

INTERNATIONAL CRIMINAL LAW BY OTHER MEANS: THE QUASI-CRIMINAL JURISDICTION OF THE HUMAN RIGHTS COURTS

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Since the close of the Cold War, the international community has created a variety of legal institutions designed to step in when state justice systems fail to prosecute genocide, war crimes, and crimes against humanity. The ad hoc criminal tribunals, the hybrid tribunals (such as the Special Court for Sierra Leone), the International Criminal Court (ICC), and the use of universal jurisdiction by national courts are among a new generation of courtly mechanisms designed to hold wrongdoers criminally accountable, state justice systems notwithstanding.¹ These mechanisms represent an era of international judicial involvement in what used to be a more exclusively sovereign matter—the response to mass crimes against civilian populations. Accordingly, they have engendered a slew of scholarship devoted to analyzing their strengths and weaknesses, individually and as a group.

Almost entirely overlooked by the scholarship on these mechanisms for accountability, however, is an alternative form that also dates from the Cold War's end, also takes shape through the intervention of an international court, and also deserves our attention. The regional human rights systems have begun to order and supervise national prosecutions when states have been unable or unwilling to act. In particular, the Inter-American Court of Human Rights has made national prosecution of gross, state-sponsored crimes a centerpiece of its regional agenda. The Court is not, technically speaking, a criminal court and cannot find individual responsibility. But in a creative interpretation of its remedial powers, it regularly orders states to investigate, try, and punish those responsible for gross human rights violations as a form of equitable relief. Then, through another interpretive twist, it supervises states' implementation of its orders: it holds mandatory hearings and issues compliance reports that aspire to hasten and guide the progress of national criminal processes. The Court has decreed and is actively monitoring

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¹ Noncriminal mechanisms have also been used, such as civil lawsuits against violators of international law, immigration law to deny refuge, and truth commissions. See STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 259–87 (3d ed. 2009). The focus here, however, will be on mechanisms that seek individual criminal responsibility and punishment.

prosecutions of international crimes in roughly fifty-one cases across fifteen states.² Pursuant to its orders in these cases, states have launched new criminal investigations, exhumed mass graves, moved cases from military to civil jurisdiction, overturned amnesties, bypassed statutes of limitations, and created new institutions and working methods to facilitate prosecution of such crimes. Indeed, at least thirty-nine prosecutions launched pursuant to the Court's orders have yielded convictions.³ To contextualize this number it should be recalled that the ICC, a decade into its work, has yielded only one conviction and that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has yielded sixty-four.⁴ The Inter-American Court currently runs on a yearly budget of under U.S.\$4 million; the ICC and ICTY each run on yearly budgets of roughly U.S.\$150 million.⁵

The Inter-American Court is not alone in its foray into prosecutorial matters. The Inter-American Commission for Human Rights (Commission), the Council of Europe's Committee of Ministers (COM), and the United Nations' Human Rights Committee also exhort states to prosecute international crimes, and monitor the ensuing national processes. In pushing for accountability, the human rights bodies exert a jurisdiction quite different from that traditionally exercised by the international and hybrid criminal courts. Whereas those courts directly conduct the prosecutorial work, the rights bodies entrust local justice systems with the corrective actions, monitoring their work from afar but at times in detail, and exerting pressure by publishing compliance reports and holding hearings. The rights bodies' methods are thus more deferential to states and, inevitably, slower to reach prosecutorial outcomes. But they have important virtues. They foster *local* processes of justice, memory, and judicial reform. They are able to pair restorative justice and victim-centered remedies with retributive justice. And significantly, it is the state rather than the international community that shoulders the cost of prosecution. This mechanism for accountability—the *practice* by an international body of ordering, monitoring, and guiding national prosecutions—will be referred to as *quasi-criminal review*,⁶ an expression that I will use interchangeably with *quasi-criminal jurisdiction*.

Skeptics may object that human rights review is too weak a mechanism to matter: if an Inter-American Court order results in prosecution, it is because the state and justice system were already able and willing to prosecute. In their volume *Accountability for Human Rights Violations in International Law*, Ratner, Abrams, and Bischoff devote only three pages to the International Court of Justice and the regional human rights courts. They argue that

² Unless otherwise stated, the data used in this article are drawn from original coding of the Inter-American Court's rulings and compliance reports, available on the Court's website, <http://www.corteidh.or.cr/>. The research methods used in this study are explained in part I.

³ See *infra* note 86 and accompanying text. Note that the Court does not itself designate these crimes as international crimes. That designation was made by the author.

⁴ The comparison is included here to stimulate the reader into taking seriously the comparisons suggested in the article, while also acknowledging the incommensurability of the different types of courts and convictions. The work of these courts will be more systematically juxtaposed in part II. For information on the ICC's convictions, see <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/>. For information on the ICTY's convictions, see <http://www.icty.org/action/cases/4>. The ICTY recently arrested its last indictee still at large. See Marlise Simons, *Serbia Arrests Its Last Fugitive Accused of War Crimes*, N.Y. TIMES, July 20, 2011, at A8.

⁵ The Inter-American Court's budget for 2011 was U.S.\$3.9 million. Inter-Am. Ct. H.R., *Informe Anual de la Corte Interamericana de Derechos Humanos 2011*, at 66–67 (2011), available at <http://www.corteidh.or.cr/docs/informes/espanol.pdf>. The ICC's approved budget for 2011 was U.S.\$130 million. ICC, *Registry Facts and Figures 2* (Apr. 8, 2011), at <http://www.icc-cpi.int/NR/rdonlyres/9B984A20-08A9-4127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf> [hereinafter ICC Budget]. For the ICTY budget, see ICTY, *The Cost of Justice* (n.d.), at <http://www.icty.org/sid/325>.

⁶ The term *mechanism for accountability* is borrowed from RATNER ET AL., *supra* note 1.

use of these courts presents key disadvantages for the goals of accountability. Their physical distance from the victims and the abstract nature of their judgments can render quite small the psychological impact of their rulings. . . . There can also be no guarantee that states will comply with decisions; . . . While it might conceivably be possible to fashion cases involving the adjudication of individual accountability, the courts appear unwilling to act as quasi-criminal tribunals, and their evidentiary practices and capabilities are ill-suited to the task.⁷

They are not alone in their pessimism. In the title of a recent book, Sonja Grover called the European Court of Human Rights (ECHR) a “pathway to impunity for international crimes.”⁸

The question of whether the quasi-criminal review of the rights bodies is effective, however, is an empirical question, and empirical studies on the practice of ordering and monitoring national trials are altogether lacking. Indeed, Ratner and colleagues’ criticisms seem to overlook the practice. If the regional rights courts succeed in triggering *local prosecutions*, their objection of the regional courts’ “physical distance from the victims” and “abstract” judgments is muted. Further, while it is true that the regional courts will not adjudicate individual accountability, the Inter-American Court has been quite willing to inquire into and review national criminal procedures; in this sense, the Court *is* taking on a quasi-criminal jurisdiction. Ratner and colleagues also object that there is “no guarantee that states will comply with decisions” of the regional courts. The feature that makes the ICC’s complementarity jurisdiction potentially effective in stimulating national prosecution is that the ICC carries a big stick: the threat of opening its own prosecution. For its part the Inter-American Court can only threaten to post on its website yet another compliance report, or to report state recalcitrance to an indifferent Organization of American States (OAS) General Assembly.⁹ And yet, states do at times comply with the orders of the regional courts. It is important, in other words, to delve into the records of the rights bodies in order to understand what they do and to what avail. That is the work of this article.

It is also sometimes objected that the quasi-criminal jurisdiction of human rights bodies illegitimately expands their mandates. The Inter-American Court and the ECHR monitor state compliance with their respective human rights conventions, which make no mention of international crimes. These courts lack the institutional capacity to adjudge individuals. Even less, it is argued, do they have the legitimate authority to do so. The charge of illegitimacy is particularly sensitive in the inter-American setting. Latin American states across the political spectrum have called on the OAS to curb the mandate of the Inter-American Commission,¹⁰ and in September 2012, Venezuela removed itself from the jurisdiction of the Inter-American

⁷ *Id.* at 257. The authors note that the individual-petition mechanism before the regional courts “alleviates many of these difficulties and provides an important mechanism for the advancement of human rights, as seen in some of the Inter-American Court’s cases.” *Id.* at 258. But they do not further explore the matter.

⁸ SONJA C. GROVER, *THE EUROPEAN COURT OF HUMAN RIGHTS AS A PATHWAY TO IMPUNITY FOR INTERNATIONAL CRIMES* (2010).

⁹ Formally, Article 73 of the American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123, charges the OAS General Assembly with enforcing judgments.

¹⁰ As a result, the Commission in 2012 launched a reform process called *Process for Strengthening the Inter-American System*. See <http://www.oas.org/en/iachr/mandate/strengthening.asp>. For a description of the Inter-American System for Human Rights, including the Inter-American Commission and the Inter-American Court of Human Rights, see *infra* notes 21–29 and accompanying text.

Court by denouncing the American Convention of Human Rights.¹¹ The incursion of the Inter-American System for Human Rights (IAS) into prosecutorial matters is among these states' complaints. Further, criminal scholars in the region are engaged in a lively debate on the legitimacy of the Inter-American Court's jurisprudence as it relates to criminal doctrine.¹² Insofar as the development of quasi-criminal jurisdiction raises questions of legitimacy, however, it becomes all the more important to understand this practice in action and to assess its outcomes empirically. Further, it is relevant to evaluate the practice not only in the context of the Court's original mandate, as many scholars do, but also in light of the emerging family of international criminal jurisdictions. The argument here is not that international human rights bodies should (or, for that matter, should not) take on criminal jurisdiction. It is, rather, (1) that the regional human rights systems *are* developing quasi-criminal review, a practice that is accomplishing some of the goals of the international criminal justice system, including fostering prosecution of criminal acts that are international crimes, and (2) as practiced by the regional rights systems, quasi-criminal review presents a complement and, in certain situations, an alternative to the work of the current international and hybrid tribunals. It is precisely the differences between these mechanisms for accountability that make it interesting to view them together.

A study of the rights bodies' quasi-criminal jurisdiction is also made timely by recent events in Africa. The African Union and the East African Community have announced that they may add criminal jurisdiction to their respective courts.¹³ The two courts could become the first international forums with the authority to adjudicate matters involving both state responsibility and individual criminal responsibility. Whether or not the project of merged jurisdictions advances, the American and European human rights systems' experience with

¹¹ See Press Release, OAS General Secretary, OAS General Secretary Communicates Venezuela's Decision to Denounce the American Convention on Human Rights (Sept. 10, 2012), at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-307/12. For the American Convention, see *supra* note 9.

¹² See, e.g., 1 SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL (Kai Ambos, Ezequiel Malarino & Gisela Elsner eds., 2010), at <http://www.kas.de/rspla/es/publications/21282/>; 2 SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL (Kai Ambos, Ezequiel Malarino & Gisela Elsner eds., 2011), at <http://www.kas.de/rspla/es/publications/31766/>. For arguments that the Inter-American Court overemphasizes penal responses, see also Daniel R. Pastor, *La Deriva Neopunitivista de Organismos y Activistas como Causa del Desprestigio Actual de los Derechos Humanos*, 1 NUEVA DOCTRINA PENAL 73 (2005); Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195 (2007); Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT'L CRIM. L. REV. 665 (2012); Roberto Gargarella, *Justicia Penal Internacional y Violaciones Masivas de Derechos Humanos*, in DE LA INJUSTICIA PENAL A LA JUSTICIA SOCIAL 105–47 (Roberto Gargarella ed., 2008). For a defense of the Court, see Oscar Parra Vera, *La Jurisprudencia de la Corte Interamericana Respecto a la Lucha Contra la Impunidad: Algunos Avances y Debates*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO (forthcoming); Victor Abramovich, "Transplante" y "Neopunitivismo": *Debates Sobre la Aplicación del Derecho Internacional de los Derechos Humanos en la Argentina*, in ACTIVISMO DE LOS DERECHOS HUMANOS Y BUROCRACIAS ESTATALES: EL CASO WALTER BULACIO 249 (Sofia Tiscornia ed., 2008); Leonardo Filippini, *El Prestigio de los Derechos Humanos: Respuesta a Daniel Pastor*, 3 JURA GENTIUM 2007, at <http://www.juragentium.org/topics/latina/es/filippin.htm>.

¹³ For the proposal to amend the jurisdiction of the African Court of Justice and Human Rights, see Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, OAU Doc. Exp/Min/IV/Rev.7 (May 17, 2012), at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-adopted-by-the-ministers-17-may.pdf>. For a discussion of the proposal to add criminal jurisdiction to the East African Court of Justice, see EAC Press Release, Council of Ministers to Discuss Extended Jurisdiction for EACJ (June 26, 2012), at http://www.eac.int/news/index.php?option=com_content&view=article&id=726:council-of-ministers-to-discuss-extended-jurisdiction-for-eacj&catid=48:eac-latest&Itemid=69.

quasi-criminal jurisdiction should be relevant to the African Union and the East African Community as they grapple with the challenge of state-sponsored criminal atrocities in their region.¹⁴

This article proceeds in three parts. Part I presents data on the Inter-American Court's practice of ordering states to prosecute and of monitoring the results. It begins to map, for the first time, how the Court and states interact and move toward prosecution, through the Court's supervisory regime. It then describes the quasi-criminal jurisdiction of the Council of Europe system and that of other human rights bodies. Part II juxtaposes the quasi-criminal review of the rights bodies to the existing family of international criminal justice mechanisms aimed at prosecuting international crimes. Focused on how the international and national justice systems divide the work of prosecution between them, it presents a typology of jurisdictions that includes the quasi-criminal type exemplified by the rights bodies. It closes by analyzing how the ICC can coordinate its work under the doctrine of complementarity with that of the rights bodies' quasi-criminal review. The conclusion suggests further avenues of research.

I. THE QUASI-CRIMINAL JURISDICTION OF THE HUMAN RIGHTS BODIES

OAS members originally modeled the Inter-American Court after its European counterpart, the European Court of Human Rights.¹⁵ Contrasts between the two regions, however, resulted in divergent evolutionary paths. Whereas the ECHR came of age overseeing a group of well-functioning democracies committed to the rule of law, the Inter-American Court was, from its first contentious case, confronted with mass, state-sponsored violations of fundamental rights. The dynamics of these violations, in which the state itself systematically committed and then concealed crimes against its citizens, came to shape the Inter-American Court's remedial practice. It quickly became apparent that monetary compensation from the very state that was responsible for the crime—and that continued to be complicit in its cover-up—was an inadequate remedy. Not only did it fail to guarantee that the state would desist from the criminal policy at issue, but it did not address the harm. Throughout Latin America, the families of disappeared victims did not take to the streets to demand money.¹⁶ They demanded to know what had happened to their disappeared sons and daughters, and where their remains lay. And they demanded that those responsible for their kidnapping, torture, and death face judgment.

¹⁴ For an account of some of the challenges posed by the project of merging the jurisdictional types, see Max Du Plessis, *A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EJIL: TALK! (Aug. 27, 2012), at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>. See also Franz Viljoen, *AU Assembly Should Consider Human Rights Implications Before Adopting the Amending Merged African Court Protocol*, AFRICLAW (May 23, 2012), at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213>; Gino J. Naldi & Konstantinos D. Magliveras, *Africa Contemplates Creating International Criminal Law Entity*, ASIL ACCOUNTABILITY (ASIL International Criminal Law Interest Group Newsletter, Summer 2012), at <http://www.asil.org/accountability/pdf/summer2012/AFRICA%20CONTEMPLATES%20CREATING%20INTERNATIONAL%20CRIMINAL%20LAW%20ENTITY.pdf>.

¹⁵ See Inter-Am. Comm'n H.R., *Report on the Work Accomplished During Its Fifteenth Session (Special)*, OAS Doc. OEA/Ser.L/V/II.16, Doc. 20 (July 26, 1967).

¹⁶ As one mother put it, "My son was not a cow, I don't want money, what I want is justice." Viviana Krsticevic, Comment, in Conference, *Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U. L. REV. 1375, 1419 (2007) (quoting a mother of one of the victims in the case of *El Amparo v. Venezuela*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 19 (Jan. 18, 1995)).

Thus, while the ECHR continued to order monetary compensation, the Inter-American Court began to innovate. In 1996, it began ordering states to prosecute individuals for particular violations.¹⁷ Then, it began to supervise those prosecutions closely for their adherence to human rights standards, and to engage the state, victims, and Inter-American Commission in an ongoing dialogue over how to overcome obstacles to prosecution in particular cases.¹⁸ It is the coupling of the Court's use of equitable remedies to order prosecution, on the one hand, with the supervision stage, on the other, that forms the basis of the Court's quasi-criminal jurisdiction.

Other human rights bodies have taken a similar turn. Increasingly, supranational rights bodies are issuing "more specific reparation orders that can include broad changes to law, policy, and practice as guarantees of non-repetition in addition to individual measures of redress."¹⁹ Through these remedial orders, the supranational bodies strive both to ensure that victims gain access to adequate reparations at home and, even more ambitiously, to address broader patterns of violations at the structural level.²⁰ The Committee of Ministers, the Inter-American Commission, and the Human Rights Committee have all adopted the practice of declaring that states must investigate and punish specific acts that amount to international crimes, and of then supervising how well states live up to this demand.

The evolution of the Inter-American Court's remedial and supervisory practices into a quasi-criminal jurisdiction is discussed below, followed by a brief look at the emerging quasi-criminal jurisdiction of the Council of Europe and other rights bodies.

