Proportionality and criminal law in the Interamerican-System*

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Abstract 1

This essay aims to explore the uses of proportionality when criminal law interferes with human rights in Latin America. To do so, I use the case law of the Interamerican Court of Human Rights ("IACtHR") as an exemplary basis to demonstrate the various uses of proportionality, to focus on its use in challenging criminal law and criminal sanctions. As I will show, the proportionality test is a methodology that forms part of the consolidated jurisprudence of the IACtHR and this has relevance for the Inter-American system because of the impact that the Court's standards seek to have at the domestic level.

I. Introduction

Proportionality is a technique of rights adjudication. The standard version 2
includes four steps. Each step contains questions to evaluate whether the right's limitation is compatible or not with constitutional or human rights law. The test starts with the question of whether the public aim supporting a State measure is legitimate before going on to assess whether a right-infringing measure is suitable to achieve the legitimate public aim (suitability test). Thereafter, the test seeks to determine whether the State could have achieved the aim by employing less restrictive measures to the rights in question (necessity test or less restrictive means test) and then, finally, whether the intensity of the interference into one right is justifiable in relation to the importance of satisfying another right (proportionality test in the narrow sense). The proportionality test is designed to challenge State action, requiring a State to justify its actions and providing a structure to

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examine the justification. The end result of this process should, in effect, show which measures are incompatible with the right in question.

3 Most Latin American States have ratified the American Convention of Human Rights ("ACHR") and accepted the jurisdiction of the IACtHR. In doing so, these States are obliged to comply with the judgements of the IACtHR in which they have been a party (*res judicata*) while all their public authorities must apply not only the treaty norm but also the 'interpreted treaty norm', i.e. in accordance with Inter-American standards that emerge from case law, advisory opinions and precautionary measures. The IACtHR stressed that all public authorities of a State party to the ACHR have an obligation to adhere to the convention (even *ex officio*) so that the interpretation and application of domestic law are consistent with the State's international human rights obligations.[1] Such adherence must be exercised both in the issuance and application of norms as well as in the determination, adjudication and resolution of particular situations and concrete cases. Discussions in Latin American States demonstrate: a) references to Inter-American standards in parliamentary debates and judgments (for example, on the inclusion of same-sex marriage in the Civil Code, the legalisation of abortion, the regulation of audio-visual media); as well as b) the use of the methodologies of adjudication of rights used by the IACtHR, including the proportionality test.

II. The structure of the Inter-American proportionality test

4 The proportionality test is part of the methodological toolbox of the IACtHR. It is used in cases assessing the limitations of rights and in cases involving inequality and non-discrimination.[2] A preliminary issue is wheth-

1 Eduardo Ferrer Mac-Gregor 'Conventionality controls the new doctrine of the Inter-American Court of Human Rights' *American Journal of International Law* 109 (2015) 93–99; Laurence Burgourgue-Larsen, The Added Value of the Inter- American Human Rights System: Comparative Thoughts in Armin v. Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan and Ximena Soley (eds.) *Transformative Constitutionalism in Latin America* (OUP 2017) 377–408.

2 Serrano Silvia Proportionality in the Adjudication of Equality and Non-Discrimination Cases in the Inter-American System in Francisa Pou-Giménez Francisca, Laura Clérico and Esteban Restrepo-Saldarriaga (eds.) *Can Proportionality be Transformative? Theory and Practice from Latin America* (CUP 2022); Yutaka Arai-Takahashi 'Proportionality' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013).

er or not a contested State action interferes with an allegedly violated right and, if answered in the positive, then two separate questions follow, namely: Is that State action prescribed by law (legality test) and is it materially justified (proportionality test)?

In the case law of the IACtHR, these are two separate tests, even though neither is integrated. The first of these, the legality test, is beyond the scope of this essay to consider, however, it is worth noting that the IACtHR stresses that legality constitutes a central element of criminal prosecution in a democratic society and its application in criminal matters is strict. This is evident from the Court's view that: 5

> "The classification of an act as illegal and the establishment of its legal effects must previously be delimited as clearly and precisely as possible, in an explicit, precise, and taxative manner".[3]

If a restriction does not pass the legality test, the restriction violates the right in question. If the IACtHR continues to evaluate State action, even if it has not passed the legality test, it does not imply that even if a measure is then found to be proportional that this will compensate for its lack of legality. The IACtHR takes this approach as it seeks to develop standards to explain how restrictions should be examined. 6

The use of the proportionality test by the IACtHR has a pre-determined, explicit and structured use, that is, before applying it to a specific case the Court announces that it will use the test and then determine the subtests involved and in what order these will be addressed. Normally, this follows the pattern of establishing the legitimacy of the State goal and then its suitability, necessity and proportionality in the narrow sense. This is the standard procedure to determine proportionality used repeatedly by the IACtHR. 7

The proportionality test allows for different levels of scrutiny (light, middle, intensive) and a flexible distribution of the burden of argumentation.[4] Different criteria can determine the level of scrutiny, a matter that 8

3 IACtHR case of *Norín Catrimán et al. v. Chile* 2014; case of *Kimel v. Argentina* 2008 para 63 (original versions in Spanish, the English Version of the judgments are available in homepage of the IACtHR).

