ECtHR stated that States have an obligation to secure the right to life "by putting in place effective criminal-law provisions"[57]; (f) in *Siliadin v. France*, a case in which the Court derived an obligation of criminal law protection from Article 4 ECHR, condemning France for the absence of criminal

48. Cf. *Marckx v Belgium*, Application no. 6833/74, Judgement 13 June 1979.
49. Cf. *Cyprus v Turkey*, Application no. 25781/94, Judgement 10 May 2001, para 81.
50. Cf. *X and Y v Netherlands*, Application no. 8978/80, Judgement 26 March 1985, para 24 and 27.
51. Cf. *Osman v. UK*, Application no. 23452/94, Judgement 28 October 1998.
52. Cf. *M.C. v. Bulgaria*, Application no. 39272/98, Judgement 4 March 2004.
53. Cf. *Paul and Audrey Edwards v. UK*, Application no. 46477/99, Judgement 14 March 2002.
54. Cf. *MS v Croatia (No. 2)*, Application no. 75450/12, Judgement 19 February 2015.
55. Cf. *Cestaro v. Italy*, Application no. 6884/11, Judgement 7 July 2015.
56. Cf. *Makaratzis v. Greece*, Application no. 50385/99, Judgement 20 December 2004; *Nachova v. Bulgaria*, Application no. 43577/98 and 43579/98, Judgement 6 July 2005).
57. Cf. *Kiliç v Turkey*, Application no. 22492/93, Judgement 28 March 2000.

legislation to effectively repress the phenomenon of so-called 'domestic slavery'[58]; (g) in *Söderman v. Sweden*, in which the right to privacy required the intervention of criminal law, to punish clandestine shots a man had taken of his 14-year-old stepdaughter while she was bathing[59].

5. The meaning of effective deterrence in the ECtHR jurisprudence.

As can be seen from the judgments referred (and the doctrine has not failed to emphasise this), the need to pursue "an effective deterrence" has almost always underpinned the Court's decision to require states to undertake a 'revision' of their domestic legal systems.[60] So far, however, the Court has not shown any particular interest in verifying whether the intervention of criminal law, which it has repeatedly claimed was absolutely necessary, had a 'dissuasive' capacity that other means of enforcement could not have had. The idea that only criminal law could ensure adequate protection of human rights has until now rested, in short, on petitions of principle and increasingly tautological reasoning.

This lack of verifications, also given the ambiguity that can be attributed to the concept of 'effectiveness', to which the Court has frequently resorted to justify the imposition of criminalisation obligations on individual Member States, could, nevertheless, denote an adherence by the Strasbourg judges to one of those 'expressive' justificatory paradigms of punishment that are more unbalanced on the retributive-deontological side (and so rather backward- than forward-looking), more interested, that is, in the mere social reaffirmation of the norms and 'communication of censure' that criminal law underlies.

The Court's frequent 'resting' on loose demonstrations would in fact be more comprehensible if it implied the idea that recourse to the criminal law could always be considered imposed in itself: because of the character of 'censure' and 'social stigmatisation' that notoriously implies; because of the message it conveys both to offenders and to the community. However, if this were indeed the Court's approach, one would probably have to conclude that the entire jurisprudence on positive criminalisation obligations would remain based on fallacious postulates and, in any case, unable to adequately support a thesis with such pervasive effects.[61] This is an idea that must therefore be properly discarded.

In fact, even if one were to recognise that an expressive-retributive justification of punishment could be accepted per se (which is rather doubtful), breaking the relationship of reciprocal interrelation that has sometimes been erroneously foreshadowed between the ends and the limits of criminal law[62], one would certainly have to recognise that in no case would such a justification for

58. Cf. *Siliadin v. France*, Application no. 73316/01, Judgement 26 October 2005.
59. Cf. *Söderman v. Sweden*, Application no. 5786/08, Judgement 12 November 2013.
60. For this observation see, among many, *Beijer* (fn. 34), p. 63 e 70; *D. Xenos*, The Positive Obligations of the State Under the European Convetion of Human Rights, 2012, p. 91; *D. Zerouki-Cottin*, L'obligation d'incriminer imposée par le juge européen, ou la perte du droit de ne pas punir, Revue de science criminelle et de droit penal compare (RSCDPC) 2011, p. 581. On the fundamental role played by the doctrine of 'effectiveness' as a basis for positive duties, in a rather critical tone, see already *J.G. Merrils*, The Development of International Law by the European Court of Human Rights[2], 1995, p. 98 et seq. At the time, the author urged caution, given the expansive potential of this doctrine, a potential that, as we shall see, time has confirmed.
61. This is also recognised by *F. Viganò*, L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali, in: Studi in onore di Mario Romano, IV, 2011, p. 2688, where he observes that "the doubt could not appear unjustified that" behind the affirmations of the Strasbourg Court, "at bottom there is a bet on the expressive-symbolic function of criminal law, conceived as an instrument of a community – so that the lack of criminal protection of one of these values would end up signalling to the same community a pernicious lack of attention to that value, while its inclusion in the table of values drawn up by the criminal code would express the will of the system to 'take seriously' the protection of the interest"; but that such a 'gamble' would prove to be "wholly distant from the prospect of a criminal law 'ultima ratio' of social policy, which always demands a legitimacy additional to the ascertainment of the high rank of the interest protected".
62. Also breaks this possible interrelation, among many others, *J. Feinberg*, The Moral Limits of the Criminal Law. Harm to Others, 1984, p. 4; *Greco* (fn. 12), p. 24; *A. Merlo*, Considerazioni sul principio di proporzionalità nella giurisprudenza costituzionale in materia penale, Riv. it. dir. proc. pen. (RIDPP) 2016, p. 1458 et seq. (distinguishing between criteria of legitimisation and criteria

the intervention of criminal law then 'stand up' to scrutiny in the light of the necessary 'limits' that criminal law must meet at the national level[63], given that such an 'expressive' justification of the criminal law would make the latter the first *ratio* of protection, rather than the last, each 'precept' being in theory 'better expressible' when assisted by the harshest sanction the system has to offer (at least if our focus is only on the public disapproval of the crime that should be reached)[64]. But only an 'anti-guarantor' reading of the *extrema ratio* would lend itself to justifying a similar form of employing the liberticidal arsenal that criminal law notoriously makes use of; whereas, in order not to give a pleonastic content to this principle, it must necessarily be recognised that even if non-criminal protection were indeed insufficient, criminal protection could never be considered justified per se[65].