The First Innovation: Prosecution as Equitable Remedy

The Inter-American System for Human Rights of the Organization of American States has two main bodies: the Inter-American Commission, created in 1959, and the Inter-American Court of Human Rights, created in 1978.²¹ The Commission's work includes monitoring states through on-site visits, issuing country reports, and investigating individual petitions. It

¹⁷ The first time that the Court included an order to prosecute in the operative part of its reparations decision was in *El Amparo v. Venezuela*, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 28, para. 64(4), (5) (Sept. 14, 1996).

¹⁸ See Inter-Am. Ct. H.R., *Supervisión de Cumplimiento de Sentencias (Aplicabilidad del Artículo 65 de la Convención Americana sobre Derechos Humanos* [Monitoring Compliance with Judgment (Applicability of Article 65 of the American Convention on Human Rights)] (June 29, 2005), at http://www.corteidh.or.cr/docs/supervisiones/general_29_06_05.pdf. For a discussion of this evolution, see David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives*, 27 AM. U. INT'L L. REV. 263 (2012).

¹⁹ Lorna McGregor, *The Role of Supranational Human Rights Litigation in Strengthening Remedies for Torture Nationally*, 16 INT'L J. HUM. RTS. 737, 740 (2012).

²⁰ *Id.*; see also Victor Abramovich, *From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*, 6 SUR INT'L J. ON HUM. RTS. 7 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706715.

²¹ The other two main regional rights systems are the European Council system, based on the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221, at <http://conventions.coe.int/>, and the African system, based on the African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf. Other regional systems, such as the Economic Community of West African States, also take on human rights matters. See *Court of Justice of the Economic Community of West African States*, at <http://www.ihrda.org/court-of-justice-of-the-economic-community-of-west-african-states/>.

is also the forum of first instance in the IAS individual-petition process. The Commission receives roughly 1500 complaints a year. Once it deems a petition admissible, it investigates the claims and works with the claimant and state toward a friendly settlement.²² If that fails, the Commission issues a report in which it advises the state to take certain actions.²³ In face of noncompliance, it may refer the case to the Inter-American Court, but only if the noncompliant state has given the Court jurisdiction.²⁴ While all thirty-five OAS member states are subject to the oversight of the Commission, only twenty-two have granted jurisdiction to the Court.²⁵ In 2011, the Commission accepted sixty-six petitions for processing, issued five reports on individual petitions (reports on the merits), and referred twenty-three cases to the Court.²⁶ The Court has both advisory and contentious jurisdiction.²⁷ Under its contentious jurisdiction, the Court adjudicates the cases referred to it by the Commission.²⁸ It holds hearings four times a year, in which the state, the victim's representatives, and the Commission appear separately. After ruling on a case, the Court monitors compliance with the ruling. In 2011, the Court issued eighteen rulings in contentious cases and thirty-two compliance reports.²⁹

The Court and Commission have played a leading role in developing international human rights law on forced disappearance,³⁰ amnesties,³¹ the victim's right to the truth,³² and the right to judicial process.³³ But their innovations have been perhaps even greater in the realm of

²² For a description of the petition process, see Inter-Am. Comm'n H.R., *What Is the IACHR?*, at <http://www.cidh.oas.org/what.htm>.

²³ Inter-Am. Comm'n H.R., Rules of Procedure, Arts. 44–46 (rev. 2011), at <http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm>.

²⁴ *Id.*

²⁵ Of twenty-four American nations that have ratified the American Convention, twenty-two have also accepted the binding jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. However, Trinidad and Tobago denounced the Convention (and thus withdrew from the Court's jurisdiction) in 1999, and Venezuela denounced the Convention on September 10, 2012. Its denunciation becomes effective in one year's time. Organization of American States, *Multilateral Treaties*, at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

²⁶ Inter-Am. Comm'n H.R., *Annual Report 2011*, ch. III(b), at <http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp>.

²⁷ The jurisdiction of the Court is set out in Articles 61–64 of the American Convention, *supra* note 9.

²⁸ *Id.*, Art. 61 (stating that individual petitions cannot be filed directly with the Court). Note that state parties, as well as the Commission, may submit cases to the Court.

²⁹ *Informe Anual de la Corte Interamericana de Derechos Humanos 2011*, *supra* note 5 (the Court and Commission also issue provisional measures and preliminary measures, respectively).

³⁰ See, e.g., Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J. L. & TRADE AM. 429, 438 (2006); Juan Luis Modolell González, *The Crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights*, 10 INT'L CRIM. L. REV. 475 (2010); see Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, OAS Doc. AG/RES. 1256 (XXIV-0/94), 33 ILM 1529 (1994).

³¹ See, e.g., Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203 (2011); Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009).

³² See, e.g., Open Society Found., *Inter-American Court Issues Groundbreaking Ruling on Right to Truth and Information* (Jan. 13, 2011), at <http://www.soros.org/initiatives/justice/news/araguaia-gomes-lund-ruling-20110113>; Thomas M. Antkowiak, Note, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977 (2002).

³³ See Basch, *supra* note 12.

remedies and monitoring.³⁴ The first two contentious cases to reach the Court, decided in 1989, dealt with forced disappearance.³⁵ In each, the Court declared that Article 1(1) of the American Convention on Human Rights, under which the state must guarantee the rights of the Convention, entailed a duty to investigate and punish.³⁶ However, even as it declared that states had a duty to prosecute, in its remedial section it ordered only monetary compensation.³⁷ In 1996, the Court began to include, in the operative section of its remedies decisions, orders that the state investigate and punish the underlying crimes.³⁸ Rather than let the state choose the manner of guaranteeing non-repetition of the violation, the Court demanded specific action. Since then, the Court has decreed prosecutorial action as a remedy in a majority of its cases.³⁹

The doctrine on the state's duty to investigate and punish has expanded and evolved over the years. Although the first cases dealt with forced disappearance and other gross violations, the Court has said that states have a "duty to punish" all individuals responsible for *any* violation of the Convention.⁴⁰ Further, although the initial emphasis was on the duty of the state to respect the rights guaranteed by the American Convention, such as the right to life, the Court also bases its orders to investigate and punish on the American Convention's individual right to a fair trial and right to judicial protection.⁴¹ The emphasis has thus shifted away from a state's general duty to guarantee rights and toward the victim's individual right to have the government investigate and punish.⁴²

The Court's orders have also become more detailed. It often adds that the prosecutions must be effective and more than "a mere formality."⁴³ Further, orders can entail a series of discrete actions, both procedural and substantive. In its *Myrna Mack v. Guatemala* ruling, for example, the Court ordered the state to conduct a criminal investigation of the extrajudicial killing that formed the basis of the complaint.⁴⁴ After recounting the (inadequate) steps that the state had already taken in the prosecution, the Court specified how Guatemala needed to proceed. The state was ordered to do all of the following: to investigate, judge, and punish not only all of the material, but also the intellectual, authors of the crime (thereby seeking to extend responsibility

³⁴ See also Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 355 (2008).

³⁵ Velásquez-Rodríguez v. Honduras, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989); Godínez-Cruz v. Honduras, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989).

³⁶ Velásquez-Rodríguez v. Honduras, *supra* note 35; Godínez-Cruz v. Honduras, *supra* note 35.

³⁷ The state's obligation to prosecute is nonetheless implicit in the Court's merits rulings in these first two cases. See Velásquez-Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 166 (July 29, 1988).

³⁸ El Amparo v. Venezuela, *supra* note 17.

³⁹ See Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011).

⁴⁰ Velásquez-Rodríguez v. Honduras, *supra* note 37. For a critique of this claim, see Basch, *supra* note 12 (arguing that the Court has backtracked on this claim, which should be interpreted rather as a duty to prosecute any act that violates the Convention that is also a crime under national or international law).

⁴¹ *Id.*

⁴² This shift has been criticized by those who worry that the Court is expanding victims' rights at the cost of due process rights for defendants. See *supra* note 12 and accompanying text.

⁴³ Trujillo Oroza v. Bolivia, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 92, para. 100 (Feb. 27, 2002); Cantoral Benavides v. Peru, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 88, para. 69 (Dec. 3, 2001); Cesti Hurtado v. Peru, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 78, para. 62 (May 31, 2001); Mack Chang v. Guatemala, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 101, para. 273 (Nov. 25, 2003).

⁴⁴ Mack Chang v. Guatemala, *supra* note 43, para. 301.

beyond the one culprit currently in prison);⁴⁵ to prosecute those involved in obstructing the investigation of the underlying crime;⁴⁶ to “abstain from resorting to” any legal maneuvers that would block the progress of the prosecution, including amnesty, prescription, *res judicata*, and other procedural doctrines;⁴⁷ to guarantee security to judges, prosecutors, witnesses, and other judicial actors as well as to the victim’s family;⁴⁸ and to use all means within its reach to speed up the process.⁴⁹ In other cases, the Court has demanded that victims be given access to the criminal proceedings and that the state not only investigate for criminal responsibility but also uncover what happened to the victims of forced disappearance and where their remains lie.⁵⁰

The Second Innovation: Supervision of National Prosecutions

It is common to describe litigation before the Inter-American Court as having three stages: preliminary objections, merits, and reparations.⁵¹ In reality, it would be more accurate to describe it as having two stages. In recent years, the Court has merged the preliminary objections, merits, and reparations phases of litigation into a single hearing: what used to be three distinct sets of arguments are now combined and would best be described as a single phase.⁵² The implementation of the Court’s reparations orders, by contrast, does form a separate stage of litigation. The Court has interpreted its mandate to include supervising the implementation of its rulings,⁵³ and it remains seized of a case until it deems there has been full compliance with each of its numerous demands, miring it in years of detailed inquiries into the political and legal obstacles to compliance. Because the Court includes the Commission and the victims in the supervisory process, it has become an important phase of litigation before the Court.⁵⁴ Further, the Court is investing a growing amount of time and resources in this supervisory

⁴⁵ *Id.*, para. 275.

⁴⁶ *Id.*

⁴⁷ *Id.*, para. 276.

⁴⁸ *Id.*, para. 277.

⁴⁹ *Id.*

⁵⁰ See, e.g., 19 Merchants v. Colombia, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 109, paras. 263 (“The next of kin of the victims must have full access and competence to act at all stages and in all bodies of these investigations, in accordance with domestic law and the provisions of the American Convention.”), 271 (“[T]he Court considers that it is fair and reasonable to order Colombia to conduct a genuine search, making every possible effort to determine with certainty what happened to the remains of the victims and, should it be possible, to return these to their next of kin.”) (July 5, 2004).

⁵¹ See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AJIL 768, 781 (2008); Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT’L L. & INT’L REL. 35, 46 (2010).

⁵² For a critical discussion of this change, see Cavallaro & Brewer, *supra* note 51.

⁵³ Article 65 of the American Convention, *supra* note 9, says only that the Court can refer a case of noncompliance to the OAS General Assembly. The Court quickly learned, however, that this option was not effective; the General Assembly consistently failed to respond with sufficient force. Since 1996, the Court has interpreted the Convention to allow it to monitor its own rulings. See *Baena Ricardo v. Panama*, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104 (Nov. 28, 2003) (rejecting Panama’s challenge to its power to supervise compliance); Inter-Am. Ct. H.R., Rules of Procedure, Art. 69 (2009), at http://www.corteidh.or.cr/reglamento/regla_ing.pdf (specifying procedures for supervision).

⁵⁴ Baluarte, *supra* note 18 (arguing that lawyers need to begin considering the supervision phase as an important part of the litigation before the Inter-American Court, with its own distinct dynamics and constraints).

phase. Last year, for example, it issued thirty-two compliance reports,⁵⁵ and these reports have themselves become more detailed. The Court has also experimented with new forms. In 2008, it began summoning the parties to mandatory closed hearings on the implementation of its orders.⁵⁶ In these closed sessions, state actors come face-to-face with the victims or their representatives, the judges, and the Commission. Now in a less adversarial modality, the Court's judges move the parties toward overcoming obstacles to implementation.

When the Court decrees prosecution as a remedy, it opens the way for a proactive review of national prosecutions of international crimes. Three features of the Court's practice of supervising prosecutions are worth noting. The first is that the Court at times delves deeply into criminal process. When the parties to the case—the state, the victims, and the Commission—provide enough information, the Court is able to explore matters in considerable detail and to make both substantive and procedural demands. The Court's compliance report in *La Rochela Massacre v. Colombia* provides a useful example. In that case a paramilitary group killed twelve judicial officials conducting investigations into crimes committed in the Santander department.⁵⁷ The Court's reparations ruling of 2007 ordered the state to conduct a more complete criminal investigation.⁵⁸ During the supervision stage, the Court found that twenty-one years after the crime and three years after the Court's reparations ruling, the investigation into the case was still not being conducted with due diligence.⁵⁹ The following quote illustrates how deeply the Court delves into criminal matters:

60. The information presented to the Court during the procedure to monitor compliance makes it possible to verify that, following the delivery of the Judgment some progress has been made in the investigation before the criminal courts. . . .

61. . . . Even though progress has been made with the investigation and punishment, it is vital that the State continue investigating, with due diligence, in order to determine all those responsible for the La Rochela Massacre. In that respect, it is necessary to remember the seriousness of the crimes committed in this case, which entailed a complex structure of individuals that took part in planning and executing the crime. In the proceeding before the Court, the State itself acknowledged that, at least, forty members of the "Los Masetos" paramilitary group, acting in cooperation and with the acquiescence of State agents, initially detained the fifteen victims of the instant case, who were members of a Judicial Commission (Unidad Móvil de Investigación [Mobile Investigative Unit]) and later committed a massacre against them. As a result of the attack, twelve members of the Judicial Commission were killed and three survived. It should be considered that, as well as the participation of various members of "Los Masetos" paramilitary group and State agents, the Court observed that said Judicial Commission was investigating the disappearance case of the *19 Comerciantes* [19 Tradesmen], among others, which was perpetrated by the ACDEGAM paramilitary group, and which had the support of and close links with senior

⁵⁵ By contrast, as of this writing it has issued only eighteen rulings in contentious cases. See Inter-Am. Ct. H.R., *Jurisprudence Monitoring Compliance with Judgments*, at <http://www.corteidh.or.cr/supervision.cfm>.

⁵⁶ See Baluarte, *supra* note 18.

⁵⁷ *La Rochela Massacre v. Colombia, Merits, Reparations & Costs*, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).

⁵⁸ *Id.*, para. 314.

⁵⁹ *La Rochela Massacre v. Colombia, Monitoring Compliance with Judgment* (Inter-Am. Ct. H.R. Aug. 26, 2010), at http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf.

leaders of the State security forces. These factors need to be taken into account to assess the number of persons that took part in the massacre and the motive.

....

63. Moreover, according to information submitted to the Court, two people associated with the criminal investigation into the facts of this case and against whom pretrial detention was ordered (*supra* Considering clause 60(d)) were proposed by the National Government as beneficiaries of the benefits contemplated in Law 975 of 2005 (Justice and Peace Law) and had made spontaneous declarations. The parties have not informed the Court whether the competent authorities had made any decision determining whether such persons do or do not meet the eligibility requirements for the benefits contemplated in the aforementioned law. However, the Tribunal notes that in these spontaneous declarations, the persons had not provided information related to the case facts.

....

66. . . . The Court deems it necessary for the State to forward updated and complete information on the criminal proceeding currently underway and those that have yet to begin before the Supreme Court of Justice, covering the observance of the criteria established by the Court regarding the appropriate manner in which to fully and effectively comply with the obligation to investigate, including the criteria mentioned in Considering Clause 62 of this Order. The State must include information related to the preliminary examination statements to be taken, the apprehension orders pending execution, the actions taken in that regard and, if applicable, it must explain the reasons why they were not executed. Also, it must indicate whether the investigation has been referred to the Supreme Court of Justice and the progress made in such investigation and explain on what charge or charges former Lieutenant Luis Enrique Andrade Ortiz is being investigated, taking into account the decision adopted by the Court in its Judgment regarding the violation of the principle of the competent, independent and impartial court [*juez natural*] which led to an order being passed, in favor of Lieutenant Luis Enrique Andrade Ortiz, to close the case on the homicide charge.⁶⁰

The Inter-American Court is not a criminal court. Nonetheless, in supervising a prosecution, it tells the state what lines of investigation it must explore; it names individuals who should be investigated; and it suggests analytical connections that should be drawn between cases.

A second noteworthy feature of the supervision of national prosecutions is that, although the Court's merits and reparations rulings reflect *retrospectively* on states' violations of the duty to investigate and punish, the supervision stage opens the way for the Court to review prosecutions *as they unfold*.⁶¹ The Court relies on the government, the Commission, and the victims to monitor and report on the state's prosecution. In this way, the supervision stage constitutes a parallel process through which the Court evaluates the underlying prosecution, and through which the parties critique or defend that same prosecution. Even as the local justice system sits

⁶⁰ *Id.*, "Considering," paras. 60–64 (footnotes omitted).

⁶¹ The Court itself has made the following distinction between the phases of adjudication and supervision: "during the monitoring of compliance with the Judgment, the Tribunal's duty is no longer the determination of the facts of the case and the State's potential international responsibility, but instead only the verification of the compliance with the obligations stated in the judgment by the State responsible." *Pueblo Bello Massacre v. Colombia, Monitoring Compliance with Judgment, "Considering,"* para. 10 (Inter-Am. Ct. H.R. July 9, 2009), at http://www.corteidh.or.cr/docs/supervisiones/bello_09_07_09_ing.pdf.

in judgment of the alleged perpetrator of international crimes, the Court sits in judgment of the local justice system.

