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International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts

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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, the International Criminal Court (ICC), and the use of extra-territorial jurisdiction by national courts are among a new generation of courtly mechanisms designed to hold wrongdoers criminally

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accountable, state justice systems notwithstanding.[1] They 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 strength and weaknesses, individually and as a group.

Almost entirely overlooked by the scholarship on these mechanisms of 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 initially unable or unwilling to act. In particular, the Inter-American Court of Human Rights has made national prosecution of gross state-sponsored crimes a center-piece of its regional agenda. The Inter-American 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, holding mandatory hearings and issuing compliance reports that aspire to hasten the progress of national criminal processes, but also to ascertain that they meet

[1] Non-criminal 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 AND JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 259-287 (Oxford University Press 3rd ed.) (2009). The focus here, however, will be on mechanisms that seek individual criminal responsibility and punishment.

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certain international standards. The Court has decreed and is actively monitoring 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 Inter-American Court orders have yielded convictions.[3] To contextualize this number it should be recalled that the ICC, a decade into its work, has yielded a single conviction, and that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has yielded sixty-four sentences.[4] The Inter-American Court

[2] Unless otherwise stated, the data used in this article is drawn from original coding of the Inter-American Court's rulings and compliance reports, available online on the Court's website at http://www.corteidh.or.cr/ (last visited Sep. 14, 2012). The research methods used in this study are explained in Part II.

[3] *See infra* Part II, footnote 78 and surrounding 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 connections the paper draws, but with acknowledgement of the incommensurability of the different types of courts and sentences. The work of these courts will be more systematically juxtaposed in Part III. For information on the ICC's convictions, *see Situation and Cases,* ICC-CPI.INT, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (last visited June 22, 2012). For information on the ICTY's convictions, *see The Cases,* ICTY.ORG, http://www.icty.org/action/cases/4 (last visited Sep.30, 2011).

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currently runs on a yearly budget of under US$4 million; the ICC and ICTY each run on yearly budgets of roughly US$150 million.[5]

The Inter-American Court is not alone in its foray into prosecutorial matters. The Inter-American Commission for Human Rights, the Council of Europe's Committee of Ministers and the 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

[5] The Inter-American Court's budget for 2011 was US$3.9 million. *Informe Anual de la Corte Interamericana de Derechos Humanos 2011,* INTER-AM. COURT OF HUMAN RIGHTS (2011), at 66-67, *available at* http://www.corteidh.or.cr/docs/informes/espanol.pdf (last visited June 22, 2012). The ICC's approved budget for 2011 was US$130 million. *Registry Facts and Figures*, INTERNATIONAL CRIMINAL COURT (April 8, 2011), at 2, *available at* http://www.icc-cpi.int/NR/rdonlyres/9B984A20-08A9-4127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf. For the ICTY budget, *see The Cost of Justice*, ICTY.ORG, http://www.icty.org/sid/325 (last visited June 22, 2012).

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community that shoulders the cost of prosecution. This mechanism of accountability -- the practice by an international body of ordering, monitoring and guiding national prosecutions – will be referred to as quasi-criminal review.[6]

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, in which they argue:

> [U]se 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 be conceivably possible to fashion cases involving the adjudication of individual accountability, the courts appear unwilling to act as a quasi-criminal tribunals, and their evidentiary practices and capabilities are ill-suited to the task.[7]

[6] The term "mechanism of accountability" is borrowed from STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (3d ed. 2009).

[7] RATNER ET AL., *supra* note 6, at 257-258. 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.

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They are not alone in their pessimism: In the title of a recent book, Sonja C. Grover dubbed 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 *et al*'s 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, and, in this sense, *is* taking on a quasi-criminal jurisdiction. Ratner et al 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 publish 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

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

[9] Formally, the American Convention on Human Rights charges the OAS General Assembly with enforcement of judgments. Organization of American States, American Convention on Human Rights, art. 73, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

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of the regional courts. It is important, in other words, to delve into the record of the rights bodies in order to understand what it is they do and to what avail. That is the work of this article.

Another objection is that the quasi-criminal jurisdiction of human rights bodies illegitimately expands their mandates. The Inter-American Court and the European Court of Human Rights monitor state compliance with their respective human rights conventions, which make no mention of international crimes. These courts lack the capacity to adjudge individuals. Even less do they have legitimacy to do so. The charge of illegitimacy is particularly sensitive in the Inter-American setting, as Latin American states across the political spectrum have called on the OAS to curb the Commission's mandate,[10] and on September 10, 2012, Venezuela removed itself from the jurisdiction of the Inter-American Court by denouncing the American Convention of Human Rights.[11] IAS incursion on 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

[10] As a result, the Commission in 2012 launched a reform process called "Process for Strengthening the Inter-American System." *See* OAS.ORG, http://www.oas.org/en/iachr/mandate/strengthening.asp (last visited Sept. 29, 2012).

[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), http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-307/12 (last visited Sept. 29, 2012).

[12] *See*, for example, SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL, (Kai Ambos, Ezequiel Malarino, & Gisela Elsner , eds. 2010)

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development of quasi-criminal jurisdiction raises questions of legitimacy, however, it becomes

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at http://www.kas.de/rspla/es/publications/21282/ (last visited September 28, 2012); SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL-TOMO II (Kai Ambos, Ezequiel Malarino & Gisela Elsner eds. 2011) at http://www.kas.de/rspla/es/publications/31766/ (last visited September 28, 2012). For arguments that the Inter-American Court's overemphasizes penal responses, s*ee also* Daniel Pastor, "*La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos*," 1 NUEVA DOCTRINA PENAL 2005, 73-114; 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 105-147 (Roberto Gargarella ed., 2008). For a defense of the Court, *see* Oscar Parra, *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 Abramovic, *Transplante y Neopunitivismo: debates sobre la aplicación de del derecho internacional de los derechos humanos en Argentina, in* ACTIVISMO DE LOS DERECHOS HUMANOS Y BUROCRACIAS ESTATALES. EL CASO WALTER BULACIO (Sofía Toscornia ed., 2009); Leonardo Filippini, *El Prestigio de los Derechos Humanos: Respuesta a Daniel Pastor,* 3 JURA GENTIUM 2007 *available at* http://www.juragentium.org/topics/latina/es/filippin.htm (last visited September 28, 2012).

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all the more important to understand this practice in action, and to assess its outcomes empirically. Further, it is important to evaluate the practice not only in the context of the Court's original mandate, 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, a) that the regional 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 b) 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 of 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 (AU) has announced that it is considering amending the protocol for the proposed African Court of Justice and Human Rights to include criminal jurisdiction.[13] The new African Court would become the first international forum with power 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

[13] For the proposed amended protocol, *see* Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *as adopted by the Ministers May 17*, 2012, O.A.U. Exp/Min/IV/Rev.7 *available at* http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf (last visited Sept., 29, 2012).

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rights systems' experience with quasi-criminal jurisdiction should be relevant to the AU as it considers how to contend with the challenge of state-sponsored atrocity crimes in its region.[14]

The article proceeds in three parts. Following the introduction, Part I presents data on the Inter-American Court's practice of ordering states to prosecute and monitoring the results. It begins to map, for the first time, how the Court and states interact towards prosecution through the Court's supervisory regime. It then describes the quasi-criminal jurisdiction of the Council

[14] For an account of some of the challenges the project of merging the jurisdictional types poses, s*ee* Max Du Plessis, *A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes,* EJIL TALK.ORG (Aug., 27, 2012), http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (last visited Sept., 29, 2012). *See also* Franz Viljoen, *AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol,* AFRICAN LAW. COM, http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213 (last visited Sept., 29, 2012); Gino J Naldi & Konstantino D Magliveras, *Africa Contemplates Creating International Crimianl Law Entity,* Newsletter (Summer 2012), AMERICAN SOCIETY OF INTERNATIONAL LAW ACCOUNTABILITY, *available at* http://www.asil.org/accountability/pdf/summer2012/AFRICA%20CONTEMPLATES%20CREATING%20INTERNATIONAL%20CRIMINAL%20LAW%20ENTITY.pdf (last visited Sept., 29, 2012).

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of Europe System, and that of other rights bodies. Part II juxtaposes the quasi-criminal review of the rights bodies to the existing family of international criminal justice mechanisms aimed at prosecution of 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 International Criminal Court 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, drove divergent evolutionary paths. While the ECHR came of age overseeing a group of well-functioning democracies committed to the rule of law, the Inter-American Court was confronted with mass state-sponsored violations of fundamental rights from its first contentious case. 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 responsible for the crime – and ongoingly 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

[15] *See* Inter-American Commission, *Report on the Work Accomplished during its Fifteenth Session (Special): 9 to 20 January, 1967*, OEA/Ser.L/V/II.16, Doc.20 (July 26, 1967).

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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.

Thus, while the European Court of Human Rights 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 closely supervise those prosecutions for their adherence to human rights standards, and to engage the state, victims and 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

[16] As one mother put it, "My son was not a cow, I don't want money, what I want is justice". Viviana Krsticevic *in* Symposium, *Reparations in the Inter-American System,* 56 American Univ. Wash. C.L. 1375, at 1419 (2007) (quoting a mother of one of the victims in the case *El Amparo v. Venezuela*).

[17] The first time the Court included an order to prosecute in the operative part of its reparations decision was in *El Amparo v. Venezuela*. El Amparo v. Venezuela, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 28, Resolutions 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)] (Inter-Am. Ct. H. R. June 29, 2005), *available at* http://www.corteidh.or.cr/docs/supervisiones/general_29_06_05.pdf. (last visited June 22, 2012). For a discussion of this evolution, see David C. Baluarte, *Strategizing for Compliance: The*

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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 which 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 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] For the Committee of Ministers, the Inter-American Commission, and the Human Rights Committee, the turn has involved declaring that states must investigate and punish specific acts that amount to international crimes, and supervising how well states live up to this demand.

The emergence of quasi-criminal review by the human rights bodies has gone little noted by scholars. This Part describes the evolution of the Inter-American Court's remedial and supervisory practices into a quasi-criminal jurisdiction, and the emerging quasi-criminal

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Evolution of a Supervising Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victim's Representatives, AM. U. INT'L L. REV. (forthcoming 2012).

[19] Lorna McGregor, *The Role of Supranational Human Rights Litigation in Strengthening Remedies for Torture Nationally*, 16 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 737, at 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 INTERNATIONAL JOURNAL ON HUMAN RIGHTS 7 (2009).

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jurisdiction of the Council of Europe and other rights bodies. It closes with a discussion of the concerns these changes have raised.

The First Innovation: Prosecution as Equitable Remedy

The Inter-American System for Human Rights (IAS) of the Organization of American States (OAS) 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, and issuing country reports, as well as investigating individual petitions. It is also the first instance in the IAS individual petition process. The Commission receives roughly 1,500 complaints a year. Once it deems a petition admissible, it

[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 (Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Rome, 4.XI.1950) [hereinafter European Convention], *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (last visited June 22, 2012); and the African system, based on the African Charter on Human and Peoples' Rights (African Union [previously Organization of African Unity], African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), *available at* http://www.achpr.org/english/_info/charter_en.html (last visited June 22, 2012). Other regional systems, such as the Economic Community of West Africa States (ECOWAS), also take on human rights matters. *See* COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICA, http://www.ihrda.org/court-of-justice-of-the-economic-community-of-west-african-states/ (last visited June 22, 2012).

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investigates the claims and works with the claimant and state towards 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 Court, but only if the non-compliant 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 Inter-American Court. [25] In 2011 the Commission accepted petitions for processing, issued five reports on

[22] For a description of the petition process, see *What is the IAHRS,* CIDH.OAS.ORG [hereinafter *Brief History IAHRS*], *available at* http://www.cidh.oas.org/what.htm (last visited Feb. 6, 2011).

[23] Inter-Am. Comm'n H.R., Rules of Procedure arts. 44-6, approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009 [hereinafter Rules of Procedure of the Inter-Am. Comm'n H.R.], *available at* http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm (last visited June 22, 2011).

[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, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, 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. *Multilateral Treates*, OAS.ORG [hereinafter Inter- American Court Information],

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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 hearing 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 Inter-American 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

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http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Sept. 20, 2012).