Unacceptable, however, even further upstream, is probably the very idea that recourse to the criminal law could be justified per se – even if it were not subject to such stringent limits – solely for its expressive function (at least if we intend expressive theories in a more deontological-retributive sense), without regard for the criminal law's actual, real-life, consequences and effects of punishment. The validity and usability of the 'expressive' theories of punishment, which, starting from Feinberg's classic work[66], have undoubtedly acquired a growing prominence and diffusion in the modern doctrinal panorama (reflected in a growing number of works in Romano-Germanic doctrine, including German and Latin-American scholarship), depends (to a very large extent) on their utilitarian connotation, i.e. on the recognition that they have consistently made of the circumstance that punishment should always also pursue some kind of purpose[67]: to use Sunstein's words, in short, despite the fact that some authors have indeed endeavoured to elaborate completely abstract 'expressive' paradigms[68] or more paternalistic censure-based approaches[69], it must be recognised that usually "good expressivists are also consequentialists"[70].

This is demonstrated by the fact that a particularly stringent connection has almost always been discerned – sometimes for this very reason with critical accents from advocates of real 'absolute'

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of delegitimisation of criminal law); *G. Fiandaca*, Legalità penale e democrazia, Quad. fiorentini (QF) 2007, 1267.

63. The reflections of *Mañalich Raffo*, RDH 2005, 255, also seem to us to go in this direction. Comparable considerations are made also by *M. van de Kerchove*, Les caractères et les fonctions de la peine, nœud gordian des relations entre droit penal et droits de l'homme, in: Y. Cartuyvels/H. Dumont/F. Ost/M. van de Kerchove/S. Van Drooghenbroeck, Les droits de l'homme bouclier ou épée du droit penal, 2007, p. 359, where he observes that, "in terms of legitimacy, however, a question of proportionality arises" from the expressive justification of punishment, since, "as Hart has pointed out" [*H.L.A. Hart*, Law, liberty and Morality, 1963, p. 65-66], the "mere expression of moral condemnation" hardly seems justifiable "at the cost of human suffering", whereas the "normal way" of such expression consists of "words" and could take the form of a simple "solemn and public declaration of disapproval".
64. It is important to note, indeed, that in many circumstances, the reaffirmation of norms may not be a virtue but may have counterproductive effects. One only must look at the fact that such an objective – reaffirming the force of norms through criminal law – is often also pursued by illiberal and authoritarian regimes [see *J.C. Müller-Tuckfeld*, Integrationsprävention: Studien zu einer Theorie der gesellschaftlichen Funktion des Strafrechts, 1998, p. 68].
65. See *Silva Sanchez* (fn. 14), p. 44-45.
66. Cf. *J. Feinberg*, The expressive function of punishment, The Monist (M) 1965, p. 397 et seq.
67. But, for a pure retributive expressive theory, see. *F. Rostalski*, Der Tatbegriff im Strafrecht. Entwurf eines im gesamten Strafrechtssystem einheitlichen normativ-funktionalen Begriffs der Tat, 2019, p. 27.
68. See *G. Jakobs*, Sobre la teoria de la pena, 1998, p. 33 et seq.; *G. Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004; p. 24 et seq. One of the main innovations of Jakobs' approach is that it alleviated punishment theory partly form the dilemma of empirical grounding. He argued that norm affirmation inherent in punishment, that is the expression of contradiction to the attack on the validity of the norm, is beyond any empirical falsifiability [*G. Jakobs*, Strafrecht zwischen Funktionalismus und "alteuropäischem" Prinzipiendenken. Oder: Verabschiedung des „alteuropäischen" Strafrechts?, ZStW 1995, p. 844 et seq.].
69. Cf. *J.-C Wolf/I. Haaz*, Strafe als Tadel? Argumente pro und kontra, in: A. von Hirsch/U. Neumann/K. Seelmann (eds.), Strafe–Warum? gegenwärtige Strafbegründungen im Lichte von Hegels Straftheorie, 2011, p. 69-77; *T. Hörnle/A. von Hirsch*, Positive Generalprävention und Tadel, Goltdammer's Archiv für Strafrecht (GA) 1995, p. 261-282; *K. Günther*, Die symbolisch-expressive Bedeutung der Strafe - Eine neue Straftheorie jenseits von Vergeltung und Prävention?, in: Festschrift für Klaus Lüderssen zum 70. Geburtstag, 2002, p. 205-220.
70. Thus *C.R. Sunstein*, On the Expressive Function of Law (1996), University of Pennsylvania Law Review (UPLR) 2021, p. 2047.

reconstructions of punishment (in the sense of being free from the achievement of any goal)[71] – between the theoretical strand in question (in which Robinson-style "empirical retributionism" could maybe also be included)[72] and the so-called "general positive prevention" (which, by the way, is rarely defended as justification of punishment in its own right)[73]. In general, then, it should be noted that the "expressive" theses have usually always emphasised – either expressly or in fact – their character of: (a) now "hybrid", of *mixtum compositum* between preventive and retributive ideas; (b) now "revolutionary", of a prototype capable of overcoming the oldest and most abused archetypes in the field of justification of punishment.[74]

