

Article

When Prosecution is Not Enough: How the International Criminal Court Can Prevent Atrocity and Advance Accountability by Emulating Regional Human Rights Institutions*

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I. INTRODUCTION

In 1998, a half-century after the Nuremberg trials of Nazi war criminals, a diplomatic conference finalized the Rome Statute of the International Criminal Court (ICC).¹ Only four years later, that treaty entered into force following its ratification by sixty states. The creation of a permanent, global tribunal to prosecute those responsible for the worst international crimes fulfilled a dream kept alive throughout the Cold War.

International human rights activists, diplomats, and jurists offered grand ambitions for the ICC. It would not only punish political leaders and military commanders who had committed genocide, crimes against humanity, and war crimes, but also would deter others from committing such mass atrocities. After the fall of the Berlin Wall in 1989, hope had surged among the international liberal elite that they could create a new, peaceful world order in which mass atrocities would be rare, and in which those responsible would be called to account. While sobered by the failure of international powers to stop genocide and crimes against humanity in the former Yugoslavia and Rwanda in the early 1990s, they were heartened by the UN Security Council's creation of new international criminal courts: the "ad hoc" International Criminal Tribunal for the Former Yugoslavia (ICTY), in 1993, and the International Criminal Tribunal for Rwanda (ICTR), in 1994. "To tribunal advocates, [the ICC, ICTY, and ICTR] represent[ed] the zenith of the international human rights movement. With such institutions in place, getting away with mass murder would no longer be the norm but the exception."²

Today, a quarter-century later, the record of international criminal tribunals is disappointing and the prospects for similar initiatives look bleak.³ International criminal law has not ushered in a new world order.⁴ The ICTY took nearly twenty-five years and approximately three billion dollars to try just over 100 defendants.⁵ Partially international "hybrid" tribunals created by the United Nations and the governments of Cambodia and Sierra Leone have spent tens of millions of dollars to convict fewer than ten defendants each. Trials in all these tribunals have proceeded excruciatingly slowly, taking years from arraignment through appeal. In several cases, justice delayed has become justice denied. For example, former Serbian President Slobodan Milosevic and former Khmer Rouge Foreign Minister Ieng Sary died four and two years into their respective

¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 5 (2008).

³ The ICTR closed in 2015, and the ICTY dissolved two years later. See *About*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <http://www.irmct.org/en/about> (last visited Nov. 15, 2019).

⁴ See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Never Again? The Legacy of the Argentine and Chilean Dictatorships for the Global Human Rights Regime*, 39 J. INTERDISC. HIST. 233, 238-44 (2008).

⁵ See Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 36-37 (2014) (estimating the ICTY's total cost in constant 2012 dollars); *Key Figures of the Cases*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last visited Nov. 15, 2019).

trials at the ICTY and the Extraordinary Chambers in the Courts of Cambodia (ECCC): their cases terminated with no findings as to guilt.⁶ People in the regions subject to these international criminal tribunals have reacted to their work with ambivalence at best. The modest impacts of the ICTY and ICTR on politics, law, and intercommunal reconciliation in the former Yugoslavia and Rwanda have been a major theme of journalism and scholarship on those courts.⁷ Most important, atrocities remain common: governments and insurgents continue to torture and slaughter civilians in Syria, Nigeria, Yemen, Myanmar, and elsewhere.⁸

By late 2019, the most important international criminal tribunal, the ICC, was approaching a crisis point as it failed in case after case to convict—and in many cases to try or even apprehend—perpetrators of appalling crimes. While other tribunals had arrested, tried, and convicted the vast majority of perpetrators they had charged, ICC prosecutors had secured just four convictions for mass atrocities in seventeen years, out of thirty-seven indictees.⁹ Worse still, the ICC’s judges had acquitted four other defendants,¹⁰ a far higher rate—fifty percent—than at other international criminal tribunals.¹¹ International criminal law experts were dismayed in June 2018 when the ICC Appeals Chamber freed Jean-Pierre Bemba, overturning the warlord’s conviction, after a four-year trial, for murder, pillage, and sexual violence in the Central African Republic.¹² This bombshell was followed in January 2019 by the Trial Chamber’s abrupt termination of proceedings against another high-profile defendant, former Côte d’Ivoire President Laurent Gbagbo, for crimes against humanity; the judges held the prosecutors’ evidence insufficient to prove guilt. Other high-profile cases, including against sitting and former heads of State of Sudan and Kenya, have collapsed or stalled. The July 2019 conviction of Bosco Ntaganda barely eased the crisis. The ICC’s authority is under siege: multiple ICC Member States welcomed Sudan’s indicted then-President Omar Al Bashir, flouting their

⁶ Marlise Simons & Alison Smale, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies*, N.Y. TIMES (Mar. 12, 2006),

<https://www.nytimes.com/2006/03/12/world/europe/slobodan-milosevic-64-former-yugoslav-leader-accused-of-war.html>; *Khmer Rouge Senior Leader Ieng Sary Dies*, BBC (Mar. 14, 2013),

<https://www.bbc.com/news/world-asia-21781153>.

⁷ See, e.g., DIANE ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY’S IMPACT IN BOSNIA AND SERBIA* 193-295 (2018); Marieke I. Wierda, *The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries* 90-92 (Jan. 9, 2019) (unpublished Ph.D. dissertation, Leiden University), <http://hdl.handle.net/1887/68230>.

⁸ HUMAN RIGHTS WATCH, *2017 WORLD REPORT* 571-78 (2017) (Syria); *id.* at 451-52 (Nigeria); *id.* at 675-82 (Yemen); *id.* at 147-51 (Myanmar).

⁹ See *Defendants*, INT’L CRIM. COURT, <https://www.icc-cpi.int/defendants> (last visited Nov. 15, 2019) [hereinafter ICC website – Defendants]. Five defendants were convicted of procedural offenses, such as procuring false witness testimony. *Id.*

¹⁰ Mathieu Ngudjolo Chui was acquitted at trial and the Appeals Chamber upheld that decision. *Id.* Jean-Pierre Bemba was convicted at trial, but the Appeals Chamber overturned the conviction. *Id.* Laurent Gbagbo and Charles Blé Goudé were acquitted at trial; the Prosecutor has appealed those decisions. *Id.*

¹¹ See *infra* text accompanying notes 59-61.

¹² Beth Van Schaack, *International Criminal Law Roundup Series: Part I*, JUST SECURITY (Sept. 6, 2018), <https://www.justsecurity.org/60597/international-criminal-law-roundup> (stating that the Chamber’s “exceptionally terse” yet “momentous” decision “dramatically departs from prior precedent” in its standard of review and application of the command responsibility doctrine, and citing expert consensus that the decision “will eventually be consigned to the jurisprudential scrapheap”).

obligation under the Rome Statute to execute the Court's arrest warrant. Most other indictees remain at large. With this woeful prosecution record, other criticisms of the Court—for its suspect focus on Africa¹³ and inability to prosecute citizens of powerful States—seem almost moot.¹⁴

There is hope, however, and models of success. The ICC and other international criminal tribunals have not been the only supranational institutions working to stop mass atrocity: regional human rights commissions and courts in the Americas, Europe, and Africa have used a variety of tools to successfully pressure governments and, through them, non-State actors to halt abuses and hold violators accountable. These regional institutions are the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights.¹⁵ During the Cold War, when an East-West standoff precluded the creation of new international criminal courts, the locus of supranational accountability for grave human rights violations shifted to these regional human rights mechanisms. These bodies have developed creative and effective methods to respond to mass atrocity, both in real time and afterwards, that provide vital lessons for the ICC. In this Article, we urge the International Criminal Court to evaluate, apply, and benefit from the experience of regional bodies.

Mass atrocities have occurred frequently in the countries that the regional bodies oversee. These commissions and courts have responded in ways that range from behind-the-scenes pressure on States and parties to conflict, to highly visible country visits and reports, and from the creation of special investigative bodies to international litigation and broad reparations measures. The success of these interventions has fostered support from citizens and elites for the regional bodies, thus promoting a virtuous cycle that has enabled bolder engagement to halt abuses and advance accountability. This vast regional experience with mass atrocity—scores of interventions, both during and after atrocity and hundreds of cases with diverse jurisprudential advances—provides the basis for the ICC to reimagine and refocus its role and tactics.

This Article attempts to reframe and advance the debate over the value of international criminal justice by (1) synthesizing and evaluating scholarship on the effectiveness of the ICC (the only permanent international criminal tribunal) and of regional human rights institutions in preventing mass atrocity and securing criminal accountability for perpetrators; and (2) assessing the differences between the ICC and the regional institutions to produce

¹³ See, e.g., Zaya Yeebo, *The ICC Debate: A Pan-African Perspective*, PAMBAZUKA NEWS (Feb. 8, 2012), <https://www.pambazuka.org/pan-africanism/icc-debate-pan-african-perspective>. But see Makau W. Mutua, *Africans and the ICC: Hypocrisy, Impunity, and Perversion*, in AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE 47 (Kamari M. Clarke et al. eds., 2016) (defending the Court).

¹⁴ See *The States Parties to the Rome Statute*, INT'L CRIM. COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 15, 2019).

¹⁵ The African Court was created after the Cold War, in 2006. See *infra* note 289. A European Commission on Human Rights operated from 1954 to 1998, in conjunction with the European Court.

recommendations for enhancing the ICC's contribution to those two important goals. We also offer the most complete data available on the costs of the ICC and the regional institutions, compiled from their official reports, to compare the institutions' efficiency.