4 Víctor Ferreres Comella, 'Beyond proportionality' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018); Francisca Pou-Giménez Unilateralism, 'Dialogue, and False Necessity: The Distribution of the Burden of Proof in Proportionality Analysis' in Pou-Giménez Francisca, Clérico Laura and Restrepo-Saldarriaga Esteban (n 3).

goes beyond the structure of proportionality, but this determination is the key to how thorough national courts should be in implementing the four subtests of proportionality. The IACtHR is clear in this respect, especially when limiting rights by criminal law, that the vigour in applying the proportionality test should be strict:

> "The Court has pointed out that criminal law is the most restrictive and severe means of establishing responsibility for unlawful conduct, particularly where imprisonment is imposed. Therefore, the use of criminal law must respond to the principle of minimum intervention, due to the nature of criminal law as an *ultima ratio*".[5]

9 Without getting bogged down in the sophistication of criminal law doctrine, the IACtHR applies the proportionality test to assess restrictions to rights when criminal law is used, just as it does in other types of norms and State practice. The key difference when criminal law is involved is that all the involved parties know beforehand that the Court's application of proportionality will be strict.

10 Criminal law scholars of the region maintain that proportionality regarding criminal law and its attendant punishments integrate into one formula substantive limits to punitive power,[6] "which have long been forged by the criminal law culture…but which have run parallel".[7]

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5 IACtHR case *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala Maya* 2021, para 168.

6 Mary Beloff 'Proportionality and jus puniendi' in Pou-Giménez Francisca, Clérico Laura and Restrepo-Saldarriaga Esteban (n 3); Norberto J. de La Mata Barranco, *El principio de proporcionalidad penal* (Tirant lo Blanch 2007), Juan Antonio Lascuraín Sánchez, Maximiliano Rusconi (eds), *El principio de proporcionalidad penal* (ADHOC 2014), and on related topics see Ezequiel Vaccheli 'Culpability', Alejandro Chehtman 'Defensive Force', Leandro Dias 'Responsibility for omision' and Leo Zaibert 'Justification of punishment' chapters in this volume.

7 Gloria Lopera Mesa 'Proporcionalidad de las penas y principio de proporcionalidad en derecho pena' *Jueces para la Democracia* (2011) Nro. 70 pp 23–32 (translation is mine). In basic terms (useful for readers not specialised in criminal law), the author explains the presence of the idea of proportionality in criminal law referring to the requirement of the test of suitability ("the requirement that prohibitions and punishments pursue a legitimate aim and that they in turn are suitable for contributing to its achievement, represents an express option for a relative and instrumental basis of criminal law... punishment is only justified as a useful means to achieve ends outside the law itself ... with the so-called 'criminal legal goods'"), the test of less restrictive alternative means ("this idea has been expressed in criminal thought through the principle of minimum intervention, with its components of subsidiarity (criminal law should only be used as an *ultima ratio*, once all other means of protection have been tried and exhausted) and

In brief, proportionality highlights the set of material requirements that must be met by any exercise of the punitive power of the State, when establishing which conducts can be classified as crimes and when determining the type and amount of the criminal sanction.[8] These two requirements mean that in human rights law, two separate proportionality tests are required: one to gauge the proportionality of criminal law and the other to gauge the proportionality of the applicable criminal sanction. 11

I. Proportionality challenging criminal law

In particular, the IACtHR has examined the use of criminal law restricting freedom of movement, personal liberty, the prohibition of arbitrary transfers of prisoners as well as the rights to privacy, assembly and protest, to family, to a speak native language in prison, to protect private data and professional secrecy obligations among others. The Court frequently, and in a pioneering manner, has used the proportionality test in cases involving restrictions imposed by criminal law on freedom of expression, stressing that using criminal law should be evaluated in a strict manner. 12

fragmentariness (criminal law should only intervene to punish the most serious attacks against legal assets worthy of protection"), and proportionality in the strict sense ("requires that the benefits derived from criminal protection, from the perspective of the legal good (bien jurídico), outweigh the costs represented by such protection from the perspective of the rights affected both by the prohibitions and the penalties, a calculation that confirms a relative and utilitarian basis for the criminal law instrument"). Lopera Mesa Gloria *Principio de proporcionalidad y ley penal* (Centro de Estudios Políticos y Constitucionales 2006).

8 Antony R. Duff 'Proportionality and the Criminal Law: Proportionality of What to What?' in Emmanouil Billis, Nandor Knust, Jon Petter Rui (eds.) *Proportionality in Crime Control and Criminal Justice* (Hart Publishing, 2021) pp 29–47 differentiating prospective and retrospective proportionality. Prospective proportionality concerns the relation between the different aims of criminalization and means. Retrospective proportionality refers to the relation between the seriousness of the offence and the severity of the punishment imposed. The author proposes to conceive proportionality as a disproportionality test since the search for any kind of precise measure of proportionality between the offence and the penalty is doomed to failure, he therefore proposes that one should not seek to do more than ruling out manifestly disproportionate punishments. Furthermore the author explores the relation between these two types of proportionality and the use of the de minimis principle in criminalization, policing, preventive enforcement, and prosecution.