Even if one were to accept an "expressive" justification paradigm for punishment (this is obviously not the place to discuss whether the most recent trends about the theoretical justification of punishment merit acceptance)[75], therefore, one would at least have to agree with Roxin that this would be "a legitimate penal aim" only "alongside the preventive goals of punishment"[76]. The reference that the Court has always given to 'deterrence', after all, we do not believe can be considered to have been made only *ad abundantiam*: this reference, in fact, should allow us to infer that "at least rhetorically, the Court" itself "(primarily) subscribes to the preventive (rather than to the retributivist or to the expressive) theory of punishment".[77] Moreover, reading the Court's jurisprudence in a non-atomistic manner, it cannot be ruled out that the Court also makes use of positive special prevention arguments.[78]

Hence, even partly adhering to an expressive justification paradigm of punishment, the need for empirical verification of the possibility of achieving the 'desired' results through recourse to criminal law only – in such a way as to ensure that criminal law intervention respects the principle of *ultima*

71. See e.g., *M.S. Moore*, Placing Blame. A Theory of the Criminal Law, 2012, p. 84 et seq. and 91 et seq.
72. See *P.H. Robinson*, Die empirisch ermittelte verdiente Strafe und die Strafrechtskodifikation im In- und Ausland, in: J. Kaspar/T. Walter, Strafen „im Namen des Volkes"? Zur rechtlichen und kriminalpolitischen Relevanz empirisch feststellbarer Strafbedürfnisse der Bevölkerung, 2019, p. 39 et seq.; *P.H. Robinson*, The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime, Ariz. St. L.J. 2010, p. 1090 et seq.; *P.H. Robinson*, ¿Una tregua en la guerra de los principios distributivos? Merecimiento empírico, credibilidad moral y la interioricazion de las normas sociales, in: F. Miró Llinares/J.L. Fuentes Osorio (eds.), El Derecho Penal ante lo empírico. Sobre el acercamiento del Derecho Penal y la Política Criminal a la realidad empírica, 2021, p. 23 et seq.
73. Cf. *T. Zürcher*, Legitimation von Strafe. Die expressiv-kommunikative Straftheorie moralischen Rechtfertigung von Strafe, 2014, p. 127; *P. Bruckmann*, Sinn und Unsinn gegenwärtiger Vergeltungstheorien – überholt, hilfreich oder notwendig zur Legitimation staatlicher Strafe?, KriPoZ 2019, p. 117 et seq.; *A. Werkmeister*, The individual and the International Community: An Outline for a Combined Meso Preventive Theory of International Punishment, in: F. Jessberger/J. Geneuss (eds.), Why Punish Perpetrators of Mass Atrocities?, 2020, p. 228 et seq., 249-250; *T.R. Andrissek*, Verlgentung als Strafzweck, 2017, p. 64, 86, and 237.
74. E.g., *T. Hörnle*, Expressive Straftheorien, in: T. Hilgers/G. Koch/C. Möllers/S. Müller-Mall (eds.), Affekt und Urteil, 2015, p. 143 et seq.; *D. Demko*, An expressive theory of international punishment for international crimes, in: F. Jessberger/J. Geneuss (eds.), Why Punish Perpetrators of Mass Atrocities?, 2020, p. 176 et seq. and 192; *A. Montensbruck*, Deutsche Straftheorie I - IV. Lehrbuch in vier Teilen[4], p. 231 et seq.
75. For a defence of a traditional consequentialist justification of punishment see, in any case, *D. Rodríguez Horcajo*, Retribución y consecuencias:¿ Todo en uno?, in: F. Miró Llinares/J.L. Fuentes Osorio (eds.), El Derecho Penal ante lo empírico. Sobre el acercamiento del Derecho Penal y la Política Criminal a la realidad empírica, 2021, p. 83 et seq.
76. See *C. Roxin*, Prevention, Censure and Responsibility. The Recent Debate on the Purposes of Punishment, in: A.P. Simester/A. du Bois-Pedain/U. Neumann (eds.), Liberal Criminal Theory. Essays for Andreas von Hirsch, 2004, p. 41.
77. As observed by *N. Peršak*, Positive Obligations in View of the Ultima Ratio Principle, in: L. Lavrysen/N. Mavronicola (eds.), Coercive Human rights. Positive Duties to Mobilise the Criminal Law under the ECHR, 2020, p. 152. Similarly, however, see also *Pinto*, UJIEL 2018, p. 172; *D.F. Orentlicher*, Addressing Gross Human Rights Abuses: Punishment and Victim Compensation, Studies in Transnational Legal Policy (STLP) 1994, p. 427; *D.F. Orentlicher*, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, Yale Law Journal (YLJ) 1991, p. 2537.
78. As observed by *V. Scalia*, Una proposta di ricostruzione degli obblighi positivi di tutela penale nella giurisprudenza della Corte europea dei diritti dell'uomo. L'esempio degli obblighi di protezione del diritto alla vita (I parte), Arch. pen. (AP) 2020, p. 32, "the reconstruction model outlined by the Court, which might appear to be entirely inspired by an exclusively general-preventive vision, in terms of deterrence, of the function of punishment [...] must be coordinated and read in coherence with the Court's pronouncements concerning Articles 3 and 8 of the ECHR, which have gradually revealed, on the other hand, a commitment to humanising punishment and its methods of enforcement, as well as attention to the requirements of special prevention and individualisation of re-education treatment".

ratio – could certainly not be dispensed with.[79] And this: (a) either where it must be shown that criminal law is something that completely prevents similar conducts in the future or at least reduces the occurrence of comparable events; (b) or if for 'effective' we intends only what the victim wishes and is satisfied with[80], considering that even in this case – although, unlike the IACtHR, it seems that the court has so far been very careful not to derive criminalisation obligations from an individual right of the victim to have the offender prosecuted or punished as a form of restoration[81] – we would still need some empirical-victimological knowledge on what generally victims really need or want when a crime has been committed[82].