Assessing the contribution of international legal institutions to reducing mass atrocity and promoting criminal accountability is an exceptionally difficult task, given the number and complexity of plausible causal connections between the institutions' activities, on the one hand, and those two goals, on the other.¹⁶ The people who influence whether mass atrocities occur in a particular situation include those who might commit atrocities (direct perpetrators), their families, military superiors, political leaders, foreign supporters, the media, prosecutors, judges, and others. All these actors' decisions are shaped by social norms and pressures, strategic calculations, material incentives, and intra-organizational dynamics, as well as individual psychology. The actors' thinking and incentives, and the systemic factors that link them, change over time. We refer to this complex system—which determines whether mass atrocities occur in a particular situation, and on what scale—as a “causal ecosystem.”¹⁷ The determinants of whether alleged perpetrators of atrocities are prosecuted—the second goal of interest to us—form a second causal ecosystem that is distinct, even though it includes many of the same actors and forces. Evaluating how the various activities of an international legal institution affect these causal ecosystems adds another thick layer of analytic complexity: the institution's activities may influence elements of the causal ecosystem determining atrocity (or the one determining accountability) in myriad ways that increase or decrease atrocity (or prosecution). Thus, there are many direct and indirect causal channels through which international legal institutions could promote, or undermine, the goals on which we focus.¹⁸

Scholars have not fully mapped those causal channels even at a theoretical level, much less tested them all empirically. They have made considerable progress, however. This Article synthesizes large bodies of scholarship on the impact of regional human rights institutions and a smaller but growing corpus on the impact of the ICC.

¹⁶ We have found invaluable conceptual and methodological guidance on evaluating the impact of international human rights institutions in the work of many scholars, especially Karen Alter, Laurence Helfer, Alexandra Huneeus, and Mikael Rask Madsen. *See, e.g.*, Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 *LAW & CONTEMP. PROBS.* 1 (2016); Alexandra Huneeus, *Compliance with Judgments and Decisions*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 437 (Cesare P.R. Romano et al. eds., 2014).

¹⁷ A large body of social science examines the causes of atrocities in particular countries or across cases. *See, e.g.*, SCOTT STRAUS, *THE ORDER OF GENOCIDE* (2006); Peter B. Owens, Yang Su & David A. Snow, *Social Scientific Inquiry into Genocide and Mass Killing: From Unitary Outcome to Complex Processes*, 39 *ANN. REV. SOC.* 69 (2013).

¹⁸ *See* Nicole De Silva, *International Courts' Socialization Strategies for Actual and Perceived Performance*, in *THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* 288, 300-09 (Theresa Squatrito et al. eds., 2018); Geoff Dancy & Christopher J. Fariss, *Rescuing Human Rights Law from International Legalism and its Critics*, 39 *HUM. RTS. Q.* 1, 11-16 (2017); *cf.* JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998) (describing efforts to influence complex political-economic-social ecosystems).

We find reasons for concern and optimism about both the ICC and the regional institutions, although more concern about the former and more optimism about the latter. All face daunting obstacles in reducing the incidence of mass atrocity. None can prevent mass atrocities on its own, either across the board or in any specific case. Mass atrocities occur when parties to conflict—or at least those with the means to commit brutal violence—have already rejected or exhausted less extreme methods for achieving their goals.¹⁹ International human rights institutions do not command police or military forces that could forcibly halt or prevent atrocities, nor wield economic sanctions that might compel national authorities to prosecute perpetrators. Their influence depends on their ability to change, usually only marginally, the causal ecosystems described above.

Despite these limitations, the evidence indicates that regional human rights institutions, and the ICC to a lesser extent, have contributed to complex processes of political and legal change at the international level and within particular countries that have brought perpetrators of appalling human rights violations to justice, curtailed ongoing atrocities, and reduced their likelihood of occurring in the future. The Inter-American and European regional institutions have much more impact than their younger African counterparts, which also confront more difficult political conditions. The ICC may be starting to affect key actors' behavior in some countries after a slow beginning, reducing atrocities and enhancing accountability. On the other hand, there is some evidence the ICC can *increase* mass atrocity by exacerbating conflict or undermining peacemaking.²⁰ (We have found little to suggest that regional institutions have negative effects; at worst, they are impotent, as the ICC also can be.)

Our most provocative conclusion is that the ICC should reconceive its strategy and overhaul its operations to act more like a regional human rights institution. Both theory and evidence from practice show that prevention and accountability result primarily from political and legal processes and norms *within* States, sometimes catalyzed or supported by international institutions, rather than from the actions of international bodies in isolation. Evidence suggests these local processes tend to have more profound and durable effects, provoke less resistance, and cost less than purely international legal processes. The regional human rights mechanisms—especially the Inter-American Commission and Court and the European Court—have learned to play this complementary role with great effectiveness. Through decades of experimentation and practice, they have devised tactics that contribute to the political and legal dynamics that generate accountability and prevention.

The ICC, by contrast, has focused narrowly on choosing cases and investigating, prosecuting, and judging them—and compiled a record of many failures and few successes. While the International Criminal Court's prosecutors

¹⁹ See STUART J. KAUFMAN, *MODERN HATREDS: THE SYMBOLIC POLITICS OF ETHNIC WAR* 12 (2001) (noting that ethnic politics rarely descends into ethnic war); *id.* at 3-12 (analyzing factors leading to ethnic violence).

²⁰ See *infra* notes 88-91 and accompanying text.

and judges should improve their performance of these core judicial tasks, they—along with the ICC’s State Parties, who oversee and guide its priorities—also must rethink the court’s strategy for pursuing its goals. The methods developed by the regional bodies provide invaluable guidance. We contend that the ICC should devote less attention and fewer resources to directly investigating and prosecuting cases and more to catalyzing and supporting actions within States—by investigators, prosecutors, judges, executive-branch actors, and civil society—that yield criminal accountability for perpetrators and reduce the chances that mass atrocity will occur. The ICC has started to make such efforts, collaborating with national actors and sometimes challenging or competing with them—for example, by signaling that it will step in to prosecute if national authorities fail to do so. The problem is that the ICC’s judges, Prosecutor, staff, and State Parties see these efforts as secondary to prosecuting and judging individual cases and invest little time, attention, and other resources in them. Reversing that priority, as we recommend, would require a significant reallocation of resources, including personnel, funds, and management focus.

Our proposal is firmly grounded in analysis of the accomplishments, failures, and potential of the ICC and regional institutions. Adopting it would enhance the ICC’s effectiveness in preventing atrocities and securing criminal accountability for grave abuses. Furthermore, it is truer to the vision of the States and civil society organizations that founded the ICC than is the court’s current strategy. The ICC was conceived as a complement to national justice systems, not as the primary source of accountability, prevention, and compensation for mass atrocities around the globe. Its current overemphasis on investigating, trying, and judging, coupled with underinvestment in less visible methods of influencing and supporting national actors, reflects a legalism that scholars have documented and criticized in many international tribunals. The court’s leaders and staff have succumbed to a lawyerly temptation to view their role as narrowly judicial and technical, detached from complicated, often politicized, processes on the ground. The ICC must reconceive its place in the multilevel legal and political realm, as a player that exercises influence through a variety of political and legal channels and whose impact depends on its interaction with others.

Our second main recommendation is that States and human rights organizations reinvest in regional human rights institutions. So far, regional institutions have been more effective than international criminal tribunals in combatting mass atrocities and securing criminal accountability for them. They are also dramatically less expensive. While the ICC merits continued funding by States, especially if it adapts as we recommend, regional institutions provide greater human rights impact at much lower cost. Each regional institution could do far more good with just a few million dollars more per year—a tiny amount when split among each institution’s Member States. The same analysis applies to human rights organizations. Since the 1990s, they have invested tremendous financial, human, and political resources in international criminal tribunals; they should devote more energy to regional institutions.

The Article proceeds as follows. Part II acknowledges the multiple goals of international human rights institutions and explains our focus on preventing mass atrocities and securing criminal prosecution of their perpetrators. Part III assesses the ICC's capacity to promote those goals, using the most significant empirical scholarship available. Part IV does the same for the regional human rights institutions: the European Court of Human Rights, the Inter-American Commission and Court, and the less influential African Commission and Court. Part V compares the impact of the two kinds of institutions, presents data on their costs, explains how the ICC can enhance its effectiveness by shifting its strategy and operational priorities, and makes the case for reinvesting in regional institutions. Part VI concludes.

II. SPECIFYING GOALS

An analysis of the effectiveness of international human rights institutions must begin by clarifying the object of inquiry: their effectiveness at *doing what?* Politicians, advocates, victims, and tribunals' own officials have argued that international courts such as the ICC and ICTY can achieve an extraordinary range of goals. These include assembling a historical record of unimaginable crimes,²¹ developing international criminal law,²² helping victims heal,²³ achieving justice,²⁴ building the rule of law,²⁵ promoting reconciliation in polarized societies,²⁶ making peace between warring factions,²⁷ and preventing atrocities.²⁸ There is less discussion, but perhaps greater agreement, on the goals of regional human rights institutions: to increase respect for the human rights provided in the international instruments they oversee, and to secure redress for victims of violations.²⁹ But regional human rights institutions supervise States'

²¹ See, e.g., Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 265 (2001); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2546 n.32 (1991).

²² See, e.g., Diane Orentlicher, *Review Essay: From Viability to Impact: Evolving Methods for Assessing the International Criminal Tribunal for the Former Yugoslavia*, 7 INT'L J. TRANSITIONAL JUST. 536, 538 (2013).

²³ See, e.g., Juan Méndez, *Comments on Prosecution: Who and For What?*, in DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA 87, 90 (Alex Boraine et al. eds., 1994) (arguing that "prosecution itself will provide a measure of healing and show the victims that their plight has not been forgotten by the state and society"). But see Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295 (2005) (documenting that evidence to support such claims is minimal).

²⁴ See, e.g., Richard Dicker & Elise Keppler, *Beyond The Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH WORLD REPORT 2004 194 (Human Rights Watch ed., 2004) (equating justice with prosecution).

²⁵ See, e.g., Naomi Roht-Arriaza, *Introduction*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 3, 4 (Naomi Roht-Arriaza ed., 1995).