13 For example, in the high-profile case of *Kimel vs. Argentina*,[9] the IACtHR dealt with a broad criminal definition of defamation (as a State action) affecting the right of a journalist to criticise the performance of a former judge in an investigation into a massacre that occurred during the last military dictatorship in Argentina.[10] The IACtHR framed the case as a "collision" between the right to freedom of expression regarding issues of public interest (Article 13 ACHR) and the right of public officials to have their honour respected (Article 11 ACHR). In *Kimel*, as in subsequent case law, the Court held that Article 13(2) of the ACHR establishes that subsequent liability for the exercise of freedom of expression must meet the following two requirements concurrently: strict legality (as previously fixed by law) and proportionality. The latter means that the aim of exercising the freedom of expression must correspond to an end permitted by the ACHR (i.e. Article 13(2)(a) of the ACHR: "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals"); and the use of criminal law should be necessary in a democratic society (for which it must meet the requirements of suitability, necessity and proportionality in the strict sense). Regarding the legitimacy of the aim and the suitability test, the IACtHR asked whether the restriction is a suitable or adequate means to achieve a purpose that conforms with the provisions of the Convention. The aim fits with those recognised in Article 13(2)(a) of the ACHR (the right to "respect the reputation of others"), and Article 11 of the ACHR recognises the right to have one's honour respected. The suitability test was used to determine whether the restriction on Kimel's right – arising from the application of a criminal penalty by virtue of a vague and ambiguous criminal law provision – would promote the right to honour. Although not quite exhaustive in its argumentation, the IACtHR sustained that threatening to impose sanctions through criminal proceedings serves "the purpose of preserving the legal right whose protection is sought" ("they may help achieve such purpose").[11]

9 IACtHR case *Kimel v. Argentina* 2008, para 58.

10 Kimel published a book about the massacre of five Pallottine priests that occurred in Argentina in 1976 during the then military dictatorship. In the book, Kimel criticised the actions of the judge in charge of the investigation stating that "… the judge fulfilled the majority of the formal investigatory requirements; however, it was obvious that a series of crucial elements for the clarification of the murders were not taken into account".

11 IACtHR case *Kimel vs. Argentina* 2008, para 71.

Regarding the necessity test, one party to the case, namely the Inter- 14
American Commission of Human Rights("IAComHR"), argued that less restrictive alternative means were available (civil sanctions and the right to reply). For its part, the IACtHR began by explaining the inter-American structure of the necessity test in that it "must consider the available alternatives to achieve the legitimate purpose sought and to determine the greater or lesser injuriousness they imply".[12] In *Kimel*, the contested State measure, which was based on a broad definition of the crime of defamation, was deemed too restrictive means by the Court ("contrary to the principle of minimum, (strictly) necessary, appropriate, and last resort or *ultima ratio* intervention of criminal law"). This position is supported by the fact that an alternative less restrictive means is available: a clear and accurate enough definition of defamation that excludes the punishment of the right to criticise a public official in the exercise of his functions.[13] Therefore the Court was correct in maintaining that the restriction of the right was not necessary.

Finally, concerning proportionality in the strict sense, the IACtHR ex- 15
amined "whether the restriction is strictly proportionate, in a manner such that the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation.". Highlighting that this is a "method", the Court stated:

> "... the restriction must be proportionate to the interest that justifies it and closely tailored to the accomplishment of that legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression".[14]

To undertake this test, it established in advance what factors it will take 16
into account in determining whether or not the restriction is justified: i) the degree to which one of the rights under consideration is affected, determining whether the scale of this affectation is serious, intermediate or moderate; ii) the importance of satisfying the opposing right, and iii) if satisfying the one justifies restricting the other (proportionality in the

12 Ibid.; IACtHR Advisory Opinion OC-28/21 2021, para 121.

13 IACtHR case *Kimel vs. Argentina* 2008 para 77, 66; Eduardo Bertoni 'The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expression standards' *European Human Rights Law Review* 3 (2009): 332–352.

14 IACtHR Advisory Opinion OC-5/85 1985, para 46.

narrower sense).[15] The IACtHR interpreted that the restriction on Kimel's freedom to criticise is serious, since a) it is imposed via criminal law, is the most restrictive and severest method of establishing liability;[16] b) the resultant criminal conviction has a stigmatising effect and c) the punishment produces a chilling effect on the future activities of Kimel and others.[17] Additionally, the importance of protecting freedom of expression is high

15 IACtHR case *Kimel vs. Argentina* 2008. para 84.

16 Ibid. para 56.

17 Recently, in the case *Baraona Bray*, the IACtHR found the State of Chile responsible for the violations of the rights to freedom of thought and expression in detriment of Baraona Bray. This resulted from the criminal proceedings and the sentence imposed for the crime of serious insults for statements issued by Baraona Bray in May 2004 regarding the actions of a senator, in his capacity as a public official, related to illegal logging of the alerce tree. In *Baraona Bray*, the IACtHR sustained that " ... *the criminal protection of the honour of public officials against offenses and the imputation of offensive facts*, except in the case of false attribution of crime, which was not discussed in the present case, *is not compatible with the Convention*, expanding the scope of the protection established by the IACHR Court in the cases *Álvarez Ramos v. Venezuela*, and *Palacio Urrutia v. Ecuador*, in which it declared the inadmissibility of the *persecutio criminis* aimed at the repression of expression in matters of public interest." Judges Pérez Manrique, Ferrer Mac Gregor, Murdovitsch in their joint concurring opinion in the Baraona Bray vs. Chile, 2022, para 95 and 98, added that this "constitutes the new standard by which this type of case should be evaluated internally through the control of conventionality". On the contrary, Judges Sierra Porto and Hernández sustained in their joint dissenting opinon in the case *Baraona Bray* that "the case at hand can be adequately resolved if we use the proportionality test, as developed and applied by the Court in this and other types of cases" (para 40). They concluded that "... in a democratic society, judicial persecution for criticism of ... public officials is undoubtedly illegitimate. However, when freedom of expression and the right to honour come into conflict, there are multiple edges and variables to the solution, depending on the particularities of each case and in the light of all the circumstances, which requires a balanced judgement, subject to a test of reasonableness and proportionality, which has already been extensively developed by the Court in its jurisprudence. To automatically deprive the protection of the honour of public officials of effective judicial protection at the first level, in the cases referred to in the majority judgment, without the possibility of assessing the circumstances of the specific case, is a debate that we believe requires further reflection, especially in view of the phenomenon of the post-truth of social networks and their expansive capacity to cause irreparable damage to honour, as well as the democratic erosion that the region is experiencing. In this regard, we adhere to the classic jurisprudence of this Court, which allows for a balanced consideration in cases of conflict between the two rights" (para 70). In general, see Janike Gerards 'Moving Away from Open Judicial Balancing' (2023) *The Law & Practice of International Courts and Tribunals 22*(2): 365-383; Laura Clérico, 'Examen de proporcionalidad y objeción de indeterminación' (2015) *Anuario de Filosofía del Derecho* 73-99.