6. The lack of empirical evidence as to the necessity of resorting to criminal law.

The acceptance of the idea that criminal law must necessarily be employed for its supposedly greater preventive virtues, however, has so far been merely rhetorical, because the Court has so far confined itself to inferring the insufficiency of the alternative means of enforcement available, and the need to resort to criminal law as an indispensable means of protection, from the mere fact that a violation of a fundamental right had in fact taken place.[83] That is to say, as has been observed, what the Court has usually limited itself to doing "in its assessment of whether the state provided for deterrent legislation is a sort of retrospective analysis, on the basis of what actually happened after an incident constituting an alleged violation of a substantive right", asking: "how effective was the deterrent effect of protective legislation, knowing that notwithstanding the existence of that legislation, a violation of fundamental rights occurred"?[84]

It is evident that a similar way of reasoning is circular and tautological, leading it to derive *sic et simpliciter* the necessity of criminal law protection from the mere fact that the protection provided by the legal system has failed to prevent its violation in practice. So, where it is a question of demonstrating the greater preventive efficacy of criminal law, we can without any doubt affirm that the Court's entire jurisprudence is substantially imbued with petitions of principle and circular reasoning that led to inferring certain conclusions from fragile or completely unproven premises, with

79. See. *W. Hassemer*, Einführung in die Grundlagen des Strafrechts[2], 1990, p. 326, on Jakobs' theory.
80. Cf. *T. Hörnle*, Straftheorien[2], 2017, p. 31-43.
81. As *Pinto*, UJIEL 2018, p. 173 et seq., observes, recording however how, "nevertheless, in a handful of cases, the ECtHR has shown that future developments in line with the IACtHR cannot be excluded. In Nikolova and Velichkova the Court went so far as to consider criminal proceedings and sanctions as remedial measures for the victim. Similarly, in Al Nashiri v Romania and Abu Zubaydah v Lithuania, the ECtHR held that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a procedure enabling a thorough and effective investigation capable of leading to the identification and punishment of those responsible".
82. Cf. *Peršak* (fn. 77), p. 153-154. A recent US research, for example, has revealed that victims overwhelmingly favour rehabilitation over punishment [Alliance for Safety and Justice, Crime Survivors Speak (ASJ, 2016), https://shadowproof.com/wp-content/uploads/2016/08/Crime-Survivors-Speak-Report.pdf]. An empirical verification of the real interests and needs of the victims would, in fact, reveal the fallacy of the idea that any inappropriate attention to the rights or welfare of the offender can be seen against the rightful measure of respect for the victim [idea also criticised by *D. Garland*, La cultura del control. Crimen y orden social en la sociedad contemporánea, 2005, 46], as this thinking only perpetuates the pain of the victim and makes it impossible to re-socialise the offender, two essential objectives to be achieved after the criminal offence [see also *Benito Sánchez* (fn. 18), 165].
83. The lacunae characterising the Court's case law on this point is also emphasised, among others, by: *Viganò* (fn. 61), p. 2688 ("the argument [of the deterrent efficacy of the sanction] is, moreover, merely stated rather than analytically demonstrated, neither the one nor the other Court [i.e. the Inter-American Court] lingering to clarify why, in particular, alternative instruments that are less costly in terms of fundamental rights – such as recourse to administrative or disciplinary sanctions, or even civil-law compensatory protection – should a priori be deemed incapable of ensuring effective deterrence from potential perpetrators, to the point that national legislators should be denied the very abstract possibility of an option other than recourse to criminal law"); *E. Nicosia*, Convenzione europea dei diritti dell'uomo e diritto penale, 2006, p. 259.
84. As they observe *P. Lemmens/M. Courtoy*, Positive Obligations and Coercion. Deterrence as a Key Factor in the European Court of Human Rights' Case Law, in: L. Lavrysen/N. Mavronicola (eds.), Coercive Human rights. Positive Duties to Mobilise the Criminal Law under the ECHR, 2020, p. 59.

reference to both substantive and procedural obligations.[85] As has also been said, in short, "the belief in the virtues of a 'magic criminal law' seems to be well entrenched in the cenacle of Strasbourg judges", who seems "to have little knowledge of the criminal law culture" and "little awareness of the debates in the criminal and criminological field on the effects of recourse to the criminal law as a means of social reaction".[86]

In the former type of obligation, in fact, only with a marginal support of certain conforming doctrinal views (which maintains that criminal prosecutions may effectively contribute to reducing human rights violations, strengthening the legal system, and helping individual victims to bear their suffering)[87], the need to use criminal law and the insufficiency of other means of protection are assumed as unproven premises, although it is actually quite controversial that prosecution and punishment are the most effective means to protect human rights[88].

In the latter type of obligations, on the other hand, the ECtHR often ends up stating, just as tautologically, that "for an investigation to be effective in practice it is a prerequisite that the State has enacted criminal-law provisions".[89] In reality, some, precisely sharing this latter assumption on the subject of procedural obligations, have sought to justify the substantive criminalisation obligations imposed by the ECtHR in view of the need to ensure an effective investigation, which could only be guaranteed when "the legislation in force, on the one hand, provides for such acts as criminal offences (and not merely as civil or disciplinary offences!)" and, on the other hand, "does not provide for justification grounds or, in any case, grounds for non-punishability (even after the event, such as amnesty or pardon), the effect of which could, in the specific case, paralyse the investigations themselves, thus preventing the facts from being ascertained in time".[90]