²⁶ See, e.g., Ivković, *supra* note 21, at 334.

²⁷ See, e.g., Rome Statute, *supra* note 1, preamble.

²⁸ See, e.g., *id.*

²⁹ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights pmbl., Jun. 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) [hereinafter Protocol to the African Charter] ("[T]he attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights . . ."); African Charter on Human and Peoples' Rights art. 30, Jun. 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter] ("An African Commission on

protection of the full panoply of civil, political, economic, social, and cultural rights. Further complicating the potential analytic task, some 150 countries and decades of events fall under the jurisdiction of the ICC or regional human rights institutions. Evaluating the effectiveness of multiple institutions in promoting all possible goals, in relation to all crimes and human rights violations within their purviews, and across their full geographic and temporal jurisdictions, would be an enormous task.

We focus our analysis on the atrocious acts that fall within the jurisdictions of both international criminal courts and regional institutions: mass atrocities involving physical violence or confinement—including killings of civilians, widespread torture, mutilation, forced disappearances, and arbitrary detention—against large numbers of people. Such mass atrocities are usually committed by repressive regimes and/or during armed conflict and are sometimes referred to as “gross” or “massive” human rights violations.³⁰ These acts generally constitute genocide, crimes against humanity, and/or war crimes, and thus fall within the subject-matter jurisdiction of the ICC.³¹ They also violate human rights that all regional institutions are empowered to protect, including the rights to life, bodily integrity, and freedom from torture. We are interested in the cases described by David Scheffer as constituting “atrocious crimes”: those in which these acts are “widespread or systematic or occu[r] as part of a large-scale commission of such crimes” and were “led, in [their] execution, by a ruling or otherwise powerful elite in society (including rebel or terrorist leaders).”³² We use the terms “atrocious crimes” and “mass atrocity” interchangeably, and in relation to both criminal justice through the ICC and civil processes in regional institutions.³³

We further focus our analysis by examining the capacity of the ICC and regional institutions to advance just two of the many goals posited for them: ensuring accountability through criminal prosecution for atrocious crimes, and reducing their incidence in the future, in both current and future conflicts, which

Human and Peoples' Rights . . . shall be established . . . to promote human and peoples' rights and ensure their protection in Africa.”); Statute of the Inter-American Court of Human Rights art. 1, Oct. 31, 1979, O.A.S. AG/RES. 448 (IX-0/79) (“The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.”); American Convention on Human Rights art. 41, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, [hereinafter American Convention] (“The main function of the [Inter-American] Commission shall be to promote respect for and defense of human rights.”); Convention for the Protection Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (“To ensure the observance of the engagements undertaken by the High Contracting Parties . . . there shall be set up a European Court of Human Rights . . .”).

³⁰ See Sebastian Rădulețu, *National Prosecutions as the Main Remedy in Cases of Massive Human Rights Violations: An Assessment of the Approach of the European Court of Human Rights*, 9 INT’L J. TRANSITIONAL JUST. 449, 450 (2015).

³¹ See Rome Statute, *supra* note 1, art. 5 (specifying that the court has jurisdiction over crimes of genocide, crimes against humanity, and war crimes).

³² See David Scheffer, *Genocide and Atrocious Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 238-39 (2006).

³³ Our focus on this subset of human rights violations reflects a methodological imperative rather than a value judgment.

we also refer to as “preventing.”³⁴ The institutions may advance or retard these goals directly or indirectly by affecting the complex interactions of many actors—the causal ecosystems—that determine whether the atrocities occur or (separately) whether perpetrators are held accountable. While the existing literature discusses all the goals of criminal tribunals and regional institutions listed above, scholars have devoted most attention to these two. Prevention is arguably the most important purpose of both the ICC and regional human rights institutions: victims who survive mass atrocities are often traumatized irreparably,³⁵ and social fabrics and political institutions take decades to recover.³⁶ Furthermore, the creators and leaders of the institutions themselves have cited preventing atrocities as their most important purpose, or one of a preeminent few. The Preamble to the Rome Statute of the ICC highlights the framing States’ “determin[ation] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”³⁷ The ICC Prosecutor’s 2013 Policy Paper on Preliminary Examinations affirmed that “the goal of the Rome Statute” is to “contribute to th[e] prevention” of “the most serious crimes of international concern,” by “put[ting] an end to impunity.”³⁸ For regional institutions, preventing human rights violations, including atrocity crimes, is inherent in the primary purpose of the conventions they enforce: to “secure to everyone within [the] jurisdiction [of the State Parties] the rights and freedoms” that the conventions define.³⁹

Securing criminal accountability for perpetrators of mass atrocities, whether in national or international courts, is one of the most common demands of victims of mass atrocities and their families. Many victims, activists, and philosophers believe that justice requires prosecution and punishment of perpetrators of these crimes. Criminal justice also may contribute to prevention, for example by incapacitating and delegitimizing those who have already committed atrocities and might otherwise do so again, deterring potential perpetrators, bolstering norms against those crimes, and strengthening the social, political, and legal consequences of violating such norms.⁴⁰

³⁴ “Conflicts” here is a shorthand for situations in which mass atrocities may occur; while all of these involve some sort of conflict, not all involve violent conflict such as civil war—dictatorships facing purely peaceful resistance may commit mass torture, for example.

³⁵ See O’Connell, *supra* note 23, at 306-16 (surveying the psychological impact on victims of atrocities such as extrajudicial killing, torture, and disappearance).

³⁶ See Eric Stover & Harvey M. Weinstein, *Conclusion: A Common Objective, A Universe of Alternatives*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 323, 323-39 (Eric Stover & Harvey M. Weinstein eds., 2004).

³⁷ Rome Statute, *supra* note 1, pmbl. The Preamble also implies that punishing the crimes might promote peace.

³⁸ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, INT’L CRIM. COURT (Nov. 2013) at 5 (¶22), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (emphasis added) [hereinafter Policy Paper on Preliminary Examinations].

³⁹ European Convention, *supra* note 29, art 1; accord American Convention, *supra* note 29, art. 1(1); African Charter, *supra* note 29, art. 1.

⁴⁰ Although criminal prosecution of perpetrators of mass atrocities—at least the political leaders and commanders who plan and order them—is valuable in many cases, human rights activists have sometimes overemphasized it, with a variety of unfortunate consequences. See generally ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle et al. eds., 2016). The overinvestment in the ICC compared to regional institutions, which we recommend redressing, reflects a related bias.

Those two goals—securing accountability and preventing atrocities—are related to each other and also connected with other goals on which we do not focus. Our analysis does incorporate evidence on how the ICC and regional institutions contribute to or undermine other goals—such as ending civil war—to the extent that these other goals serve as a means towards accountability or prevention.

III. THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT

Human rights organizations, their funders, and friendly governments invested tremendous time and political capital throughout the 1990s to create the International Criminal Court. Sixty States quickly ratified the Rome Statute after its completion in 1998, and it entered into force in 2002, bringing the Court into existence.⁴¹ (As of late 2019, 122 States are members.⁴²) Within a year, the ICC's first Prosecutor and judges were working to build an institution capable of investigating, prosecuting, and adjudicating the most heinous and complex crimes recognized by the international community.

The Rome Statute establishes the Court's powers and basic procedures. It can prosecute individuals for genocide, crimes against humanity, and war crimes.⁴³ Importantly for our analysis, the ICC is intended to be secondary to national court systems, possessing only "complementary" jurisdiction to investigate and prosecute crimes *only* when States are "unable" or "unwilling" to do so themselves.⁴⁴ The Court also is limited to prosecuting crimes committed on the territory of a State Party to the Rome Statute, by a national of a State Party, or in a situation that has been referred to the Court by the UN Security Council.⁴⁵ It is constrained by no statute of limitations, and heads of State and other State officials have no immunity from indictment, arrest, or prosecution.⁴⁶

The Court's formal engagement with a particular "situation"—a conflict or country—begins when the Prosecutor opens a "preliminary examination" to determine whether crimes within the Court's jurisdiction occurred.⁴⁷

⁴¹ References to "the Court" in this Part refer to the ICC.

⁴² See The States Parties to the Rome Statute, INT'L CRIM. COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 17, 2019).

⁴³ Rome Statute, *supra* note 1, art. 5(1). Since 2018, it can also charge and prosecute the "crime of aggression," but it has not done so yet. See *id.* art. 5(2); Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SECURITY (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/>. Since the crime of aggression—which involves "the use of armed force" by one State against another in a "manner inconsistent with the Charter of the United Nations"—does not necessarily involve mass atrocities, it is irrelevant to the analysis in this article. Rome Statute, *supra* note 1, art. 8 *bis*.

⁴⁴ Rome Statute, *supra* note 1, art. 17(1).

⁴⁵ *Id.* arts. 12, 13(b).

⁴⁶ *Id.* arts. 27, 29.