[26] *Annual Report 2011*, Chapter III(b) (2011), INTER-AM. COMM'N H.R., *available at*: http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp. (last visited June, 22 2011).

[27] The jurisdiction of the Court is set out in the American Convention articles 61-64. Organization of American States, American Convention on Human Rights arts. 61-64, Nov. 22, 1969, 1144 U.N.T.S. 123, *available at* http://www.oas.org/juridico/English/treaties/b-32.html.

[28] *Id.* at 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] INTER-AM. CT. H.R., *supra* note 5 (the Court and Commission also issue provisional measures and preliminary measures, respectively).

[30] *See, e.g.,* Brian D. Tittemore, *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 Gonzalez,

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truth,[32] and the right to judicial process.[33] Their innovations have been perhaps even greater in the realm of remedies and their supervision.[34] The first two contentious cases to reach the Inter-American Court 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

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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).

[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 Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Scheme*, 49 VA. J. INT'L L. 915 (2009).

[32] *See, e.g., Inter-American Court Issues Groundbreaking Ruling on Right to Truth and Information*, OPEN SOCIETY INSTITUTE (Jan. 13, 2011), *http://www.soros.org/initiatives/justice/news/araguaia-gomes-lund-ruling-20110113* (last visited June 22, 2011)*;* Thomas M. Antkowiak, Note, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977 (2002).

[33] Basch, *see supra* note 12.

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

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

[36] *Id.*

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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 ruling orders that the state investigate and punish the underlying crime.[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. While 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, while the initial emphasis was on the state's duty to respect the rights guaranteed by the American Convention, such as the right to life, the Court also roots orders to investigate and punish in the American Convention's right to a fair trial and right to judicial

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

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

[39] *See* Alexandra Huneeus, *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, beyond international crimes, the Court should allow states to decide whether and which acts to prosecute). The Court itself has back-tracked on this claim, which should be interpreted rather as a duty to prosecute any act in violation of the Convention that is also a crime under national or international law. *Id.*

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protection.[41] Thus, the emphasis has shifted away from a state's general duty to guarantee rights, and towards 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 the *Myrna Mack v Guatemala* ruling, for example, the Court orders the state to conduct a criminal investigation of the extra-judicial killing that forms the basis of the complaint.[44] After recounting the (inadequate) steps the state had already taken in the prosecution, the Court specified how Guatemala must now proceed: It must investigate, judge and punish not only all of the material but also the intellectual authors of the crime, seeking responsibility beyond the one culprit currently in prison; it must also prosecute the efforts to hide and obstruct investigation of the underlying crime.[45] The state must inform the victims and Guatemala of exactly what happened, and the results of the prosecution

[41] *Id.*

[42] This shift has been the subject of some criticism from those who worry that the Court is expanding victim's rights at the cost of due process rights for defendants. *See supra* note 12.

[43] Trujillo-Orozca v. Bolivia, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 100 (Feb. 27, 2002); Cantoral Benavides v. Peru, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 69 (Dec. 3, 2001); Cesti Hurtado v. Peru, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 78, ¶ 62 (May 31, 2001); Myrna Mack-Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 273 (November 25, 2003).

[44] Myrna Mack-Chang v. Guatemala, *supra* note 43, at ¶ 5-6.

[45] *Id.* at ¶ 275.

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must be publicly published. [46] Most stridently, the state should remove any obstacles that block the progress of the prosecution, including amnesty, prescription, *res judicata* and other procedural doctrines.[47] And it should guarantee security to judges, prosecutors, witnesses and other judicial actors as well as the victim's family.[48] Finally, it should 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 investigates 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

[46] *Id.* at ¶ 273-275.

[47] *Id.* at ¶ 276.

[48] *Id.* at ¶ 277.

[49] *Id.* at ¶ 277.

[50] *See, e.g.,* 19 Merchants v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 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.") and ¶ 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).

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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 Inter-American Court has interpreted its mandate to including supervising the implementation of its rulings.[53] It remains seized of a case until it deems there has been full

[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 AM. J. INT'L L. 768, at 781 (2008); Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights* 6 J. INT'L L. & INT'L REL. 35, at 47 (2010).

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

[53] The American Convention of Human Rights says only that the Court can refer a case of non-compliance with the OAS General Assembly (GA) (art. 65). This, however, the Court quickly learned was not effective: the OAS GA did not act forcefully in the instances it did send a case. Since 1996, the Court has interpreted the Convention to allow it to monitor its own rulings. *See* Baena-Ricardo et al. v. Panama, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104 (November 28, 2003) (rejecting Panama's challenge to its power to supervise compliance) and Inter-Am. Ct. H.R., Rules of Procedure art. 69, approved by the Court during its 85th Regular Period of Sessions, held from November 16-28, 2009, *available at:*

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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 and their representatives in the supervision, this has become an important phase of litigation before the Court.[54] Further, the compliance phase of litigation has evolved in recent years. The Court is investing a growing amount of time and resources into this ongoing supervision. Last year, for example, it issued thirty-two compliance reports.[55] Compliance reports have become more regular and more detailed. Further, the Court has 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 towards overcoming obstacles to implementation.

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http://www.corteidh.or.cr/reglamento/regla_ing.pdf (last visited June 22, 2011) (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).

[55] Whereas it issued only 18 rulings in contentious cases. *See Jurisprudence Monitoring compliance with judgments, in Jurisprudence,* INTER-AM. CT. H.R., http://www.corteidh.or.cr/supervision.cfm?&CFID=989981&CFTOKEN=54648700 (last visited June 22, 2011).

[56] *See* Baluarte, *supra* note 18.

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When the Court decrees prosecution as a remedy, it thus 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. First, the Court at times delves deeply into criminal process. Where the parties to the case – the state, the victims and the Commission – provide enough information, the Court is able to opine in some detail. The Court makes substantive as well as procedural demands. To illustrate it is worth quoting a compliance report at length. In *La Rochela Massacre v Colombia*, the Court ruled on a case in which a paramilitary group killed 13 judicial officials conducting investigations into crimes committed in the Santander department.[57] In its reparations ruling of 2007, the Court orders the state to conduct a more complete criminal investigation.[58] During the supervision stage, the Court finds that 21 years after the crime and three years after the Court's reparations ruling, the investigation into the case is still not being conducted with due diligence.[59] The following quote is an example of how deeply the Court delves into criminal matters:

> 160. The Court observes that the Office of the Attorney General received various statements that point to the participation of senior military leaders and other State agents in the events surrounding the Rochela Massacre. These included the statements made from 1995 to 1998 by the well-known member of

[57] Rochela Massacre vs. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).

[58] *Id.* at ¶ 9-10 .

[59] Rochela Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. August 26, 2010).

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the paramilitary forces, Alonso de Jesús Baquero Agudelo, who was convicted for the homicide of the judicial officials in 1990 (*supra* 154.b). In a resolution of September 12, 1997, the Office of the Delegate Regional Prosecutor of the National Human Rights Unit summarized the pertinent parts of these statements, in which the witness described "not only the motives for this atrocious act, but also the creation and evolution of the criminal organization to which the hired assassins or material authors belonged, and also named the intermediaries, sponsors, decision-makers and intellectual authors." The Prosecutor highlighted that:

> These statements not only describe the facts that gave rise to the presence of the Judicial Commission that was massacred (that is, with regard to the tradesmen), but also relate how this criminal organization was created; identified its center of operations in Puerto Boyacá under the front of the ASSOCIATION OF FARMERS AND RANCHERS OF THE MAGDALENA MEDIO (ACDEGAM); […] the initial collection of quotas to support it from farmers and livestock owners, and the subsequent alliances with drug traffickers; the direct intervention and support of the commanders of the Second Division Brigades and Battalions of the National Army, as in the case of Generals FARUK YANINE DIAZ, CARLOS GIL COLORADO, VACA PERILLA, SALCEDO LORA and MANUEL MURILLO, Colonels FAJARDO CIFUENTES, DAVILA, BOHORQUEZ, LONDOÑO, VERGARA and NAVAS RUBIO, and Major OSCAR DE JESÚS ECHANDÍA SANCHEZ; the military training

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> academies where courses are given by foreign mercenaries […and] the massacres and executions that were planned by the leaders of the groups of hired assassins […].

161. In addition to the testimony of Alonso Baquero Agudelo, two other statements and a public complaint tied General Farouk Yanine to the perpetration of the massacre, and a still another statement alluded to the possible responsibility of a Navy intelligence network. Likewise, the relationship between the ACDEGAM paramilitary group and senior military leaders in the area has already been described (*supra* para. 90). In this regard, the Court observes that, even though the Office of the Attorney General and the Office of the Procurator had all of these probative elements since the mid-1990s, it was only in September 2005 that it issued an order to receive the spontaneous declarations of retired General Yanine and other senior military leaders allegedly involved in the Rochela Massacre. None of these military commanders has been formally tied to the investigation.

162. The Court also observes that, despite the connections among the two cases (*supra* footnote 75 and 90) the Office of the Attorney General failed to take into account the relationship that existed between the Rochela Massacre and the case of the disappearance of the 19 tradesmen. As a result, the Office of the Attorney General excluded two individuals from the investigation. In the case of Luis Alfredo Rubio Rojas, a member of the ACDEGAM board of directors, the Office of the Attorney General found that an investigation of a member of the ACDEGAM board of directors for the acts of that group "has no connection with

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the multiple homicides under investigation in the [The Rochela massacre] proceedings." Consequently, it ordered that the respective investigation should be conducted separately. In another case, when revoking the charges against retired Major Oscar de Jesús Echandía, the Regional Director of the Prosecutor's Office [*Dirección Regional de la Fiscalía*] found that the massacred Judicial Commission "was not investigating the disappearance of the 19 tradesmen," and therefore ruled out that the motive of the Rochela Massacre was to seize the case file on the disappearance of the 19 tradesmen, together with the related evidence, from the Judicial Commission. …

164. The Court notes that the judicial authorities did not develop an investigation into the combination of probative elements that pointed to security forces, including senior military leaders. As a result, the investigations have been partially ineffective. In addition, there was a lack of diligence with regard to the development of a line of investigation, which took into account the complex structure of the perpetration of the crime (*supra* para. 158). This failure has caused some of the investigations into the Rochela Massacre to be ineffective, particularly with regard to the investigation into the responsibility of senior military commanders in the area. In this regard, the absence of an exhaustive investigation into the operational structure of the paramilitary groups and their linkages and relationships with State agents, including members of the security forces, has been one of the factors that has hindered the investigation, prosecution and punishment of all those responsible. In particular, this affected the determination of possible responsibility of the commanders of the military

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battalions located within the area of operations of the paramilitary groups tied to the massacre.[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 that should be investigated, and it suggests analytical connections that should be drawn between cases. This, indeed, is an extension of the Courts mandate into a form of quasi-criminal review.

A second noteworthy feature of the supervision of national prosecutions is that while the Court's merits and reparations rulings reflect *retrospectively* on a state's violation 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 the underlying prosecution. Even as the local justice system sits in judgment of the alleged perpetrator of international crimes, the Court sits in judgment of

[60] *Id.* at ¶ 160-164.

[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 vs. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 9, 2009).

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the local justice system. Through this compliance phase, the Court strives to shape national prosecutions of international crime to meet international human rights standards.

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 Rodriguez-Garavito finds 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 they 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 "the unlocking of 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 fulfill the Court's order and for the victims to be satisfied. The meaning of the remedial order thus evolves through the back and forth dialogue between parties during the supervision phase.

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[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.

[63] César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America*, 89 TEX. L. R. 1669 (2011).

[64] *Id.* at 1696.

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The supervision of national prosecutions, then, tracks substantive and procedural issues in detail, takes place in parallel to the national prosecution, and unfolds through a dialogic interaction (including face-to-face meetings) with the parties. Taken together, these features yield a singular phase which we have called quasi-criminal review. This innovation is not without critics. After some initial resistance, states have accepted the evolution of the Court's supervision of compliance with its rulings.[65] But they still balk at the Court's incursion into their criminal procedural affairs. The compliance reports reveal that the Colombian government 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:

> [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.[66]

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

[65] 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 et al. v. Panama, *supra* note 53.