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85. Cf. *Peršak* (fn. 77), 155. Similarly, see also *S. van Drooghenbroeck*, Droit pénal et droits de l'homme: le point de vue de la Cour européenne des droits de l'homme, in: Y. Cartuyvels/H. Dumont/F. Ost/M. van de Kerchove/S. Van Drooghenbroeck, Les droits de l'homme bouclier ou épée du droit penal, 2007, p. 100 et seq.
86. Cf. *Y. Cartuyvels*, Droits de l'homme et droit penal, un retournement?, in: Y. Cartuyvels/H. Dumont/F. Ost/M. van de Kerchove/S. Van Drooghenbroeck, Les droits de l'homme bouclier ou épée du droit penal, 2007, p. 43-44, referring, inter alia, to the dissenting opinion of Judge Rozakis in *Calvelli et Ciglio v. Italy* of 17 January 2002 (when he states that only the criminal procedure, unlike the civil procedure, allows "the expression of public reprobation in the face of a serious offence such as homicide") and the dissenting opinion of Judge Ress in *VO v. France* of 8 July 2004. Isolated remained the position expressed by F. Tulkens, in its concurring opinion in *MC v Bulgaria*, Application no. 39272/98, Judgement 4 December 2003: "I believe that penal intervention must remain, in theory and in practice, an ultimate remedy, a subsidiary intervention, and that its use, even in the field of positive obligations, must be subject to a certain 'restraint'. As for the assumption that the criminal law route is, in any case, the most effective in terms of prevention, the continuous observations in the Report on Decriminalisation of the European Committee on Crime Problems show that the effectiveness of general prevention based on criminal law depends on many factors and that it is not the only way of preventing undesirable behaviour".
87. Thus *C. Safferling*, Can Criminal Prosecution be the Answer to massive Human Rights Violations?, German Law Journal (GLJ) 2004, p. 1479. Similarly, also *H. Kim/K. Sikkink*, Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries, International Studies Quarterly (ISQ) 2010, p. 939, 951, have supported the idea that human rights prosecutions have, at least, "a strong and statistically significant impact" on decreasing the level of abuses.
88. This claim is rejected by many scholars, e.g.: *C.S. Nino*, The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina, Yale Law Journal (YLJ) 1991, p. 2619 et seq.; *M. Koskenniemi*, Between Impunity and Show Trials, Max Planck Yearbook of United Nations Law (MPYUNL) 2002, p. 2 et seq.; *M. Drumbl*, Atrocity, Punishment, and International Law, 2007, p. XII and 18 et seq. It is also known that numerous studies have confirmed the uncertain and limited nature of the real effects of criminal deterrence. See e.g.: *P. Guibentif*, Retour à la peine: context et orientations des recherches récentes en prevention Générale, Déviance et société (DS) 1981, p. 293 et seq.; *Ph. Robert*, Les effets de la peine pour la societé, in: M. Anquetil et al. (eds.), La peine, quel avenir? Approche pluridisciplinaire de la peine judiciaire, 1983, p. 105 et seq.; *A.C. Berghuis*, La prévention générale: limites et possibilités, in: L. Slachmuylder/A. Tsētsoura, A. (eds.), Les objectifs de la sanction pénale. En hommage à Lucien Slachmuylder, 1989, p. 69 et seq.
89. Cfr. *Gäfgen v Germany*, Application no. 22978/05, Judgement 1 June 2010, para 117.
90. Thus *Viganò* (fn. 61), p. 2689 et seq., considering that "such an investigative task" can "sensibly be carried out not by the victims themselves nor by their lawyers, but only by the public authority, and more specifically by the bodies deputed to the enforcement of criminal law: the judicial police, prosecutors and guarantee judges, each within their respective competences". According to the author, only these bodies would in fact have: (a) "the necessary financial resources to conduct investigations that are generally lengthy and complex, precisely because of the widespread lack of cooperation from the bodies of the executive power"; (b) "a sufficient degree of independence from the executive power to guarantee effective and transparent investigations, within the framework of which the victims have the opportunity to make their voices heard".

Even this belief, however, which although at first glance might not seem entirely unreasonable (at least according to 'common sense'), on closer inspection seems to be the fruit of nothing more than a further petition of principle, not taking into account (a) neither of the 'sloppiness' that usually characterises criminal investigations (in our legal system, but it is presumable to assume that the same happens in all systems where there is a situation of patently overcriminalisation, since this phenomenon makes it notoriously difficult to guarantee effective investigations even through criminal law)[91] and the fact that the very requirements of criminal evidence can sometimes be an obstacle to ensuring effective investigations concerning certain types of conduct[92]; (b) nor of the not-so-deficient and desolate image of private enforcement that some empirical-comparative investigations have given to us over the years[93]; (c) nor of the jurisprudence of the ECtHR, which has repeatedly had to admit – willingly or unwillingly – both the sufficiency of civil law remedies alone to guarantee compliance with procedural obligations (at least in certain cases, such as in the area of negligence) and the possibility of guaranteeing effective investigations not only through criminal law, but also through other public inquests or inquiries procedures, insofar as they are compliant with the prescribed requirements of applicability and effectiveness[94].

Not every obligation to criminalise, therefore, could be automatically justified by the mere fact that the ECtHR always recognises – in the event of a violation of one of the rights protected by the ECHR – the need to guarantee victims adequate knowledge of the facts and, therefore, effective investigations. On the contrary, we believe that the procedural obligations themselves, just like the substantive ones, should necessarily be subject to more stringent verification of the inadequacy of the alternative investigative mechanisms available and of the absolute necessity of 'disturbing' the criminal law and its liberticidal arsenal, from the investigation stage, to achieve the envisaged goals.[95]