⁴⁷ The Prosecutor's office states that it conducts preliminary examinations similarly regardless of whether it is taking on the situation on its own initiative (*proprio motu*) or the UN Security Council or a

Investigators generally travel to the country to interview victims, witnesses, and sometimes suspects. They may visit crime sites and gather physical evidence. They also determine whether any national judicial system is investigating and prosecuting the crimes adequately; if so, the complementarity principle makes those cases inadmissible at the ICC. The Prosecutor can end the preliminary examination without bringing any cases. Alternatively, he or she can upgrade the situation to an “investigation,” begin assembling cases against individual suspects, and eventually indict.⁴⁸ A trial occurs only if the Court gains custody of the indictee. Importantly for our analysis, the Prosecutor has wide latitude on when, as well as whether, to move from preliminary examination to investigation. That step sometimes takes months, but in Colombia the Prosecutor has continued the preliminary examination for fifteen years,⁴⁹ using the implicit threat of a shift to investigation and prosecutions to influence the Colombian peace process, as discussed below.⁵⁰

The ICC’s effectiveness in promoting the goals on which we focus has been hotly disputed. Politicians, activists, and analysts have criticized it with increasing vehemence for indicting too few defendants too slowly,⁵¹ picking fights with powerful defendants who defy the Court,⁵² overemphasizing crimes committed in Africa,⁵³ and deferring to powerful States such as the United States.⁵⁴ On the other hand, many activists see the Court as central to their efforts to reduce violations of the most fundamental human rights.⁵⁵

What does the evidence show? This Part examines the ICC’s contribution to date to efforts to prevent and—through its own trials and those in national courts—secure criminal accountability for mass atrocity. Rigorous research has only begun to appear, but it is sufficient to move our analysis beyond the speculation that has proliferated since the 1990s. As noted in Part I, international legal institutions may affect mass atrocity and accountability through numerous

court member has referred the case to the Court. See David Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor’s Preliminary Examinations*, 111 AM. J. INT’L L. 395, 399 (2017). Bosco argues, however, that preliminary examinations after referrals are “tilted sharply toward opening a full investigation,” *id.* at 395, and his data suggest preliminary examinations of situations referred by a State Party or the Security Council are much shorter than those initiated by the Prosecutor *proprio motu*, *id.* at 400–401.

⁴⁸ The ICC’s Pre-Trial Chamber must confirm the upgrade to an investigation if the Prosecutor took on the situation *proprio motu*. Rome Statute, *supra* note 1, art. 15.

⁴⁹ Sara Wharton & Rosemary Grey, *The Full Picture: Preliminary Examinations at the International Criminal Court*, 2018 CAN. Y.B. INT’L L. (online version) 1, 41–42.

⁵⁰ See *infra* Section III.C.

⁵¹ See, e.g., David Davenport, *International Criminal Court: 12 Years, \$1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), <https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#7c5ada092405>.

⁵² See, e.g., Marlise Simons, *South Africa Should have Arrested Sudan’s President*, ICC Rules, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html>; Alastair Leithad, *Dismissal of Case Against Kenya’s Ruto Huge Blow to ICC*, BBC (Apr. 5, 2016), <https://www.bbc.com/news/world-africa-35974172>.

⁵³ See Yeebo, *supra* note 13.

⁵⁴ See DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014).

⁵⁵ See, e.g., ICC: *Strengthen Court on 20th Anniversary*, HUM. RTS. WATCH (July 16, 2018), <https://www.hrw.org/news/2018/07/16/icc-strengthen-court-20th-anniversary>.

direct and indirect causal channels. The number and complexity of those channels may explain why no scholar has comprehensively theorized, let alone evaluated, all the ways in which the ICC might shape the causal ecosystems that determine the incidence of atrocity and legal accountability, although many valuable works have examined some connections.⁵⁶ This Part takes a pragmatic approach, examining only those channels that have been studied empirically, using quantitative or qualitative methods.

We begin, in Section A, with a single, straightforward way in which the ICC promotes one of our goals: generating criminal accountability for mass atrocity directly, by itself investigating and prosecuting perpetrators. Section B performs a more complicated task, evaluating the evidence on how ICC investigations and prosecutions of individual cases affect, through various possible causal mechanisms, both goals—increasing prosecutions, now considering only those in *national* courts, and reducing the incidence of mass atrocity. Section C considers how Court activities other than building cases and prosecuting individual cases—including preliminary examinations—may influence accountability, again in national courts specifically, and atrocity levels.

The last two Sections yield a surprising conclusion: the ICC's greatest potential impact is *indirect*, through its support of and pressure on national-level actors who gather evidence of crimes, prosecute perpetrators in national courts, and punish them at the domestic level, and other contributions to dynamics that reduce atrocity or increase accountability. Less promising is the Court's conventional judicial work of direct investigation and prosecution of particular perpetrators. Its indirect exercise of influence resembles the process by which regional human rights systems work, and matches the philosophy of complementarity that guided the ICC's creators.

A. Direct Prosecution: Criminal Accountability at the ICC

In theory, the ICC has the power to achieve one of the goals of concern to us, criminal accountability, directly—by prosecuting perpetrators of mass atrocity itself. In practice, the Court has barely advanced accountability through its own cases. In over seventeen years, it has acquitted as many defendants of mass atrocities as it has convicted—four each.⁵⁷ This record might be reasonable in a national court, but international courts can try only a few defendants from among thousands of perpetrators of atrocities under their jurisdiction. Their complex, multi-year trials cost tens of millions of dollars each, and impose enormous burdens on victims, witnesses, and defendants.

⁵⁶ See, e.g., Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L J. TRANSITIONAL JUST. 434, 442 (2013); Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016). All of the empirical studies discussed below also explain the theory behind their findings, and many helpfully summarize theories of ICC impact beyond those they test.

⁵⁷ See ICC website – Defendants, *supra* note 9.

ICC prosecutors seem to have departed from their colleagues' practice of bringing only cases with exceptionally solid factual and legal bases. Their fifty percent conviction rate is far lower than those of their international predecessors. The first Chief Prosecutor of the Special Court for Sierra Leone, David Crane, stated in 2003 that he brought only cases he was confident he could prove beyond a reasonable doubt.⁵⁸ His record backs up that claim: the Special Court convicted all defendants against whom it rendered final verdicts.⁵⁹ The Extraordinary Chambers in the Courts of Cambodia have convicted three defendants and acquitted none.⁶⁰ The ICTY and ICTR, with more defendants, acquitted some, but their conviction-to-acquittal aggregates, at 90:18 (83% convicted) and 61:14 (81% convicted), are far better than the ICC's 4:4 (50% convicted).⁶¹

A criminal court can enhance accountability even without convicting, to be sure: ICC defendants are generally imprisoned during trial, a significant deprivation even if they are eventually acquitted. Even those who never face the Court could lose time, money, reputation, and opportunities due to their indictment and efforts to avoid capture. But the ICC has done little to promote accountability in these ways. In the seventeen years since the Rome Statute entered into force, the Prosecutor has indicted only thirty-seven people for mass atrocities, including the four who have been convicted.⁶² Just four more are in ICC custody, on or awaiting trial.⁶³ The other twenty-nine indictees include the four who were acquitted.⁶⁴ Cases against eight collapsed and were withdrawn by the Prosecutor or dismissed by the judges, including those against the now-President and Vice President of Kenya.⁶⁵ One was closed because the defendant—Abdullah Al-Senussi—was being tried by a national court.⁶⁶ Five

⁵⁸ *Sierra Leone News*, THE SIERRA LEONE WEB (May 29, 2003), <http://www.sierra-leone.org/Archives/slnews0503.html>.

⁵⁹ *Homepage*, SPECIAL CT. FOR SIERRA LEONE: RESIDUAL SPECIAL CT. FOR SIERRA LEONE, <http://rscsl.org/> (last visited Nov. 15, 2019). The investigations and indictments of all defendants the Special Court tried for mass atrocities (rather than procedural offenses such as witness tampering) occurred during Crane's term, even though most of the trials took place under his successors. *See Office of the Prosecutor*, SPECIAL CT. FOR SIERRA LEONE: RESIDUAL SPECIAL CT. FOR SIERRA LEONE, <http://rscsl.org/> (last visited Dec. 13, 2019); Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice*, 32 MICH. J. INT'L L. 395, 405-12 (2011).

⁶⁰ *Case Load*, EXTRAORDINARY CHAMBERS CTS. CAMBODIA, <https://www.eccc.gov.kh/en/case-load> (last visited Nov. 15, 2019).

⁶¹ *Key Figures of Cases*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <http://unictr.irmct.org/en/cases/key-figures-cases> (last updated Oct. 2019) (detailing figures for the ICTR); *Key Figures of the Cases*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last updated Aug. 2019) (detailing figures for the ICTY).

⁶² *See* ICC website – Defendants, *supra* note 9. Seven others have been charged only with crimes against the administration of justice, such as witness tampering. *Id.*

⁶³ The four are Al Hassan Ag Abdoul Aziz, Alfred Yekatom, Patrice-Edouard Ngaïssona, and Dominic Ongwen. *Id.*

⁶⁴ *Id.*

⁶⁵ Charges against Bahar Abu Garda, Callixte Mbarushimana, Mohamed Ali, Henry Kosgey, William Ruto, and Joshua Sang were dismissed. *Id.* Charges against Uhuru Kenyatta and Francis Muthaura were withdrawn. *Id.*

⁶⁶ *Id.*

indictees have died without facing trial.⁶⁷ The ICC has been unable to apprehend the remaining eleven.⁶⁸

Trials for international crimes are necessarily more complex and time-consuming than ordinary criminal cases such as murder or battery. But the ICC, like the ICTY, ICTR, and other recent international criminal courts, has slowed justice significantly: trials alone take three years or more, and the single level of appeal often takes years more. By contrast, the Argentine courts took twenty-one months to try, convict, sentence, and decide the appeals of the military juntas responsible for crimes against humanity from 1976 to 1983.⁶⁹

The twelve indictees who have defeated the ICC, and sixteen more who have avoided capture, may have suffered some inconvenience.⁷⁰ But the Prosecutor and judges have undermined the Court's authority, respectively by choosing losing battles and by inexplicably ruling for defendants. The Court's failures include its highest profile cases. Lord's Resistance Army leader Joseph Kony, indicted for crimes against humanity and war crimes in 2005, remains at large.⁷¹ Omar Al Bashir remained President of Sudan for ten years despite an outstanding ICC arrest warrant for genocide and crimes against humanity, and Kenya and South Africa hosted him in defiance of their obligation to enforce the ICC warrant.⁷² Kenyan politicians Uhuru Kenyatta and William Ruto waged a vigorous struggle against the ICC in African Union (AU) diplomatic fora and at home in Kenya after the ICC indicted them for crimes against humanity. They succeeded, persuading the AU to condemn the ICC and their fellow citizens to elect them President and Vice President of Kenya.⁷³ The ICC's cases against them collapsed after witnesses withdrew amid reported intimidation.⁷⁴

While the Court cannot be blamed for lacking a military force that might arrest indictees, its prosecutors could prioritize investigating and indicting offenders whom they have a reasonable chance of capturing and convicting. To be sure, the ICC must strike a balance between taking on intractable situations that have defied all other accountability mechanisms yet merit international concern, on the one hand, and securing accountability and building its own

⁶⁷ The deceased are Sylvestre Mudacumura, Raska Lukwiya, Muammar Gaddafi, Saleh Jerbo, and Okot Odhiambo. *Id.* Mudacumura died in September 2019. See *DR Congo: Warlord Sought by ICC Killed*, HUM. RTS. WATCH (Sept. 20, 2019), <https://www.hrw.org/news/2019/09/20/dr-congo-warlord-sought-icc-killed>. The ICC has not yet dismissed the case against him. See ICC website – Defendants, *supra* note 9.