The third noteworthy feature of the supervision phase is that it is dialogic. The Court receives and responds to inputs from all parties. Many scholars of judicial review argue for the importance of a dialogic relation between courts and other state actors.⁶² César Rodríguez-Garavito has found that courts achieve greater compliance when they issue weak remedies but then undertake dialogic monitoring in which they set deadlines, hold public hearings in which many actors participate, and issue follow-up decisions that fine-tune orders in response to what courts learn on the ground.⁶³ The underlying idea is that these practices foster dialogue among public authorities and civil society actors. Positive outcomes of this dialogue can include “unlocking policy processes” and “improving coordination among disconnected state agencies.”⁶⁴ The Inter-American Court has begun employing each of these dialogic tools in its monitoring phase. As it learns more details of the prosecution through supervision, the Court becomes more specific and realistic as to what, exactly, must be done in order for the state to satisfy the Court’s orders and for the victims to be satisfied. The meaning of the remedial orders thus evolve through the back and forth dialogue between parties during the supervision phase.

The Court, then, interprets its mandate to allow it to order, monitor, and guide—in great detail, at random intervals, over an indefinite number of years, and in dialogue with all the litigating parties—the substantive and procedural aspects of national prosecutions as they unfold. Taken together, these features yield a singular phase: quasi-criminal review.

Criticisms of the Inter-American Court’s Quasi-criminal Review

This innovation—quasi-criminal review—has not been without critics.⁶⁵ It raises several thorny legal and political issues. First, quasi-criminal review arguably represents an illegitimate expansion of the Inter-American Court’s mandate. The Court was created to adjudicate the human rights violations of states, not of individuals, and it was not meant to monitor judicial processes as they unfold. Steps toward quasi-criminal review encroach on a terrain that the states have not explicitly delegated to the Inter-American System.

After some initial resistance, states have accepted the evolution of the Court’s supervision of compliance with its rulings.⁶⁶ However, mere acquiescence to the Court’s practice provides a weaker form of legitimacy than would, for example, the ratification of a protocol that explicitly altered the terms of the American Convention. Further, some states still balk at the Court’s incursion into their criminal procedural affairs. The compliance reports reveal that Colombia, in particular, pushes back, arguing that the Court does not have the power to second-guess local officials in the legitimate exercise of their discretion:

⁶² See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391 (2007).

⁶³ César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669 (2011).

⁶⁴ *Id.* at 1696.

⁶⁵ A group of scholars in Argentina have been especially vociferous in their criticism of the Court. See *supra* note 12 and accompanying text.

⁶⁶ The Inter-American Court rejected Panama’s challenge to the Court’s supervision of compliance with its rulings, and states have since accepted the practice. See *Baena Ricardo v. Panama*, *supra* note 53.

[Colombia] also mentioned that, unless there is an alleged due process violation, this Tribunal is not allowed to analyze in depth and decide on the procedural actions because this is within the scope of the domestic procedure and, in this case, of the prosecutor in charge of the investigation who, according to the information of the court file, shall make the appropriate legal decisions.⁶⁷

In response, the Court consistently asserts a bright line between a criminal court and a human rights court:

[T]he Court reiterates . . . that it is not a criminal court where the criminal responsibility of individuals can be analyzed, reason for which in this phase it shall not analyze the entire scope of the domestic investigations and processes, but only the degree of compliance with that ordered in the Judgment.⁶⁸

Such assertions can “ring hollow,”⁶⁹ however, when the judgment’s orders are broad and when the Court’s jurisprudence on the duty to punish is not yet developed in such detail as to carefully delineate the boundary between matters that belong to the Court and those that fall within the national officials’ legitimate discretion. In truth, as shown by the compliance report quoted above, the Court does at times indicate *who* should be investigated.

A second line of criticism is that, because these bodies were not designed to supervise national criminal procedures, their capacity to do so is limited. As Ratner and colleagues argue, the Court’s “evidentiary practices and capabilities are ill-suited to the task” of investigating individual responsibility.⁷⁰ When the Inter-American Court suggests lines of investigation to the Colombian courts, as shown above,⁷¹ one might well wonder if the judges and their staff, based in Costa Rica, have the requisite knowledge of the facts on the ground and local laws to be making such suggestions to actors in the criminal justice system. The Court relies on the Commission, the litigants, and the state for its information. It does not have its own investigative arm. Further, its ability to process and analyze the information that it receives from the parties is increasingly limited as its caseload increases.⁷² This limitation became evident last year in a case brought against Colombia. The Court had affirmed a list of victims of the Mapiripán Massacre in order to ascertain whose relatives should be paid reparations. At least one of the alleged victims was later found to be still living.⁷³ As a *Wall Street Journal* op-ed

⁶⁷ Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, “Considering,” para. 20 (Inter-Am. Ct. H.R. July 8, 2009), at http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf.

⁶⁸ Pueblo Bello Massacre v. Colombia, Monitoring Compliance with Judgment, “Considering,” para. 11 (Inter-Am. Ct. H.R. July 9, 2009) (footnote omitted), at http://www.corteidh.or.cr/docs/supervisiones/bello_09_07_09_ing.pdf.

⁶⁹ Malarino, *supra* note 12, at 691.

⁷⁰ RATNER ET AL., *supra* note 1, at 257. But the authors also concede that the individual-petition mechanism before the regional courts is more effective. *Id.* at 258.

⁷¹ See *supra* note 59 and accompanying text.

⁷² In 2011, for example, the Inter-American Commission referred twenty-two cases to the Court, up from fifteen the previous year. See <http://www.oas.org/en/iachr/decisions/cases.asp>. Thus, the Court had fewer resources for supervision in 2012. I owe this point to Oscar Parra.

⁷³ See Press Release No. 114/11, Organization of American States, With Regard to Recent Events Surrounding the Mapiripán Massacre in Colombia (Oct. 31, 2011), at http://www.oas.org/en/iachr/media_center/PReleases/2011/114.asp.

argued, such a lapse is more likely when, as in Inter-American Court proceedings, witnesses can file their testimony by affidavit, with no cross-examination.⁷⁴

One bright line has been drawn: the Court will not itself conduct the investigation and prosecution. In one case, the criminal prosecution stalled at the national level, in part because witnesses were afraid to come forward. Surinam, the defendant state, suggested during the supervision stage that the witnesses be allowed to give their testimony at the Inter-American Court, where their safety would be guaranteed. The Court answered:

In light of the State's proposal that witnesses be interrogated at its seat, the Tribunal reminds the parties that it is not a criminal court in which the criminal responsibility of individuals may be analyzed. The State must be able to fulfill its duties relating to the protection of witnesses subject to its jurisdiction. The Court reiterates that it is the State's responsibility to "provide adequate safety guarantees to [. . .] victims, [. . .] witnesses, judicial officers, prosecutors, and other [. . .] law enforcement officials" participating in the investigation and prosecution of crimes.⁷⁵

Unlike the criminal and hybrid tribunals, then, the Court leaves the hands-on work to states.

A third, related criticism, speaks to due process: the Inter-American Court does not give standing to individual criminal defendants, even as its decisions directly affect their rights—and freedom.⁷⁶ In a recent compliance report, for example, the Court reasoned that the Peruvian Supreme Court had erred in ruling that a particular crime was not a crime against humanity, but a lesser offense.⁷⁷ At stake was the length of the sentence that particular individuals would receive. But these defendants could not appear before the Inter-American Court to make their arguments; only victims, the Commission, and the defendant state have standing. Those concerned with defendants' rights worry that by ruling that statutes of limitations, the doctrine of *res judicata*, and other procedural safeguards cannot block prosecutions of gross rights violations, the Court enhances the state's power against individual defendants and may undermine due process.⁷⁸

Fourth, one might question the efficacy of ordering and monitoring prosecutions from the perspective not of international criminal law, but of human rights law. If the point is not to punish individuals but to curb and improve state behavior, would it not be more effective and politically astute to order structural reform through legislative change? As with the international criminal courts, while some applaud the prohibition of amnesties, others worry that the Court is taking an important negotiating tool off the table when it insists on punishment.⁷⁹

⁷⁴ Mary Anastasia O'Grady, *A 'Human Rights' Swindle in Colombia*, WALL ST. J., Nov. 7, 2011, at A17.

⁷⁵ *Moiwana Community v. Suriname*, Monitoring Compliance with Judgment, "Considering," para. 12 (Inter-Am. Ct. H.R. Nov. 22, 2010) (footnotes omitted), at http://www.corteidh.or.cr/docs/supervisiones/moiwana_22_11_10_ing1.pdf.

⁷⁶ Malarino, *supra* note 12, at 692.

⁷⁷ *Barrios Altos v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Sept. 7, 2012), at http://www.corteidh.or.cr/docs/supervisiones/barrios_07_09_12.pdf.

⁷⁸ The debate came to a head in *Bulacio v. Argentina*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003), when the Inter-American Court ordered Argentina to reopen, investigate, and punish in a case of torture that the Supreme Court of Argentina had closed because the statute of limitations had run. The Supreme Court duly reopened the case, even as it declared that it disagreed with the Inter-American Court's order. The ruling created controversy among the legal community. See Basch, *supra* note 12; see also Malarino, *supra* note 12.

⁷⁹ For discussions of the Inter-American System and amnesty, see Laplante, *supra* note 31. See also Binder, *supra* note 31; Pastor, *supra* note 12; Gargarella, *supra* note 12. For a nuanced discussion of amnesty reflecting more

The prioritization of punishment is neither inevitable nor, as many have argued, always the best response to the many challenges that societies face in the wake of mass atrocities.

These four criticisms are important and difficult ones. Insofar as they query the proper ambit of judicial protagonism, they run deep. Should a court adhere to a strict reading of its original mandate or read it as a living document in light of changing circumstances? Can an international court weigh in on a national criminal proceeding without undermining due process rights? How much discretion does a democratic state have to decree an amnesty in the service of peace and stability? These questions are fueling a rich and important debate among Latin American scholars.⁸⁰ But insofar as the criticisms speak to the capacity of the rights bodies to effectively accomplish the new tasks that they take on, the criticisms can and should be addressed through empirical research. The next section thus presents an analysis of state responses to the Court's quasi-criminal review.

The Court's Quasi-criminal Jurisdiction in Action

What has the Inter-American Court achieved through quasi-criminal review? No state has ever fully complied with an Inter-American Court order to prosecute and punish for an international crime.⁸¹ The Court's compliance reports nevertheless record the actions that the state has taken that advance it toward completion of a particular order, even when it has not yet fully complied with it.⁸² This section examines—in three separate realms—the response of states to Inter-American Court remedial orders in cases involving international crimes: prosecution outcomes, restorative justice, and institutional learning. It is based on original coding of a database that includes 145 rulings and 238 compliance reports.⁸³

Prosecutorial outcomes. There are fifty-one contentious cases in which (1) the Inter-American Court has ordered the state to conduct a criminal investigation,⁸⁴ (2) the underlying state

broadly based empirical research, see AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Francesca Lessa & Leigh A. Payne eds., 2012).

⁸⁰ See *supra* note 12 and accompanying text. The present article does not directly engage this debate. Its objective is not to justify the Inter-American Court's practice of quasi-criminal review in light of its founding documents. The objective is rather to highlight one aspect of the Court's engagement with state-sponsored crime—quasi-criminal review—and to assess that practice insofar as it presents a complement and possible alternative to existing institutions of criminal law.

⁸¹ *Castillo Páez v. Peru* is the closest that a state has come to fulfilling such an order. While the Court agreed that the state had fulfilled its duty to investigate and punish, it considered that compliance with other remedies was pending. See *Castillo Páez v. Peru*, Monitoring Compliance with Judgment, "Declares," paras. 1, 2 (Inter-Am. Ct. H.R. Apr. 3, 2009), at http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09_ing.pdf.

⁸² As Hawkins and Jacoby, *supra* note 51, argue, partial compliance with court rulings is the most common modality of states in regional rights systems; little is gained by counting only cases of full compliance with a court ruling. Using the information provided in the compliance reports, Hawkins and Jacoby qualitatively evaluate partial compliance with a particular type of order.

⁸³ The database was compiled and coded by the author and three research assistants using Nvivo qualitative analysis software and a shared coding protocol. The codes were devised to reveal both what the Court demanded in cases involving international crime and how, over time, states responded to the Court's demands. The data analyzed are drawn from the Court's own rulings and reports on compliance with its rulings. The Court issued remedies rulings in roughly 107 cases between 1988, its first such ruling, and September 2012. In 68 percent of those cases, it issued orders to launch or complete a criminal investigation. Starting in the 2000s, it also began regularly issuing reports on state compliance with its orders.

⁸⁴ The group of cases consequently does not include the Court's first contentious cases—in which the Court did not order a prosecution as part of its remedial orders—even if the violations underlying those cases are international crimes. See *Velásquez Rodríguez v. Honduras*, *supra* note 35; *Godínez Cruz v. Honduras*, *supra* note 35.

violation of the American Convention can be characterized as an international crime,⁸⁵ and (3) the Court had issued at least one compliance report by September 2012.⁸⁶ Although the cases involve different states and different types of violations, they all had something in common at the moment of the Court's ruling: in each case the criminal investigation of the alleged violation at the national level was stalled or glaringly deficient. In some, the investigation had never gotten past the initial stages: no one had been indicted years after the crime.⁸⁷ In others, procedural laws such as amnesties or statutes of limitations blocked the way.⁸⁸ In yet others, intellectual authors of the crime had not been investigated even as lower-ranking offenders served time,⁸⁹ or arrest warrants had not been issued or executed.⁹⁰

The compliance reports reveal that in twenty-four of the fifty-one cases, the prosecutions had advanced little or not at all since the rulings came down.⁹¹ Perhaps the state has reported that a case has moved from one court to another or that an actor from the executive has become involved on behalf of the victim, but basically the case is still stalled. In these cases, it seems that the Court's ruling has yielded no change. In one case, for example, the Court wrote that "the violations declared in the instant case remain unpunished, which impunity was noted by the Court in its Judgment on the merits over eight years ago and nearly seventeen years after the incidents."⁹² In eighteen of the fifty-one cases, there has been some advancement. For example, a high court may have issued a positive decision that bars the application of the statute of limitations, or it may have annulled a prior ruling, or the courts may be allowing the victims to participate in the penal proceeding.⁹³ However, things are still moving slowly, and no indictments or convictions have taken place or are set to take place soon. Finally, in nine cases, the

⁸⁵ Thus, the underlying acts be characterized as genocide, crimes against humanity, or war crimes. Only these three crimes are considered here, following the jurisdiction of the main international criminal law tribunals. Of course, only a criminal court could make the final determination of whether the elements of the crime are actually met. But all the cases included demand prosecution for acts that, *prima facie*, constitute international crimes. For a categorization and description of international crimes, see ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* (2d ed. 2008).

⁸⁶ Thus, each case included has generated at least one compliance report. Some cases have several. *Bámaca Velásquez v. Guatemala*, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 91 (Feb. 22, 2002), has received nine compliance reports. In recent years, the Court has used the compliance report format to call the parties to closed hearings. While these convocations are brief, many of them still provide at least some information about state compliance.

⁸⁷ *Id.*

⁸⁸ *See, e.g.*, *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

⁸⁹ *See, e.g.*, *Goiburú v. Paraguay*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

⁹⁰ *See* *Pueblo Bello Massacre v. Colombia*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006).

⁹¹ Each case was coded for its progress by the author and one of two research assistants. The codes used were "little advancement," "some advancement," and "substantial advancement."

⁹² *Bámaca Velásquez v. Guatemala*, Provisional Measures & Monitoring Compliance with Judgment, "Considering," para. 15 (Inter-Am. Ct. H.R. Jan. 27, 2009) (footnote omitted), at http://www.corteidh.or.cr/docs/supervisiones/bamaca_27_01_09_ing.pdf.

⁹³ *See, e.g.*, *Heliodoro Portugal v. Panama*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. May 28, 2010) (finding that Panamanian Supreme Court had declared that the underlying acts were of a character that did not allow them to be subject to statute of limitations, that a criminal case had been opened, and that the victim's family was being kept informed as to the advance of the case, pursuant to its remedial order), at http://www.corteidh.or.cr/docs/supervisiones/portugal_28_05_10_ing.pdf

path to prosecution is no longer obstructed.⁹⁴ Procedural hurdles have been cleared; indictments and convictions have come down; and the prosecutors and judges are moving the case forward at a reasonable pace.⁹⁵ In these cases, the state is fulfilling its duty under the American Convention to prosecute and punish, but the Court continues to monitor because it remains seized of its cases until the remedy is fully implemented.

The compliance reports also reveal that, following orders to prosecute and punish issued by the Inter-American Court in fifty-one cases, at least thirty-nine convictions have come down in fifteen separate cases⁹⁶ (see Table 1). These convictions took place *after* the Inter-American

⁹⁴ *Barrios Altos v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Dec. 7, 2009); *Blake v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Jan. 22, 2009); *Castillo Páez v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. May 19, 2011); *Mack Chang v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 16, 2009); *Servellón García v. Honduras*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 5, 2008); *Escué Zapata v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 21, 2011); *Goiburú v. Paraguay*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 19, 2009); *La Cantuta v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 20, 2009); *Las Palmeras v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 3, 2010).

⁹⁵ See, e.g., *Escué Zapata v. Colombia*, Monitoring Compliance with Judgment, “Considering,” para. 16 (Inter-Am. Ct. H.R. May 18, 2010):

The Tribunal values the information furnished by the State, inasmuch as it shows the intention to comply with its international obligations to investigate and punish the [*sic*] responsible for the human rights violations declared in the instant case. As a result, the Tribunal declares that the State has made significant progress in the compliance with this measure of reparation and waits for updated information on the proceedings pending resolution.

⁹⁶ Note that the actual number may be higher, as some of the cases have not received compliance reports for several years. It is also possible that states have failed to report convictions.

⁹⁷ *Barrios Altos v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Dec. 7, 2009), at http://www.corteidh.or.cr/docs/supervisiones/barrios_7_12_09.pdf.

⁹⁸ *Blake v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 27, 2003), at http://www.corteidh.or.cr/docs/supervisiones/blake_27_11_03_ing.pdf.