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91. See e.g., *S. Gaboriau*, Éclairage sur la justice en France, Quest. Giust. (QG) 2022, p. 2 et seq.
92. Thus *van Drooghenbroeck* (fn. 85), p. 101.
93. See the analyses of *R.H. Lande/J.P. Davis*, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrusts Laws, Brigham Young University Law Review (BYULR) 2011, p. 315 et seq.; *S.J. Choi/A.C. Pritchard*, SEC Investigations and Securities Class Actions: An empirical Comparison, J. Empirical Legal Stud. 2016, p. 27-49. See also the articulate examination made by *C.R. Albiston/L. Nielsen*, The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General, UCLA L. Rev. 2007, p. 1087 et seq. In Italian doctrine, see then the reflections of *F. Quarta*, Risarcimento e sanzione nell'illecito civile, 2013, p. 355. Cf. also *D. Spielmann*, Du délicat exercice de mettre en balance certains droits fondamentaux. A propos du projet de loi n. 5076 "garantissant l'usage paisible du droit de propriété et la liberté de mouvement" et portant introduction d'un nouvel article 442-1 au code penal, Annales de droit luxembourgeois (ADL) 2002, p. 52 et seq.
94. This is what seems to us to emerge, in general, from the in-depth casuistic examination carried out by *K. Kamber*, Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law, 2017, p. 246 et seq., p. 254 et seq. Similarly, observes *Scalia*, Arch. pen. (AP) 2020, p. 32, that the obligation of states to protect life "does not in every case require that criminal protection measures be put in place. In fact, in cases where the conduct detrimental to life or individual safety is not voluntary, European case-law has made it clear that the positive obligation of protection deriving from the provisions of the conventions does not necessarily and automatically require recourse to criminal law, provided that effective and accessible remedies of a civil, administrative, or disciplinary nature exist within the national systems".
95. As observed by *Pinto*, UJIEL 2018, p. 179 "yet, if we accept that finding those responsible for abuses, preventing future crimes, restoring the rule of law and giving redress are the goals to be pursued with a view to human rights protection, it appears that, beside criminal prosecution, there are other possible means, including civil trials, truth and reconciliation commissions (TRCs), and other non-legal measures (such as legislative reparations, public inquiries, transparency, and the politics of commemoration)". As argued by *M. Aukerman*, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, Harvard Human Rights Journal (HHRJ) 2002, p. 91-92, the superiority of criminal law in pursuing those aims is controversial and, rather, in most cases prosecution and punishment "have no clear advantages over other mechanisms". For example, "criminal trials are focused on individual cases and inevitably fail to investigate the roots of systematic abuses as a bigger social phenomenon". Moreover, "economic, political, social, and cultural factors are" always "to be taken into account whilst assessing the efficiency of criminal law in comparison to other measures", considering that "what works well in one country might not work as well in others" [cf. *Pinto*, UJIEL 2018, p. 179; *M. Sorochinsky*, Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law, Michigan Journal of International Law (MJIL) 2009, p. 211]. As noted by *Drumbl* (fn. 88), p. 194-204, sometimes "[t]ort, contract, and restitution implicate involved masses more effectively by permitting more carefully calibrated measurements of degrees of responsibility beyond the scarlet letter of guilt", and "encouraging multiple forms of accountability through diverse legal and extra-legal modalities could be a better way to promote justice in the aftermath of atrocities rather than ordinary criminal law-mechanisms".

Now, as is evident, the lack of empirical tests to determine the absolute necessity of resorting to criminal law can only be detrimental to respect for the principle of *ultima ratio*, in the light of the pervasive effects that the positive (substantive and procedural) obligations have on individual national legal systems.

Indeed, the obligation to criminalise attributes to jurisprudence the power, depending on the regime adopted in each legal system, to overcome any legislative inertia in the implementation of the obligations by means of disapplication, declaration of inconvenience or pronouncement of unconstitutionality. On the basis of human rights, or other parameters of international sources, it is frequently observed that the domestic court may either disapply a provision more favourable to the offender introduced in the meantime by the legislature (making the category of the prohibition of decriminalisation operate) or – a more complex hypothesis – fill a 'gap' in the incrimination in relation to the international datum by way of interpretation (thus implementing an obligation of penalisation in the strict sense).

These pervasive effects, which have been much more often studied in order to verify their compatibility with the canon of legality (insofar as they are obviously capable of negatively impacting on the resilience and solidity of the centuries-old principle – common to all civil law systems – of *nullum crimen, nulla poena sine lege*), are obviously also liable to favour a 'substantial' circumvention of that necessary 'subsidiarity' test that every national legislator would always be required to undertake before being able to say whether it is really possible to resort to the weapon of punishment (as we have previously observed).

In fact, even in the case that has given rise to fewer problems with regard to respect for the canon of *nullum crimen sine lege*, i.e. the spontaneous fulfilment of the obligation to criminalise directly by the national legislature, such an arrangement would in any case – *de facto* – end up considerably relieving the latter of its task of carrying out the appropriate checks on whether the use of criminal law actually corresponds to the canons of *ultima ratio* and subsidiarity, since it would be very difficult for the legislature – in the face of an obligation of criminalisation of a conventional matrix (albeit without any meaningful verification by the ECtHR as to the absolute necessity of resorting to the weapon of punishment) – to feel obliged to double-check (but it would be better to say 'check' at all, given that at Strasbourg they does not take the trouble to carry out such verifications) that all the other enforcement instruments theoretically employable were not really sufficient to protect the rights of potential victims.[96]

Moreover, even if such a check is carried out, perhaps with a negative outcome (and thus in conflict with the Strasbourg findings), it cannot be ruled out that the final determination made by the domestic legislature – especially if it is an 'about-face' aimed at decriminalising a rule already introduced in the absence of any empirical verifications, only to comply with the indications coming from Strasbourg – may not end up being censured by the Constitutional Court in some way.[97] The

96. Even those who consider that the conventional obligations of protection are not assisted by the sanction of "justiciability", in effect, agree that the prospect that the State is confronted with, in the event of failure to comply spontaneously (i.e., incurring "condemnation decisions of the European Court of Human Rights"), can certainly exercise "moral suasion (or moral pressure) at the political level" [see *V. Manes*, Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali, 2012, p. 128]. For a more in-depth analysis of the 'omissive' responsibility of the state that at the international level could result from the violation of positive obligations, with specific reference to criminal matters, see *F. Bestagno*, Diritti umani e impunità. Obblighi positivi degli Stati in materia penale, 2003, p. 149 et seq.