⁶⁸ These individuals are Saif Gaddafi, Simone Gbagbo, Al-Tuhamy Mohamed Khaled, Joseph Kony, Ali Kushayb, Mahmoud al-Werfalli, Omar Al Bashir, Ahmad Harun, Abdel Raheem Hussein, Abdallah Banda, and Vincent Otti. *Id.*

⁶⁹ See THOMAS C. WRIGHT, STATE TERRORISM IN LATIN AMERICA: CHILE, ARGENTINA, AND INTERNATIONAL HUMAN RIGHTS 148-50 (2007); *Supreme Court of Argentina, Buenos Aires: Judgment of December 30, 1986*, 3 TRANSITIONAL JUSTICE 500, 500-03 (Neil J. Kriz ed., 1995).

⁷⁰ ICC website – Defendants, *supra* note 9.

⁷¹ *Kony et al. Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/uganda/kony> (last visited Nov. 15, 2019).

⁷² See Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, 91 ST. JOHN'S L. REV. 105, 123 (2017).

⁷³ See Laurence R. Helfer & Anne Elizabeth Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 INT'L CRIM. L. REV. 1 (2017).

⁷⁴ Dutton & Alleblas, *supra* note 72, at 158, 161-62, 169-70.

authority to facilitate future prosecutions, on the other. In our view, the Court has overestimated its power, underestimated the importance of success, or both. Thus, looking only at the most direct channel by which the ICC advances one of the goals that concern us, the Court has had little impact: its own investigations and trials have provided very little criminal accountability for mass atrocities. We now turn to evidence on whether its cases help prevent atrocities or promote accountability less directly.

B. The Impact of ICC Cases on Atrocities and National-Level Accountability

Numerous plausible theories suggest that the ICC's indictment and prosecution of individual defendants could, through various causal paths, decrease or increase mass atrocity or prosecutions in national courts. This Section summarizes what we know about the reality, by synthesizing empirical scholarship. The significant, though limited, universe of studies relevant to the first goal yields contradictory findings: some suggest that ICC indictments and prosecutions reduce atrocities, while others indicate that its judicial activity leads to more crimes. There is less evidence on how ICC cases affect national-level prosecutions; one cross-national, quantitative study finds a positive effect, but several book-length studies of the ICC's involvement in particular countries find that individual cases neither stimulated nor undermined national-level accountability.

There is some evidence that ICC prosecutions can shape conflict dynamics in ways that reduce atrocities. Political scientist Michael Broache interviewed rebel soldiers in the Democratic Republic of Congo (DRC) and combined their observations with reporting and analysis by the United Nations, media, and experts.⁷⁵ Both groups that Broache studied routinely committed mass atrocities such as massacres of civilians. Broache finds that the arrests in 2009 and 2010 of leaders of the Forces Démocratiques de Libération du Rwanda (FDLR), based on warrants issued by the ICC and German courts, seriously weakened the group.⁷⁶ Fundraising in Europe dried up.⁷⁷ A FDLR officer "reported that these arrests created a leadership vacuum [in the DRC] that undermined the FDLR's ability to organize operations, including attacks against civilians."⁷⁸ The loss of international support undermined combatant morale, triggering desertions.⁷⁹ Broache's study of a second rebel group, the Congrès National Pour la Défense du Peuple/Mouvement du 23 Mars (M23), found that M23 leader Bosco Ntaganda's surrender to the ICC "undermin[ed] group morale, prompt[ed] massive defections and depriv[ed] M23 of access to critical financial and

⁷⁵ Michael Broache, *International Prosecutions and Atrocities in the Democratic Republic of Congo: A Case Study of the FDLR*, 7 J. MIDDLE EAST & AFRICA 19, 25-28 (2016) [hereinafter Broache, *International Prosecutions and Atrocities*].

⁷⁶ *Id.* at 32-34.

⁷⁷ *Id.* at 32-33.

⁷⁸ *Id.* at 33.

⁷⁹ *Id.* at 33-34.

recruitment networks, while also generating deterrence vis-a-vis some combatants who feared future legal sanctions as a result of Ntaganda's surrender."⁸⁰ Broache's research indicates that specific ICC cases—against FDLR and M23 commanders—served to diminish those rebel movements' military capacity, and thus may have reduced their activity and perhaps their victimization of civilians.

Several other studies also conclude that ICC cases can reduce atrocities, but their evidence is thin and inconclusive. The Court issued arrest warrants for atrocities during the Libyan civil war on a single day; Courtney Hillebrecht finds that violence against civilians was lower than other variables would predict exactly seven days later, although not the day after.⁸¹ Based on interviews with activists, politicians, journalists, and others, Yvonne Dutton and Tessa Alleblas attribute the low level of violence around Kenya's 2013 election to the ICC's having indicted two leading candidates, Kenyatta and Ruto, for atrocities after the 2007 election.⁸² When they appeared voluntarily at a preliminary hearing, the ICC trial judge warned them she would order their arrest if they incited violence.⁸³ Kenyatta and Ruto repeatedly called for peace during the subsequent campaign.⁸⁴

There is strong evidence that the ICC reduced mass atrocities globally during its first decade. Hyeran Jo and Beth Simmons analyze data on intentional killing of civilians between 1989 and 2011 by government forces and rebels in 101 countries. They control for variables including type of government, existence of a civil war, quality of domestic judicial institutions, foreign aid receipts, and activity by human rights organizations. Looking across all countries in their sample, including those in which the ICC was involved and those in which it was not, Jo and Simmons find that more ICC activity reduced civilian killings during the period studied. Specifically, when other factors were held constant, an increase by one in the number of new ICC preliminary examinations, investigations, or arrest warrants over a three-year period coincided with a decrease in the number of civilians killed by government forces the next year by 43% and the number killed by rebels by 17%.⁸⁵ This finding provides evidence that the ICC has reduced atrocities, although the authors do not prove causation.

It is not clear, however, whether the possible life-saving effect could have flowed from the ICC's investigation and prosecution of individual cases (considered in this Section) or from other sources, such as the possibility it would act (considered in the next Section). Jo and Simmons's measure of ICC activity

⁸⁰ Michael Broache, *Irrelevance, Instigation, and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case*, 10 INT'L J. TRANSITIONAL JUST. 388, 405 (2016) [hereinafter Broache, *Irrelevance, Instigation and Prevention*].

⁸¹ See Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT'L INTERACTIONS 616, 633-34 (2016). Many massacres occurred after the warrants were issued. Wierda, *supra* note 7, at 58.

⁸² Dutton & Alleblas, *supra* note 72, at 157-59.

⁸³ *Id.* at 159.

⁸⁴ *Id.*

⁸⁵ Jo & Simmons, *supra* note 56, at 460, 468.

combines two variables that reflect the Court's individual cases (i.e., moving situations into the investigation stage and issuing arrest warrants) with one that does not (launching new preliminary examinations).⁸⁶ Because the authors analyze the relationship between killing and a single variable that measures all ICC activities, it is possible that the reduction in killing they find is connected to individual prosecutions, other activities, or both.

Unfortunately, the reduction in mass atrocity that Jo and Simmons identify may be limited to the period up to 2011, when the ICC appeared more powerful than it does now. They theorize that their finding reflects potential perpetrators' fear of the Court—presumably that the ICC would inflict costs on them by indicting or, worse, apprehending and trying or, worse still, convicting and imprisoning them. In the period Jo and Simmons studied, through 2011, however, potential perpetrators may have feared the ICC much more than they do now. The ICC's four acquittals and the collapse of the Kenya cases have all occurred since 2011. During this period, the Court has continued to fail to apprehend most indictees, including the highest profile defendants. Literature on ordinary crime finds that potential criminals' beliefs about likelihood of punishment shape their behavior more than their beliefs about severity of punishment.⁸⁷ Considering the number of Rome Statute crimes committed since 2002, the probability of any particular perpetrator facing justice in The Hague is extremely small. However clear that was before 2011, the ICC's weak record in investigating and prosecuting individual cases since then may have diminished the deterrent effect that Jo and Simmons's research suggests.

There is also some evidence that ICC prosecutions actually increase atrocities—although this, too, is far from conclusive. Broache's studies of FDLR and M23 report "suggestive evidence" that the 2012 ICC arrest warrant for the FDLR's supreme military commander, Sylvestre Mudacumura, "strengthened Mudacumura's opposition to peace initiatives and, in doing so, indirectly contributed to the uptick in violence beginning in mid-2014."⁸⁸ A former M23 member told Broache that after the ICC convicted Thomas Lubanga in 2012, M23 leader Bosco Ntaganda, a Lubanga protégé, "began to have some fear of the ICC."⁸⁹ Broache believes Ntaganda's fear that the DRC government would turn him over to the Court caused him to form M23, which immediately committed atrocities against civilians.⁹⁰ Alyssa Prorok's quantitative study uses data on all civil wars between 2002 and 2013. After controlling for factors such as country size, type of government, and rebel military strength, she finds that conflicts connected with an ICC investigation or preliminary examination had an 11% chance of ending in a particular year, compared to a 21% chance for those in which the ICC was not active.⁹¹ However, Prorok acknowledges that

⁸⁶ *Id.* at 457-58 (defining ICC ACTIONS variable).