due to its intimate relationship with the democratic principle on a point of public interest regarding the actions of a public official. In contrast, the importance of protecting a public official's right to honour is moderate, taking into account that the opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded less protection. As such, the Court also noted that debate in a democratic system is encouraged as, in a democratic society, political and public personalities are more exposed to scrutiny and the criticism of the public. For the IACtHR, this threshold is based "on the public interest inherent in the actions the public personally performs, as when a judge conducts an investigation into a massacre committed in the context of a military dictatorship, as in the instant case." The IACtHR affirmed the existence of an obvious public interest in the case since it is about to give an opinion on how a judge during the military dictatorship investigated a massacre. It also stressed that Kimel expressed a critical value opinion and did not refer to the personal life of the former judge before concluding that the restriction of the freedom of expression has been overtly disproportionate and is excessive in relation to the alleged impairment of the official's right to have his honour respected in the instant case. As a reparative measure, the IACtHR ordered the State to change the contested criminal statutes "in order to comply with the requirements of legal certainty so that, subsequently, they do not affect the exercise of the right to freedom of thought and expression". The *Kimel* case is considered a leading case for many reasons. In our context, the judgment plays a key role in structuring the proportionality analysis. Additionally, it stresses the need to be extremely cautious when analysing the use of criminal law to limit rights.

Another remarkable case is *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala* (2021). It shows the use of proportionality to evaluate criminal law restricting the rights of indigenous people living in historical and structural inequality. In this case, a legal framework regulating radio broadcasting prevents, in practice, indigenous communities from legally operating their community radio stations. This reality is reflected in the fact that of the 424 licenced radio stations using an FM frequency and the 90 using an AM frequency that existed in Guatemala at the time, only one was an indigenous community station.[18] Since the public auction 17

18 IACtHR case *Kimel vs. Argentina* 2008, para 43.

for the acquisition of radio frequencies was concerned only with the best price offered, the IACtHR maintained that, while the procedure appears to be neutral, it has a disproportionate impact on indigenous peoples. The Court noted that these groups do not have the economic and technical resources to compete on equal terms with the non-indigenous part of society as in Guatemala, some 43.6 % of the population is indigenous and approximately 80 % of these indigenous people are considered poor. Radio in Guatemala is the most widely used means of communication in rural and hard-to-reach areas of the country, which is where most indigenous communities are located. Indeed, sometimes radio is the only medium available due to various factors, such as the absence of an electricity supply, the lack of internet service and the long distances that limit access to other services. Several indigenous community radio stations operated, albeit without a licence, as was the case of the Ixchel and Uqul Tinamit La Voz del Pueblo radio stations that were raided after court orders were issued. This resulted in its transmission equipment being confiscated and some of its operators being criminally prosecuted for "theft" involving the radio spectrum. The IACtHR considered that these criminal prosecutions constituted illegitimate actions and a restriction on the right to freedom of expression contrary to the Convention. Firstly, the Court noted that there was no legitimate State aim since its actions do not align with the scope of Art. 13 ACHR (neither respect for the rights or reputations of others nor the protection of national security, public order, public health or morals). This time, the IACtHR tested the suitability and necessity of the State's actions together, emphasising once again that criminal law is the most restrictive and severe means, particularly when imprisonment is imposed. It concluded that criminal prosecution for "theft" involving the radio spectrum was both inappropriate and unnecessary as the State could have used less harmful means than those provided for by criminal law, such as administrative procedures which would achieve the same result but affect the indigenous communities in a less burdensome manner. With regard to the intensity of the restriction on freedom of expression, the IACtHR considered that it is imperative to take into account that the right to freedom of expression of indigenous peoples encompasses their right to establish and operate community radio stations; the legislation regulating radio broadcasting in Guatemala has, in practice, prevented the indigenous Maya Kaqchikel Sumpango and Achí communities of San Miguel Chicaj from legally accessing the radio spectrum; and the State has made no

legislative or other efforts to recognise these community radio stations and to ensure that these indigenous peoples can operate their radio stations. In particular, the IACtHR took into account the importance of community radio stations to indigenous peoples when stating that they enable these peoples "to participate more fully in the public sphere, are an essential tool for the conservation, transmission and continuous development of their cultures and languages; ... is an essential component in promoting the identity, language, culture, self-representation, and collective and human rights of indigenous peoples" and no State justification to limit this was available. As a reparatory measure, the IACtHR ordered the State to "immediately refrain from criminally prosecuting" the individuals who operate indigenous community radio stations, cease raiding said radio stations or seizing their broadcasting equipment and to "strike the convictions and any related consequences for people from indigenous communities convicted of using the radio frequency spectrum".[19] Additionally, due to the structural and historical discrimination suffered by indigenous people, the Court ordered that Guatemala should take all necessary measures to reverse the various levels of disadvantage they experience and ensure indigenous people's access to radio licenses.