[66] Mapiripán Massacre vs. Colombia, Monitoring Compliance with Judgment, Order of the Court, ¶ 20 (Inter-Am. Ct. H.R. July 8, 2009).

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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."[67]

Such assertions, however, can "ring hollow"[68] 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. Further, and, as Ratner et al argue, the Court's "evidentiary practices and capabilities are ill-suited to the task" of investigating individual responsibility. [69] This was made 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 to whose relatives reparations must be paid. At least one of the alleged victims was later found to be still living.[70] As a *Wall Street Journal* op-ed argued, such a lapse is more likely where, as in Inter-American Court proceedings, witnesses can file their testimony by affidavit,

[67] Pueblo Bello Massacre vs. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 9, 2009).

[68] Malarino, *supra* note 12, at 691.

[69] RATNER ET AL., *supra* note 6, at 257-258. But the authors also concede that the individual petition mechanism before the regional courts is more effective. *Id.* at 258.

[70] *See Press Release, With Regard to Recent Events Surrounding the Mapiripán Massacre in Colombia*, OAS.ORG (October 31, 2011), http://www.oas.org/en/iachr/media_center/PReleases/2011/114.asp

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and there is no cross-examination.[71]

One bright line, however, 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 too scared 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.[72]

The Court itself, then, will not conduct prosecutorial acts. Unlike the criminal and hybrid tribunals, it leaves all the hands-on work to the state. However, the Court interprets it mandate to allow it to order, monitor and guide – in great detail, at random intervals, over an indefinite

[71] *See* Maria Anastasia O'Grady, *A Human Rights Swindle in Colombia*, WALL STREET JOURNAL, Nov. 7, 2011.

[72] Moiwana Community vs. Suriname, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22 2010).

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amount of years, and in dialogue with all the litigating parties – the substantive and procedural aspects of national prosecutions as they unfold.

The Court's Quasi-Criminal Jurisdiction in Action

What has the Inter-American Court achieved through its quasi-criminal jurisdiction? No state has ever fully complied with an Inter-American Court order to prosecute and punish for an international crime.[73] However, the Court's compliance reports record the actions taken by the state that advance it toward completion of a particular order, even when it has not yet fully complied with that order.[74] This section examines the response of states to Inter-American Court remedial orders in cases involving international crimes in three realms: prosecution outcomes,

[73] Castillo Páez v. Peru is the closest 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. Perú, Monitoring Compliance with Judgment, "Considering" ¶ 10, (Inter-Am. Ct. H.R. Apr. 3, 2009), *available at:* http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09.pdf (last visited June 22, 2011).

[74] As Hawkins and Jacoby argue, partial compliance with Court rulings is the most common modality of states in regional rights systems. Little is gained, therefore, by counting only cases of full compliance with a Court ruling in a case in its entirety. This study qualitatively evaluates partial compliance with a particular type of order, using the information provided in the compliance reports. *See* Hawkins & Jacoby, *supra* note 51.

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restorative justice, and institutional learning. It is based on original coding of a database which includes 145 rulings and 238 compliance reports.[75]

Prosecutorial Outcomes

There are a total of fifty-one contentious cases in which a) the Inter-American Court has ordered the state to conduct a criminal investigation;[76] b) the underlying state violation of the American Convention can also be characterized as an international crime;[77] and c) the Court had

[75] 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 is 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% 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.

[76] Thus the group of cases 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 and Godínez-Cruz v. Honduras, *supra* note 35.

[77] Thus, the acts underlying the case before the Inter-American Court can be characterized as an act of genocide, a crime against humanity, or a war crime. Only these three crimes are considered here, following the jurisdiction of the main ICL tribunals. Of course, only a criminal court could make the final determination of whether the elements of the crime are actually met.

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issued at least one compliance report by September 2012.[78] 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.[79] In others, procedural laws such as amnesties or statutes of limitations blocked the way.[80] In yet others, intellectual authors of the

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But all the cases included demand prosecution for acts which, *prima facie*, constitute an international crime.

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

[79] *Id.*

[80] *See, e.g.*, Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

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crime had not been investigated even as lower-ranking offenders served time,[81] or arrest warrants had not been issued or executed.[82]

The compliance reports reveal that in twenty-four of the fifty-one cases there has been little to no advancement in the prosecution since the ruling came down.[83] 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 the Court's ruling has yielded no change. In one case, for example, the Court writes "the violations in the instant case remain unpunished, which was noted by the Court in its Judgment on the merits over eight years ago and nearly seventeen years after the incidents."[84] 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

[81] *See, e.g.*, Goiburú et al. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

[82] *See* Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006).

[83] 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."

[84] Bámaca-Velásquez v. Guatemala, Monitoring Compliance with Judgment, "Considering," ¶ 15 (Inter-Am. Ct. H.R. Jan. 27, 2009).

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proceeding.[85] 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 path to prosecutions is no longer obstructed.[86] Procedural hurdles have been cleared, indictments and convictions have

[85] *See*, for example, Heliodoro Portugal v. Panama, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 28, 2010) (Inter-American Court finds that the Panamanian Supreme Court has declared that the underlying acts were of a character that did not allow them to be subject to statute of limitations. The Inter-American Court also finds 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.)

[86] Barrios Altos v. Peru, Monitoring Compliance with Judgment, Order of the President of the Court (Inter-Am. Ct. H.R. Dec. 7, 2009); Blake v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Jan. 22, 2009); Castillo-Páez v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 19, 2011); Myrna Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 16, 2009); Servellón-García et al. v. Honduras, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 5, 2008); Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 21, 2011); Goiburú et al. v. Paraguay, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 19, 2009); Cantuta v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 20, 2009); Palmeras v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 3, 2010).

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come down, and the prosecutors and judges are moving the case forward at a reasonable pace. [87] 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 cases (see table two).[88] These are convictions that took place *after* the Inter-American 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 investigation continue to be stalled or deficient.

Table One: Convictions following Inter-American Court Order to Investigate and Punish

Name of case and year of	

[87] *See, e.g.*, Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court, "Considering" ¶ 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.")

[88] Note that the actual number may be higher, as some of the cases have not received a compliance report in several years. It is also possible that a state fails to report a conviction.

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reparations ruling	Convictions *since* reparations ruling
Barrios Alto v. Peru (2001)	1 conviction (in case of a massacre)[89]
Blake v. Guatemala (1999)	1 conviction for forced disappearance and assassination [90]
Castillo Páez v. Peru (1998)	4 convictions for crimes against humanity (in case of forced disappearance)[91]
Escué Zapata v. Colombia (2007)	2 convictions for homicide (in case of extra-judicial killing of civilian by state agents)[92]
Goiburú v. Paraguay (2006)	5 convictions (in cases of forced disappearance)[93]

[89] Barrios Altos v. Peru, Monitoring Compliance with Judgment, Order of the President of the Court (Inter-Am. Ct. H.R. Dec. 7, 2009).

[90] Blake v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 27, 2003).

[91] Castillo-Páez v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. April 3, 2009).

[92] *See* Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb 21, 2011). In this case three persons were convicted in 2008, however after the appeal, one of them was absolved (therefore it is not counted here as a separate conviction).

[93] 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. *See* Goiburú et al. v. Paraguay, *supra* note 86.

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La Cantuta v. Peru (2006)	4 convictions (in cases of murder and forced disappearance)[94]
Las Palmeras v. Colombia (2002)	3 conviction for aggravated homicide (in cases of extra-judicial killing of civilians by members of police and or army)[95]
Manuel Cepeda Vargas vs Colombia (2010)	2 convictions for aggravated homicide (in cases of extra-judicial killing of civilians by members of police and or army)[96]
Masacre de las Dos Erres vs. Guatemala (2009)	3 convictions (in case of a massacre)[97]
*Masacre de Mapiripán v. Colombia (2005)**	6 convictions (in case of a massacre)[98]

[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. However, his conviction is counted only once, under the *Barrios Altos* case above. *See* Cantuta v. Peru, *supra* note 86.

[95] *See* Palmeras v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 4, 2008). However, two of the three convicted were not in state custody, and could not be found. *See* Palmeras v. Colombia, *supra* note 86.

[96] *See* Manuel Cepeda Vargas v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 30, 2011).

[97] *See* Masacre de las Dos Erres v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 06, 2011).

[98] Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 8, 2009) (Court does not specify with what crime the convicts were charged.).

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Masacre de Pueblo Bello v. Colombia (2006)	2 convictions (in case of a massacre)[99]
Masacre de la Rochela v. Colombia (2007)	2 convictions (in case of a massacre)[100]
Myrna Mack Chang v. Guatemala (2003)	1 conviction for murder[101]
Servellón García y Otros Vs. Honduras (2006)	2 convictions for forced disappearance and assassination (in case of extra-judicial killing of civilians by members of police or army)[102]
Valle Jaramillo y Otros Vs. Colombia (2008)	1 conviction for homicide (in cases of extra-judicial killing of civilians by members of police and or army)[103]

[99] Pueblo Bello Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 9, 2009) (Court does not specify with what crime the convicts were charged.).

[100] Rochela Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 26, 2010) (Court does not specify with what crime the convicts were charged.).

[101] Myrna Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Sept. 12, 2005). However, the convict is not under state custody: he escaped, and the Court is keeping the case open and under supervision, prompting the state to find him.

[102] Servellon Garcia y Otros v. Honduras, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2011).

[103] Valle Jaramillo y Otros v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Dec. 21, 2010).

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Total Cases: 15	Total Convictions: 39

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 to investigate and punish for international crimes, there have been only thirty-nine convictions. Further, with the exception of *Castillo Paez v. Peru*, many more indictments and sentences are still due in most of those cases in which the state has reached one or more convictions. Often those not yet sentenced are the intellectual authors of the crimes – those who directed and led the crimes, but who hold social power, as opposed to those who executed them. In some cases, the convictions were for a lesser crime than what the Court thought appropriate.[104] Finally, many of these convictions came slowly: the average for this set of cases is five years between the reparations ruling and the compliance report that first reports the conviction.

When juxtaposed to the reality as opposed to the aspirations of international criminal law, however, the outcomes appear noteworthy. Guatemala, Colombia 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 extremely rare.[105] And this set of cases, which involve

[104] *See* Goiburu v Paraguay, *supra* note 86.

[105] "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."' [from David Grann, *A Murder*

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powerful figures acting while holding office, are particularly difficult to process. Even where there has been a transition in government, as in Guatemala, many of those implicated still form part of powerful networks able to thwart well-intentioned prosecutor and judges.[106] These are the kind of cases that rarely reach sentencing in even disciplined rule of law states.

Indeed, the international criminal tribunals can also move slowly. The ICC started its work in 2002, which is roughly when the Inter-American Court began to issue compliance reports with more regularity. After a decade's work, the ICC has issued twenty-eight indictments and has reached the sentencing stage in only one of its cases.[107] The ICTY began its work roughly at the same time as the Inter-American Court began issuing orders to prosecute. Over its 28-year life span, the ICTY has sentenced 64 high-level persons, and it recently arrested its last high-level indictee still at large.[108] The comparison is particularly striking if we consider the difference in yearly budget. Both the ICC and the ICTY cost approximately $150 million in

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Foretold, THE NEW YORKER, April 4, 2011, at #], *available at* http://www.newyorker.com/reporting/2011/04/04/110404fa_fact_grann?currentPage=2

[106] 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.)

[107] ICC budget, *supra* note 5.

[108] *See* Marlise Simons, *Serbia Arrests Its last Fugitive Accused of War Crimes*, N.Y. TIMES (July 20, 2011), http://www.nytimes.com/2011/07/21/world/europe/21goran-hadzic.html?_r=1. For a list of the ICTY's indictees, see *The Cases*, ICTY.ORG, http://www.icty.org/action/cases/4 (last visited June 22, 2011).

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2011.[109] The Inter-American Court cost roughly $4 million in 2011.[110] It might be argued that the Inter-American Court passes the costs of the prosecutions to national systems. Then again, that is where the international order would prefer the costs to lie. The comparison between these jurisdictions will be more carefully drawn in Part III, but is here sketched only to show that the prosecutorial outcomes that follow on Inter-American Court orders are not negligible.