⁸⁷ See Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939, 943 (2010).

⁸⁸ Broache, *International Prosecutions and Atrocities*, *supra* note 75, at 34-35.

⁸⁹ Broache, *Irrelevance, Instigation and Prevention*, *supra* note 80, at 399, 404.

⁹⁰ *Id.*

⁹¹ Alyssa Prorok, *The (In)Compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination*, 71 INT'L ORG. 213, 228-30 (2017).

this finding does not prove that the ICC inhibits peacemaking—the Court may take on the very civil wars that are most difficult to end, rather than making those it addresses more intractable.⁹² Furthermore, Prorok’s results are contradicted by a subsequent quantitative study, by Geoff Dancy and Eric Wiebelhaus-Brahm, which finds no connection between international or domestic trials and the likelihood that conflict will end.⁹³

Five in-depth scholarly studies of the ICC’s cases against Joseph Kony and other commanders of the Lord’s Resistance Army (LRA) support competing views of the possible deterrent (or inflammatory) impact of ICC cases on mass atrocity. On the one hand, several conclude that the July 2005 LRA indictments contributed to the group’s international isolation, including Sudan’s withdrawal of support.⁹⁴ Over the following years, LRA fighters left the group and returned to civilian life. The rump LRA retreated into Congo and the Central African Republic. While it still attacks civilians there, its smaller size may make it less of a threat and it no longer operates in Uganda, where it wreaked havoc for years. The ICC thus may have helped reduce LRA atrocities. On the other hand, nearly all of these scholars agree that the indictments contributed to the failure in 2008 of peace talks with the Ugandan government in Juba, which might have led to the group’s complete demobilization. Most specifically, they believe that Kony rejected a peace agreement laboriously crafted by his own negotiators and the government, because it did not sufficiently protect him from the ICC.⁹⁵ Some see the indictments as having created a general mistrust that the talks never overcame.⁹⁶

If the evidence is thin, inconclusive, and ambiguous about whether ICC investigation and prosecution of specific defendants significantly decreases or increases atrocities, then do its cases at least promote the other goal of concern to us, criminal accountability, by increasing prosecutions at the national level? The evidence on this goal is too modest to suggest even a tentative conclusion. Geoff Dancy and Florencia Montal’s multivariate analysis of fifty-one African

⁹² See *id.* at 233-39.

⁹³ Geoff Dancy & Eric Wiebelhaus-Brahm, *The Impact of Criminal Prosecutions During Intrastate Conflict*, 55 J. PEACE RESEARCH 47, 56 (2018); see also Geoff Dancy & Florencia Montal, *From Law Versus Politics to Law In Politics: A Pragmatist Assessment of the ICC’s Impact*, 32 AM. U. INT’L L. REV. 645, 670 (2016) [hereinafter Dancy & Montal, *From Law Versus Politics*] (stating that their research found “no significant correlation between ICC involvement [in conflicts] and the end of fighting” but providing no detail on methods).

⁹⁴ See MARK KERSTEN, JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT’S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE 80 (2016); PATRICK S. WEGNER, THE INTERNATIONAL CRIMINAL COURT IN ONGOING INTRASTATE CONFLICTS 269-70 (2015); Hyeran Jo, Michell Radtke & Beth Simmons, *Assessing the International Criminal Court, in THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* 193, 214 (Therese Squatrito et al. eds., 2018).

⁹⁵ See LINE ENGBO GISSEL, THE INTERNATIONAL CRIMINAL COURT AND PEACE PROCESSES IN AFRICA: JUDICIALIZING PEACE 61 (2018); KERSTEN, *supra* note 94, at 114 (reporting this as the “mainstream understanding”); SARAH M.H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYZING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN 136 (2013); WEGNER, *supra* note 94, at 271.

⁹⁶ Julia Reilly, *The Prosecution Paradox: How the International Criminal Court Affects Civil War Peace Negotiations* 102-35 (July 2019) (unpublished Ph.D. dissertation, University of Nebraska), <https://digitalcommons.unl.edu/poliscitheses/52/>.

countries finds that those in which the ICC is conducting a full-fledged investigation—having issued indictments or being on the verge of doing so—prosecuted significantly more government agents for violations of physical integrity rights between 1970 and 2014 than other African countries.⁹⁷ They find, by contrast, that preliminary examinations, which focus on the situation as a whole rather than individual cases, had no effect on domestic prosecution activity.⁹⁸ This influence was not overwhelming, however, and other research emphasizes the weakness of any national-level effects of ICC cases. Several in-depth case studies of Sudan find the ICC's involvement has not increased prosecution of mass atrocities there.⁹⁹ Analyses of Uganda, where the Court has indicted only rebels, not government agents, find at best modest impact. They attribute what little impact the Court has had not to its individual cases—its indictments of LRA commanders and ongoing trial of one—but to its broader engagement with the government, media, and civil society.¹⁰⁰

To summarize, the available evidence suggests that the ICC's investigation and prosecution of individual cases sometimes affects conflict dynamics and thus atrocities, but can cut either way, reducing or exacerbating them. Jo and Simmons associate greater ICC activity with significantly less killing of civilians by government and rebel forces, but it is not clear whether this might stem from individual prosecutions, which this Section has examined, or from the shadow of the ICC's attention or other ICC actions, considered in the next Section. Furthermore, the Court's impotence against individual defendants, apprehending few indictees and acquitting half those it has tried, raises serious doubts that it can realize the potential of individual indictments and prosecutions. There is as yet insufficient evidence to assess the impact of ICC cases on prosecution of perpetrators of mass atrocity by national courts.

C. Complement and Catalyst: The Potential of Indirect Influence

The ICC's first Prosecutor, Luis Moreno Ocampo, recognized as early as 2003 that the Court could contribute to legal accountability through actions other than investigating and prosecuting individual cases.¹⁰¹ His successor, Fatou Bensouda, believes those actions can help prevent atrocities as well: during

⁹⁷ Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689, 711 (2017) [hereinafter Dancy & Montal, *Unintended Positive Complementarity*]. The violations of physical integrity rights on which they focus include torture, political imprisonment, disappearance, unlawful killing, and sexual abuse. *Id.* at 703. These are similar in nature, although not necessarily scale, to what we term mass atrocities. In a different article, the same authors argue that ICC investigations in the Uganda and DRC, specifically, increased prosecutions there, but this is a more geographically limited claim and they offer less compelling quantitative support than in *Unintended Positive Complementarity*. Dancy & Montal, *From Law Versus Politics*, *supra* note 93, at 698.

⁹⁸ Dancy & Montal, *Unintended Positive Complementarity*, *supra* note 97, at 709.

⁹⁹ See NOUWEN, *supra* note 95, at 321-28; WEGNER, *supra* note 94, at 91.

¹⁰⁰ See *infra* text accompanying notes 116-117.

¹⁰¹ The Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, INT'L CRIM. COURT (Sept. 2003) at 5.

preliminary examinations, in addition to considering whether to proceed to investigation stage,

the Office [of the Prosecutor] also seeks to contribute to two overarching goals of the Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes, thereby potentially obviating the need for the Court's intervention.¹⁰²

Actions and statements by prosecutors and judges unrelated to individual cases, as well as the Court's very existence and its jurisdiction on the territory of Member States, could shape the interests, expectations, and tactics of politicians, military commanders, rank-and-file fighters, national judges and prosecutors, activists, the media, and other relevant actors. Their interactions in national and international arenas make up the causal ecosystems that determine whether atrocities occur and whether perpetrators are held accountable. Despite Moreno Ocampo's and Bensouda's words, however, they, their staff, and the ICC's judges have focused overwhelmingly on investigating and prosecuting individual cases. Except in Colombia, they have devoted little energy and few resources to stimulating and supporting accountability in national courts or trying to reduce atrocities.

Scholars have recognized these indirect channels of possible influence, but few have examined them rigorously. "[E]mpirical work . . . tends to operationalize ICC involvement in a situation only as formal prosecution, or perhaps slightly more broadly as formal investigation."¹⁰³ Nonetheless, emerging evidence strongly suggests that ICC prosecutors, and perhaps judges, can act in ways that shift the ecosystems driving atrocities and national-level prosecutions, decreasing the former and increasing the latter. Those actions include supporting, educating, and pressuring national actors.

Subsection 1 musters the evidence on the ICC's impact on atrocities and national-level prosecutions through efforts beyond investigating and prosecuting its own cases. Subsection 2 describes the ICC's lack of investment in such approaches. Subsection 3 examines the ICC's involvement in efforts to end the civil war in Colombia. That case study illustrates the complexity of the Court's channels of influence and how it can contribute to conflict resolution (thus averting atrocities) and accountability through persistent, strategic engagement.

1. Evidence of Potential

Several quantitative studies suggest that the mere possibility that the ICC might intervene in a particular situation may shift the atrocities ecosystem in

¹⁰² The Office of the Prosecutor, *Report on Preliminary Examination Activities: 2018*, INT'L CRIM. COURT (Dec. 2018) at 8 [hereinafter *Report on Preliminary Examination Activities: 2018*].