It follows from the above that the proportionality test regarding the application of criminal law in Latin America entails strict scrutiny: criminal law can be exercised "only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them",[20] otherwise, the IACtHR concluded that "the opposite would result in the abusive exercise of the punitive power of the State".[21] Translated into the sub-tests of the intensively applied proportionality test, this means that: i) the restriction on a right by use of criminal law must pursue one of the ends that the right in question itself enables in the norm, otherwise the end is not compatible with the Convention; ii) the use of criminal law is only justified if it contributes to achieving an end compatible with the Convention; iii) criminal law is, in principle, not the least harmful means to achieve this end unless it can be shown that it is the only one to protect the legitimate aim and that the means is used "only to the extent that is strictly necessary" (*ultima ratio*); iv) criminal law entails 18

19 IACtHR case *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala* 2021, para 158.
20 Ibid para 168.
21 Ibid para 168.

a very intensive restriction to the limited right and can only be justified to protect fundamental legal rights from serious attacks which may impair or endanger them.

2. Proportionality of criminal sanctions in abstract and concrete terms

19 If there is one use of the idea of proportionality in which criminal law has always been a pioneer, it is that of the proportionality of criminal sanctions.[22] This can be examined on two levels: abstract and concrete.

a) The proportionality of criminal sanctions in abstract terms

20 The proportionality of criminal sanctions in the abstract focuses mainly on the internal relationship of the elements of the penal norm, between the penal reaction and the penalty. This is initially a requirement for the parliament that discusses and approves penal norms as it must control the compatibility of these norms with the Convention, not only in terms of strict legality and proportionality with respect to the criminal law (proportionality of the criminal law) but also regarding the specific norm with respect to the proportionality of the punishment. Criminal law scholars explain that proportionality of the penalties demands that "the type and amount" of the sanction envisaged by parliament ("the abstract penal framework"), is related to the "seriousness" of the conduct classified as a crime. The latter is determined:

> "according to the importance of the legal good protected by the norm, as well as the degree to which it is injured or endangered by the conduct described in the criminal offence. Both criteria are combined to determine the extent of the harm caused by the action that is incriminated".[23]

22 Ambos Kai (ed.) *Strafzumessung/Sentencing. Angloamerikanische und deutsche Einblicke. Anglo-American and German Insights* (Göttingen 2020); Richard Frase, Carsten Momsen, Tom O'Malley and Sarah Luisa Washington 'Proportionality of punishment in common law jurisdictions and in Germany' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds.) *Core Concepts in Criminal Law and Criminal Justice: Volume 1, Anglo-German Dialogues* (CUP 2019) pp 213–260.

23 Gloria Lopera Mesa (n 8); Mary Beloff (n 7).

Accordingly, in a democratic system, great care must be taken to ensure that criminal sanctions are adopted with strict respect for the basic rights of the individual and include a careful verification of the effective existence of the wrongful act.[24] 21

In *Manuela and Family vs. El Salvador*, the IACtHR used proportionality in different parts of its judgment to evaluate the criminalisation of Manuela for aggravated murder, and who was sentenced in 2008 to 30 years in prison for an obstetric emergency that resulted in pregnancy loss. However, she served only two years as she died in prison in 2010 due to inadequate medical care for Hodgkin's lymphoma. The Court rightly pointed out that Manuela's case was not isolated as the absolute prohibition of abortion that came into force in El Salvador resulted in numerous obstetric emergencies that have been criminalised and convicted as aggravated murders with prison sentences ranging between 30 and 50 years. As in the case of Manuela, most of these women were treated in public hospitals, had little or no income, lived in rural or marginal urban areas and had a low level of education. 22

The IACtHR held the State responsible for violating the rights to life, health care, judicial protection and guarantees as well as the prohibition of discrimination and gender violence, among others.[25] The IACtHR adverted that "obstetric emergencies, because they are a medical condition, cannot automatically generate a criminal sanction",[26] which could have been the starting point to address the disproportionality of the total ban of abortion in El Salvador. The IACtHR considered the effects of the total ban of 23

24 IACtHR case of *Baena Ricardo et al. v. Panama* 1999, para 106; case of J. *v. Peru* 2013, para 278.

25 IACtHR case *Manuela and family vs. El Salvador* 2021 para 161. Laura Clérico "Estereotipos de género y la violación de la imparcialidad judicial: Nuevos estándares interamericanos. El caso Manuela vs. El Salvador", *Revista de Derecho, Universidad y Justicia* (2022) SAIJ/Universidad Nacional de Avellaneda. On gender and criminal justice, see Astrid Sánchez Mejía's chapter in this volume, and about gender and proportionality; Harriet Samuel's 'Feminizing human rights adjudication: Feminist method and the proportionality principle' (2013) *Feminist Legal Studies*, 21 pp 39–60. Laura Clérico, and Martin Aldao's 'An Argument for the Test of Proportionality in Concreto: Silenced Voiced from the Margins to the Center' in Jan-R. Sieckmann (ed.) *Proportionality, Balancing, and Rights* (Cham: Springer, 2021) pp 215–229.