⁹⁹ *Castillo Páez v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. April 3, 2009), at http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09_ing.pdf.

¹⁰⁰ *Escué Zapata v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 21, 2011), at http://www.corteidh.or.cr/docs/supervisiones/escue_21_02_11_ing.pdf. In this case three persons were convicted in 2008. Since one of them was absolved after an appeal, however, that person’s case is not counted here as a separate conviction).

¹⁰¹ *Goiburú v. Paraguay*, *supra* note 94. The Supreme Court of Paraguay finalized these sentences in 2008, though four had been initially issued by the time of the Inter-American Court order.

¹⁰² *La Cantuta v. Peru*, *supra* note 94. In this case, there is also a fifth conviction: that of President Fujimori, who was found guilty of ordering both the *Barrios Altos* and *La Cantuta* massacres. His conviction is counted only once, however—under the *Barrios Altos* case above.

¹⁰³ *Las Palmeras v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 4, 2008), at http://www.corteidh.or.cr/docs/supervisiones/laspalmeras_04_08_08_ing.pdf. Two of the three convicted were not in state custody, however, and could not be found. *Id.*

¹⁰⁴ *Cepeda Vargas v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 30, 2011), at http://www.corteidh.or.cr/docs/supervisiones/cepeda_30_11_11_ing.pdf.

¹⁰⁵ *Dos Erres Massacre v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. July 6, 2011), at http://www.corteidh.or.cr/docs/supervisiones/doserres_06_06_11_ing.pdf.

¹⁰⁶ *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. July 8, 2009), at http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf. This order does not specify with what crime(s) the convicts were charged.

¹⁰⁷ *Pueblo Bello Massacre v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. July 9, 2009), at http://www.corteidh.or.cr/docs/supervisiones/bello_09_07_09_ing.pdf. This order does not specify with what crime(s) the convicts were charged.)

TABLE 1. CONVICTIONS FOLLOWING INTER-AMERICAN COURT ORDERS TO INVESTIGATE AND PUNISH

Case	Year of reparations ruling	Convictions <i>since</i> reparations ruling
<i>Barrios Alto v. Peru</i> (2001)	2001	1 conviction (in case of a massacre) ⁹⁷
<i>Blake v. Guatemala</i> (1999)	1999	1 conviction for forced disappearance and assassination ⁹⁸
<i>Castillo Páez v. Peru</i> (1998)	1998	4 convictions for crimes against humanity (in case of forced disappearance) ⁹⁹
<i>Escué Zapata v. Colombia</i> (2007)	2007	2 convictions for homicide (in case of extrajudicial killing of civilian by state agents) ¹⁰⁰
<i>Goiburú v. Paraguay</i> (2006)	2006	5 convictions (in cases of forced disappearance) ¹⁰¹
<i>La Cantuta v. Peru</i> (2006)	2006	4 convictions (in cases of murder and forced disappearance) ¹⁰²
<i>Las Palmeras v. Colombia</i> (2002)	2002	3 convictions for aggravated homicide (in cases of extrajudicial killing of civilians by members of police or army) ¹⁰³
<i>Cepeda Vargas v. Colombia</i> (2010)	2010	2 convictions for aggravated homicide (in cases of extrajudicial killing of civilians by members of police or army) ¹⁰⁴
<i>Masacre de las Dos Erres v. Guatemala</i> (2009)	2009	3 convictions (in case of a massacre) ¹⁰⁵
<i>Masacre de Mapiripán v. Colombia</i> (2005)	2005	6 convictions (in case of a massacre) ¹⁰⁶
<i>Masacre de Pueblo Bello v. Colombia</i> (2006)	2006	2 convictions (in case of a massacre) ¹⁰⁷
<i>Masacre de la Rochela v. Colombia</i> (2007)	2007	2 convictions (in case of a massacre) ¹⁰⁸
<i>Mack Chang v. Guatemala</i> (2003)	2003	1 conviction for murder ¹⁰⁹
<i>Servellón García v. Honduras</i> (2006)	2006	2 convictions for forced disappearance and assassination (in case of extrajudicial killing of civilians by members of police or army) ¹¹⁰
<i>Valle Jaramillo v. Colombia</i> (2008)	2008	1 conviction for homicide (in cases of extrajudicial killing of civilians by members of police or army) ¹¹¹
Total cases: 15		Total convictions: 39

Court's order. Note that of the fifteen cases, not all were coded as having experienced substantial advancement. In other words, some cases have had convictions even as other aspects of the investigations continue to be stalled or deficient.

From one perspective, perhaps juxtaposed to the goal of ending impunity, these outcomes are not impressive. Out of fifty-one cases in which the Inter-American Court has given orders

¹⁰⁸ *La Rochela Massacre v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 26, 2010), at http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf. This order does not specify with what crime the convicts were charged.

¹⁰⁹ *Mack Chang v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Sept. 12, 2005), at http://www.corteidh.or.cr/docs/supervisiones/mack_12_09_051.pdf. The convict was not under state custody, however; he escaped, and the Court is keeping the case open and under supervision, thereby prompting the state to find him.

¹¹⁰ *Servellón García v. Honduras*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 22, 2011), at http://www.corteidh.or.cr/docs/supervisiones/servellon_22_11_11_ing.pdf.

¹¹¹ *Valle Jaramillo v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Dec. 21, 2010), at http://www.corteidh.or.cr/docs/supervisiones/jaramillo_21_12_10_ing.pdf.

to investigate and punish for international crimes, there have been convictions in only fifteen. Further, in most of the cases in which the state has reached one or more convictions, more indictments and sentences are still due to be entered. Often, those remaining to be sentenced are the intellectual authors of the crimes—those who directed and led the crimes, but who hold social power, rather than those who carried them out. It is also true that in some cases, the convictions were for lesser crimes than what the Court thought appropriate.¹¹² Finally, most of the thirty-nine convictions came slowly: an average of five years elapsed between the reparations rulings ordering prosecution and the compliance reports that first records the convictions.

When juxtaposed to the reality, as opposed to the aspirations, of international criminal law, however, the outcomes appear noteworthy. Colombia, Guatemala, and Peru, the states with most cases before the Inter-American Court, are also states where impunity is a dramatic, generalized problem. Any sentence in Guatemala is rare.¹¹³ And cases of state atrocity, many of which involve the actions of powerful figures while holding office, are especially difficult to prosecute. Even where there has been a transition in government, as in Guatemala, many of those implicated still belong to powerful networks able to thwart well-intentioned prosecutors and judges.¹¹⁴ Such cases rarely reach sentencing even in disciplined rule-of-law states. Indeed, as noted earlier, the results of the Inter-American Court are comparable to those of the ICC and ICTY, particularly if we take into consideration the vastly larger budgets of these two other tribunals.¹¹⁵

One difficulty in assessing the impact on states of the Inter-American Court's orders is that of proving causation. Although the state actions in question occur later than the Court orders in question, are they merely subsequent in time or are the states actually acting in obedience to the Court? In some instances, it is evident from the narrative in the compliance report that the state action is a direct response to the Court's ruling. Further, it is a prerequisite to petitioning the IAS that local judicial options first be exhausted; thus, we can assume in cases of state-sponsored atrocities that prosecution at the national level was blocked before the Inter-American Court ruling came down. Nonetheless, one cannot assume that a prosecution that came after a remedial order to prosecute was caused primarily by the Court's order, especially when the supervision phase has dragged on for years. Overcoming impunity is a complex social process, and diverse pressures may come into play, influencing states' willingness and capacity to prosecute.¹¹⁶ Further empirical work is needed to determine the extent to which the Court's

¹¹² See *Goiburú v. Paraguay*, *supra* note 94.

¹¹³ As David Grann noted in *A Murder Foretold*, *NEW YORKER*, Apr. 4, 2011, at 42, 44:

Incredibly, the death rate in Guatemala is now higher than it was for much of the civil war. And there is almost absolute impunity: ninety-seven per cent of homicides remain unsolved, the killers free to kill again. In 2007, a U.N. official declared, "Guatemala is a good place to commit a murder, because you will almost certainly get away with it."

¹¹⁴ On the Inter-American Court's difficulty in securing national prosecution for such crimes, see Huneeus, *supra* note 39 (arguing that the Court needs to establish closer ties to national justice systems, even while acknowledging the difficulty of such prosecutions going forward).

¹¹⁵ For information on these tribunals' records of convictions and their budgets, see *supra* notes 4 and 5, respectively, and accompanying text. See part II for a further, more detailed comparison of the Inter-American Court to other courts.

¹¹⁶ Indeed, a rich scholarly literature explores the factors that influence some states, but not others, to prosecute for the crimes of repressive governments. See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 *INT'L SEC.* 5 (2003); CATH COLLINS, *POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR* (2010); TRICIA D. OLSEN, LEIGH A. PAYNE

interventions have spurred prosecutorial actions that would not otherwise have taken place.¹¹⁷ A similar problem arises in evaluating the effects of the international criminal tribunals. Although we know that the prosecutions conducted by the ICTY or the Special Court for Sierra Leone are a direct product of the actions of those tribunals, we do not know whether, over time, the national courts would have prosecuted if the international courts had not taken over the case. Even without quantitative analysis, however, the record suggests that the Inter-American Court's contributions are real and that its rulings and monitoring are an effective complement to the work of the international and hybrid criminal tribunals.

Other outcomes: Institutional learning. The prosecutorial outcomes discussed above speak to criminal law's core mission of retribution—the aspiration that “the most serious crimes of concern to the international community as a whole must not go unpunished.”¹¹⁸ However, the objectives ascribed to international criminal institutions go beyond retribution. One further goal of the international community is to repair or reform the criminal justice systems of the affected states, thereby enabling those states both to undertake prosecutions themselves and, more generally, to restore the rule of law. When Luis Moreno Ocampo began his term as the first prosecutor to the ICC, he declared that the ultimate marker of its success would be an empty docket: “the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”¹¹⁹ The hybrid tribunals are, in particular, touted as improving national justice systems because national actors learn by working in partnership with international actors.¹²⁰

Both the inter-American and European regional rights systems could also be described as engaged in building the capacity of local justice systems. They are triggered into action only when domestic systems do not provide adequate remedies, and in this sense they are subsidiary. But they also proactively foster structural changes to enhance the ability of domestic systems to provide adequate remedies. The ECHR has taken on many cases having to do with excessive

& ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* (2010); KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); ELIN SKAAR, *JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA: VIOLATIONS, POLITICS, AND PROSECUTION* (2011).

¹¹⁷ We need both quantitative and qualitative studies that compare across cases. Note, however, that several case studies already highlight the role of the Inter-American System in fostering accountability. See, e.g., NADINE BORGES, DAMIÃO XIMENES: PRIMEIRA CONDENAÇÃO DO BRASIL NA CORTE INTERAMERICANA DE DIREITOS HUMANOS (2009); HUMAN RIGHTS REGIMES IN THE AMERICAS (Mónica Serrano & Vesselin Popovski eds., 2010); Lisa J. Laplante, *Entwined Paths to Justice: The Inter-American Human Rights System and the Peruvian Truth Commission*, in *PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES* 216 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007); RICHARD PRICE, *RAINFOREST WARRIORS: HUMAN RIGHTS ON TRIAL* (2011); VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA (Catherine A. Sunshine ed. (English), 2007), available at <http://www.dplf.org/uploads/1190403828.pdf>.

¹¹⁸ Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 UNTS 900 [hereinafter Rome Statute].

¹¹⁹ Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), at <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>.

¹²⁰ See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AJIL 295 (2003); see also Pdraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan*, 7 J. INT'L LAW & INT'L REL. 1 (2011).

judicial delay, demanding that states provide more expedited procedures.¹²¹ Likewise, the Inter-American Court has ordered several states to curtail and otherwise reform their military justice systems, mostly through legislation. Further, it frequently orders states to ensure that justice-system actors take courses in human rights; in a recent case, for example, it declared that “this Tribunal considers it important to strengthen the institutional capacities of the State of Mexico, through the training of public officials.”¹²² The Inter-American System has also taken on a special role in preserving judicial independence: there is a line of cases in which judges have appealed to the IAS as a way to denounce illegitimate political intrusion.¹²³ The IAS’s supervision of individual prosecutions thus comes hand in hand with its supervision of other reform-oriented measures, including orders to reform entire judicial systems through legislation.¹²⁴

The Inter-American Court’s quasi-criminal review yields reform not just because it is accompanied by more general structural reform orders, however, but also because the supervision stage is itself a teaching opportunity. Through supervision the Court keeps open a dialogue with the state on the obstacles to compliance, and it offers suggestions on how to overcome them, while pressuring state actors to do so. Indeed, the compliance reports reveal many instances in which national justice systems adapt laws and working methods to enable prosecutions to move forward. In the wake of orders from the Court, national judges have reinterpreted laws in ways that facilitate prosecution of international crimes. High courts in Argentina, Bolivia, Chile, Colombia, Guatemala, and Peru, for example, have ruled that the Court’s orders are self-executing and therefore trump procedural law.¹²⁵ Other courts have

¹²¹ Prominent examples include the following: *Lukenda v. Slovenia*, App. No. 23032/02, Eur. Ct. H.R. (June 10, 2005); *Bottazzi v. Italy*, App. No. 34884/97, Eur. Ct. H.R. (July 28, 1999); *Scordino v. Italy (No. 1)*, App. No. 36813/97, Eur. Ct. H.R. (July 29, 2004); and *Kudla v. Poland*, App. No. 30210/96, Eur. Ct. H.R. (Oct. 26, 2000). For discussion of these cases, see FRÉDÉRIC EDEL, *THE LENGTH OF CIVIL AND CRIMINAL PROCEEDINGS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2007); PHILIP LEACH, HELEN HARDMAN, SVETLANA STEPHENSON & BRAD K. BLITZ, *RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF ‘PILOT JUDGMENTS’ OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL* (2010).

¹²² *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, para. 346 (Nov. 23, 2009). In a recent series of rulings, for example, the Court has ordered Mexico to restructure its military jurisdiction and to ensure that judges take courses in human rights. *See id.*; *González (“Corton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

¹²³ *See, e.g.*, *Constitutional Court v. Peru*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 71 (Jan. 31, 2001) (declaring that Peru violated the American Convention by removing three constitutional court judges for political reasons); *Apitz Barbera (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) (demanding that Venezuela reinstate three judges removed for ruling against the government).

¹²⁴ Thus, in *Radilla-Pacheco v. Mexico*, in addition to ordering Mexico to investigate and punish for the forced disappearance of Radilla-Pacheco, the Court ordered Mexico to reform its federal penal code and military justice code through legislative action and to create permanent courses for justice-system personnel on the matter of forced disappearance. *See supra* note 122 and accompanying text.

¹²⁵ *See Bámaca Velásquez v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 18, 2010), at http://www.corteidh.or.cr/docs/supervisiones/bamaca_18_11_10_ing.pdf (citing cases in Argentina, Bolivia, Colombia, Guatemala, and Peru in which high courts have deemed the Court’s orders to be self-executing); *Almonacid Arellano v. Chile*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 18, 2010), at http://www.corteidh.or.cr/docs/supervisiones/almonacid_18_11_10_ing.pdf (citing a Chilean Supreme Court ruling in the same vein). *Cf. Medellín v. Texas*, 552 U.S. 491 (2008) (ruling that the International Court of Justice’s rulings were not self-executing and that Texan courts did not have a duty to implement that court’s mandated remedies).

ruled that statutes of limitations do not apply to the prosecution of acts that can be classified as crimes against humanity. These interpretations then leave their mark on the legal system, paving the way for the Inter-American Court–mandated prosecutions to move forward in subsequent cases. At the urging of the Court, states have also created special working groups to oversee the implementation of its orders and to change national penal codes to facilitate the prosecution of crimes for which the Court has mandated prosecution.¹²⁶ The Court has been especially active in pushing states to meet their obligations under the Inter-American Convention on the Forced Disappearance of Persons, through which states take on the obligation to codify the crime of forced disappearance, within specific parameters.¹²⁷

Other outcomes: Restorative justice. Conceptually, transitional justice, or “the particular form of justice required by a society’s move from a state where international crimes are committed to one where they are no longer,”¹²⁸ is broader than the retributive justice that animates criminal law. But increasingly, the international and hybrid courts are expected to keep this broader sense of justice in sight. Frédéric Mégret argues that the ICC, under the doctrine of complementarity, could monitor not only judicial responses but other kinds of state undertakings in response to mass atrocities, such as holding truth commissions,¹²⁹ and that it could order states to erect memorials and to undertake other public acts.¹³⁰

Should the ICC choose to stretch its mandate in this direction, the Inter-American Court’s practice could provide a model.¹³¹ Drawing on its well-established use of equitable remedies, the Inter-American Court typically pairs retributive justice with other transitional

¹²⁶ For example, in a report on compliance with *Bámaca Velásquez v. Guatemala*, the Court wrote that Guatemala created a roundtable on human rights (*Mesa de derechos humanos*) in which different state actors, including the judiciary, the public ministry, and the human rights institution, took part. The roundtable selected four cases, including *Bámaca*, in which there was evidence of structural impunity (*impunidad procesal*). Their objective was to analyze and identify how the justice system worked—or failed—through analysis of these paradigmatic cases. The state itself claimed that one direct outcome of this roundtable was that in December 2009, the Guatemalan Supreme Court declared the Inter-American Court’s orders to be self-executing. See *Bámaca Velásquez*, *supra* note 125. In *Mapiripán Massacre v. Colombia*, the Court asked the state to create a working group for implementing its orders. Colombia complied. It included actors from different branches of the state, as well as the victims and their representatives, in the working group, called the *mecanismo oficial de seguimiento de las reparaciones* (“official mechanism to monitor reparations”), or *M.O.S. Mapiripán*. The M.O.S. went on to hold twenty-four meetings and advanced the implementation of the Court’s remedies. *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. July 8, 2009), at http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf; see also *Molina-Theissen v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 16, 2009) (asking Guatemala to designate specific actors to coordinate the implementation of the remedies), at http://www.corteidh.or.cr/docs/supervisiones/molina_16_11_09_ing.pdf.