¹⁰³ Reilly, *supra* note 96, at 14; see also Courtney Hillebrecht & Alexandra Huneeus, *The Judicialization of Peace*, 59 HARV. INT'L L.J. 279, 287 (2018).

ways that reduce suffering. All of these studies apply regression analysis to large statistical samples and control for other factors that could influence their dependent variables. In addition to the findings discussed previously, Jo and Simmons find that the governments of ICC members killed, on average, 47% fewer civilians than those of non-Member States.¹⁰⁴ Benjamin Appel finds a statistically significant drop in mass atrocities within States that ratified the Rome Statute from before ratification to after.¹⁰⁵ Prorok also finds that ICC Member States are more successful at ending civil wars than non-members; ending conflict likely reduces both motivation and opportunity for government forces and their opponents to commit atrocities.¹⁰⁶ Beth Simmons and Allison Danner's analysis yields a similar finding.¹⁰⁷ These studies do not prove that the ICC caused the associations they document,¹⁰⁸ but they show such causation is possible—while correlation does not show causation, causation requires correlation.

These studies support the inference that the ICC may reduce atrocities even when it is not actively prosecuting or even seriously considering doing so. All find statistically significant effects across samples mostly composed of countries in which the ICC was not conducting a preliminary examination or investigation during the periods studied. Jo and Simmons's finding that greater ICC activity correlated with decreased civilian killing covered many countries in which the Court was not active during the period studied, as well as a few in which it was: killings in all countries, total, decreased.¹⁰⁹ If the ICC did contribute to these reductions in atrocities and civil war terminations, there could be many causal paths. Potential perpetrators may have felt a vague apprehension when the ICC stepped up its activities worldwide (Jo and Simmons) or when their own country became a member (Appel). They therefore may have refrained from atrocities even if the Court was not investigating their situation and thus they had no reason to fear imminent indictment. The effects could be even less direct: Appel finds that countries in which the ICC was involved in a particular year, at any stage from preliminary examination to trial, were more likely to suffer a political crisis and/or international economic sanctions, even if their level of human rights violations was the same.¹¹⁰ Although Appel does not show the ICC caused crises

¹⁰⁴ Jo & Simmons, *supra* note 56, at 460.

¹⁰⁵ Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, 62 J. CONFLICT RESOL. 3, 12 (2018) (defining dependent variable); *id.* at 18 (reporting statistical results). Appel examined the effect on "human rights violations," which he defined similarly to our "mass atrocities." *Id.* at 8.

¹⁰⁶ Prorok, *supra* note 91, at 229.

¹⁰⁷ Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 247-48 (2010) (associating joining the ICC with much improved chances of peacefully and quickly ending a civil war, in States with less democratic regimes, less constrained executives, or weak rule of law).

¹⁰⁸ Alternative explanations for the findings may include omitted variable bias (for example, in the Jo and Simmons study, a third factor could cause both ICC ratification and lower killing) and reverse causation (for example, governments that expected to kill fewer civilians might be more likely to join the ICC than others that were similar on the characteristics for which the authors controlled).

¹⁰⁹ See *supra* text accompanying note 85.

¹¹⁰ Appel, *supra* note 105, at 22.

or sanctions, that is possible, and those developments could in turn affect potential perpetrators' behavior.

There is also evidence that our two goals may be linked: the ICC could help prevent atrocities by increasing domestic prosecutions. Hunjoon Kim and Kathryn Sikkink find torture, summary execution, disappearances, and political imprisonment less common in transitional countries that prosecute more government agents for human rights violations.¹¹¹ The Jo and Simmons study also finds that the governments of countries that have called human rights violators to account through trials and truth commissions kill fewer civilians.¹¹²

Can the ICC stimulate prosecutions in national courts? This question has provoked much discussion among scholars and the Court's own staff,¹¹³ but little empirical scholarship. What scholarship there is suggests that the Court could significantly, although not vastly, increase national-level prosecutions, but has not yet realized that potential. Both the vague possibility of Court intervention and specific Court actions (known as "positive complementarity"¹¹⁴) may influence national politicians, commanders, judges, or others. Their effects may be particularly strong during preliminary examinations. Marieke Wierda notes that ICC prosecutors have shared evidence on specific atrocity cases with Colombian prosecutors even during the preliminary examination stage. She concludes that ICC pressure has contributed to national authorities' decisions to investigate and prosecute government forces' killings of civilians: in Colombia the "'shadow effect' [of the preliminary examination] achieved more than active investigations probably would have."¹¹⁵ Sarah Nouwen's in-depth case study of Uganda finds that the ICC's presence in Uganda and engagement with local actors (rather than the specific cases it was pursuing) indirectly contributed to those actors' success in creating a War Crimes Chamber in the national courts.¹¹⁶ The Court could have achieved even more there: Nouwen criticizes the ICC Prosecutor for failing to indict government officials, "instruct[ing] ICC-protected witnesses not to cooperate with other courts," and other decisions that limited the Court's effect on accountability in the Ugandan courts.¹¹⁷ The ICC's record in numerous countries leads Wierda to conclude that the Court could "act as an incubator of domestic proceedings," but has devoted insufficient resources

¹¹¹ Kim & Sikkink, *supra* note 87, at 952-54.

¹¹² Jo & Simmons, *supra* note 56, at 465. Jo and Simmons do not separate the effects of trials and truth commissions, nor estimate the number of lives saved.

¹¹³ See, e.g., THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn & Mohamed M. El Zeidy eds., 2011); Luis Moreno-Ocampo, *A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 21-32 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

¹¹⁴ See Policy Paper on Preliminary Examinations, *supra* note 38, at 23.

¹¹⁵ Wierda, *supra* note 7, at 143.

¹¹⁶ NOUWEN, *supra* note 95, at 234-38, 240.

¹¹⁷ *Id.* at 228-43. Some countries may have undertaken sham investigations after ICC intervention; we do not consider these examples of accountability. For example, the Government of Sudan created specialized courts and investigation authorities after major steps in the ICC's Darfur investigation, but these have not led to significant prosecutions and appear to be "smokescreens" intended to pre-empt ICC prosecutions without actually holding perpetrators accountable. See *id.* at 320-28; WEGNER, *supra* note 94, at 81-93.

to doing so and has chosen to compete rather than cooperate with national prosecutors.¹¹⁸ Remediating those errors would increase its catalytic effect. An in-depth Human Rights Watch study finds that ICC prosecutors have contributed somewhat to national-level accountability in Colombia and Guinea, although not in Georgia or the United Kingdom.¹¹⁹ It recommends a number of shifts that could enhance that impact, including devoting more resources and collaborating more with local advocates and international donors.¹²⁰ Dancy and Montal's finding that the number of ICC preliminary examinations was not associated with more domestic prosecutions in Africa, discussed above, is consistent both with the possibility that the Court has little capacity to stimulate national-level accountability and with our contrary conclusion, informed by other research and the success of regional mechanisms described in Part IV, that it has unrealized potential.¹²¹

The Pinochet case illustrates how national courts can be spurred to act by the threat that other courts will prosecute. After Spanish courts sought the extradition of former Chilean dictator Augusto Pinochet for torture and extrajudicial killing during the 1970s and 1980s, Chilean judges ended nearly a decade of passivity and began prosecuting him and his subordinates. Many scholars believe the Spanish case altered the causal ecosystem that shaped Chilean courts' actions. For example, Pion-Berlin argues that Spanish courts' influence flowed through the Chilean executive branch, which preferred to deal with Pinochet at home and pressured domestic courts to act.¹²² The ICC Prosecutor might stimulate similar executive branch action in other countries by signaling concern with national courts' inaction, such as through public or private statements or launching a preliminary examination. The response could depend on complex aspects of political and legal context, so the Prosecutor would need to assess those before acting.

2. The Court's Underinvestment

Surprisingly, the Office of the Prosecutor (OTP) and the ICC's judges have devoted few resources to stimulating and supporting national prosecutions or to trying to reduce atrocities. Following a narrow conception of judicial work, they have focused almost entirely on investigating, indicting, and—for the few they have apprehended—trying individual perpetrators of mass atrocities. The Prosecutor is not wholly to blame: the ICC's Assembly of States Parties, representing its Member States and functioning as the Court's board of directors, takes a very narrow view of the Court's role and has denied or sharply limited

¹¹⁸ Wierda, *supra* note 7, at 111-12.

¹¹⁹ HUMAN RIGHTS WATCH, *PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE 6-8* (2018) [hereinafter *PRESSURE POINT*]. Although written by an advocacy group, the study is balanced and relies on scholarship as well as original interviews with government officials, activists, journalists, and judges. *Id.* at 22.

¹²⁰ *Id.* at 16-19; but see *id.* at 21 (noting significant limitations on the Court's potential influence).

¹²¹ Dancy & Montal, *Unintended Positive Complementarity*, *supra* note 97, at 709.

¹²² See David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?*, 36 J. LAT. AM. STUD. 479, 503-04 (2004).

funding for activities other than case investigations and prosecutions.¹²³ The OTP Situation Analysis Section, which conducts preliminary examinations, had just five to six staff members until 2011—and devoted half its time to work on investigation-stage situations.¹²⁴ Bensouda has improved matters: by 2018 the unit had thirteen staff who appeared to be focused almost entirely on preliminary examinations.¹²⁵ However, Human Rights Watch’s analysis of their workload concluded that this was too few even for the research and analysis tasks necessary in that stage—such as determining whether crimes within the Court’s jurisdiction had been committed—“let alone the steps that may be necessary to engage national authorities in a way that can catalyze national prosecutions.”¹²⁶ For 2019, the OTP requested approximately one-fifteenth as much funding for preliminary examinations as for investigations and prosecutions.¹²⁷

The Court also fails to make optimum use of these relatively modest resources, as Wierda, Nouwen, and Human Rights Watch note.¹²⁸ Moreno Ocampo’s OTP occasionally shared information with national courts and participated in seminars with local lawyers and judges, but made little attempt to pressure national authorities to act or build the capacity of local judges and prosecutors.¹²⁹ Preliminary examinations, except in Colombia, have involved few of the country visits necessary to build relationships, understand complex political conditions, and deliver many kinds of support and pressure.¹³⁰ The OTP resists hiring political analysts who could provide the strategic, context-aware advice on what statements or actions could refract through local politics to increase prosecutions or reduce atrocities.¹³¹ There are some signs of greater creativity and assertiveness: Bensouda reported that in 2018 OTP staff working on the Nigeria preliminary examination conferred with government officials, diplomats, and local activists; trained Nigerian prosecutors to handle mass atrocity cases; and threatened the government that the ICC would open an investigation and begin indicting if the government did not prosecute crimes by its own army.¹³²

¹²³ Wierda, *supra* note 7, at 100.