26 IACtHR case *Manuela and family vs. El Salvador* 2021 para 161.

abortion in El Salvador as part of the context to analyse the case[27] but not as part of the normative issue. In 2022, the IAComHR referred another case to the IACtHR against El Salvador, but this time directly challenged the abortion ban.[28] This case concerns violations of the rights of Beatriz (a young woman living in extreme poverty) caused by the absolute abortion ban that prevented her from having timely termination of her pregnancy in a situation where her life, health and personal integrity were all at risk and where the fetus had no chance of surviving outside her womb. The IAComHR highlighted that criminalising the termination of pregnancy (the attacked means) when the fetus would not survive outside the womb is not suitable. Further argument was made that, on the one hand, "the aim of protecting the life of the fetus was null and void since the fetus was anencephalic"; on the other hand, the particular seriousness of the restrictions of her rights caused by her lack of access to a medically-professional means of terminating of her pregnancy meant that this encourages women such as Beatriz to resort to illegal and unsafe abortions that put their physical and mental health, and even their lives, at risk. While this resembles the structure of the test of proportionality in the narrow sense, it is interesting to note how far the IACtHR went in this case.

24 At any rate, in exploring the case law on declarations of the unconstitutionality of abortion bans in the region and the associated public debates in the various congresses passing legalisation on abortion, scholars frequently highlight the prominent use of inter-American standards and the test of proportionality (showing through public health factual data that "criminalisation of abortion does not result in lower abortion rates" and the effects of criminalisation on women's lives and health).[29] In this regard, the IACtHR has already held in *Artavia Murillo et al. v. Costa Rica,* which concerned

27 Both Manuela's representation and some expert witnesses argued the point; and the IAComHR, while not raising the issue directly, did include it as part of the context and left a window open for the IACtHR to address the issue.

28 [27] https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2022/011.asp

29 IACtHR case *Artavia Murillo vs. Costa Rica* 2012 para 263, 264, 258. Verónica Undurraga 'Criminalisation under Scrutiny: How Constitutional Courts are Changing their Narrative by Using Public Health Evidence in Abortion Cases' (2019) *Sexual and Reproductive Health Matters* 241 ff; and in general using proportionality to challenge the modern inflationary trend in criminal law, see Konstanze Jarver 'Effectiveness, proportionality, and the abstract and concrete forms of decriminalization' in in Emmanouil Billis, Nandor Knust, Jon Petter Rui (eds.) *Proportionality in Crime Control and Criminal Justice* (Hart Publishing, 2021) pp 207–226.

a total ban on in vitro fertilisation, that "the object and purpose of the 'in general' clause of Article 4 (1) (on the right to life) of the ACHR are to allow an adequate relationship between conflicting rights and interests. Thus, the absolute protection of the embryo cannot be enforced by overriding other rights. After carrying out a proportionality test in the narrow sense, the IACtHR concluded that the Constitutional Chamber of Costa Rica, while confirming the constitutionality of the total ban of in vitro fertilisation, started from an "absolute protection of the embryo" perspective which, by not taking into account the other rights in conflict, resulted in an excessive intervention into the rights of women as well as private and family life "that made the interference disproportionate".[30] Thus, this and other examples demonstrate the centrality of the use of proportionality as a material limit to the punitive power of the State.

Returning to *Manuela vs El Salvador*, the IACtHR used a proportionality 25
test for the relevant criminal sanctions in the abstract to show that a sentence in the order of 30 to 50 years for aggravated homicide applied in these cases was clearly disproportionate to the criminal offence for two reasons. Firstly, "the particular status of women during the puerperal or perinatal period was not taken into account",[31] without prejudice to the fact that in this case, due to a lack of investigation, it cannot be ruled out that it would have been a case of absence of any criminal liability. Secondly, the Court applied a less restrictive means test to show "that new *penal dosimetry* is clearly disproportionate". The new one imposes 30 to 50 years in prison for aggravated homicide, whereas the old one imposed only 1 to 4 years in prison for infanticide (derogated in 1998 in El Salvador). Therefore, a proportional penalty for this type of crime, "would have to be analogous to or less than that established in the previous Salvadoran legislation, by the specific legal means determined by the State".[32] The IACtHR concluded that the penalty currently provided for infanticide is cruel and therefore contrary to the Convention (Art. 5.2 and 5.6 ACHR). As a reparative measure, and under the heading of the "adequacy of the penal dosimetry of infanticide", the IACtHR ordered the State, to reform

30 Ibid. para 263.

31 IACtHR case *Manuela vs. El Salvador* 2021, para 166. Furthermore, the Court stressed that the maximum that in the previous Salvadoran legislation was punishable with up to four years, now can be punished with up to fifty years; and "the minimum, which was previously one year, was raised to thirty years".