One difficulty with this sketch of what states have done following Court orders is that of proving causation. The verb "following" in this context is ambiguous: it can mean subsequent in time, or it can mean "obeying." In some instances, it is evident from the narrative in the compliance report that the state action is a direct response to the Court ruling. Further, it is a prerequisite to petitioning the IAS that local judicial first be exhausted; thus, we can assume in cases of state-sponsored atrocity that progress of the 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. This is particularly so where the supervision phase has dragged on for years. Overcoming impunity is a complex social process, and many distinct sources of pressure to prosecute on states may be at play.[111] Further empirical work is needed to determine whether the

[109] *See supra* note 5.

[110] *Id.* .

[111] Indeed, there is a rich scholarly literature debating which factors have caused some states to prosecute for the crimes of repressive governments, while others have not. *See, e.g.,* Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5 (2003); CATH COLLINS, POST-TRANSITIONAL JUSTICE: HUMAN

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Court's intervention spurred prosecutorial action that would not otherwise have taken place.[112] Note, however, that evaluating the effects of the international criminal tribunals can also be tricky: although we know that the prosecutions conducted by, for example, the ICTY or the SCSL are a direct product of the actions of those tribunals, we do not know whether, over time, the national courts would have prosecuted had not the international court taken over the case. Even without further empirical study, and until such a study be done, the record suggests that the

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RIGHTS TRIALS IN CHILE AND EL SALVADOR (2011); TRICIA D. OLSON, LEIGH A. PAYNE AND 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).

[112] We are in need of both quantitative studies, 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: PRIMERIA 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 (Marie-Bénédictine Dembour and 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., 2007).

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Inter-American Court's rulings and monitoring are worth considering as a relevant 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."[113] However, the objectives ascribed to international criminal institutions go beyond retribution. In particular, one goal of the international community is to repair or reform the criminal justice system of the affected state, as a way to enable states to undertake prosecutions themselves and, more generally, to restore the rule of law. Luis Moreno Ocampo began his term as first prosecutor to the ICC declaring that the ultimate marker of its success would be an empty docket as national courts become able and willing to prosecute on their own.[114] The hybrid tribunals, in particular, are touted as improving

[113] Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 900, 37 I.L.M. 999 [hereinafter Rome Statute].

[114] "[A]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success." 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), *Office of the Prosecutor,* ICCNOW.ORG, http://www.iccnow.org/documents/MorenoOcampo16June03.pdf (last visited June 22, 2011).

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national justice systems because national actors learn by working in partnership with international actors.[115]

Both the Inter-American and European regional rights systems could also be described as engaged in building local justice system capacity. They are triggered into action only when the domestic system does not provide an adequate remedy, and in this sense are subsidiary. But they also proactively foster structural changes to enhance the domestic system's ability to provide an adequate remedy. The European Court has taken on many cases having to do with excessive judicial delay, demanding that states provide more expedited procedures.[116] The Inter-American Court, in turn, 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

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Cited in 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).

[115] *See, e.g.,* Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

[116] Prominent examples include, *e.g.*,Lukenda v. Slovenia App. No.23032/02 Eur. Ct. H. R. (June 10, 2005); Botazzi v. Italy App. No. 34884/97 Eur. Ct. H. R. (July 28, 1999); Scordino v. Italy App. No 36813/97 Eur. Ct. H. R. (July 29, 2004); Kudla v Poland App. No. 30210/96 Eur. Ct. H. R. (Oct. 26, 2000), among many others. 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); *see also* PHILIP LEACH, HELEN HARDMAN, SVETLANA STEPHENSON, BRAD K. BLITZ, RESPONDING TO SYSTEMATIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF 'PILOT JUDGMENTS" OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL (2010).

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system actors take courses in human rights, declaring in a recent case, for example, that "this Tribunal considers it important to fortify the institutional capacities of the Mexican state through the capacitation of public functionaries."[117] The Inter-American System has also taken on a special role in preserving judicial independence: there is a line of cases in which judges appeal to the IAS as a way to denounce and receive protection from illegitimate political intrusion.[118] The supervision of individual prosecutions thus comes hand in hand with the supervision of the Inter-American System's other reform-oriented measures, including orders to reform entire judicial systems through legislation.[119]

[117] 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, respectively,* Radilla Pacheco v. Mexico, Inter-Am. Ct. H. R. (ser. C) No. 209 (Nov. 23, 2009); and González et al. ("Cotton Field") v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

[118] See, for example, Constitutional Court v. Peru, Inter-Am. Ct. H. R. (ser. C) No. 71 (January 31, 2001) (declaring that Peru violated the American Convention by removing three constitutional court judges for political reasons); and Apitz Barbera and others v. Venezuela, Inter-Am. Ct. H. R. (ser. C) No. 182 (August 5, 2008) (demanding that Venezuela reinstate three judges removed for ruling against the government).

[119] Thus, in Radilla Pacheco v. Mexico, the Court orders Mexico to investigate and punish for the forced disappearance of Mr. Radilla Pacheco, but it also orders 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 117.

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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 is a teaching opportunity. Unlike in the hybrid tribunal scenario, local actors do not work in partnership with international actors. However, through supervision the Court keeps open a dialogue with the state on the obstacles to compliance and offers suggestions on how to overcome them, while pressuring state actors to do so. Indeed, the compliance reports reveal many instances of the national justice system adapting laws and working methods so as to enable prosecutions to move forward. Subsequent to Court orders, judges have reinterpreted laws in ways that facilitate prosecution of international crimes, altered their working procedures, and even changed their penal codes. The cases examined reveal instances of national judges re-interpreting local doctrine so as to overcome procedural hurdles and allow the Court-mandated prosecutions for international crimes to go forward. One way to do this is by arguing that the Court's rulings are mandatory, or in the language of US law, self-executing, and thus override local procedure.[120] High courts in Argentina, Bolivia, Colombia, Chile, Guatemala and Peru have ruled that the Court's orders are self-executing, and trump procedural law.[121] These interpretations then leave

[120] *c.f.* Medellín v. Texas, 555 U.S. 922 (2008) (ruling that the ICJ's rulings were not self-executing, and that Texan courts did not have a duty to implement the ICJ-mandated remedies.

[121] *See* Bámaca-Velásquez v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 18, 2010) (citing to cases in Argentina, Bolivia Colombia, Guatemala and Peru in which high courts deem the Court's orders to be self-executing) and Almonacid-Arellano et al. v. Chile, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 18, 2010) (citing to a Chilean Supreme Court ruling in the same vein).

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their mark on the legal system. In some cases, they pave the way for the Court-mandated prosecutions to move forward in face of contrary national procedural laws, including amnesties. In others, they leave a precedent in the national system that could be adopted by other judges to overcome procedural hurdles in cases not before the IAS. 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 so as to ascertain the proper prosecution of its cases.[122] The Court has been

[122] For example, in a report on compliance with *Bámaca-Velásquez v. Guatemala,* the Court writes 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 claims that one direct outcome of this Roundtable was that in December 2009 the Guatemalan Supreme Court declared the Court's orders to be self-executing. *Bámaca-Velásquez, supra* note 121. In *Mapiripán Massacre v. Colombia,* the Court asked the state to create a working group for implementation of its orders. Colombia complied, and 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 24 meetings, and advanced the implementation of the Court's remedies. Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 8, 2009). *See also* Molina-Theissen v. Guatemala, Monitoring Compliance with Judgment, Order

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particularly active in pushing states to live up to their treaty obligations under the Inter-American Treaty on Forced Disappearance, through which states take on the obligation to codify the crime of forced disappearance, within specific parameters.[123]

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,"[124] 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. Frederic Megret argues that the ICC in proactive complementarity mode could monitor not only judicial responses, but other kinds of state undertakings in response to mass atrocity, such as

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of the Court (Inter-Am. Ct. H.R. Nov. 16, 2009) (asking Guatemala to designate specific actors to coordinate the implementation of the remedies.)

[123] In *Trujillo-Oroza v. Bolivia*, for example, the Court orders the state to "define the forced disappearance of persons as an offense in its domestic legislation." Trujillo-Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92 (Feb. 27, 2002). In a subsequent compliance report, the Court deems the state to have complied. Trujillo-Oroza v. Bolivia, Monitoring Compliance with Judgment, Order of the Court, "Considering," ¶ 33 (Inter-Am. Ct. H.R. Nov. 16, 2009).

[124] Frederic Megret, *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 (2010).

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holding truth commissions,[125] and that it could issue orders to the state to erect memorials, and undertake other public acts.[126]

Should the ICC choose to stretch its mandate in this direction, the Inter-American Court's practice could provide a model.[127] Drawing on its well-established use of equitable remedies, the Inter-American typically pairs retributive justice with other transitional justice measures, tailoring its orders to a post-conflict society's multifold needs. Along with ordering prosecutions, the Court orders remedies that seek rehabilitation of the victims and, more generally, 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 officially apologize to victims and their relatives, and to construct memorials, among other remedies.[128] It has been particularly

[125] 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).

[126] Megret, *supra* note 124. The OTP itself requested assistance from the Inter-American System while developing the Victim's Fund.

[127] *Id. See also* Thomas 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 useful guide for other international courts).

[128] *Id.*

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creative in ordering states to conduct rituals of remembrance, such as the construction of shrines and memorials, and the holding of public ceremonies where the state officially apologizes to the victims.

Though aimed at retribution, the orders to prosecute and their supervision also have restorative justice dimensions. Because of the structure of the individual petition system, the human rights bodies provide victims an important, participative role in the international proceedings (even as they order states to include victims in the national proceedings).[129] The Court further enhances the role of victims by ordering that they be kept abreast of the prosecution as it unfolds.[130] The Court typically orders the state to publish its rulings in major newspapers, or even to broadcast it over the radio in the native language of the victims. Perhaps most significantly, the trail of former high-ranking officials can have an important educative effect, moving society as a whole towards 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 forty-four percent: in almost half the cases, the states implement the reparative measures.[131] Note that in these types of orders, as in orders for

[129] Although individuals cannot petition the Court directly, they 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.

[130] *See supra* note 50.

[131] Huneeus, *supra* note 39. *See also,* Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossa and Bárbara Schreiber, *The Effectiveness of the Inter-American System of*

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monetary compensation, causation is easier to trace because the orders are very specific. When Guatemala named a school after the child victims in the *Villagrán-Morales v. Guatemala* case,[132] just as when Surinam broadcast in the Saramaka language the ruling of the Court,[133] there was little doubt that this was a direct outcome of the Court's order to do so.

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 towards 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 conflictive violent past.

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 seventies and eighties, the governments themselves committed crimes against citizens, and then failed to prosecute. The European Court has issued

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Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions, 7 SUR JOURNAL 9 (2010).

[132] Villagrán-Morales et al. v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, "Having Seen," ¶ 4 (Inter-Am. Ct. H.R. Nov. 27, 2003).

[133] Pueblo Saramaka v. Surinam, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 23, 2011).

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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.[134] The European Court'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 practice into compliance with the European Convention.[135] However, under the Council of Europe System, the Court does not supervise compliance with its rulings. Rather, the Committee of Ministers (COM) is charged with declaring when a state has complied with a Court ruling and closing the case. Interestingly, the Committee of Ministers has begun engaging in a quasi-criminal practice, the ECHR's deferential position notwithstanding.[136]

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[134] *See* Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 European H.R. L.R.732,758-9 (2008) (arguing that the European Court 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").

[135] In other words, it declares that there has been a violation, and then defers to states on how to bring their practice in line with the European Convention of Human Rights. 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, Broniowki and Sejdovic Cases*, 7 HUMAN RIGHTS L. R. 396 (2007).

[136] 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

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In its supervision of the Chechnya cases, the Committee of Ministers 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 and Akayeva v. Russia,* for example, it writes:

> 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 emphasized that the effectiveness of general measures adopted so far will very much depend on the results achieved in the concrete cases.[137]

In its 2010 Annual Report and memoranda, the COM details the problems with the investigations conducted in the Chechnya cases following an ECHR ruling, noting lapses in lines

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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 was arguably a different form of quasi-criminal jurisdiction, no longer available. *See* Basak Cali, *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, 313 (2010). *See also* GROVER, supra note 8.

[137] Comm. Of Ministers, Council of Eur., Annotated Agenda and Decisions Adopted, app. 57942/00: Khashiyev Group v. Russian Federation, Doc. No. CM/Del/Dec (2011)1115, at 42 (June 10, 2011), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1115&Language=lanEnglish&Ver=immediat&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (last visited September 30, 2011).