97. Only some authors consider that the reservation of the law can in this matter operate as a 'counter-limit' (in the atechnical sense), preventing the constitutional courts of individual states from intervening in the absence of spontaneous compliance by the legislature and thus making compliance with conventional obligations a matter left exclusively to the political responsibility of the legislature [*Manes* (fn. 96), p. 128; *G. Insolera*, Democrazia, ragione e prevaricazione. Dalle vicende del falso in bilancio ad un nuovo riparto costituzionale nella attribuzione dei poteri?, 2003, p. 62; *Bonomi* (fn. 44) p. 336-337; *R. Chenal*, Obblighi di criminalizzazione tra sistema penale italiano e Corte europea dei diritti dell'uomo, in La legisl. Pen. (LP) 2006, p. 189 (both, however, with some openness towards 'justiciability'); *C. Sotis*, Le novità in tema di diritto penale europeo, in: P. Bilancia/M. D'Amico, (eds.), La nuova Europa dopo il Trattato di Lisbona, 2009, p. 151-153].

legislature induced to introduce criminal law to avoid condemnation by the Court, according to many, could in fact no longer validly turn back, at least not without having his choice censured by the Constitutional Court, and this even in the presence of new empirical evidence as to the manifest sufficiency of the other means of investigation and protection available within the legal system.[98]

Not to mention the fact that, by now, there is even the idea that the Court's review extends to cases of partial non-implementation *ab origine* and total original non-implementation, if "the deficiency can be remedied by means of an intervention unequivocally traced by the reference parameters", or if we are faced with a "hypothesis – which for the moment seems only theoretical – of an obligation to criminalise totally and exhaustively 'pre-packaged' in terms of content at supranational level".[99] After all, it may be somewhat perplexing to theorise about a mechanism for purifying the legal system that can only be activated when the legislature 'undoes' (decriminalises) and not when it 'does not do' (does not punish). Indeed, the question that naturally arises – according to many scholars – is whether it can be considered reasonable to maintain that the Constitutional Court can only impose criminalisation when what is being challenged is a decriminalising rule, but not when the problem encountered is that of the indisputable absence of a rule that should have been provided for. Not least because the control granted to the Constitutional Court over favourable norms does not prove to be any less objectionable, as it always produces, as an identical end result, the validity of a law – the one that criminalised originally (in accordance with the determination of the ECtHR) and that now criminalises again – that the legislator deems no longer necessary: a law, in short, that no one wants, that no one supports any more.[100]

7. Concluding remarks: the need for empirical tests by the ECtHR to support the positive obligations it imposes?

This state of affairs would in all likelihood not create enormous problems from the point of view of respecting the *ultima ratio*, if the necessary empirical verification capable of guaranteeing compliance with the principle in question were to be carried out upstream by the Strasbourg Court itself, when imposing the obligation of criminalisation on the individual State (especially given that, as seen, according to many the State itself could not even turn back, where new empirical evidence would prove the sufficiency of the other means of enforcement available).[101]

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98. In Italy, for example, many believe that the non-democratic nature of the supervisory body, being inherent and functional in the system, would in no way hinder the justiciability of non-compliance with the obligations of protection under the conventions, which would be "binding on the Italian legal system", interacting with Article 117(1) of the Constitution, without the reservation of the law as per art. 25 co. 2 of the Constitution being "invoked as a counter-limit to the limitations of sovereignty necessarily resulting from Italy's accession to the ECHR" [thus *Viganò* (fn. 61), p. 2678-2681, 2699-2703; *F. Viganò*, Obblighi convenzionali di tutela penale?, in: V. Manes/V. Zagrebelsky (eds.), La convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano, 2011, p. 246 and 293 et seq.; see also *A. Lollo*, Sindacato di costituzionalità e norme penali di favore, 2017, p. 161 et seq. (at least for the case of the supervening breach and 'favour' penal norms); *Manacorda* (fn. 36), p. 324 et seq.; *C. Paonessa*, Gli obblighi di tutela penale. La discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari, 2009, p. 192 (both in the sense that the intervention of the Constitutional Court would be allowed within the narrow limits in which the reviewability of 'favour' penal norms is admitted); *Scalia*, Arch. pen. (AP) 2020, p. 67 et seq.].
99. Thus e.g. *V. Napoleoni*, Il sindacato di legittimità, in: V. Manes/V. Napoleoni (eds.), La legge penale illegittima. Metodo, itinerari e limiti della questione di costituzionalità in materia penale, 2019, p. 545 et seq., who does not seem to exclude the possibility of a review by the Court: (a) both in cases of "supervening non-implementation", where "it is assumed that the legislature, in transposing the supranational provision, has already correctly exercised its discretion"; (b) both in cases of partial "non-implementation" ab origine and of total "original non-implementation", when "the shortcoming can be remedied by means of an intervention unequivocally traced by the parameters of reference", or one is faced with a "hypothesis – which seems, for the moment, only theoretical – of an obligation to criminalise totally and exhaustively 'pre-packaged' in its contents at supranational level".
100. As critically observed in J.A. Lascuraín Sánchez, InDret 2012, p. 28.
101. Whether one agrees or disagrees with the idea that obligations to criminalise may derive from constitutional charters or conventions designed to protect the most important individual prerogatives, the absence of empirical verification of the greater effectiveness of the criminal law and the absolute necessity of resorting to it, however, is undoubtedly open to criticism. This is

It is a pity, however, that the Court, as we have seen, does not usually carry out such checks at all, contenting itself with preconceived convictions regarding the (entirely presumed and unproven) need to resort to criminal law, which, at best (when the Court does not consider bypassing even this 'minimal' test)[102], would only be "supported" by "a comparative analysis of the criminalisation of a certain behaviour or a certain modality or form of aggression against the legal good considered", aimed at "verifying the degree of consensus that this choice of criminalisation has acquired within the member states of the Council of Europe"[103].