32 Ibid. para 171.

its criminal legislation to make it compatible with the standards relating to the proportionality of sentences in this type of cases "within two years". While this amendment is being carried out, the IACtHR highlighted that the relevant State authorities, judges in particular, have an obligation to apply conventionality in their decisions.[33] Surprisingly, the Court chose to take infanticide, a derogated criminal offence in the State, to show the clear disproportionality of the use of the aggravated homicide sanction, although the Court itself acknowledges the proportionality of the sanction was not a point raised by either party. As stated above, it is also surprising that the Court did not analyse that the overarching problem lay in the disproportionality of the total prohibition of abortion that resulted in the criminalisation of obstetric emergencies (irrespective of which criminal offence was alleged to have occurred) and not only the disproportionality of the penalties. At any rate, *Manuela* demonstrates that the IACtHR also uses proportionality to analyse and rule on criminal sanctions in abstract.

b) Proportionality of criminal sanctions in concrete terms

26 The IACtHR has similarly referred to the importance of the proportionality test in both determining a criminal sanction in the concrete case and its execution.[34] It has held "that the State's response to a wrongful act

33 Ibid. para 295 and para 16 of the resolutive points of the Judgment.

34 The IACtHR stressed that "the rule of proportionality" also applied to the execution of the sanction of the convicted person. For example, in the case of Peruvian government's decision granting a humanitarian pardon to former President Alberto Fujimori (sentenced to 25 years in prison for serious human rights violations), the Court stated that it had *to analyse whether* the "pardon for humanitarian reasons" has an unnecessary and disproportionate impact on the right of access to justice of the victims of such violations and their next of kin. The IACtHR reasserted that the "improper granting" of "benefits may eventually lead to a form of impunity, particularly when it comes to the commission of serious human rights violations", and that "the execution of the sentence is an integral part of the right of access to justice of the victims of serious human rights violations and their relatives." In applying the proportionality test, the IAComHR said that granting a humanitarian pardon in the case was not necessary because there is no minimum parameter of proportionality between the purpose of adopting necessary measures to guarantee access to medical attention for Fujimori and the pardon for humanitarian reasons, taking into account the intense impact on the right to justice and the dignity of the victims and their families. Although persons deprived of their liberty have the right to be treated with dignity and to receive adequate medical care, to achieve these ends it is not necessary to issue a pardon, which implies the extinction of the sentence; rather, there are

of the perpetrator of an offence must be proportionate a) to the rights affected and b) to the responsibility of the perpetrator, so that it should be established based on the different nature and seriousness of the acts".[35] By characterising criminal sanctions as an expression of the punitive powers of the State, the IACtHR highlights that "great care must be taken to ensure that these measures are adopted with strict respect for the basic rights of the individual and include a careful verification of the effective existence of the wrongful act".[36]

The proportionality of the penalty in concrete terms implies moving 27
from the abstract level of the classification of generic criminal offences to the determination of the sanction with respect to a specific act. To this end, a sanction must be assessed in the light of (i) the degree of harm or endangerment to the legal good that the punishable conduct specifically generates, (ii) the actual intervention of the person being tried in the creation of said harm or risk, (iii) as well as the individual and social factors that allow the basis for the lesser enforceability of other conduct". In this vein, the IACtHR deemed in *Manuela and Family vs. El Salvador* that "there is now a doctrinal and jurisprudential consensus that the penalty must be proportionate to the degree of personalised reproach (or culpability) that can be attributed to the offender on account of the degree of determination that he or she had in the specific circumstances of the act".[37] Taking these standards into account in *Manuela*, the IACtHR addressed the proportionality of punishing a woman for aggravated murder and then sentencing her to 30 years in prison in a case involving an obstetric emergency. For the IACtHR, "the abysmal disproportion with the guilt" results, among other things, from the context that stress that in the majority of cases, and certainly in Manuela's case, the criminalised women are (to paraphrase the

multiple means that are less harmful to the rights of the victims. It concludes that the pardon, "which prevents the satisfaction of the victims' right to justice, is even more serious and reprehensible when it comes to crimes against humanity" (IAComHR). IACtHR case *Barrios Altos y Case La Cantuta vs. Perú*, Resolución de supervisión de cumplimiento de sentencia, 2018. Inter-American Commission on Human Rights, *Compendium of the Inter-American Commission on Human Rights on truth, memory, justice and reparation in transitional contexts*, 2021; Rainer Huhle 'Transitional Justice' in Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds) *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022).

35 65.
IACtHR case *Manuela vs. El Salvador* 2021 para 165.

36 Ibid. para. 106; case *Norín Catrimán and others* 2014 para 389.

37 IACtHR case *Manuela vs. El Salvador* 2021 para 165.

Court) "young, with communication difficulties or who suffer situations of cultural isolation, truly voiceless women (not in a position to join or gain the protection of movements that usually fight for women's rights and equality), highly vulnerable and in a strongly patriarchal culture".[38] This is a *relevant standard* and implies applying the Court's structural inequality and intersectional approach[39] in the determination of responsibility[40] and, where appropriate, the type of sentence and quantum.

28 Additionally, the IACtHR referred to the aim of the punishment. For example, in *Mendoza et. al. vs. Argentina,* the victims were all juveniles who had been punished with life sentences for crimes committed before they turned eighteen. In referring the case to the IACtHR, one of the main arguments of the IAComHR was that domestic judicial authorities disregarded international standards that apply in a case of juvenile criminal justice and that the sentenced individuals were denied an appeal to their sentences in cassation after their conviction. The IACtHR found the State responsible for violating several articles of the ACHR. In particular, it refers to the grounds of the requirement of proportionality of criminal sanction[41] and stresses that Article 5 para 6 ACHR enshrines the fact that

38 Ibid. para 168.

39 Ibid. para 168, 46, 253.

40 In general, about the question of (i) legitimacy of punishment in contexts of social exclusion, s. among others, Gustavo Beade and Rocío Lorca "¿Quién tiene la culpa y quién puede culpar a quién? Un diálogo sobre la legitimidad del castigo en contextos de exclusión social. (2017) *Isonomía* 47 pp 135–164, on 'Poverty and Criminal Law' see Hernan Dario Orozco Lopez's in this volume.