¹²⁷ In *Trujillo-Oroza v. Bolivia*, for example, the Court ordered the state to “define the forced disappearance of persons as an offense in its domestic legislation.” *Trujillo Oroza v. Bolivia*, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 92, para. 98 (Feb. 27, 2002). In a subsequent compliance report, the Court deemed the state to have complied. *Trujillo Oroza v. Bolivia*, Monitoring Compliance with Judgment, “Considering,” para. 33 (Inter-Am. Ct. H.R. Nov. 16, 2009), at http://www.corteidh.or.cr/docs/supervisiones/trujillo_16_11_09_ing.pdf. For the Convention, see *supra* note 30.

¹²⁸ Frédéric Mégret, *Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice*, 16 *BUFF. HUM. RTS. L. REV.* 1, 5 (2010).

¹²⁹ Declan Roche, *Truth Commission Amnesties and the International Criminal Court*, 45 *BR. J. CRIMINOLOGY* 565 (2005); Christopher D. Totten, *The International Criminal Court and Truth Commissions: A Framework for Cross-interaction in the Sudan and Beyond*, 7 *NW. U. J. INT’L HUM. RTS.* 1 (2009).

¹³⁰ Mégret, *supra* note 128.

¹³¹ *Id.*; see also Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 *STAN. J. INT’L L.* 279 (2011) (arguing that the Inter-American Court’s experience with remedies provides a useful guide for other international courts).

justice measures, tailoring its orders to a postconflict society's multifold needs. Along with ordering prosecutions, the Court orders remedies that seek rehabilitation of the victims and, more generally, both the construction of a historical record and societal acknowledgement of the crimes. To this end, it has ordered states to enhance victim participation in the criminal proceedings, to continue the search for victims of forced disappearance, to apologize officially to victims and their relatives, and to construct memorials, among other remedies.¹³² It has been creative in ordering states to conduct rituals of remembrance, such as to construct shrines and memorials, and to hold public ceremonies in which states officially apologize to the victims.

Though aimed at retribution, the orders to prosecute and their supervision also have a restorative-justice dimension. Because of the structure of the individual-petition system, the human rights bodies provide victims an important, participatory role in the international proceedings.¹³³ The Court further enhances the role of victims by ordering that they be kept abreast of the prosecution as it unfolds.¹³⁴ The Court typically orders states to publish their rulings in major newspapers or even to broadcast them over the radio in the native languages of the victims. Perhaps most significantly, the trial of former high-ranking officials can have an important educative effect, moving society as a whole toward a different understanding of the past.

The compliance reports do not measure whether victims and society are more reconciled or made whole or somehow bettered by such measures. We do know, however, that in this area of reparations, state compliance is 44 percent: in almost half the cases, the states implement the reparative measures.¹³⁵ Note that in these types of orders, as in orders for monetary compensation, causation is easier to trace because the orders are so specific. When Guatemala named a school after the child victims in the *Villagrán-Morales v. Guatemala* case,¹³⁶ just as when Surinam broadcast in the Saramaka language the ruling of the Court,¹³⁷ there was little doubt that these state actions were a direct outcome of the Court's orders.

By coupling its creative remedial orders and ongoing supervision of compliance, then, the Inter-American Court has forged a unique, quasi-criminal jurisdiction. Further, it has used this practice to achieve the kind of outcomes toward which the international and hybrid tribunals also strive: retribution, restorative justice, and justice-sector reform. More empirical work is needed, but the compliance reports suggest that states under the contentious jurisdiction of the Inter-American Court do alter their prosecutorial practices and enhance their processes of contending with a legacy of mass crimes.

¹³² *Id.*

¹³³ Although individuals cannot petition the Court directly, they can petition the Inter-American Commission. Further, since 2001, victims participate as parties in the Inter-American Court's hearings, alongside the Commission and defending state.

¹³⁴ See *supra* note 50 and accompanying text.

¹³⁵ Huneeus, *supra* note 39; see also Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi & Bárbara Schreiber, *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to Its Functioning and Compliance with Its Decisions*, 7 SUR INT'L J. ON HUM. RTS. 9 (2010).

¹³⁶ *Villagrán Morales v. Guatemala* (The "Street Children" Case), Monitoring Compliance with Judgment, "Considering," para. 4 (Inter-Am. Ct. H.R. Nov. 27, 2003), at http://www.corteidh.or.cr/docs/supervisiones/villagran_27_11_03_ing.pdf.

¹³⁷ *Saramaka People v. Surinam*, Monitoring Compliance with Judgment, "Considering," para. 35 (Inter-Am. Ct. H.R. Nov. 23, 2011), at http://www.corteidh.or.cr/docs/supervisiones/saramaka_23_11_11_ing3.pdf.

The Council of Europe Develops Quasi-criminal Review

The European human rights system has also embarked on a type of quasi-criminal review. As the Council of Europe rights system expanded after the Cold War, it began to include states where, as in Latin America during the 1970s and 1980s, the governments themselves committed crimes against citizens and then failed to prosecute. The ECHR has issued rulings in over 115 cases relating to abuses that took place during the Chechnya conflict in 1999–2003, including forced disappearance and other war crimes. In these cases, the ECHR has refused to order states to prosecute.¹³⁸ The ECHR's remedial practice is more deferential to states than that of the Inter-American Court: it views its rulings as "declaratory" and typically demands financial compensation of the victim, but allows states to choose the means of bringing their practices into compliance with the European Convention.¹³⁹ However, under the Council of Europe system, the ECHR does not supervise compliance with its rulings. Rather, the Committee of Ministers is charged both with declaring when a state has complied with an ECHR ruling and with closing the case. Interestingly, the COM has begun engaging in quasi-criminal review, the ECHR's deferential position notwithstanding.¹⁴⁰

In its supervision of the Chechnya cases, the COM has declared that successful prosecution of individual cases is prerequisite to a finding that Russia has complied with its obligation to ensure effective remedies pursuant to the ECHR's rulings. In reviewing compliance in *Kashiyev v. Russia*, for example, it wrote: "The Committee of Ministers' examination is presently focused on the state of domestic investigations carried out following the judgments of the European Court It has been emphasised that the effectiveness of general measures adopted so far will very much depend on the results achieved in the concrete cases."¹⁴¹

The May 2010 report by COM deputies sets out the problems with the investigations conducted in the Chechnya cases following an ECHR ruling, noting lapses in lines of investigation and other structural problems impeding prosecution.¹⁴² And in June 2011, for example,

¹³⁸ See Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 EUR. HUM. RTS. L. REV. 732, 758–59 (2008), at http://www.londonmet.ac.uk/library/m12314_3.pdf (arguing that the ECHR should order such remedies in cases of forced disappearance, as "making an order for an investigation to be undertaken is arguably the only step which could get near to 'remedying' the violation"); see also Kirill Koroteev, *Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context*, 1 INT'L HUMANITARIAN LEGAL STUD. 275 (2010).

¹³⁹ In other words, it finds a violation and then defers to states on how to bring their practices in line with the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 21. This practice has begun to change in recent cases. See Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdicovic Cases*, 7 HUM. RTS. L. REV. 396 (2007).

¹⁴⁰ The Chechnya cases are not the only cases of international crimes to come before the ECHR. In the 1990s, the Court received hundreds of petitions against Turkey for cases arising out of the conflict between Turkish security forces and the Kurdish armed group the Kurdistan Workers Party. In these cases, the ECHR worked with the European Commission of Human Rights (no longer existing) to establish a record of the crimes committed. This approach, no longer available, was arguably a different form of quasi-criminal jurisdiction. See Başak Çali, *The Logics of Supranational Human Rights Litigation, Official Acknowledgement, and Human Rights Reform: The Southeast Turkey Cases Before the European Court of Human Rights, 1996–2006*, 35 LAW & SOC. INQUIRY 311, 312–13 (2010); see also GROVER, *supra* note 8.

¹⁴¹ Committee of Ministers, Annotated Agenda and Decisions Adopted, 1115th meeting (DH), 7–8 June 2011, at 43, CoE Doc. CM/Del/Dec (2011)1115 (June 10, 2011) (*Khashiyev Group v. Russian Federation*), at <https://wcd.coe.int/ViewDoc.jsp?id=1799029&Site=CM>.

¹⁴² Committee of Ministers, Department for the Execution of Judgments of the European Court of Human Rights, Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to

another report by the deputies noted the “lack of co-operation by different law-enforcement agencies in dealing with the prosecutor’s requests” and asked Russia to report on whether “the issue of responsibility of superior officers was examined by the investigators.”¹⁴³ So far, Russia has not been deemed compliant in any of the Chechnya cases. Like the Latin American states, it has paid just compensation to the victims but has failed to investigate.¹⁴⁴ Human Rights Watch concluded in 2009 that Russia “has failed to meaningfully implement the core of the judgments: it has failed to ensure effective investigations and hold perpetrators accountable.”¹⁴⁵ The COM has expressed “deep concern at the lack of any conclusive results in the investigations, in particular in those cases in which members of the security forces may have been involved.”¹⁴⁶

As in the inter-American setting, however, a close reading of the supervision memorandums reveals that Russia has made some adjustments. In 2008, Russia set up a Special Investigating Unit “for the investigation of cases which gave rise to applications to the European Court” and a Special Supervising Unit, which meets weekly to discuss the course of these investigations.¹⁴⁷ The COM deputies’ May 2010 report noted: “The setting-up of such a mechanism appears to be a positive development in finding concrete solutions concerning individual measures required by these judgments.”¹⁴⁸ The outcome of a successful investigation still eludes, but Russia has taken steps that move it closer to prosecution—albeit slowly, and perhaps only on paper.¹⁴⁹

The COM, then, has moved toward the practice of quasi-criminal review. First, it made success in individual prosecution prerequisite to a finding of compliance with the general measures demanded by the ECHR. Then, it began supervising individual prosecutions, at times in some detail, aiming to influence their course and taking note of particular lines of investigation and institutional innovations as they unfold. Many commentators have criticized the ECHR and the COM as too timid in their dealings with international crime.¹⁵⁰ Even as Latin American scholars attack the Inter-American Court for unduly interfering in criminal matters, many European scholars urge the Council of Europe system to study the experience

Comply with the Judgments of the European Court of Human Rights, CoE Doc. CM/Inf/DH(2010)26 (May 27, 2010), at <https://wcd.coe.int/ViewDoc.jsp?id=1626557&Site=CM>.

¹⁴³ Annotated Agenda and Decisions Adopted, *supra* note 141, at 44.

¹⁴⁴ See Julia Lapitskaya, *ECHR, Russia, and Chechnya: Two Is Not Company and Three Is Definitely a Crowd*, 43 N.Y.U. J. INT’L L. & POL. 479 (2011); Leach, *supra* note 138.

¹⁴⁵ HUMAN RIGHTS WATCH, “WHO WILL TELL ME WHAT HAPPENED TO MY SON?” RUSSIA’S IMPLEMENTATION OF EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS ON CHECHNYA I (2009), available at <http://www.hrw.org/en/node/85744>.

¹⁴⁶ Annotated Agenda and Decisions Adopted, *supra* note 141, at 46.

¹⁴⁷ Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights, *supra* note 142, paras. 9–13.

¹⁴⁸ *Id.*, para. 20 (secretariat’s assessment).

¹⁴⁹ In a 2008 article, Philip Leach characterized Russia’s stance in relation to the COM’s supervision as one of “obfuscation.” He did note, however, that “in response to the Court’s earliest judgments in the Chechen cases, domestic investigations were re-opened or re-instigated.” See Leach, *supra* note 138, at 759.

¹⁵⁰ See, e.g., GROVER, *supra* note 8; Koroteev, *supra* note 138; Leach, *supra* note 138; Giulia Pinzauti, *The European Court of Human Rights’ Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia*, 6 J. INT’L CRIM. JUST. 1043 (2008); Diego Rodríguez-Pinzón, *The Inter-American Human Rights System and Transitional Processes*, in TRANSITIONAL JURISPRUDENCE AND THE ECHR: JUSTICE, POLITICS AND RIGHTS 239 (Antoine Buyse & Michael Hamilton eds., 2011).

of the Inter-American Court and to move further in its direction.¹⁵¹ However, important differences between the two systems' approaches are likely to persist. Formally, COM reports are not binding in the same way as court decrees, and it is unlikely that the ECHR will alter its self-understanding and begin to order states to conduct prosecutions. Further, since the COM is more deferential to states and has many more cases within its purview than does the Inter-American Court, it is unlikely to supervise individual prosecutions as carefully. The upshot is that Russia will continue, *de facto*, to have considerable leeway in the Chechnya cases.

Other Supranational Rights Bodies

Beyond the human rights courts, other human rights bodies that receive individual petitions can likewise both urge states to undertake prosecutions and monitor state compliance. The Inter-American Commission, in particular, developed a practice—in conjunction with that of the Inter-American Court—of imposing equitable reparatory measures and monitoring their implementation. When the Commission publishes a report on the merits, it often includes a recommendation that states prosecute. It then monitors whether the state has complied with the recommendation.¹⁵² In its 2010 Annual Report, the Commission reported on the supervision of 143 cases.¹⁵³ Of these, 88 included recommendations to states that they investigate and punish. Indeed, since the Commission decides which cases to refer to the Inter-American Court, and since it accompanies each referral with recommendations as to what the state ought to do, the Commission could be considered as the first phase in the Court's quasi-criminal review process.¹⁵⁴

At the universal, as opposed to regional, level, five of the bodies that monitor major human rights treaties also have the power to receive, and to make their views known on, individual communications alleging state violations.¹⁵⁵ At least two of these bodies have adopted a practice of quasi-criminal review. In its 2011 Annual Report, the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, reported that it issued 151 Views on individual cases, and it included its supervision of fifty-three cases in which it had issued a view. Of these, twenty-eight included recommendations that the state investigate and punish.¹⁵⁶ The Committee Against Torture has also issued decisions on individual cases, declaring that the state must investigate and punish for the

¹⁵¹ See, e.g., Koroteev, *supra* note 138; RÉPARER LES VIOLATIONS GRAVES ET MASSIVES DES DROITS DE L'HOMME: LA COUR INTERAMÉRICAINNE, PIONNIÈRE ET MODÈLE? [REPAIR OF SERIOUS AND MASSIVE HUMAN RIGHTS VIOLATIONS: THE INTER-AMERICAN COURT, PIONEER AND MODEL?] (Elisabeth Lambert Abdelgawad & Kathia Martin-Chenut eds., 2010).

¹⁵² Manoel Leal de Oliveira v. Brazil, Case 12.308, Inter-Am. Comm'n H.R., Report No. 37/10, OAS Doc. OEA/Ser.L/V/II.Doc. 5, rev. 1 (2010).

¹⁵³ Inter-Am. Comm'n H.R., *Annual Report 2010*, ch. III(D), OAS Doc. OEA/Ser.L/V/II, Doc. 5, rev. 1 (2011) (status of compliance with the Commission recommendations), at <http://www.cidh.org/annualrep/2010eng/TOC.htm>.

¹⁵⁴ The Inter-American Court's process thus begins with a nonjudicial body that has the power to conduct on-site visits and to dismiss cases in which states cooperate through friendly settlement—something that the European human rights system lacks. I owe this point to one of the three anonymous reviewers.

¹⁵⁵ These bodies are Committee on the Elimination of Discrimination Against Women, Committee on the Elimination of Racial Discrimination, Committee on the Rights of Persons with Disabilities, Committee Against Torture, and Human Rights Committee.

¹⁵⁶ 1 Report of the Human Rights Committee at iii, UN GAOR, 66th Sess., Supp. No. 40, UN Doc. A/66/40 (2011). The Committee noted that one hundred of these cases were "from the Republic of Korea on the same issue."

underlying crime, although its orders are declaratory, and the supervision of these decisions is not public.¹⁵⁷

The differences between the work of these rights bodies and the Inter-American Court are worth noting. Whereas the practices of the Inter-American Commission, the COM, and the Human Rights Committee resemble those of the Inter-American Court, their rulings do not have the same binding legal status as court opinions, and their supervision of the implementation of their opinions is not as detailed or extensive as that of the Inter-American Court.¹⁵⁸ In this sense, they practice a weak form of quasi-criminal review.¹⁵⁹ Nonetheless, the main contours are the same: they issue orders to investigate and punish in particular cases, and they supervise (at least in some incipient form) the implementation of the orders. Given the human rights bodies' move toward more individual communications, more specific reparatory rulings, and supervision of state compliance, the practice of this weaker form of quasi-criminal review will likely grow.¹⁶⁰

Having brought to light the phenomenon of quasi-criminal jurisdiction, the analysis now turns to evaluating its potential contribution to the mix of mechanisms most frequently considered in discussions of judicial responses to atrocity crimes: the international criminal and hybrid courts, and the use of universal jurisdiction by national courts. Through juxtaposition, the potential of quasi-criminal jurisdiction as a partner and, at times, alternative to the other options begins to emerge.

II. QUASI-CRIMINAL JURISDICTION AND THE INTERNATIONAL CRIMINAL TRIBUNALS

Formally speaking, criminal courts aim to assign responsibility and punishment. In reality, criminal justice is a complex, polysemous phenomenon. Those who design, fund, participate in, observe, and act as audience to the international criminal courts do so for different purposes and under varied understandings of justice. The courts aim not only to punish the guilty but also to help stricken societies return to peace, stability, and the rule of law;¹⁶¹ to demonstrate that the international community will not tolerate certain acts;¹⁶² to deter future offenders;¹⁶³

¹⁵⁷ See, e.g., Committee Against Torture, Communication No. 327/2007, UN Doc. CAT/C/47/D/327/2007 (Jan. 13, 2012) (decision on Canada); Committee Against Torture, Communication No. 353/2008, UN Doc. CAT/C/47/D/353/2008 (Jan. 16, 2011) (decision on Ukraine). These documents are available at <http://www2.ohchr.org/english/bodies/cat/jurisprudence.htm>.