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of investigation and other structural problems impeding prosecution. In June 2011, for example, the COM noted the "lack of cooperation by different law-enforcement agencies in dealing with the prosecutor's requests" and asks Russia to report on whether "the issue of responsibility of superior officers was examined by the investigators."[138] 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.[139] 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."[140] 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.[141]

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[138] *Id.* at 44.

[139] *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); Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 EUR. HUM. RTS. L. REV. 732 (2008).

[140] HUMAN RIGHTS WATCH, WHO WILL TELL ME WHAT HAPPENED TO MY SON?: RUSSIA'S IMPLEMENTATION OF EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS IN CHECHNYA (2009), *available at* http://www.hrw.org/en/node/85744 [hereinafter Human Rights Watch I].

[141] Comm. Of Ministers, Council of Eur., Decisions Adopted, app. 57942/00: Khashiyev Group v. Russian Federation, Doc. No. CM/Del/Dec(2011)1115, at "Decision," ¶ 4 (June 10, 2011), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1115&Language=lanEnglish&Ver

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However, as in the Inter-American setting, a close reading of the supervision memoranda 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.[142] In a 2010 memorandum the COM writes: "The setting-up of such a mechanism appears to be a positive development in finding concrete solutions concerning individual measures required by these judgments."[143] The outcome of a successful investigation still eludes, but Russia has taken steps which move it closer to prosecution -- albeit slowly, and perhaps only on paper.[144]

The Committee of Ministers, then, has moved toward a quasi-criminal practice. First, it made success in individual prosecution prerequisite to a finding of compliance with the general

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[142] Comm. of Ministers, Council of Eur., Ministers' Deputies Information Documents, Doc. No. CM/Inf/DH(2010)26 at "Introduction," ¶ 3 (May 27, 2010), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1626557&Site=COE.

[143] Comm. of Ministers, Council of Eur., Ministers' Deputies Information Documents, Doc. No. CM/Inf/DH(2010)26 at "Introduction," ¶ 20 (Secretariat's assessment) (May 27, 2010), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1626557&Site=COE.

[144] In a 2008 article, Philip Leach characterizes the Russian government's position before the COM's supervision as one of "obfuscation." However, he does note that "in response to the Court's earliest judgments in the Chechen cases, domestic investigations were reopened or re-instigated." *See* Leach, *supra* note 134, at 759.

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measures demanded by the ECHR. Then, it began supervising, at times in some detail, the course of individual prosecutions, aiming to influence the course they take, and taking note of particular lines of investigation and institutional innovations as they unfold. It should be noted that some commentators criticize the ECHR as too timid in its dealings with international crime,[145] and some urge the Council System to study the experience of the Inter-American Court and to move further in its direction.[146] However, important differences between the two systems' approaches are likely to persist. Formally, COM reports are not binding in the same way as a court decree, and it is unlikely that the European Court will alter its self-understanding and order states to conduct prosecutions. Further, the COM is more deferential to states and has many more cases on its plate than does the Inter-American Court. Thus, it will likely not delve into as detailed reporting on the advance of individual prosecutions, leaving Russia a bit more cover.

Other Supranational Rights Bodies

Beyond the human rights courts, other human rights bodies that receive individual petitions can also urge states to undertake prosecutions and monitor state compliance. The Inter-

[145] *See e.g.* GROVER, *supra* note 8; Giulia Pinzauti, *The European Court's Incidental Application of International Criminal law and Humanitarian Law: A Critical Discussion of* Kononov v. Latvia, 6 J. OF INT'L CRIM. JUSTICE 1043 (2008).

[146] *See e.g.* RÉPARER LES VIOLATIONS GRAVES ET MASSIVES DES DROITS DE L'HOMME: LA COUR INTERAMÉRICAINE, PIONNIÈRE ET MODÈLE? [REPAIR OF SERIOUS AND MASSIVE HUMAN RIGHTS VIOLATIONS: THE INTER-AMERICAN COURT, PIONEER AND MODEL?] (Société de Legislation Comparée [Society of Comparative Legislation]) (Elisabeth Lambert Abdelgawad & Kathia Martin-Chenut eds., 2010).

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American Commission, in particular, developed a practice in conjunction with that of the Inter-American Court of emphasizing equitable reparatory measures and monitoring their implementation. When the Commission publishes a report on the merits, it often lists among its recommendations that states prosecute. It then monitors whether the state has complied with the recommendation.[147] In its 2010 Annual Report, the Commission reports on the supervision of 143 cases.[148] Of these, 88 include recommendations to states to investigate and punish. Indeed, since the Commission decides which cases to refer to the Inter-American Court, and accompanies the 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.[149]

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 opine on individual communications alleging state violations.[150] At least two of these have adopted a practice of quasi-criminal review. In its

[147] Manoel Leal de Oliveira v. Brazil (Final Merits Report), Case 12.308, Inter-Am. C.H.R., Report No. 37/10 (2010).

[148] *See* Rep. Int-Am. Com. H. R. supra note 15.

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

[150] The Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, the Committee against Torture, and the Human Rights Committee.

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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. The Committee against Torture has also issued decisions on individual cases in which it declares that the state must investigate and punish for the underlying crime, although its orders are declaratory, and the supervision of these decisions is not public.[151]

The differences between the work of these rights bodies and the Inter-American Court is that while the practices of the Inter-American Commission, the Committee of Ministers and the Human Rights Committee resemble that of the Inter-American Court, their rulings do not have the same legal status as a binding court opinion, and their supervision of the implementation of their opinions is not as detailed or extensive as that of the Inter-American Court.[152] In this sense, they practice a weaker form of quasi-criminal jurisdiction than does the Court. Nonetheless, the main contours are the same: there is an order to investigate and punish in a particular case, and

[151] *See e.g.* Committee against Torture, Communication No. 327/2007 (Decision adopted by the Committee at its forty-seventh session, 31 October to 25 November 2011); and Communication No. 353/2008 (Decision adopted by the Committee at its forty-seventh session, 31 October to 25 November 2011), *available at* http://www2.ohchr.org/english/bodies/cat/jurisprudence.htm (last visited Sep. 20, 2012).

[152] The CAT 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.

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there is supervision (at least an incipient form of supervision) of the implementation of the order. Insofar as there seems to be among the human rights bodies a trend toward individual communications, more specific reparatory rulings, and supervision of state compliance, the practice of this weaker form of quasi-criminal review by human rights bodies may spread.[153]

Problematic Aspects of Quasi-Criminal Jurisdiction

The emergence of quasi-criminal review as practiced by supranational rights bodies has not been without controversy.[154] It raises several thorny issues. First, it arguably represents an illegitimate expansion of these bodies' mandates. The Inter-American 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 towards quasi-criminal review encroach on a terrain the states have not explicitly delegated to the Inter-American System. Most states seem to have accepted this expansion of the Court's jurisdiction, participating in the supervision proceedings and closed hearings. 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 alters the terms of the American Convention.

Second, because these bodies were not designed to supervise national criminal procedures, their capacity to do so is limited. When the Inter-American Court suggests lines of investigation to the Colombian courts, as shown above,[155] 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

[153] *See* Mcgregor, *supra* note 19.

[154] *See supra* note 12.

[155] *See supra* note 59 and surrounding text.

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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 it receives from the parties is increasingly limited as its caseload increases.[156]

Third, and perhaps more troubling, is the concern that the Inter-American Court does not give standing to individual criminal defendants, even as its decisions directly affect their rights – and freedom.[157] 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.[158] At stake was the length of the sentence 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 power of the state against individual defendants, undermining due process.[159]

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[156] In 2011, for example, the Inter-American Commission referred 23 cases to the Court, up from 16 the previous year. Thus, the Court had fewer resources for supervision in 2012. *See* Inter-Am. Com. H. R. *supra* note 15. I owe this point to Oscar Parra.

[157] Malarino, *supra* note 12, at 692.

[158] Barrios Altos v. Peru, Monitoring Compliance with Judgment, Order of the Court, (Inter-Am. Ct. H.R. September 7, 2012).

[159] The debate came to a head in *Bulacio v. Argentina*, when the Inter-American Court ordered Argentina to re-open, investigate and punish in a case of torture which the Supreme Court of

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Fourth, one might question the efficacy of ordering and monitoring prosecutions from the perspective not of international criminal law, but human rights law. If the point is not the punishment of individuals but rather curbing and improving 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.[160] The prioritization of punishment is neither inevitable nor, as many have argued, is it always the best response to the many challenges societies face in the wake of mass atrocity.

These are important and difficult questions. Insofar as they speak to the capacity of the rights bodies to effectively accomplish the new tasks they take on, they will be answered by empirical research. Whether the Inter-American Court can gather reliable information is a question that can be investigated. But insofar as the questions demand normative judgments

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Argentina had closed because the statute of limitations had run. The Supreme Court re-opened the case, but the ruling created controversy among the legal community. The torture at issue was a single incidence of torture that took place after the transition to democracy, and was not considered to be a crime against humanity. *See* Basch, *supra* note 12. *See also* Malarino, *supra* note 12.

[160] For discussions of the Inter-American System and amnesty, *see* Laplante, *supra* note 31. *See also* Binder, *supra* note 31; Pastor, *supra* note 12; Roberto Gargarella, *supra* note 12. For a nuanced discussion of amnesty more generally based on empirical research, *see* FRANCESCA LESSA & LEIGH A. PAYNE, AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES (2012).

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about the proper ambit of a human rights institution, the challenges are real. Should a court adhere to a strict reading of its original mandate or read it as a living document in light of changing circumstance? Can an international court weigh in on a national criminal proceeding without undermining due process rights? How much discretion does a state have to decree an amnesty? These questions deserve a deeper treatment than they can be afforded here, and indeed, they have triggered a lively debate among legal scholars in Latin America.[161] This paper will be limited to delineating the quasi-criminal practice, and examining it in light of the goals of international criminal justice. Its objective is not to justify the quasi-criminal practice of the Inter-American Court in light of its founding documents. The objective here is rather to highlight one aspect of the Inter-American 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. Part III below undertakes the work of assimilating and comparing this practice to what the international criminal courts already do.

II. QUASI-CRIMINAL JURISDICTION AND THE INTERNATIONAL CRIMINAL TRIBUNALS

Formally speaking, criminal courts aim to investigate crime and punish the guilty. In reality, criminal justice is a complex, polysemous phenomenon. Those who design, fund, use and experience the international criminal courts do so to advance different goals and under varied understandings of justice. The courts aim not only to punish the guilty, but also to help

[161] *See e.g. supra* note 12.

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stricken societies return to peace, stability and the rule of law;[162] to demonstrate and perform the notion that the international community will not tolerate certain acts;[163] to deter future offenders;[164] to help individual victims recover;[165] to develop a body of international law,[166] and to uncover facts and develop a narrative of the events that took place.[167] No single institution

[162] Thus, the preamble to the Security Council Resolution on the ad hoc tribunal for Yugoslavia reads "[c]onvinced 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." S.C. Res. 827 (May 25, 1993).

[163] *See, e.g.* THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL AT RWANDA 169 (2010) (arguing the ICTR was a way for the international community to express its remorse at having allowed the 1994 genocide to unfold without intervention).

[164] *See, e.g.* Rome Statute, Preamble, *supra* note 113.

[165] *See, e.g.* Thomas Antkowiak, *supra* note 127.

[166] *See*, e.g. Yuval Shany, *The Role of National Courts in Advancing the Goals of International Criminal Tribunals,* 103 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) (2009) 210, 212 (listing as a goal of international criminal tribunals "developing international criminal law and other branches of international law").

[167] For a discussion of the role of trials in constructing a historical narrative, *see e.g.* RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS (2011) and LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2005).

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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 skillfully upon a host of possible options, using each of them to suit best the historical, social, and legal conditions of each individual situation."[168] Having brought to light the phenomenon of quasi-criminal jurisdiction, the paper 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. By juxtaposing the features of quasi-criminal jurisdiction against those of the other jurisdictional types, its potential as a partner and, at times, alternative to the other options begins to emerge.