Some consider that the possibility of carrying out such reviews would even fall ontologically outside the capacities of the ECtHR and the tasks institutionally incumbent upon it, since "the Court is not in a position to undertake any empirical study in this respect", nor "can it argue on the basis of a given criminological theory", considering that "there may be different views concerning criminology and it is not the role of the Court to privilege one of them over the others".[104] But if this were the case, all case-law on positive obligations of criminalisation – if we understand these obligations as absolute – would inevitably come into conflict with the limits to which the use of criminal law must necessarily be subject at national level, as case-law imposing absolute obligations of criminalisation that ontologically do not respect the principles of subsidiarity and *ultima ratio*, and as such need to be decisively overcome or downsized (considering them only relatively binding).[105]

Overcoming or downsizing that, in truth, could also turn out to be much less regrettable than one would instinctively be led to believe. Behind the jurisprudence of the Strasbourg Court, after all, there is not only the will to protect human rights from attacks that might be directed at them, since the decision to impose criminalisation obligations is often and willingly based also (and perhaps even to a greater extent) on reasons of mere expediency[106] or on populist impulses which, emerging at the national level, induce the Court – under the latent threat of exit from the conventional system by individual states – to favour unacceptable repressive drifts[107].

Taking a more practical and less uncompromising view, however, the radical abandonment of the Court's jurisprudence on 'positive obligations' seems an aim too difficult to achieve now to realistically hope for (at least within a reasonable timeframe). In light of the ECHR's manifest tendency to progressively increase the development of its jurisprudence[108], with the substantial risk that this will lead to the extension of interpretative standards originally developed in cases concerning systemic failures in the criminal justice system (or a culture of impunity) to micro-manage criminal processes concerning 'singular incidents' and everyday criminal law as well[109], one could therefore

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made clear by the fact that the German Constitutional Court's lack of empirical verification of the (debatable) preventive efficacy of the criminal law on the termination of pregnancy has over the years been at the center of criticism of its judgments also by those interpreters, such as *K. Tiedemann*, Constitución y Derecho penal, Revista Española de Derecho Constitucional (REDC) 1991, p. 165-166, who had by no means rejected the construction of positive criminalisation obligations per se.

102. As observed by H. Dumont/I. Hachez, Les obligations positives déduites du droit international des droit de l'homme: dans quelles limites?, in: Y. Cartuyvels/H. Dumont/F. Ost/M. van de Kerchove/S. Van Drooghenbroeck, Les droits de l'homme bouclier ou épée du droit penal, 2007, p. 66.
103. Cf. *Scalia*, Arch. pen. (AP) 2020, p. 34 et seq. On the Role of Comparativism in Human Rights Law, see also *S. Fredman*, Comparative Human Rights Law, 2018, p. 4 et seq.
104. For this line of thought cf. Lemmens/Courtoy (fn. 84), p. 59.
105. See the reflections of *Greco* (fn. 34), p. 122 et seq.
106. Reading the Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights from 27 September 2001, *A. Mowbray*, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, 2004, p. 222, has pointed out that: "Court's desire to minimize the use of time-consuming and expensive fact-finding missions to examine specific complaints had been achieve, in part, by imposing positive obligations", and so that those types of obligations were "partly inspired by the wish to reduce the overwhelming number of cases being lodged at Strasbourg".
107. The influences that the Court is subjected to in reaching its decisions are many and operate in different and sometimes conflicting directions [cf. *S. Hennette Vauchez/D. Roman*, Droits de l'homme et libertés fondamentales[5], 2022, p. 149].
108. Cf. *J. Gerards*, Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights, Human Rights Law review (HRLR) 2018, 495.
109. Cf. *A. Seibert-Fohr*, Prosecuting Serious Human Rights Violations, 2009, p. 140.

be more realistically content to demand, at least, that "any" further "development in the case law" of the ECtHR in "this area" be subject to "stronger and more principled justifications than those provided so far by the Court in order to contain the risk of unwarrantedly widening the web of social control in the name of human rights"[110].

As has been repeatedly observed, indeed, "the fact that it remains unclear under which precise circumstances the ECtHR finds that non-criminal law measures are not sufficient or effective is problematic under the *ultima ratio* principle with its inherent requirements that" ask "a choice to criminalise be extensively justified". Such considerations ought to be evident in ECtHR judgments, "which should examine not only the question of whether the domestic law allows criminal-law measures but also the question whether resorting to criminal law is desirable in the first place".[111]

In other terms, in Van Kempen words, "since a positive obligation more intrusively violates freedom and possibly even fundamental rights, the urgency to justify a duty increases and the reasoning must be more powerful".[112] Only the recognition that the "positive obligations to use criminal law require strong argumentation and the burden of proof lies with the Court"[113], in fact, would make it possible to grant individual member states that necessary control over the Court's determinations, which is indispensable if one hopes to be able to guarantee also in practice a use of criminal law in conformity with the principle of *ultima ratio*, in the face of obligations that – at least in intentions – would like to be increasingly binding on the legislator.

110. Thus *L. Lavrysen*, Positive Obligations and the Criminal Law. A Bird's-Eye View on the Case Law of the European Court of Human Rights, in: L. Lavrysen/N. Mavronicola (eds.), Coercive Human rights. Positive Duties to Mobilise the Criminal Law under the ECHR, 2020, p. 53.
111. Cf. *J.W. Ouwerkerk*, Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?, New Journal of European Criminal Law (NJECL) 2012, p. 240. One can only agree, therefore, with the opinion of *Greco* (fn. 34), p. 123 et seq., where he notes that "if the ground of the duty to punish is the duty to protect human rights", "this protection has the nature of an end to be aimed at, for which punishment represents a means. It becomes, therefore, an empirical question whether this means is the most suitable, and it is impossible to exclude beforehand the existence of other more suitable means. What matters, then, will be whether the state can fulfil its duty to actively protect human rights without criminal law. A duty to punish will only arise when these alternative means are insufficient. The fact that human rights oblige the State to actively protect them does not mean that this protection must only occur through the criminal law".
112. Cf. *P.H.P.M.C. van Kempen*, Repressie door mensenrechten: over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten, 2008, p. 66.
113. So also, *Peršak* (fn. 77), 152.