¹⁵⁸ The Committee Against Torture does not publish the results of its supervision, and the Human Rights Committee does not report on what the state has done or not done, but rather reiterates the state's obligation to investigate and punish.

¹⁵⁹ See TUSHNET, *supra* note 62 (defining the difference between weak-form and strong-form judicial review).

¹⁶⁰ See McGregor, *supra* note 19.

¹⁶¹ The preamble to the Security Council resolution establishing the International Criminal Tribunal for the Former Yugoslavia reads as follows: "Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the restoration and maintenance of peace[.]" SC Res. 827 (May 25, 1993).

¹⁶² See, e.g., THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 169 (Chari Voss trans., 2010) (arguing that the International Criminal Tribunal for Rwanda (ICTR) was a way for the international community to express its remorse at having allowed the 1994 genocide to unfold without intervention).

¹⁶³ See, e.g., Rome Statute, *supra* note 118, pmbl.

to help individual victims recover;¹⁶⁴ to develop a body of international law,¹⁶⁵ and to uncover facts and develop a narrative of the events that took place.¹⁶⁶ No single institution could possibly deliver on so ambitious and diverse a range of goals. “In the struggle against impunity . . . , there is no single panacea available. One has to rely skilfully upon a host of possible options, using each of them to suit best the historical, social, and legal conditions of each individual situation.”¹⁶⁷

A Typology of Jurisdictions

The international judicial mechanisms for criminal accountability created since the Cold War’s end establish different types of relationships between the international or extraterritorial court, on the one hand, and the affected state and its justice system, on the other. The jurisdictional relationship is salient because these mechanisms are created not to replace, but rather to coexist and interact with, and ultimately even improve, the local justice system. These jurisdictional relationships can be usefully categorized into three main types: *direct* criminal jurisdiction, *shared* or *hybrid* criminal jurisdiction, and *quasi-criminal* jurisdiction.¹⁶⁸

Direct criminal jurisdiction. The first type, direct criminal jurisdiction, refers to the legal authority to single-handedly open and conduct a prosecution from abroad, with or without consent of the state where the crime took place. The International Criminal Tribunal for Rwanda (ICTR) and the ICTY exemplify direct criminal jurisdiction.¹⁶⁹ They have jurisdiction that is concurrent to, and has primacy over, that of national courts. If one of these ad hoc tribunal claims a case, the national justice system must yield jurisdiction, other jurisdictional claims notwithstanding.¹⁷⁰ Once seized of the case, the international court relies on the national system for many tasks—most notably, to identify, apprehend, and surrender suspects, to collect documents, and to take testimony. Pursuant to UN Security Council resolutions,

¹⁶⁴ See, e.g., Antkowiak, *supra* note 131.

¹⁶⁵ See, e.g., Yuval Shany, *The Role of National Courts in Advancing the Goals of International Criminal Tribunals*, 103 ASIL PROC. 210, 212 (2009) (listing as a goal of international criminal tribunals the development of “international criminal law and other branches of international law”).

¹⁶⁶ For a discussion of the role of trials in constructing a historical narrative, see, for example, RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* (2011); LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* (2005).

¹⁶⁷ Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, in *INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 3, 3 (Cesare P. R. Romano, André Nollkaemper & Jann K. Kleffner eds., 2004).

¹⁶⁸ One could also categorize the mechanisms by whether they were created pursuant to a Security Council resolution, UN treaty, or interstate treaty. Others have focused on the more technical terms of their jurisdiction (primacy versus complementarity). The relation with national systems seems more relevant here and more suited to bringing out the contrasts between the rights bodies and the other systems. For a categorization scheme based on jurisdictional rules, see William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT’L L. 279 (2008).

¹⁶⁹ Note that direct criminal jurisdiction also describes the work of the International Military Tribunal at Nuremberg, forebear of the post–Cold War international criminal law institutions. The difference, of course, is that the Allies had occupied Germany and consequently had actual, as opposed to only formal, control of the justice system. See CHRISTOPHER K. LAMONT, *INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE* 1 (2010); Leila Nadya Sadat, *Judgment at Nuremberg: Foreword to the Symposium*, 6 WASH. U. GLOB. STUD. L. REV. 491, 495 (2007).

¹⁷⁰ See, e.g., Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 9 (Sept. 2009), at <http://www.icty.org/sid/135>.

states are bound to comply with the tribunals' orders.¹⁷¹ National justice systems are thus cast as auxiliary. The international tribunals set the prosecution strategy for particular cases; national justice systems have a duty to assist with the prosecutorial tasks dictated from above.¹⁷²

The International Criminal Court, a creature of interstate treaty rather than Security Council fiat, has a more deferential relation to states.¹⁷³ Under the complementarity doctrine of Article 17 of the Rome Statute, the ICC can determine that a case is admissible only when the state "is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁷⁴ That means that the state has priority: if it prosecutes, the ICC is barred from intervening. The catch, however, is that the treaty empowers the ICC itself to make the determination of whether the local prosecution passes muster. Once the ICC does decide that the state is unable or unwilling to prosecute, the regime becomes much like that of the ad hoc tribunals. The ICC conducts the particular prosecutions, and the state justice system has a duty to yield jurisdiction and cooperate with the investigatory tasks that the ICC demands of it.¹⁷⁵ It might be objected that, because of complementarity, the ICC *overall* has a different working relation with the state than do the ad hoc tribunals. However, a single court or mechanism for accountability may have more than one jurisdictional mode. The assertion here is that, once the ICC opens an investigation, it switches into a relation best described as direct jurisdiction.¹⁷⁶

A final, if weaker, example of direct jurisdiction is that exercised by national courts claiming—under customary international law—universal jurisdiction for genocide, crimes against humanity, and war crimes.¹⁷⁷ Since the court that takes jurisdiction is created by national law, the mechanism involved is not, strictly speaking, an international one. However, these courts, too, claim the authority to open and conduct prosecutions from abroad. They rely on authority granted by a system of interstate treaties to require the affected states to cooperate with letters

¹⁷¹ See, e.g., *id.*, Art. 29; SC Res. 827, *supra* note 161, op. para. 4.

¹⁷² As Frederik Harhoff wrote of the ICTY:

To clarify the Tribunal's supremacy over national authorities, Rule 59 establishes that failure to execute an arrest warrant within a reasonable time period may result in a prompt report of the matter to the U.N. Security Council. These provisions appear dramatically interventionist, making it more appropriate to characterize this part of the Tribunal's jurisdiction not as concurrent with, but superior to, the national jurisdiction of states.

Frederik Harhoff, *Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571, 580 (1997).

¹⁷³ CASSESE, *supra* note 85, at 349 (arguing that states crafted a regime that left them more discretion).

¹⁷⁴ Rome Statute, *supra* note 118, Art. 17.

¹⁷⁵ But the ICC's regime of cooperation is more deferential than that of the ad hoc tribunals. See CASSESE, *supra* note 85, at 346–51. Further, some argue that the doctrine of complementarity opens the door to a more cooperative relation with national justice systems. The ICC could use the threat of prosecution to spur national justice systems to action, monitoring their progress over time. See, e.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008).

¹⁷⁶ One might still object that if the state began actively to prosecute, the ICC could change its assessment and suspend its own direct prosecutorial work. But this is only to say that the ICC can opt back into the complementarity mode.

¹⁷⁷ The most famous examples are the prosecution of Adolf Eichmann by Israel and the prosecution of General Augusto Pinochet opened by Spanish investigating magistrate Garzón in 1996. When Garzón opened the case, he did so under passive personality jurisdiction, investigating the forced disappearance and killing of Spanish citizens by the Pinochet regime. He later broadened the investigation, relying on universal jurisdiction. See David Sugarman, *From Unimaginable to Possible: Spain, Pinochet and the Judicialization of Power*, 3 J. SPANISH CULTURAL STUD. 107, 110 (2002).

rogatory, extradition requests, and the like.¹⁷⁸ Once the prosecution begins, the national justice systems of the states where the crimes took place are formally relegated to the role of auxiliary: they have a duty under international treaties to extradite suspects and to carry out investigatory tasks to assist the foreign courts' prosecutions. Like the ICC, however, these courts must defer to local prosecution.¹⁷⁹ The important difference is that in the use of universal jurisdiction, local courts are the ones to decide if the local prosecution renders the foreign prosecution redundant.

Hybrid criminal jurisdiction. The second type is hybrid criminal jurisdiction, wherein international actors and the state justice system prosecute as partners. Authority is rooted at least partly in the consent of the affected state to prosecute, in situ, with significant participation of the local justice system. The resulting court is of mixed origin: "both the institutional apparatus and the applicable law consist of a blend of the international and the domestic."¹⁸⁰ Such courts draw on domestic and international law, are staffed and led by actors from both the domestic and international law justice systems, and use domestic and international resources to prosecute and try international crimes. While these institutions may have formal primacy over other institutions within the national system, the state's participation as an equal partner changes the fundamental nature of the national-international relation. These courts rely on the local justice system for prosecutorial tasks, but the local actors are also part of the system, working side by side with international actors.

The international community has participated in the creation of five hybrid tribunals to prosecute international crimes.¹⁸¹ Each is uniquely structured, so that the national and international elements are differently distributed across the models. They share, however, the animating principle that a prosecutorial process that is embedded nationally will more effectively engage and reflect the interests of local communities, and thus have a greater impact. In particular, that process will engage and empower local justice system actors. The Extraordinary Chambers in the Court of Cambodia, for example, represents an international effort to work toward prosecution of Khmer Rouge-era crimes from within the national justice system. Each of its three judicial chambers comprises a mix of international and national judges. The

¹⁷⁸ For a comparison of this system to that eventually adopted by the criminal tribunals, see CASSESE, *supra* note 85, at 346–51.

¹⁷⁹ *Id.*

¹⁸⁰ Dickinson, *supra* note 120, at 295.

¹⁸¹ The hybrid tribunals are the Extraordinary Chambers in the Courts of Cambodia, Regulation 64 Panels in the Courts of Kosovo, Special Court for Sierra Leone, Special Panels for Serious Crimes in East Timor, and War Crimes Chamber in Sarajevo. With Lebanon, the international community has also created the Special Tribunal for Lebanon, but this court does not have jurisdiction over international crimes and thus will not be discussed here. See Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1016 (2009), though the Bosnia War Crimes Chamber is not mentioned. One might also include in this category the International Commission Against Impunity in Guatemala. See Andrew Hudson & Alexandra W. Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 J. INT'L CRIM. JUST. 53 (2010); *infra* note 221 and accompanying text. Also, some argue that the Rome Statute allows the ICC to hold trials locally and that the ICC should do so. However, that is different from arguing that the ICC should incorporate local actors and institutions into its local trials. See William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729 (2003); Stuart Ford, *The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?* 43 J. MARSHALL L. REV. 715 (2010).

Supreme Court Chamber seats three Cambodian and two international judges, but a guilty verdict requires a super-majority of four votes.¹⁸²

Quasi-criminal jurisdiction. The two types of relations between international and national justice systems sketched above will appear familiar to scholars of international criminal law. In one, national justice systems are cast as auxiliary while the international takes over, in a hands-on way, the prosecution. In the other, the international and national work hand in hand as partners toward prosecution. The relative merits of these two jurisdictional types have generated much scholarly debate, as has the question of how to fuse the best features of each in a single mechanism.¹⁸³ Quasi-criminal jurisdiction is a third type of relation between international bodies and local justice systems working toward prosecution. In this type, the actual work of conducting the prosecution and trial falls entirely to the national system. National justice systems are cast as the main protagonists, but the international body decrees and then closely monitors the prosecution. As in hybrid jurisdiction, all trials take place close to home, and the national justice system plays a primary role. As in direct jurisdiction, the international tribunal stands at a geographical and hierarchical distance from the local proceedings. In contrast to both, the international body does not itself conduct prosecutorial tasks. Rather, it monitors and guides the proceedings at a remove.

The relation between the state and the international court described by quasi-criminal jurisdiction encompasses the practice of positive, or proactive, complementarity that some advocate for the ICC.¹⁸⁴ Complementarity was meant to be a form of deference to sovereignty: states with working justice systems can keep the ICC at bay by opting to prosecute.¹⁸⁵ But the flip side of complementarity is that it puts the Office of the Prosecutor (OTP) in the position of supervising whether local prosecutions are taking place and, more intrusively, of assessing whether they meet a vaguely articulated standard. Many scholars and, indeed, former prosecutor Luis Moreno Ocampo himself argued that the OTP should interpret complementarity to allow it to pressure states proactively toward prosecution, threatening to file a case if the states do not undertake certain actions. Under such an approach, the OTP would closely review local justice system decisions over a period of years and exert pressure toward particular procedural standards. Emphasizing that the OTP should engage states dialogically, William Burke-White offers the following description of proactive complementarity:

By watching domestic proceedings and issuing public statements when necessary, the OTP and its partners may be able to provide ongoing pressure to ensure that domestic investigations and prosecutions meet basic standards of due process and represent genuine efforts to bring the accused to justice. Such monitoring may also be able to draw a state's attention to inadvertent inadequacies in its domestic processes at a stage when reform or

¹⁸² See generally Padraic J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143 (2008).

¹⁸³ See, e.g., Dickinson, *supra* note 120; Raub, *supra* note 181; Stuart Ford, *The Promise of Local or Regional ICC Trial Chambers: Incorporating the Benefits of the Hybrid Tribunals into the ICC*, J. MARSHALL L. REV. (forthcoming), available at <http://ssrn.com/abstract=1605294>; David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 STAN. J. INT'L L. 1 (2007); Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347 (2005–06).

¹⁸⁴ It also encompasses the work of the ICTR under the Completion Strategy. See *infra* note 235 .

¹⁸⁵ See CASSESE, *supra* note 85, at 342–43.

adjustment is still possible. Taken collectively, these tactics offer a promising means of catalyzing domestic prosecutions by at least some initially unwilling states.¹⁸⁶

The quasi-criminal review of the Inter-American Court and the Council of Europe are also examples. As discussed above, the Inter-American Court typically decrees prosecutions to take place as a form of remedy for human rights violations that amount to international crimes. It then monitors compliance with these orders over years and even decades. Through compliance reports, it keeps apace of the prosecutions and is able to highlight shortcomings, and to issue orders and offer suggestions to overcome them. A key feature of this review is that it is dialogic: the supervising court receives the input of the state, the victims, and other actors on the progress of the prosecutions, and then makes suggestions and gives new orders in light of that information. The Committee of Ministers and the Inter-American Commission each exercises a softer form of the same practice; unlike the orders to prosecute issued by the Inter-American Court, their orders do not have the legal force of binding decrees.

Quasi-criminal review, then, offers the possibility of a different kind of relation between the international community and the national justice system. It is a jurisdictional relation that will likely take on greater importance as the ICC identifies more situations in states, such as Colombia and Kenya, that have justice systems that are able, and claim to be willing, to prosecute the crimes in question.

Comparing the Jurisdictional Types

Having distilled the types, we now turn to their comparison. In light of the manifold goals of the international community in prosecution, three sets of features emerge as salient: (1) holding prosecutions locally, where the crimes took place and where the affected communities reside; (2) ensuring autonomy from the state's government; and (3) involvement in the prosecution and trial by international institutions and actors (see Table 2).

The virtue of local prosecution and trial. Juxtaposed to direct jurisdiction, hybrid and quasi-criminal jurisdiction share an important feature: their trials take place in situ. Studies of the ad hoc tribunals suggest that the experience of justice is less rich and meaningful when the prosecutions are directed from, and the trials take place, abroad. In many instances of international trials, locals have known little about them, understood them less, and even experienced them as foreign impositions.¹⁸⁷

¹⁸⁶ Burke-White, *supra* note 175, at 91. Such a view of the ICC's work is consonant with the definition of positive complementarity provided by the Bureau of Assembly of States Parties Hague Working Group, which defines it as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance." Assembly of States Parties to the Int'l Crim. Ct., Report of the Bureau on Stocktaking: Complementarity, para. 16, UN Doc. ICC-ASP/8/51 (Mar. 18, 2010), at http://212.159.242.181/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf. The focus is on review and deliberation, rather than active on-the-ground engagement. *Id.*, para. 2.

¹⁸⁷ See, e.g., Hum. Rts. Ctr. & Int'l Hum. Rts. L. Clinic, Univ. of Cal., Berkeley, & Centre for Hum. Rts., Univ. of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102 (2000); ELIZABETH NEUFFER, THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA 371–88 (2002) (account of Rwandan and Bosnian villagers and their experiences with the ad hoc tribunals).

TABLE 2. COMPARISON OF FEATURES OF THE JURISDICTIONAL TYPES

	Direct criminal jurisdiction	Hybrid criminal jurisdiction	Quasi-criminal jurisdiction
Local prosecution and trial <ul style="list-style-type: none"> • Local awareness & public deliberation • Learning by national justice system • Lower cost 		✓	✓
Autonomy from nation-state <ul style="list-style-type: none"> • Ability to act despite national government • Avoids fragmentation of international law 	✓		✓
Hands-on involvement by international community <ul style="list-style-type: none"> • Quicker pace • Symbolizes commitment of international community • Greater international awareness 	✓	✓	

Hybrid and quasi-criminal jurisdiction both offer the advantage of physical proximity. Prosecutions that result from quasi-criminal jurisdiction, however, are local across more dimensions. Note that the virtue of local prosecution and trial is a matter not only of geography—proximity to the scene of the crime and those most directly affected by it—but also of using local legal institutions, local officials, and even local laws. Under quasi-criminal review the prosecution takes place under a familiar, autochthonous process and law, conducted by actors entirely drawn from local society. It is true that the national justice system is being pressured—by foreign interests—to reform and adapt its working methods. New institutions might emerge, and laws may be reinterpreted. But such changes occur within an existing system. By contrast, each hybrid court is novel, embodying a *sui generis* mix of local and national law, actors, and institutions. Each presents an extraordinary institution that is unfamiliar to local communities.