A Typology of Jurisdictions

The international and extra-territorial mechanisms of criminal accountability created since the Cold War's end each articulate a different jurisdictional relation between the international or extraterritorial courts, on the one hand, and the affected state and its justice system, on the other. The jurisdictional relation is salient because mechanisms are created not to replace but rather to co-exist and interact with, and ultimately even improve, the local justice system. While there is variation in the relationships each mechanism articulates, and while some mechanisms exhibit more than one relationship type, the relationships themselves can be usefully

[168] 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, at 3 (Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner ed., 2004).

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categorized into three main types: direct criminal jurisdiction, shared or hybrid criminal jurisdiction, and quasi-criminal jurisdiction.[169]

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 ICTR and ICTY exemplify the type of direct criminal jurisdiction. [170]

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[169] One could also categorize the mechanisms by whether they were created pursuant to a Security Council resolution, UN-State treaty or inter-state treaty. Others have focused on the more technical terms of their jurisdiction (primacy vs. complementarity). The relation with national system 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) [hereinafter *Domestic Influence*].

[170] Note that direct criminal jurisdiction also describes the work of the International Military Tribunal at Nuremberg (IMT), forbear of the post-Cold War International Criminal Law (ICL) institutions. The difference, of course, is that the Allies had occupied Germany, and so 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); Leyla Nadya Sadat, *Judgment at Nuremberg: Foreword to the Symposium*, 6 WASH. U. GLOB. STUD. L. REV. 491, 495 (2007).

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They have jurisdiction that is concurrent to and has primacy over that of national courts. If the ad hoc tribunal claims a case, the national justice system must yield jurisdiction, other jurisdictional claims notwithstanding.[171] Once seized of the case, the international court relies on the national system for many tasks, most notably identifying, apprehending and surrendering suspects, the collection of documents, the taking of testimony, and the exhumation of graves. Pursuant to a U.N. Security Council Resolution, states are bound to comply with the court's orders.[172] National justice systems are thus cast as auxiliary. The international tribunal sets the prosecution strategy for particular cases; national justice systems have a duty to assist with the prosecutorial tasks dictated from above.[173]

[171] *See, e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 9, Sept. 2009, *available at* http://www.icty.org/sid/135 (last visited Sep 20, 2011).

[172] *See, e.g.*, S.C. Res. 827, *supra* note 162, at ¶ 4; Updated Statute of the ICTY, *supra* note 171, at art. 29.

[173] As Frederik Harhoff writes of the ICTY, "[t]o 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. OF COMP. & INT'L. L. 571,580 (1997).

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The International Criminal Court, a creature of interstate treaty rather than Security Council fiat, has a more deferential relation to states.[174] Under the complementarity doctrine of Article 17 of the Rome Statute, the ICC can only determine that a case is admissible where the state "is unwilling or unable genuinely to carry out the investigation or prosecution."[175] 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 demanded of it by the ICC.[176] 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 of accountability may have more than one

[174] CASSESE, *supra* note 77, at 349 (arguing that states crafted a regime that left them more discretion).

[175] Rome Statute, *supra* note 113, at art. 17.

[176] But the ICC's regime of cooperation is more deferential than that of the ad hoc tribunals. See CASSESE *supra* note 77, at 346–351. 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, for example,* Burke-White, *supra* note 114. Thus far, however, complementarity has acted as a yes/no threshold, rather than a phase of cooperative progress towards prosecution. The possibility of greater interaction will be explored further below.

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jurisdictional mode. The assertion here is that, once the ICC opens an investigation, it switches into a relation best described as direct jurisdiction.[177]

A final if weaker example of direct jurisdiction is that exercised by national courts claiming universal jurisdiction for genocide, crimes against humanity and war crimes under customary international law.[178] This is not strictly speaking, an international mechanism: the court that takes jurisdiction is created by national law. 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 state to cooperate with letters rogatory, extradition requests and the like.[179] Once the prosecution begins the national justice system where the crimes took place is formally relegated to the role of auxiliary: It has a duty under

[177] One might still object that if the state began to actively 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.

[178] The most famous examples of this are the prosecution of Adolf Eichmann by Israel, and the prosecution of General 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 JOURNAL OF SPANISH CULTURAL STUDIES 107, 110 (2002).

[179] For a comparison of this system to that eventually adopted by the criminal tribunals, *see* CASSESSE *supra* note 77, at 346-351.

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international treaties to extradite suspects and to carry out investigatory tasks to assist the foreign court's prosecution. Like the ICC, these courts must defer to local prosecution.[180] 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 jurisdictional relationship type is that of 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."[181] Such courts draw on domestic and international law, are staffed and led by domestic and international law justice system actors, 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 fact that the state participates as an equal partner changes the fundamental nature of the national-international relationship. 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.

[180] *Id*.

[181] Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

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The international community has participated in the creation of five hybrid tribunals to prosecute international crime.[182] Each is structured differently, so that the national and international elements are differently distributed across the models. But they share 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, it

[182] The hybrid tribunals are the Extraordinary Chambers in the Courts of Cambodia, Regulation 64 Panels in the Courts of Kosovo, the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the War Crimes Chamber in Sarajeveo. 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) (but Raub does not mention the Bosnia War Crimes Chamber). One might also include in this category the International Commission against Impunity in Guatemala (CICIG). *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). Also, some argue that the Rome Statute allows the ICC to hold trials locally, and 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 Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729 (2003); and 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).

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will engage and capacitate local justice system actors. The Extraordinary Chambers in the Court of Cambodia (ECCC), 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 is composed of a mix of international and national judges. The Supreme Court Chamber seats three Cambodian and two international judges, but a guilty verdict requires a supra-majority of four votes.[183]

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 towards 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 of accountability.[184] However, there is a third type of relation between international bodies and

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

[184] *See e.g.*, Dickinson, *supra* note 181; Raub, *supra* note 182; Stuart Ford, *The Promise of Local or Regional ICC Trial Chambers: Incorporating the Benefits of the Hybrid Tribunals into the ICC* JOHN MARSHALL LAW REVIEW (April 23, 2010) (Forthcoming), at 15. *Available at* SSRN: http://ssrn.com/abstract=1605294 (last visited Sep 20, 2012); 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*

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local justice systems working towards prosecution of international crimes: quasi-criminal jurisdiction. 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 protagonist. However, 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 state-court relation described by quasi-criminal jurisdiction encompasses the practice of positive or proactive complementarity that some advocate for the ICC.[185] Under the complementarity doctrine, the ICC can only open a case if the state party that has jurisdiction is unable or unwilling to do so.[186] 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.[187] 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, assessing whether they meet a vaguely articulated standard. Many scholars and,

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Empowerment and National Criminal Justice Reform, 23 ARIZ. J. INT'L & COMP. L. 347 (2005-2006).

[185] It also encompasses the work of the ICTY under the Completion strategy. *See supra* Table 2 and accompanying notes.

[186] Rome Statute, *supra* note 113, at art. 17.

[187] *See* CASSESE, *supra* note 77, at 342-3.

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indeed, Chief Prosecutor Moreno Ocampo himself, have argued that the OTP should interpret complementarity to allow it to proactively pressure states towards prosecution, threatening to file a case if the state does not undertake certain actions.[188] Such a vision would have the OTP closely reviewing local justice system decisions over a period of years, and pressuring toward particular procedural standards. Emphasizing that the Office of the Prosecutor (OTP) should engage in active dialogue with states over prosecutions (or their absence), 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 adjustment is still possible. Taken collectively, these tactics offer a promising means of catalyzing domestic prosecutions by at least some initially unwilling states.[189]

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[188] For an argument that the ICC's complementarity role should not be limited to state parties or by its temporal jurisdiction, s*ee* Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence*, 43 J. Marshall L. Rev. 635 (2010)

[189] *See* Burke-White, *supra* note 114, 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 (ASP) Hague Working Group, which defines it as "all activities/actions whereby national

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The practice of quasi-criminal review, however, is not restricted to criminal courts. The above description of ICC complementarity could also fit the work of the Inter-American Court and Commission, and the Council of Europe's Committee of Ministers. As described in Part II, 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 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. As described in Part II, while the Inter-American Court is the only body that issues orders to prosecute as binding decrees, the ECHR's Committee of Ministers and the Inter-American Commission each exercise a softer form of the same practice.

Quasi-criminal review, then, offers the possibility of a different kind of relationship between the international community and the national justice system. It is a jurisdictional

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jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statue, without involving the Court in capacity-building, financial support and technical assistance." The focus is on review and deliberation, rather than active on-the-ground engagement. BUREAU OF THE ASSEMBLY OF STATES PARTIES, REPORT OF THE HAGUE WORKING GROUP ON COMPLEMENTARITY (2010), ¶ 16, *available at* http://212.159.242.181/iccdocs/asp_docs/ASP9/ICC-ASP-9-26-ENG.pdf (last visited Aug.18, 2011).

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relation available to the international and mixed criminal tribunals as well as the human rights bodies, and is likely taking 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.

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: a) that of holding prosecutions where the crimes took place and where the affected communities reside; b) that of keeping the roles played by national and international actors distinct; and c) that of hands-on involvement in the prosecution and trial by international institutions and actors (see Table Two).

Table Two: Comparison of Features of the Jurisdictional Types

	Direct Criminal Jurisdiction	**Hybrid Criminal Jurisdiction**	**Quasi-Criminal Jurisdiction**
Local prosecution and trial • Local awareness & public deliberation • Learning by national justice system • Lower cost		✓	✓
Autonomy from Nation State • Ability to act despite national government • Avoids fragmentation of international law	✓		✓
Hands-on involvement by international community • Quicker pace	✓	✓	

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• Symbolizes commitment of international community • Greater international awareness			

The Virtue of Local Prosecution and Trial

Juxtaposed to direct jurisdiction, hybrid and quasi-criminal jurisdiction share an important feature: their trails take place *in situ*. Prosecutions that result from quasi-criminal jurisdiction, however, are local across more dimensions. Note that the virtue of local prosecution and trial refers not only to geography – proximity to the scene of the crime and those most directly affected by it – but also to the use of local legal institutions, local officials and even local laws. Studies of the *ad hoc* tribunals show 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 knew little about them, understood them less, and even experienced them as a foreign imposition.[190] Local trials can be more easily witnessed, understood and discussed, rendering them more significant to the communities most affected. The interactive and quasi-criminal jurisdictions both offer the advantage of physical proximity. But the latter is more local also in its juridical language and staff. Under quasi-criminal review

[190] *See, e.g.*, The Human Rights Ctr. and the Int'l Human Rights L. Clinic, Univ. of Cal., Berkeley & The Ctr. for Human Rights, 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 NEIGHBORS' HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA 371 – 388 (2002) (account of Rwandan and Bosnian villagers and their experiences with the ad hoc tribunals).

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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; 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 unfamiliar to local communities and requiring translation.

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.[191] 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:[192] the international actors introduce a new judicial culture and working practices to their local partners. But it is also the case that the hybrid tribunals' status as *sui generis* and extraordinary can undermine their

[191] One could also argue that they are a sign that all this has already to some extent occurred. As a Report by the Council on Foreign Relations reports, "They have uneven records…triggering broader reconstruction of law enforcement and judicial institutions." *See* DAVID A. KAYE, COUNCIL ON FOREIGN RELATIONS, JUSTICE BEYOND THE HAGUE: SUPPORTING THE PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL COURTS 10 (2011), *available at* http://www.cfr.org/international-criminal-courts-and-tribunals/justice-beyond-hague/p25119 (last visited Sep 20, 2012).

[192] *See* Dickinson, *supra* note 181.

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influence. One study notes that ECCC working methods could not be replicated by the ordinary Cambodian justice system because "the Ministry of Justice has one percent of the ECCC's budget to run twenty-five courts in the country and it is difficult to envision how replicating practices such as computerized case management could be transferred."[193] In Bosnia, while the WCC has helped strengthen the judiciary, "such impact is diminished by the fact 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."[194] 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, in light of the local culture and economy, albeit under the review of a foreign body. When they 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 and state share the costs of prosecution. 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

[193] Olga Martin-Ortega & Johanna Herman, *Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia* 16 (Just and Durable Peace by Piece (JAD PbP) Working Paper Series No. 7, University of East London, May 2010), *available at* http://www.uel.ac.uk/chrc/documents/WP7.pdf.