41 IACtHR case *Mendoza vs. Argentina* 2013 para 165, 174: "In the area of international human rights law, most relevant treaties only establish, by fairly similar formulas, that "no one shall be subject to torture or to cruel, inhuman or degrading treatment". However, the dynamic nature of the interpretation and application of this branch of international law has allowed a requirement of proportionality to be inferred from norms that make no explicit mention of this element. The initial concern in this regard, focused on the prohibition of torture as a form of persecution and punishment, as well as other forms of cruel, inhuman and degrading treatment, has extended to other areas, including those of State punishments for the perpetration of offenses. Corporal punishment, the death penalty and life imprisonment are the main sanctions that are of concern from the point of view of international human rights law. Therefore, this area refers not only to the means of punishment, but also to the proportionality of the punishment. Therefore, punishments considered radically disproportionate, such as those that can be described as atrocious fall within the sphere of application of the articles that contain the prohibition of torture and cruel, inhuman and degrading treatment". On prisons see Jorge Núñez and Luis González Alvo's chapter in this volume. Recently IACtHR, Advisory Opinion on

"the deprivation of liberty shall have as an essential aim the reform and social reintegration of the prisoners". Taking into account this aim (combined with the "desirability of promoting the child's reintegration and the child assuming a constructive role in society", Convention of the Rights of the Child), the Court concluded that the measure that should be ordered as a result of the perpetration of an offence must have the aim of the child's reintegration into society.[42] Thus, the proportionality of the sentence should be evaluated in the context of this specific purpose[43] because, if it is not related to the aim of reintegration, then the measure has no legitimate aim and is incompatible with the Convention. Therefore, life imprisonment and reclusion for life ("this type of sentence entails the maximum exclusion of the child from society") do not achieve the social reintegration of juveniles "because the expectations of re-socialisation are annulled to their highest degree". Indeed, far from aiming at re-socialisation, "it functions in a purely retributive sense". Based on international standards, and in light of the best interests of the child, the Court stated that life imprisonment and reclusion for life for children are incompatible with the ACHR because a) they are not exceptional punishments (*ultima ratio*), b) they do not entail the deprivation of liberty for the shortest possible time or for a period specified at the time of sentencing (as short as possible), and c) they do not permit a periodic review of the continued need for the deprivation of liberty of the children. Finally, as a reparatory measure, the Court decided that the State must ensure that the life imprisonment sentences and reclusion for life are never again imposed on the three individuals involved in this case or on any other person for crimes committed while they were minors. Additionally, it ordered Argentina to guarantee that anyone currently serving such sentences for crimes committed while they were minors may obtain a review of their sentence.

This section served to show the importance of the test of proportionality 29
in the determination of the type and gravity of a criminal sanction, the

Differentiated approaches to certain groups of persons deprived of liberty, Advisory Opinion OC-29/22 of May 30, 2022 para 2, requested by the IAComHR highlighting the deplorable conditions of detention that characterise the prisons in the region and the disproportionate impact caused by the lack of differentiated protection to some groups such as pregnant, postpartum and breastfeeding women; LGBT persons; indigenous people; the elderlies; and v) children living with their mothers in prison.

42 IACtHR Case *Mendoza vs. Argentina* 2013, para 151.

43 Ibid. para 165, 174; IACtHR Case López vs. Argentina 2019, para 246.

fixing of the sentence and its execution. Although the IACtHR recognises that it

> "cannot substitute the domestic authorities in determining the punishment for the crimes established by domestic law, and has no intention of doing so, an analysis of the effectiveness of criminal proceedings and of access to justice can lead the Court, in cases of serious human rights violations, to examine the proportionality between the State's response to the unlawful conduct of a State agent and the legal right allegedly affected by the human rights violation".[44]

30 In doing so, the Court uses proportionality standards that apply not only in the concrete case brought before it but also to States so they can avoid the trap of falling into similar human rights violations.

III. Final considerations

31 This essay has shown that the proportionality test developed in inter-American human rights law is used not only to assess the (dis)proportionality of penalties (standard use in criminal law) but, even more so, as a material limit to the use of the punitive power of the State to challenge criminal laws that restrict rights. The case law of the IACtHR shows that the standard version of proportionality used in the region is structured and includes four subtests (or steps: legitimate aim, suitability, less restrictive means or necessity and proportionality in the narrow sense). These subtests are considered autonomous and distinct steps that are applied strictly and need to be taken when assessing criminal laws that restrict rights.

32 The IACtHR's sustained and constant use of the proportionality test to evaluate restrictions to rights arising from criminal law has rekindled an interest in and the study of criminal law doctrine in the region. In the not-too-distant future, it is likely that this criminal law doctrine will be subject to even more studies regarding the use of proportionality in criminal law. Let us hope that this will continue to happen throughout the region via dialogue among the key actors involved with international/inter-American human rights law to address this ongoing area of concern.

44 IACtHR case *Manuela vs. El Salvador* 2021, para 165.

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