Local prosecutions are also touted as having a greater teaching effect. Through them, state officials learn about international criminal law and how to investigate and prosecute atrocities. The hybrid scenario, in which international officials work side by side with locals, provides a path to improved local practices. Laura Dickinson stresses the importance of the exchange of norms between international and national actors:¹⁸⁸ the international actors introduce their local partners to a new judicial culture and new working practices. Nevertheless, the hybrid tribunals' status as extraordinary can undermine their influence. One study notes that working methods of the Extraordinary Chambers in the Court of Cambodia could not be replicated by the ordinary Cambodian justice system because “the Ministry of Justice has 1% of the ECCC's budget to run 25 courts in the country and it is difficult to envision how replicating practices such as computerized case management could be transferred.”¹⁸⁹ In Bosnia, while the War Crimes Chamber has helped strengthen the judiciary, “such impact is diminished by the fact

¹⁸⁸ See Dickinson, *supra* note 120.

¹⁸⁹ Olga Martin-Ortega & Johanna Herman, *Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia* 16 (Just and Durable Peace by Piece, Working Paper No. 7, 2010), at <http://www.uel.ac.uk/chrc/documents/WP7.pdf>.

that it is seen as a very specialized court with its own competences and therefore unable to interact on a day-to-day basis with the rest of the judicial domestic system.”¹⁹⁰ By contrast, prosecutions pursuant to quasi-criminal review take place within the regular justice system, under international review but without international participants. In order for the prosecution to take place at all, the local system must adapt and change, but it does so within its means, in ways that make sense to the local actors, and in light of the local culture and economy, albeit under the review of a foreign body. When such local prosecutions succeed, they have the advantage of catalyzing local change and demonstrating that the local justice system is able to work on its own terms.

Local also refers to the source of funding. Under direct jurisdiction the cost falls entirely to the international court; in the hybrid scenario, the international community shares the costs of prosecution with the state. Trials triggered by quasi-criminal review, by contrast, are entirely paid for by the state. The international community pays only the cost of the supervision. Moreover, local trials are cheaper, regardless of who pays. Off-shore courts incur many costs simply by virtue of their distance.¹⁹¹ But even when international or internationalized trials are nationally based, they will be costlier.¹⁹² Those that have taken place in the post-Cold War era focus on problems in developing countries in which the salaries of local officials are significantly lower than the salaries of international civil servants. Thus, the more international actors involved, the costlier the trial.¹⁹³ Finally, in the case of the ad hoc and hybrid tribunals, in each situation either an entire institution must be constructed from the ground up (as with ad hoc tribunals), or the nation’s own institutions must be significantly revamped (as with hybrid tribunals). Local prosecutions, by contrast, either rely on, or contribute to the reconstruction of, an existing justice system.

It is striking to compare the costs per conviction of three different types of courts: the ICTY, the Special Court for Sierra Leone, and the Inter-American Court. If we calculate how much each has cost the international community from its starting date until June 2011, and divide

¹⁹⁰ *Id.* at 15; see also DAVID A. KAYE, JUSTICE BEYOND THE HAGUE: SUPPORTING THE PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL COURTS 9 (2011), available at <http://www.cfr.org/international-criminal-courts-and-tribunals/justice-beyond-hague/p25119> (arguing that the hybrid tribunals “have uneven records integrating into domestic systems, typically not triggering broader reconstruction of law enforcement and judicial institutions”)

¹⁹¹ Distance is a persistent hindrance to the work of off-shore criminal courts. The evidence and witnesses mostly reside where the crimes took place, which makes prosecution more expensive.

¹⁹² Although the hybrid tribunals were meant to be more cost-effective, they have not necessarily been so. See Ford, *supra* note 183, at 15 (footnote omitted):

[C]omparing the ICTY to the SCSL indicates that the ICTY will cost eight times as much as the SCSL, but will try ten times as many suspects and do it in only twice as much time. A similar comparison to the [Extraordinary Chambers in the Court of Cambodia] indicates that the ICTY will cost a little more than six times as much as the ECCC but will try more than 15 times as many people and do it in only twice as much time. These numbers indicate that the hybrid tribunals may be cheaper than the *ad hoc* tribunals but they are also less efficient.

¹⁹³ See Cesare P. R. Romano, *The Price of International Justice*, 4 LAW & PRAC. INT’L CTS. & TRIBUNALS 281 (2005); Ford, *supra* note 183 (arguing that the hybrid tribunals are not that much cheaper than international tribunals); see also Cohen, *supra* note 183 (arguing that hybrid tribunals were a response to the ad hoc tribunals “expensive justice”). But see David Wippman, *The Costs of International Justice*, 100 AJIL 861 (2006) (comparing the costs of international and U.S. criminal courts); see also Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953 (2011).

that number by how many convictions that they have completed or, in the case of the Inter-America Court, successfully ordered, we find a stark contrast. The cost per conviction for the ICTY¹⁹⁴ is roughly \$39 million; for the Special Court for Sierra Leone,¹⁹⁵ \$28 million; and for the Inter-American Court, \$1 million.¹⁹⁶ The comparison is imperfect. Most importantly, of course, the Inter-American Court budget does not reflect the cost of the local prosecutions, as these are incurred by the defendant states themselves. Several other caveats are in order. The Inter-American Court's budget includes the cost of many cases that do not involve international crimes. The prosecutions of the ICTR and ICTY, as well as the convictions reached following Inter-American Court orders, include trials of both low- and high-level officials, whereas the hybrid courts focus only on the latter, whose prosecutions are costlier.¹⁹⁷ One further dimension is whether the institution is a standing tribunal or is specially created for a particular situation, raising costs.¹⁹⁸ The ICC, with its \$130 million budget for 2011,¹⁹⁹ is still in a preliminary phase, and its costs may go down over time. Despite the imperfection of these comparisons, it does suggest that quasi-criminal review is an accessible means of fostering prosecution of international crimes.²⁰⁰

The virtue of autonomy from the state. The distinctive trait and virtue of hybrid criminal jurisdiction is that it conjoins national and international actors and law. It can also be advantageous, however, to keep international and national jurisdictions separate, for it provides greater autonomy from the state. Using direct jurisdiction, the UN Security Council can establish a criminal tribunal to prosecute actions by or in a state that has never agreed, through participation in a treaty or otherwise, to such intervention. For the quasi-criminal jurisdiction associated with the inter-American or Council of Europe scenario, states must be party to

¹⁹⁴ Information on costs was drawn from the ICTY website. See *supra* note 5 and accompanying text.

¹⁹⁵ "Security Council Resolution 1315 (2000) stated that the operations of the Special Court would be financed through voluntary contributions of funds, equipment, and services from states, and intergovernmental and non-governmental organizations." *First Annual Report of the President of the Special Court for Sierra Leone*, at 29. In order to calculate the costs to the international community, I have subtracted from the costs of the Special Court for Sierra Leone the \$24 million contribution by Sierra Leone. The data on costs are drawn from the annual reports of the Court's president: first report at 29 (2002–03), second report at 41 (2004–05), third report at 46 (2005–06), fourth report at 41, 63 (2006–07), fifth report at 43 (2007–08), sixth report at 35 (2008–09), and seventh report at 36 (2009–10). The annual reports are available at <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx>.

¹⁹⁶ The data for the Inter-American Court do not include donations. Also, note that the Court's budget was very small in the first years: it cost roughly \$3 million overall the first decade, compared to \$13 million its third decade. The data on costs for the Inter-American Court are drawn from its annual reports (for 1980, at 6 (for 1979–80); 1981, at 7–8 (for 1981–82); 1984, at 7 (for 1983–85); 1987, at 7 (for 1986–87); 1988, at 7 (for 1988–89); 1990, at 10 (for 1990–91); 1996, at 14 (for 1997); 1999, at 48 (for 1999–2000); and 2010, at 20 (for 2001–10)) and from the following additional documents: 1991 INTER-AM. Y.B. ON HUM. RTS. 7 (for 1992–93); 1994 INTER-AM. Y.B. ON HUM. RTS. 96 (for 1994–95) ("The Assembly approved the Court's budget for 1995 and increased it by 15.86%."); 1995 INTER-AM. Y.B. ON HUM. RTS. 80 (for 1996) ("The Assembly approved the budget of the Court for the year 1996 and increased it by 16% in relation to the previous year."); and Organization of American States, Program-Budget of the Organization for 1998, 1998 Quotas and Pledges to the Voluntary Fund, at 3, OAS AG/RES. 1531 (XXVII-O/97) (June 5, 1997) (for 1998), available at <http://www.oas.org/budget/ingles.pdf>. The Court's annual reports are available at <http://www.corteidh.or.cr/informes.cfm>.

¹⁹⁷ See Ford, *supra* note 183, at 15 n.62 (noting that "[o]ne would expect that ordinary cases would be simpler, quicker and less complex than leadership cases").

¹⁹⁸ *Id.* (noting the economies of scale of a larger caseload and over time).

¹⁹⁹ See *supra* note 5 and accompanying text.

²⁰⁰ One might object that the comparison should not be of convictions but of the number of completed prosecutions. A finding of innocence or an acquittal is also an important outcome. However, if the point of the courts is accountability for crimes committed by many, the conviction rate is also an important measure.

the respective human rights conventions. But once they ratify or accede, participation in a particular case or set of cases is not optional,²⁰¹ thereby allowing the international community to become involved even when governments oppose prosecution.²⁰² By contrast, for hybrid jurisdiction to be possible, the state must consent to the scope of the particular cases to be prosecuted,²⁰³ with the consequence that the government might try to tailor prosecutions to fit its own political interests, as some argue Cambodia has done in the ECCC proceedings.²⁰⁴

A fully international court, moreover, arguably has greater potential to create a coherent jurisprudence independent of particular state interests. The models of direct and quasi-criminal jurisdiction are structured such that they keep the national and international bodies of criminal law distinct: the prosecutions that take place under the former are clearly governed by international law, and those under the latter, by national criminal law. With hybrid courts, however, each works independently and is embedded within a different national system—which potentially adds to the fragmentation of international criminal law.²⁰⁵ More problematically, these courts' admixture of national and international norms, particularly if influenced by national politics, might muddy the international doctrine. While there are benefits to constructing a jurisprudence that closely reflects and responds to national experiences, the risk is that hybrid institutions do not have sufficient autonomy from politics and that their jurisprudence and procedures will reflect the interests of particular factions. When a state's motives are mixed or its commitment is unsteady, a clean distinction between national and international jurisdiction may be preferable.

The virtue of direct international involvement. The distinctive trait of quasi-criminal review is that it legally engages the international community in pursuing accountability for international crimes without direct involvement in prosecution. But sometimes the international community will prefer to get its hands dirty; at times, the international community will want to move more quickly, more forcefully, or with a higher profile than quasi-criminal review allows.

²⁰¹ As Peru learned the hard way. See Karen C. Sokol, Case Report: Ivcher Bronstein; Constitutional Tribunal, 95 AJIL 178 (2001) (on Peru's attempt to withdraw from the Court's jurisdiction in a particular case, and the Court's denial of this possibility).

²⁰² In terms of actually completing a prosecution, the international criminal tribunals have more autonomy than the rights bodies using quasi-criminal review. Indeed, some view the ICC as an instrument of specific deterrence with the potential to deter crimes of heads of state in the midst of armed conflict. Whether the ICC has this deterrent effect, however, is still uncertain. See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).

²⁰³ It is important not to overstate this difference. All of the international mechanisms of accountability depend on state cooperation to conduct investigations and prosecute. That remains the case even when the UN Security Council imposes a court on an unwilling state by creating an ad hoc tribunal or through an ICC referral. See LAMONT, *supra* note 169; VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* (2009) (discussing the politics of getting state compliance).

²⁰⁴ See, e.g., James A. Goldston, *No Justice in the Killing Fields*, INT'L HERALD TRIB., Apr. 27, 2011, at 6 (arguing that the ECCC has caved to government pressure).

²⁰⁵ See, e.g., Markus Benzing & Morten Bergsmo, *Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court*, in *INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA*, *supra* note 167, at 407, 410 ("There is a danger that the governing instruments of other internationalized courts will be diverging from or even be inconsistent with the Rome Statute . . ."); see also Raub, *supra* note 181, at 1048.

The pace of the rights bodies—in particular, the Inter-American System—is slow.²⁰⁶ Of course, timely justice is not exactly a feature of the international criminal system either.²⁰⁷ Slowness is endemic, in part because all international justice systems rely on local state justice systems. And these, following periods of mass atrocities, are often structurally or politically compromised, or both. Even by these standards, however, the time between commission of the violation and compliance with the remedy is exceedingly long in the IAS.²⁰⁸ A petitioner to the IAS must have already exhausted local judicial remedies.²⁰⁹ The petitioner must then go through the Commission process, which, a recent study shows, takes from five to eleven years.²¹⁰ Once a complaint reaches the Court, another two years may pass before a ruling is issued.²¹¹ And then, as argued above, a new litigation phase begins: the case now *returns* to the national system, and the Court begins to pressure the reluctant state toward prosecution. Procedures could be streamlined to improve processing times,²¹² but quasi-criminal review is necessarily slow due to the circularity of its stages, which require a return to a reluctant state system. It is neither efficient nor compact.

At times, too, the international community will want to act directly for symbolic reasons. Alain Pellet writes that when crimes that “deeply shock the conscience of humanity” are at stake, they are “‘of concern to the international community as a whole’, . . . and it is then important that they not be ‘confiscated’ by any particular state, including the one in which the crime has been committed.”²¹³ Direct involvement of international actors in prosecuting such crimes expresses a legal responsibility that transcends traditional sovereign bounds. International involvement can also symbolize a more particular type of concern. Many have described

²⁰⁶ See, e.g., RATNER ET AL., *supra* note 1.

²⁰⁷ For a discussion of the criticism that international justice, including the ad hoc tribunals moves too slowly, see Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L.J. 323, 323–24 (2009) (footnote omitted):

The conventional wisdom among policymakers, practitioners, and commentators (both academic and popular) is that war crimes prosecutions, particularly those at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and its counterpart for Rwanda (“ICTR”), have frequently been too slow, and that it is essential for the future success of the ICC (and other ad hoc tribunals) that accused war criminals be charged, arrested, and tried more expeditiously.

²⁰⁸ See Basch et al., *supra* note 135, at 26:

The average duration of proceedings, from when the petitions enter into the [IAS] until their resolution is approximately 7 years and 4 months. The median is 6.7 years (approx. 6 years and 8 months), which means that half of the cases are resolved in 6.7 years or less, while the other half takes 6.7 years or more before they are resolved.

²⁰⁹ American Convention, *supra* note 9, Art. 46.

²¹⁰ See Basch et al., *supra* note 135, at 26 (“42% of the cases that ended with an IACHR final report lasted from 5 to 8 years. 33% of them lasted from 7 to 11 years and 17% lasted more than 11 years.”)

²¹¹ *Id.* (“The proceedings in more than 56% of the cases finalized by a Court ruling lasted from 5 to 8 years, and 14% of them lasted from 2 to 5 years, another 15% went on for 7 to 11 years, and another 15% lasted for more than 11 years.”)

²¹² See HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCHOOL OF LAW, MAXIMIZING JUSTICE, MINIMIZING DELAY: STREAMLINING PROCEDURES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2011), available at http://www.utexas.edu/law/clinics/humanrights/work/Maximizing_Justice_Minimizing_Delay_at_the_IACHR.pdf.

²¹³ Alain Pellet, *Internationalized Courts: Better Than Nothing . . .*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 167, at 437, 438; see also HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 269–71 (1963) (considering whether it is proper for a national court to claim jurisdiction over an offense against humanity).

the ICTR as expressing the international community's remorse in the wake of its weak, belated response to the Rwandan genocide. "[T]he Arusha-based tribunal represents a symbolic justice that was supposed to formally mark the community of nations' refusal to allow the crime to go unpunished"²¹⁴ A national proceeding could not have the same communicative effect. It is true that in the quasi-criminal review scenario, the international community becomes involved. But such involvement is limited to pushing the state to fulfill *its* responsibility, rather than taking direct responsibility for conducting the prosecution.²¹⁵ Further, although states may criminalize the underlying acts, the crime under which they fall may fail to capture the acts' status as international crimes. For example, a forced disappearance or crime against humanity may be prosecuted as an ongoing kidnapping.²¹⁶ Thus, an important piece of the meaning of international criminal law may fail to be expressed.

Finally, international involvement triggers further international engagement. Whereas local proceedings create more local knowledge and resonance, international trials foster more international media coverage and awareness than local prosecutions that are supervised by regional rights courts or international criminal bodies.²¹⁷ Hands-on involvement by international actors in prosecution also contributes to the creation of an international criminal law civil service. Key to international legalization in this realm is the creation of "a professional class of international civil servants who are going on to legitimate and extend these tools in other venues."²¹⁸

Collaboration and Convergence

Having distinguished the jurisdictional types and contrasted their virtues, it is useful to examine their synchronicities. The types can be viewed not as competing alternatives but rather as complements that can be deployed in different types of situations, in sequence, or even within the same overall situation to address different crimes, actors, or levels of culpability. The question of what situation on the ground calls for which jurisdictional type cannot be answered in the abstract. The choice will vary both from situation to situation and on the details of the

²¹⁴ CRUVELLIER, *supra* note 162, at 169.