[194] *Id.*

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trials are cheaper regardless of who pays. Off-shore courts incur many costs simply by virtue of their distance.[195] But even where international or internationalized trials are nationally based, they will be costlier.[196] 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. Further, international due process is not cheap: international and internationalized institutions must live up to standards that significantly raise costs.[197] Finally, in the case of the

[195] 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.

[196] The hybrid tribunals were meant to be more cost-effective, but this has not necessarily been the case. *See* Ford, *supra* note 184, at 15 ("comparing 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 ECCC 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.")

[197] *See* Cesare P.R. Romano, *The Price of International Justice*, 4 LAW AND PRACTICE OF INT'L COURTS AND TRIBUNALS 281 (2007); Ford, *supra* note 184 (arguing that the hybrid tribunals are not that much cheaper than international tribunals). *See also* 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) (arguing that hybrid tribunals were a response to the ad hoc tribunals 'expensive justice"). *But see* David Wippman, *The Costs of International Justice*, 100 AM. J. OF

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ad hoc and hybrid tribunals, each time an entire institution must be constructed from the ground up or, in the case of the hybrid tribunals, significantly revamped. Local prosecutions, by contrast, rely on an existing justice system, or at least contribute to its reconstruction.

It is striking to compare the costs per conviction of three different types of courts, the ICTY, the SCSL 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 that number by how many convictions 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 ICTY[198] is roughly $39 million, for the SCSL[199] it is $28 million, and for the Inter-American Court, $1 million.[200] The

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INT'L. L. 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 U.S. To Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts,* 55 SAINT LOUIS UNIVERSITY LAW JOURNAL 953 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674063 (last visited Oct. 4, 2011).

[198] Information on costs was drawn from ICTY, *see supra* note 5.

[199] 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, intergovernmental and non-governmental organizations. *See* First Annual Report of the President of the Special Court for Sierra Leone (SC-SL), SC-SL. ORG, at 29, *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176 (last visited October 3, 2011). In order to calculate the costs to the international community, I have subtracted from the costs of the SC-SL the $24 million contribution by Sierra Leone. The data on costs for the SCSL is

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drawn from the following sources: First Annual Report of the President of the Special Court for Sierra Leone (SC-SL), at 29; Second Annual Report of the President of the SC-SL, at 41; Third Annual Report of the President of the SC-SL, at 46; Fourth Annual Report of the President of the SC-SL, at 41 and 63; Fifth Annual Report of the President of the SC-SL, at 43; Sixth Annual Report of the President of the SC-SL, at Page 35; Seventh Annual Report of the President of the SC-SL, at 36. All Annual Reports of the President of the SC-SL *are available at* http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx (last visited October 1, 2011).

[200] The data for the Inter-American Court does not include donations. Also, note that the Court's budget was very small in the first years: it costs roughly $3 million the first decade, compared to $13 million its third decade. The data on costs for the Inter-American Court is drawn from the following sources: Rep. Inter-Am. Ct. H.R. 1980, at 6, *available at* http://corteidh.or.cr/docs/informes/1980.pdf (for 1979-80); Rep. Inter-Am. Ct. H.R. 1981, at 7-8, *available at* http://www.corteidh.or.cr/docs/informes/1981.pdf (for 1981-82); Rep. Inter-Am. Ct. H.R. 1984, at 7, *available at* http://www.corteidh.or.cr/docs/informes/19841.pdf (for years 1983-85); Rep. Inter-Am. Ct. H.R. 1987, at 7 *available at* http://www.corteidh.or.cr/docs/informes/1987.pdf (for years 1986-87); Rep. Inter-Am. Ct. H.R. 1988, at 7, *available at* http://www.corteidh.or.cr/docs/informes/1988.pdf (for years 1988-89); Rep. Inter-Am. Ct. H.R. 1990, at 10, *available at* http://www.corteidh.or.cr/docs/informes/1990.pdf (for years 1990-91); Inter-American Yearbook on Human Rights, at 67 (1991) (for years 1992-93); *The Inter-American Court of Human Rights, 1994 Activities, Approval of the Court's 1995 Budget,* INTER-AM. Y.B. HUM. RTS. 1994, at 96 (1996) ("The Assembly approved the Court's budget for 1995 and increased it by 15.86%.") (for

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comparison is imperfect. Most importantly, of course, the Inter-American Court budget does not reflect the cost of the local prosecution, as these are incurred by the defendant state itself. There are several other important caveats. The Inter-American Court's budget includes the cost of many cases that do not involve international crimes. The prosecutions of the ICTY, ICTR and the convictions reached following Inter-American Court orders include trials of lower level as well as higher level officials, whereas the hybrid courts focus only on high-level participants, which are costlier.[201] Also, one dimension of difference not captured by the typology is whether the

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1995); *The Inter-American Court of Human Rights, 1995 Activities, Approval of the 1996 Budget of the Court*, INTER-AM. Y.B. HUM. RTS. 1995, at 80 (1996) ("The Assembly approved the budget of the Court for the year 1996 and increased it by 16% in relation to the previous year.") (for 1996); Rep. Inter-Am. Ct. H.R. 1996, at 14, *available at* http://www.corteidh.or.cr/docs/informes/1996.pdf (for 1997); OAS, PROGRAM-BUDGET OF THE ORGANIZATION FOR 1998, 1998 QUOTAS AND PLEDGES TO THE VOLUNTARY FUND (Resolution adopted at the seventh plenary session, held on June 5, 1997), at 3, AG/RES. 1531 (XXVII-O/97) (June 5, 1997), *available at* http://www.oas.org/budget/ingles.pdf (for 1998); Rep. Inter-Am. Ct. H.R. 1999, at 48, *available at* http://www.corteidh.or.cr/docs/informes/info_99_ing.pdf (for years 1999-2000); Rep. Inter-Am. Ct. H.R. 2010, at 20, *available at*: http://www.corteidh.or.cr/docs/informes/2010_eng.pdf (for years 2001-2010). For the years 1993 and 1997, we have estimated the budget, based on prior and subsequent years.

[201] *See* Ford *supra* note 182, at 15 (noting that "[o]ne would expect that ordinary cases would be simpler, quicker and less complex than leadership cases").

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institution is a standing tribunal or is specially created for a particular situation, raising costs.[202] The ICC is still in a preliminary phase, and its costs may go down over time. Despite the imperfection of the comparison, the table does suggest that quasi-criminal review is an accessible means of fostering prosecution of international crime.[203]

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. There can also be an advantage, however, to keeping international and national jurisdictions separate: greater autonomy from the state. Using direct jurisdiction, the UNSC can impose a tribunal on a state that has never agreed, through participation in a treaty or otherwise, to such intervention. In the Inter-American or Council of Europe scenario, states must be party to the respective human rights conventions. But once they ratify or accede, participation in a particular case or set of cases is not optional.[204] This allows

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

[203] One might object that the table should compare not convictions but number of completed prosecutions. A finding of innocence or an acquittal is also important outcomes. However, if the point of the courts is accountability for crimes committed by many, the conviction rate is also an important measure.

[204] As Peru learned the hard way. See Karen C. Sokol, *International Decisions: Jurisdiction of Inter-American Court of Human Rights - Effect of Attempted Withdrawal of Jurisdiction*, 95 AMER. J. INT'L L. 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).

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the international community to become involved even when governments oppose prosecution.[205] For hybrid jurisdiction to be possible, by contrast, the state must consent to the scope of the particular cases to be prosecuted.[206]

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 take place under national criminal law. There is concern that the internationalized courts, each working independently and embedded within

[205] 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 to deter specific crimes of heads of state. Whether this is the case is still uncertain. *See, e.g.,* Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 84 WASH. U.L. REV. 777 (2006).

[206] It is important not to overstate this difference. All of the international mechanisms of accountability depend on state cooperation to conduct investigations and prosecute. This is so even when the UNSC imposes a court on an unwilling state through creation of an ad hoc tribunal or ICC referral. *See* LAMONT *Supra* note 170 and VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION (2008) (discussing the politics of getting state compliance).

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different national systems, could add to the fragmentation of international criminal law.[207] More problematically, their 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 interest of particular factions.[208] Where the 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

[207] *See e.g.*, Markus Benzing and 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, at 411 (Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner ed., 2004) ("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 182, at 1048.

[208] The ECCC has been particularly vulnerable to this criticism. *See, e.g.*, James A. Goldstone, *No Justice in the Killing Fields*, THE NEW YORK TIMES, Apr. 26, 2011 (arguing that the ECCC has caved to government pressure).

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times, the international community will want to move more quickly, more forcefully or with a higher profile than quasi-criminal review allows.

One feature of the rights bodies' work towards accountability is that it is slow.[209] Of course, timely justice is not exactly a feature of the international criminal system either.[210] Slowness is endemic. In part, this is because all international justice systems rely on local state justice systems. And these, following periods of mass atrocity, 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 Inter-American System.[211] A petitioner to the IAS must have already exhausted local judicial

[209] *See, e.g.* RATNER ET AL, supra note 6.

[210] For a discussion of the criticism that international justice, including the ad hoc tribunals moves too slowly, see**Error! Bookmark not defined.** 323-324 and 324 n. 1 (2009) ("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.")

[211] *See* Basch et al., *supra* note 131, at 26. "The average duration of proceedings, from when the petitions enter into the IASPHR 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."

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recourses.[212] Then, the petitioner must go through the Commission process, which, a recent study shows, takes from five to eleven years.[213] Once it reaches the Court, another two years may pass before a ruling is issued.[214] 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.[215] Even so, 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, and this is a considerable drawback.

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[212] American Convention on Human Rights, *opened for signature* Nov. 22, 1969, Art. 46, 1144 UNTS 123 (also known as the Pact of San José, Costa Rica).

[213] *See* Basch et al, *supra* note 131, 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.")

[214] *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.)"

[215] *See* HUMAN RIGHTS CLINIC THE UNIVERSITY OF TEXAS OF 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 (last visited Sept. 29, 2012).

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There will be times, too, when 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."[216] Direct involvement of international actors in prosecution of 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 the ICTR as expressing the international community's remorse in the wake of the international community's weak and 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."[217] 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 the execution of the

[216] Alain Pellet, *Internationalized Courts: Better Than Nothing, in* INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 438 (Cesare P.R. Romano, André Nollkaemper & Jann K. Kleffner eds., 2004). See also HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963), at 269-271 (considering whether it is proper for a national court to claim jurisdiction over an offense against humanity).

[217] *See* CRUVELLIER *supra* note 163.

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prosecution.[218] Further, states may articulate the underlying acts as a crime that does not express its status as an international crime. For example, a forced disappearance or crime against humanity may be prosecuted as an ongoing kidnapping.[219] Thus, an important piece of the meaning of international criminal law may be less forcefully expressed.

Finally, international involvement triggers further international engagement. While local proceedings create more local knowledge and resonance, international trials foster more international media coverage and awareness than local prosecutions supervised by a regional rights Court or international criminal body.[220] Hands-on involvement by international actors in

[218] One might also note that it requires an individual to petition the IAS. While the Inter-American Convention allows states to denounce other states' violations of the Convention, this has never been used. *See* American Convention, art. 61 *supra* note 212.

[219] This issue has come up for both the Inter-American Court, *see supra* note 93, 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 the complementarity under the Rome Statute allows states to configure the crimes under ordinary criminal law). *But see* ARENDT, *supra* note 216, at 127 ("these 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.")

[220] 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

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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."[221] The role of international and internationalized criminal tribunals in its creation is crucial.

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 complements which can be deployed in different types of situations, in sequence, or for the different levels of culpability of actors within a situation.

The question of what situation on the ground calls for which jurisdictional type cannot be answered in the abstract. The choice will vary from situation to situation and on the details of the mechanism devised. Nonetheless, two threshold issues stand out when picking a path toward prosecution of mass atrocity. The first is whether the local justice system is willing to cooperate towards prosecution. If the answer is no -- if the government resists -- a hybrid institution is likely out of the question. The second threshold issue is the level of resources the international

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do not rise to the level of international awareness. One reason for this may be that they tend to be less high-level offenders than those that 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.