²¹⁵ One might also note that it requires an individual to petition the IAS. While the Inter-American Convention, *supra* note 9, Art. 61, allows states to denounce other states' violations of the Convention, no state has ever invoked this option.

²¹⁶ This issue has come up for both the Inter-American Court (*see supra* note 101) and also for the ICC. *See, e.g.*, Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85 (2012) (arguing that complementarity under the Rome Statute allows states to configure the crimes under ordinary criminal law). *But see* ARENDT, *supra* note 213, at 272 ("[T]hese modern, state-employed mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people. Nothing is more pernicious to an understanding of these new crimes, or stands more in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same").

²¹⁷ While the trial of ex-president of Peru Alberto Fujimori generated much media coverage, most national trials that take place following an order to prosecute by the Inter-American Court do not rise to the level of international awareness. One explanation may be that they tend to be less high-level offenders than those who appear before the international and hybrid tribunals. But it is also the case that the involvement of the international community generates interest, as it reflects a more direct state investment. That the ICC has been using complementarity to push for trials in Colombia has arguably gone less noted than any of its direct investigations in Africa.

²¹⁸ Heather Schoenfeld, Ron Levi & John Hagan, *Extreme Crises and the Institutionalization of International Criminal Law*, 33 CRITIQUE INTERNATIONALE 37, 37 (2007) (exploring how innovations within the ICTY have led to the development of such a class).

mechanism devised. Nonetheless, two threshold issues stand out. The first is whether the state is willing to prosecute; that is, do those in power want such prosecutions to take place, and do they see the prosecutions as a relatively high priority, regardless of whether the state has the capacity (and is thus “able”) to carry them out? If the answer is no—for example, if the government resists—a hybrid institution is likely out of the question. The second threshold issue is whether the international community is willing to prosecute; that is, is there a broad consensus (especially among the powerful states) that prosecutions should be undertaken and that the international community should be actively involved in pushing forward those prosecutions? For crimes committed by the Gaddafi regime in Libya, the international community may well be willing to take responsibility for the prosecution, pay the cost, and follow it through. But for a case that engenders less international concern, or in which a consensus is lacking, a court with direct criminal jurisdiction may not be available.

These two threshold considerations—local interest and international interest, as defined above—suggest a way of determining which jurisdictional approaches should be used for what sorts of situations (see Table 3). Only certain cases—the ones that most pique the concern and interest of the international community—provoke direct international criminal jurisdiction. Where international *and* national interest is low, the quasi-criminal modality should be deployed. Where international interest is low but the state is willing to prosecute, either the quasi-criminal or hybrid modality should be engaged.

One might object to so simple and static a chart. While it takes both the international community and states to be single, unitary actors, neither is monolithic. The politics between sub-actors, for example, can be salient: a national judiciary may be unwilling to prosecute even when the executive is pushing for prosecution.²¹⁹ Further, the chart presumes that levels of interest are stable, whereas both the national and international politics surrounding such cases is contested and changeable. A recalcitrant state may soften its stance in face of international pressure, or the international community may lose interest in a particular situation or prioritize another. But the idea is that the levels of state and international interest, taken together, provide a useful initial categorization, especially if we view the three different jurisdictional types not as alternatives but as complements.

The two considerations—the level of state interest and level of international community interest—are also relevant for deciding how to process different types of cases within any particular situation. The best practice may be to use them together in a single situation, either contemporaneously or with alternation over time, and with individual cases processed differently depending on their characteristics. For example, the international community usually has a greater interest in trying higher-ranking officers, whereas these cases present a challenge for states. The international tribunal could thus try the highest-ranking officers, with the rest left to the national system under a system of quasi-criminal review. Another possibility is to use the threat of direct jurisdiction as a means of stimulating national prosecutions already under quasi-criminal review, as is taking place in Colombia.²²⁰ States themselves can play a role in coordinating the work of different jurisdictional types, as Guatemala did when it asked the International Commission Against Impunity in Guatemala—a joint effort by the United Nations

²¹⁹ See Huneus, *supra* note 39 (arguing that this sort of resistance occurs in the inter-American setting).

²²⁰ As the focus of this article is on quasi-criminal review, collaboration between direct jurisdiction and hybrid jurisdiction is not explored. Note, however, that the work of the ICTY and the Bosnia tribunal may be an example of such collaboration. See Burke-White, *supra* note 168.

TABLE 3. THRESHOLD CONSIDERATIONS

		Level of international interest in prosecution	
		High	Low
Level of government interest in prosecution	High Low	Direct or hybrid Direct	Hybrid or quasi-criminal Quasi-criminal

and Guatemala to improve prosecution practices in Guatemala—to prioritize the cases before it that are also before the Inter-American System.²²¹

The above examples suggest that policymakers are already incorporating quasi-criminal review, as practiced by regional rights bodies, into the international struggle against impunity and are mixing jurisdictional types for more effective prosecution. In addition, as discussed below, there is also a need for collaboration between different mechanisms for accountability working under the same jurisdictional type.

A Note on the ICC and the Inter-American System

Scholars have noted the parallels between the ICC and Inter-American System. They have noted, for example, that the ICC has much to learn from the experience of the IAS with mass, state-sponsored crimes. The Inter-American Court's creative reparations regime provided a model for the restorative responses to atrocities that the ICC has incorporated into its own practice, particularly in the Victim's Fund.²²² Others have noted that the Inter-American Court has created a jurisprudence that could inform ICC decisions on whether local prosecutions satisfy the complementarity criteria.²²³

Once we begin to examine the quasi-criminal jurisdiction of the Inter-American Court, more parallels between the ICC and the IAS emerge. The Inter-American Court's active engagement in national legal processes as they unfold could inform the ICC's understanding of, and approach to, proactive complementarity. Indeed, the Inter-American Court's

²²¹ See *Blake v. Guatemala, Monitoring Compliance with Judgment* (Inter-Am. Ct. H.R. Nov. 27, 2007), at http://www.corteidh.or.cr/docs/supervisiones/blake_27_11_07_ing.pdf. The International Commission Against Impunity in Guatemala is unique within the UN system. See Hudson & Taylor, *supra* note 181. While its aim is to support Guatemalan institutions in dismantling illegal domestic security apparatus and clandestine security organizations, it has, within its mandate, the power to investigate any person, official, or private entity, to present charges to the public prosecutor, and to join criminal proceedings as a private prosecutor. Its head and many of its staff are not Guatemalan but are international actors brought in by the United Nations. It represents, then, a new kind of hybrid jurisdiction. *Id.* at 54 (categorizing the International Commission Against Impunity in Guatemala as a "hybrid" mechanism like the hybrid criminal tribunals).

²²² See, e.g., Mégret, *supra* note 128; Antkowiak, *supra* note 131. Yet others argue that the ICC should (and does) look to the IAS in matters such as access and victim participation. See Héctor Olásolo & Pablo Galain, *La Influencia en la Corte Penal Internacional de la Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Acceso, Participación y Reparación de Víctimas*, in 1 SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL, *supra* note 12, at 379.

²²³ See Cecilia Cristina Naddeo, *Praising the Region: What Might a Complementary Criminal Justice System Learn from the Inter-American Court of Human Rights?* in THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW (Larissa van den Herik & Carsten Stahn eds., 2012) (providing a rigorous analysis of how the ICC could incorporate inter-American jurisprudence into its application of the principle of complementarity as an admissibility test); see also Dino Carlos Caro Coria, *La Garantía del Tribunal Imparcial en el Derecho Internacional de los Derechos Humanos: Análisis Desde el Principio de Complementariedad de la Corte Penal Internacional*, in 1 SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL, *supra* note 12, at 295.

experience with the supervision of national prosecutions suggests a unique set of lessons: it could reveal the particular situations under which monitoring would be more likely to yield prosecution, just as it might suggest what kinds of monitoring techniques are most productive.

Beyond the question of what the ICC can learn from the Inter-American System, there is an impending and evermore urgent question of how the ICC can work *with* the IAS and with other rights bodies conducting quasi-criminal review. The IAS is not just a model for the ICC. It is a potential partner. In Colombia, both the IAS and ICC are monitoring the pace and adequacy of prosecutions of massacres and killings that amount to crimes against humanity.²²⁴ The ICC could explicitly make compliance with IAS reparatory orders to investigate and punish an indicator in its decisions whether the state in question is unable or unwilling to prosecute.²²⁵ The ICC's doing so would bolster the IAS by imposing a greater cost on noncompliance with its orders: Colombia is keen to avoid becoming the first non-African state to provoke an ICC trial. As another possibility, the ICC and IAS could rely on each other in assessing the advance of local prosecutions. Both bodies—the ICC under complementarity and the Inter-American Court through its supervision of orders to prosecute—are in need of the same kind of information: what, exactly are state officials willing and able to do in order to prosecute particular cases? Worth noting in this context is that the ICC's relation with the African Union, the main regional system of the continent that is home to the ICC's seven active cases, has been tense and, at times, counterproductive.²²⁶ The ICC could use its dealings with the IAS as a model for forging a smoother, more cooperative relation with regional and subregional legal orders.

For the ICC, three additional advantages would come from collaborating with the IAS.

Regional legitimacy. The first advantage is regionalism itself. There are no regional criminal law institutions: "To date, a core level of this system—the regional level—remains unexplored and underdeveloped."²²⁷ But it is an option that has its virtues, as is suggested by recent proposals that the African Court of Justice and Human Rights and the East African Court of Justice be endowed with criminal jurisdiction.²²⁸ Compared to their international counterparts, regional institutions enjoy two important attributes. First, they have a deeper knowledge of local norms and situations because regions tend to share political problems and types of human rights abuses. It is as a response to state practice across the region, for example, that the Inter-American System has developed in such detail the doctrines of forced disappearance

²²⁴ See, e.g., Burke-White, *supra* note 175; Jocelyn Courtney, *Enforced Disappearances in Colombia: A Plea for Synergy Between the Courts*, 10 INT'L CRIM. L. REV. 679 (2010).

²²⁵ For a similar suggestion, see Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 49 (2009).

²²⁶ See Charles Jalloh, *The African Union and the International Criminal Court: The Summer of Our Discontent(s)*, JURIST (Aug. 6, 2010), at <http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php>; Charles Chernor Jalloh, *Regionalizing International Criminal Law?* 9 INT'L CRIM. L. REV. 445 (2009).

²²⁷ Burke-White, *supra* note 181, at 730.

²²⁸ See *supra* note 13 and accompanying text. For a discussion of the African Union's steps in this direction, see *Analysis: How Close Is an African Criminal Court?* IRINNEWS (June 13, 2012), <http://www.irinnews.org/Report/95633/Analysis-How-close-is-an-African-criminal-court>.

and self-amnesty. Second, they have greater local legitimacy.²²⁹ By cooperating and collaborating with the IAS toward prosecution of specific cases in Colombia and Honduras, the ICC could avail itself of the advantages of regionalism, including the capacity to draw upon IAS's knowledge of local laws and legal systems.

More broadly, working with the IAS would enable the ICC to reasonably counter two strong criticisms: first, since it has focused its efforts on African states, the ICC is often characterized as picking on Africa, and second, it is often perceived (especially by African countries) as an instrument of Western imperialism.²³⁰ An ongoing connection with the IAS in relation to the prosecution of crimes in Latin America would undercut the charges that Africa had been singled for criminal prosecutions and that it was singled out specifically by Western powers. By the same token, the ICC's connection with the IAS may preempt potential perceptions by Latin Americans that they, like Africa, were being singled out and picked on by stronger nations.

Finally, collaboration across systems could serve to offset certain political dynamics. One of the criticisms of the international criminal tribunals is that they are susceptible to manipulation by the more powerful members of the international community. This weakness is shared by the rights bodies, which are, of course, also susceptible to geopolitics. The United States and China alike have avoided submitting to human rights quasi-criminal review, just as they have avoided ICC jurisdiction. At any given time, however, the politics at the regional level will likely be different from politics at the international level. Hugo Chavez carries less weight at the international than at the inter-American level, and China arguably carries less weight at the inter-American than the international level.

Restorative justice. The second advantage of ICC collaboration with the IAS is that the Inter-American Court has developed a rich jurisprudence in remedies aimed at restorative justice. As noted above, the Inter-American Court and Commission are unique in the broad array of victim-focused and reconciliation-focused remedies that they order states to undertake in the wake of atrocities. Some scholars have argued that the ICC, in proactive complementarity mode, could monitor not only judicial responses but other kinds of state undertakings in the wake of mass atrocities—such as holding truth commissions²³¹—and that it could issue orders to the state to erect memorials and to undertake other public acts.²³² Indeed, Frederic Mégret argues that for the ICC, the issue of restorative reparations is “no longer simply one of policy, but one increasingly tainted with [legal] obligation.”²³³ Should the ICC choose to stretch its

²²⁹ See HELEN M. STACY, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE 141–69 (2009). This greater local legitimacy should not be taken to imply, however, that regional rights systems are uncontroversial. As this article was being written, the Inter-American Commission and arguably the IAS itself came under attack from a broad spectrum of Latin American states. See Jim Wyss, *OAS Rights Body Slammed at Annual Meeting*, MIAMI HERALD, June 5, 2012, at <http://www.miamiherald.com/2012/06/05/2834901/oas-rights-body-slammed-at-annual.html#storylink=misearch>. Moreover, one of the main criticisms of the OAS is that the United States controls the system even as it does not abide by Commission rulings or submit to the Court's jurisdiction. The proper point to make, then, might be a narrower one: the status of regional institutions as more local *can* be a source of legitimacy. Thus, Hugo Chavez has proposed creating a rights system within UNASAR (Unión de Naciones Suramericanas) or ALBA (Alternativa Bolivariana para las Américas), which do not include the United States and are thus more “local.” *Id.*

²³⁰ An African regional court would be harder to characterize in that way.

²³¹ Roche, *supra* note 129; Totten, *supra* note 129.

²³² See Mégret, *supra* note 128.

²³³ *Id.* at 4.

mandate in this direction, the Inter-American Court's practice provides not only a model, as he suggests, but an actual partner.²³⁴ The ICC could make compliance with IAS restorative remedial orders a factor in its own appraisal of a state's response.

Exit strategy. Finally, the IAS's long-term involvement with the states of the region provides the ICC an exit strategy. Were the ICC ever to open a case in Colombia, it would likely prosecute only the highest-level actors. The IAS could monitor the state, pressure it to take on the remainder of cases, and continue its involvement even after the ICC closed its case, making it easier for the ICC to exit. It is already common in collaborative criminal proceedings for the actor's level of responsibility to determine which jurisdiction takes the case. Just as the Nuremberg tribunal tried only the "major" war criminals, so the ad hoc tribunals, the ICC, and the hybrid tribunals try only the highest-level actors, leaving the rest to national justice systems. The suggestion here, however, is that these lower-level cases not be left to the national justice systems alone: supervision by an international body could make an important difference to their success.²³⁵

The IAS also stands to gain from such collaboration. Its orders and supervision would, at times, be backed by the threat of direct prosecution by the ICC. Further, the international community's backing may bolster the IAS's standing—particularly in its efforts against impunity for genocide, war crimes, and crimes against humanity.

III. CONCLUSION

This article has highlighted an alternative form of international judicial intervention toward prosecution of mass atrocities—namely, the quasi-criminal jurisdiction of the human rights bodies. This form of jurisdiction's two most salient features, when compared to the existing forms of international criminal jurisdiction, are that it is cheap and that the prosecutions it fosters are closer to home. In this sense, this article's role is descriptive. It calls our attention to an emerging phenomenon and gives it a name. But the article also has a normative argument: quasi-criminal review is a form that should be considered as an alternative and complement to the existing mechanisms for accountability.

The research presented here is a first step. Much empirical study remains to be done on the rights bodies' work in this realm. Further research and analysis should reveal which situations

²³⁴ *Id.*; see also Antkowiak, *supra* note 131.

²³⁵ The ICTR provides an example. In 2002, the UN Security Council, concerned that the ad hoc tribunals were moving too slowly, imposed a Completion Strategy, creating "a jurisdictional relationship under which the . . . [ad hoc tribunal] could send cases back to national jurisdictions, monitor domestic proceedings, and remove cases back to the international forum only if key targets were not met." Burke-White, *supra* note 168, at 320; see also SC Res. 1534 (Mar. 26, 2004). On June 28, 2011, the ICTR referred its first case to the Rwandan national court system. Most notably for our purposes, it decided that the African Commission on Human and Peoples' Rights will monitor the trial in Rwanda and bring any potential concerns to the attention of the ICTR. See *Prosecutor v. Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, para. 35 (June 28, 2011), at <http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf> ("The Tribunal shall rely on African Commission on Human and Peoples' Rights ('ACHPR') monitors to identify and report promptly on any violations which would be an impediment to the fair trial rights of the Accused if tried in Rwanda."). Should the commission find that the Rwandan judiciary is not meeting adequate standards, the ICTR can reclaim jurisdiction. The ICTR, in other words, is using the African Commission to conduct a quasi-criminal review of cases that it has decided not to prosecute itself.

on the ground are more likely to respond to quasi-criminal review and which forms of quasi-criminal review are more effective. Further research should also help determine how the different types of jurisdiction can be used together. In particular, more consideration needs to be given to quasi-criminal review in deciding how the ICC should work with the regional rights systems, and how the African Union and East African Community should use their judicial organs to foster prosecution of gross human rights violations.²³⁶

²³⁶ The inter-American experience with quasi-criminal review may also be relevant to courts in subregional legal orders, such as the Economic Community of West African States' Community Court of Justice, which has jurisdiction over human rights.