[221] Heather Schoenfeld, Ron Levi & John Hagan, *Extreme Crises and the Institutionalization of International Criminal Law*, 33 CRITIQUE INTERNATIONALE 37, 37 (2007).

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community is willing to pour into the situation. For crimes committed by the Gaddafi regime in Libya, the international community may be will be willing to take responsibility for the prosecution, pay the cost, and follow it through. But if we are before a case that engenders less international concern, or a lack of consensus, a court with direct criminal jurisdiction may be out of the question. In cases of decades-old injustices in a country not on the international radar, such as, say, the crimes of the Stroessner dictatorship in Paraguay, international interest may be lacking. It is in these lower-profile matters that quasi-criminal review presents an attractive option, not because the crimes are less egregious, but out of the realistic assessment that some situations will pose a greater threat to the peace and security of the international community, or otherwise stimulate more interest and consensus, than others.

These two threshold considerations suggest a particular distribution of cases of atrocities which rise to the level of international crimes, but for which states are not prosecuting on their own. Only certain cases – the ones that most pique the concern and interest of the international community – are able to provoke direct international criminal jurisdiction. Where international *and* national interest is very 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.

Table Four: Threshold Considerations

		Level of international interest in prosecution	
		High	**Low**
	High	Direct or Hybrid	Hybrid or Quasi-

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Level of government interest in prosecution			criminal
	Low	Direct	Quasi-criminal

One might object to so simple and static a map. While it constructs the international community and the state as single unitary actors, neither the state nor the international community is monolithic, and the politics between the actors that comprise them can be salient. For example, a national judiciary may be unwilling to prosecute even where the executive is pushing for prosecution.[222] Further, the table presumes stable levels of interest, 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 and prioritize another.

The threshold considerations nonetheless provide a useful initial categorization, especially if we view the three different jurisdictional types not as alternatives, but as complements. The two considerations – level of state interest and level of international community interest – are also relevant for deciding how to process different types of cases within a situation. Best practice may be to use them together in a single situation, either with alternation over time, or contemporaneously, with individual cases processed differently depending on their characteristics. For example, the international community usually has a greater interest in trying higher-ranking officers, a particular challenge for states. The international tribunal could try the highest-ranking officers, with the rest left to the national system under a system of quasi-criminal review. Or, the threat of direct jurisdiction can be used

[222] *See* Huneeus, *supra* note 39 (arguing that this is often the case in the Inter-American setting).

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to stimulate national prosecutions already under quasi-criminal review, as is taking place in Colombia.[223] 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 (CICIG), a joint effort by the UN and Guatemalan state to prosecute crimes for gang activities and corruption, to prioritize the cases before it that are also before the Inter-American system.[224]

The above examples suggest that already policy-makers are incorporating quasi-criminal review as practiced by regional rights bodies into the international struggle against impunity, mixing jurisdictional types for more effective prosecution. There is also a need for collaboration

[223] 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 this. *See* Burke-White, *supra* note 169.

[224] See Blake v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 27, 2007). CICIG is unique within UN system. *See* Andrew Hudson & Alexandra W. Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanism*, 8 J. INT'L CRIM. JUST. 53 (2010). While its aim is to support Guatemalan institutions in dismantling domestic illegal security apparatus and clandestine security organizations, it has within its mandate the power to investigate any person, official or private entity, and to present charges to the public prosecutor and join criminal proceedings as private prosecutor. Its head and many of its staff are not Guatemalan but international actors brought in by the UN. It is, then, a new kind of hybrid jurisdiction. *Id.* at 54 (categorizing CICIG as a "hybrid" mechanism like the hybrid criminal tribunals).

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between different mechanism of accountability working under the same jurisdictional type, as will be described below.

A Note on the ICC and the Inter-American System

Scholars have noted the coincidence between the ICC and the work of the Inter-American System. They have noted, for example, that the ICC has much to learn from the experience of the Inter-American System with mass, state-sponsored crimes. The Inter-American Court's creative reparations regime provides models of restorative responses to atrocity that the ICC has incorporated into its own practice, particularly in the Victim's Fund.[225] Others have noted that, in ruling on whether national judicial proceedings have lived up to the American Convention, the Inter-American Court has created a jurisprudence that could inform the decision of the ICC of when a local prosecution satisfies the complementarity criteria.[226]

[225] *See e.g.* Megret, *supra* note 124 and Antkowiak, *supra* note 127. Yet others argue that the ICC should (and does) look to the IAS in matters such as access and victim participation. *See* Hector 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* GISELA ELSNER, KONRAD- ADENAUER- STIFTUNG E.V, (2010) *supra* note 12, at 379-426.

[226] *See e.g.* Dino Carlos Caro Coria, *La Garantía del Tribunal Imparcial en el derecho internacional de los derechos humanos: Analisis desde el principio de complementariedad de la corte penal internacional, in* GISELA ELSNER, KONRAD- ADENAUER- STIFTUNG E.V (2010) *supra* note 12, at 295-312.

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By grouping proactive complementarity alongside the rights bodies' supervision of national prosecutions, the typology of jurisdictions presented above shifts the focus to quasi-criminal jurisdiction. In other words, it shifts the focus from what the ICC can learn from the Inter-American Court's merits and reparations rulings to what the ICC can learn from the I-A Court's active engagement in national legal processes as they unfold. The Inter-American Court's 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 more 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 Inter-American System, and with other rights bodies conducting quasi-criminal review. The IAS is not just a model for the ICC. It is a potential partner. Thus far the ICC has had a contentious relation with the main regional system of the continent that is home to its seven active cases, the African Union.[227] Perhaps it can forge a smoother, more cooperative relation with the OAS human rights system. In Colombia, both institutions are monitoring the pace and adequacy of prosecutions of

[227] *See* Charles Jalloh, *The African Union and the International Criminal Court: The Summer of Our Discontent(s)*, JURIST - Forum, Aug. 6, 2010, http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php (last visited Sep. 20, 2012); and Jalloh, Charles C., *Regionalizing International Criminal Law?* 9 INTERNATIONAL CRIMINAL LAW REVIEW 445 (2009).

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massacres and killings that amount to crimes against humanity.[228] The ICC could explicitly make compliance with IAS reparatory orders to investigate and punish an indicator in its decision on whether the state is unable or unwilling to prosecute.[229] This would bolster the IAS by imposing a greater cost to non-compliance with its orders: Colombia is keen to avoid becoming the first non-African state to provoke an ICC trial. Further, 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 doing to prosecute particular cases?

For the ICC, three additional advantages would come of collaboration with the IAS.

Regional Legitimacy

The first 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."[230] But it is an option that has its virtues, as a proposal that the African Human

[228] *See, e.g.* Burke-White, *supra* note 114; Jocelyn Courtney, *Enforced Disappearances in Colombia: A Plea for Synergy between the Courts*, 10 INT'L CRIM. L. R. 679 (2010).

[229] For a similar suggestion, but focused on the doctrine of the Inter-American Court, *see* Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study* 26 ARIZ. J. INT'L & COMP. LAW 49.

[230] *See* Burke-White, *supra* note 182, at 730 ()

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Rights Court be endowed with criminal jurisdiction suggests.[231] Compared to their international counterparts, regional institutions enjoy two important attributes: a deeper knowledge of local norms and situations, and greater local legitimacy.[232] The first is true in part 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 and self-amnesty. The second attribute – local legitimacy – does not mean that regional rights systems are uncontroversial. As this paper was being written, the Inter-American Commission and arguably the IAS itself came under attack from a broad spectrum of Latin American states.[233] The point, more narrowly, is that their status as more local can be a source of legitimacy.[234] The ICC, which has focused its efforts entirely on

[231] For a discussion of the African Union's steps toward this project, *see 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 (last visited Sep. 20, 2012) (discussing reasons why the AU is moving in this direction).

[232] *See* HELEN STACY, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY AND CULTURE 141-169 (2009).

[233] *See* Jim Wyss, *OAS Rights Body Slammed at Annual Meeting*, THE MIAMI HERALD (June 5, 2012), http://www.miamiherald.com/2012/06/05/2834901/oas-rights-body-slammed-at-annual.html#storylink=misearch (last visited Sep. 20, 2012).

[234] But one of the main criticisms of the OAS from its critics is that the US controls the system even as it does not abide by Commission rulings or submit to the Court's jurisdiction. Thus

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African states, is often depicted as picking on Africa, and as an instrument of Western imperialism. An African regional court would be harder to depict as such. By working with the Inter-American System towards prosecution of specific cases in Colombia and Honduras, the ICC could avail itself of the advantages of regionalism. It could draw from the IAS's knowledge of local laws and legal systems, and it could help preempt and undercut perceptions by Latin Americans that they, like Africa, were being singled out and picked on by stronger nations.

It should be noted that one of the main criticisms of the international criminal tribunals is that they are susceptible to manipulation by the more powerful members of the international community. This is a weakness shared by the rights bodies, which of course are also susceptible to geo-politics. The US and China alike have avoided submitting to human rights quasi-criminal review, just as they have avoided ICC jurisdiction. However, at any given time, 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 the Inter-American level, and China arguably carries less weight at the Inter-American than the international level. Collaboration across systems could thus serve to offset certain political dynamics.

Restorative Justice

The second advantage of collaboration is the Inter-American Court's rich jurisprudence in remedies aimed at restorative justice. As noted in above, the Inter-American Court and Commission are unique in the broad array of victim-focused and reconciliation-focused remedies they order states to undertake in the wake of atrocity. Some scholars have argued that the ICC in

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Hugo Chavez has proposed creating a rights system within UNASAR or ALBA, which don't include the United States, and are thus more "local." *See* Wyss, *supra* note 233.

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proactive complementarity mode could monitor not only judicial responses, but other kinds of state undertakings in response to mass atrocity, such as holding truth commissions,[235] and that it could issue orders to the state to erect memorials, and undertake other public acts.[236] Indeed, Frederic Megret poses that for the ICC, such restorative reparations are "no longer simply an issue of policy but one increasingly tainted with [legal] obligation."[237] Should the ICC choose to stretch its mandate in this direction, the Inter-American Court's practice provides not only a model, as he suggests, but an actual partner.[238] The ICC could make compliance with IAS remedial orders a factor in its own appraisal of a state's response. Alternatively, the ICC could relegate restorative justice matters to the IAS, and focus on retribution.

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 and pressure for the State to take on the remainder of cases, and could continue to do so even after the ICC closed its case, making it easier for the ICC to exit. Collaborations in which the actor's level of responsibility determines what

[235] 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).

[236] *See* Megret, *supra* note 124.

[237] *Id.*

[238] *Id. See also* Antkowiak, *supra* note 127.

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jurisdiction takes the case are already common. Just as the Nuremberg tribunal only tried the "major" war criminals, so the ad hoc tribunals, the ICC and the hybrid tribunals only try the highest-level actors, leaving the rest to the national justice system. The suggestion here, however, is that these cases not be left to the national justice system alone: supervision by an international body could make an important difference to their success.[239]

[239] 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, *Domestic Influence, supra* note 169, at 320. *See also* U.N. Security Council Resolution 1534 (March 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 People's Rights will monitor the trial in Rwanda and bring any potential concerns to the attention of the ICTR. *See* Prosecutor v. Jean Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (June 28, 2011), *available at* http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf (last visited Sep. 20, 2012) ("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 re-take

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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, such a partnership would boost its image, for if regional belonging lends legitimacy, it can also help to have the backing, and imprimatur of significance, of the international community at large. Finally, the Inter-American Court could benefit from the know-how of an institution that is explicitly criminal in orientation.

III. CONCLUSION

There is concern that the international criminal tribunals are not cost-effective, and that the ICC has targeted African nations. This paper has highlighted an alternative form of international judicial intervention towards prosecution of mass atrocity, the quasi-criminal jurisdiction of the human rights bodies. Two of its 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 by the rights bodies is a form that should be considered as an alternative and complement to the existing mechanisms of accountability.

The research presented here is a first step. There is much empirical study yet to be done on the rights bodies' work and potential in this realm. Further study should be able to show what situations on the ground are more likely to respond to quasi-criminal review, as well as what

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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.

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forms of quasi-criminal review are more effective. More careful, empirically-grounded study also needs to be done to show how the different forms of jurisdiction highlighted here 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's judicial organs should work to foster prosecution of gross human rights violations.

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