¹²⁴ PRESSURE POINT, *supra* note 119, at 162.

¹²⁵ Proposed Program Budget for 2019 of the International Criminal Court 61-62, Assembly of States Parties, 17th Sess., Dec. 5-12, 2018, ICC-ASP/17/10 (Dec. 12, 2018), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-10-ENG.pdf [*hereinafter* ICC 2019 Proposed Budget].

¹²⁶ PRESSURE POINT, *supra* note 119, at 162-63.

¹²⁷ Compare ICC 2019 Proposed Budget, *supra* note 125, at 60-64 (requesting €4,332,400 for Jurisdiction, Complementarity, and Cooperation Division, and stating that Situation Analysis Section staff comprise less than half of the Division total) *with id.* at 66 (requesting €19,918,700 for Investigation Division) *and id.* at 74 (requesting €11,731,500 for Prosecution Division).

¹²⁸ See *supra* text accompanying notes 116-120.

¹²⁹ See WEGNER, *supra* note 94, at 199-200; William Burke-White, *Reframing Positive*

Complementarity, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 113, at 346-47.

¹³⁰ Wierda, *supra* note 7, at 286.

¹³¹ *Id.*

¹³² Report on Preliminary Examination Activities: 2018, *supra* note 102, at 61-62.

3. Colombia: A Promising Experiment

The ICC's role in Colombia's peace negotiations with right-wing paramilitaries and the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC) illustrates how ICC activities other than building and prosecuting individual cases can contribute to reducing atrocities and achieving criminal accountability. The ICC Prosecutor has kept the Court's examination of Colombia in the preliminary examination stage for fifteen years, since 2004, rather than upgrading it to an investigation and issuing indictments.¹³³ Moreno Ocampo, then Bensouda, and their staff have engaged regularly in public and private with the Colombian government, judiciary, and civil society, and modulated their positions as the peace talks have progressed.¹³⁴ This flexible, strategic approach has allowed the ICC some influence in a complex, high-stakes peace process. The Court has supported the conclusion of a landmark agreement that could end a four-decade civil war characterized by rampant atrocities, while preserving the possibility of criminal accountability in Colombian courts. As Courtney Hillebrecht and Alexandra Huneus conclude in their exceptionally subtle study, the ICC's and Inter-American Court's effect on the Colombian peace process suggests that "'shadow effects' [may be] the most important way courts exert influence," rather than through indicting and prosecuting individual cases.¹³⁵

Colombian combatants—including the army, FARC, and paramilitaries—feared prosecution for the mass atrocities that all sides committed throughout the civil war, including massacres of civilians and torture. FARC and another rebel group compiled analyses of the chances that their personnel would be prosecuted by the ICC as well as by Colombian courts.¹³⁶ During the peace talks, FARC negotiators pushed hard for a full amnesty that would shield commanders and combatants from criminal penalties.¹³⁷ Paramilitary leader Vicente Castaño's fear of ICC prosecution reportedly contributed to his decision to lay down arms.¹³⁸

The OTP tried to affect peace talks from their inception in 2005, to promote two goals that were somewhat in tension: ending the conflict, and thus preventing further mass atrocities, and achieving criminal accountability for atrocities already committed. The Prosecutor and OTP staff issued reports and statements on the peace process. They visited Colombia to engage government officials, judges, civil society, and media in private and public, trying to elevate concern for criminal accountability among these actors and, through them, the public.¹³⁹ The Inter-American Commission and domestic and international human rights

¹³³ Wharton & Grey, *supra* note 49.

¹³⁴ See *infra* text accompanying notes 139, 146-149.

¹³⁵ Hillebrecht & Huneus, *supra* note 103, at 287; cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950 (1979).

¹³⁶ Jo & Simmons, *supra* note 56, at 449.

¹³⁷ GISSEL, *supra* note 95, at 179.

¹³⁸ Jo & Simmons, *supra* note 56, at 449.

¹³⁹ See Hillebrecht & Huneus, *supra* note 103, at 295-99, 314; René Uruña, *Prosecutorial Politics: the ICC's Influence in Colombian Peace Processes, 2003-2017*, 111 AM. J. INT'L L. 104, 104 (2017).

organizations made similar efforts. The Inter-American Court issued judgments on accountability for mass atrocities in Colombia and other countries.¹⁴⁰

This pro-accountability coalition significantly influenced the peace process.¹⁴¹ For example, the government reportedly abandoned a plan to give amnesty to several paramilitaries due to media coverage of the preliminary examination.¹⁴² The OTP's impact was complex, indirect, and far from determinative, however. Whether the peace talks succeeded (thus ending atrocities) and what forms of criminal accountability the eventual agreement permitted were determined by a causal ecosystem shaped by the balance of power between government and opposition parties, media discourse about the FARC's culpability, military developments on the ground, local activists' perceived legitimacy, and many other factors.¹⁴³ The OTP engaged this ecosystem in myriad ways. For example, its interactions with the media and activists likely increased their knowledge of international criminal law, helping them critique particular semi-amnesty proposals as violations of Colombia's international legal obligations.¹⁴⁴ Because many Colombian officials and citizens took those obligations very seriously,¹⁴⁵ grounding the critiques in international law likely made them more persuasive.

The OTP monitored these complex dynamics and adapted its position strategically. While many of its effects on the talks were convoluted, one example reflects a more straightforward channel of influence. In a sense, the OTP participated in the negotiations indirectly, by signaling that it would not prosecute after a peace agreement if that agreement permitted some degree of criminal prosecution and punishment.¹⁴⁶ The OTP modulated its demands as the peace talks evolved. It framed them not as political positions aimed at achieving the best outcome possible within many constraints, but as objective, legal interpretations of the Rome Statute.¹⁴⁷ Specifically, it periodically evaluated whether the semi-amnesties that the negotiators were considering would permit enough national-level accountability for atrocities to satisfy the Rome Statute's complementarity provisions and thus preclude ICC prosecutions. Early in the talks with the FARC, Bensouda took a hard line, but she recognized the limits of her power. Eventually, she accepted that the FARC would insist on some protection from prosecution and that the government would acquiesce rather than scuttle the talks. With the Colombian Constitutional Court, influential Colombian and international NGOs, and academics also showing openness to compromising criminal accountability to end the war,¹⁴⁸ Bensouda softened the

¹⁴⁰ Hillebrecht & Huneus, *supra* note 103, at 299-302.

¹⁴¹ *Id.*; Urueña, *supra* note 139, at 107-21.

¹⁴² Appel, *supra* note 105, at 9.

¹⁴³ Hillebrecht & Huneus, *supra* note 103, at 302-16; Reilly, *supra* note 96, at 162-86.

¹⁴⁴ Hillebrecht & Huneus, *supra* note 103, at 302-07.

¹⁴⁵ *Id.*

¹⁴⁶ One illustration of the complexity of the ICC's channels of influence is that other actors, such as Human Rights Watch, sometimes threatened that the ICC would intervene—attempting to exploit perceptions that they knew the Court's intentions. *Id.* at 310.

¹⁴⁷ See Urueña, *supra* note 139, at 117.

¹⁴⁸ *Id.* at 119.

OTP's position. At a public event in Bogotá, her deputy signaled that the OTP might deem the Rome Statute satisfied by criminal accountability short of full-scale prosecution and punishment.¹⁴⁹ In doing so, the OTP aimed to maintain some influence over the negotiations: maintaining a firm line could have risked the FARC deciding that the ICC would not accept any peace terms it could stomach, accepting the risk of eventual ICC indictments (knowing that the Court had limited prosecutorial capacity), and insisting on a peace agreement that completely shielded its fighters from prosecution in the Colombian courts.

In late 2016, the government and FARC reached a final peace accord, promising an end to 40 years of fighting. The agreement sharply restricted national prosecutions: if perpetrators confessed, then even crimes within the jurisdiction of the ICC would be punishable by "a maximum of eight years of 'effective restriction of freedom,' which under 'no circumstances [was to] be understood as jail or prison.'"¹⁵⁰ Opposition politicians and Human Rights Watch denounced this provision as violating the principle of accountability for international crimes.¹⁵¹ Bensouda, by contrast, opted for silence, tacitly endorsing an agreement that could end one of the longest-running wars in the world, and the atrocities it had spawned.¹⁵²

The OTP's strategy for reducing atrocity and promoting accountability in Colombia differed fundamentally from its approach to most of its situation countries. "[T]he ICC works in Colombia not in its capacity as a court, but rather through the OTP as an international body monitoring domestic prosecutorial policy."¹⁵³ The fact that the Court had maintained the preliminary examination for over a decade, rather than moving to prosecute individual cases, gave Bensouda critical room for maneuver. As Line Engbo Gissel explains, because the ICC had not accused specific individuals—from the government or rebel side—of atrocities,

the Court was at liberty to be supportive [of the peace process]. It did not have to vilify alleged perpetrators or mobilize domestic or international opinion in favour of marginalisation or arrest. Had the OTP indicted the FARC leadership, it would have been difficult for the Prosecutor to maintain support for the peace process, unless it committed the conflict parties to their surrender or arrest.¹⁵⁴

¹⁴⁹ *Id.* at 120.

¹⁵⁰ *Id.* at 121 (quoting the peace accord).

¹⁵¹ GISSEL, *supra* note 95, at 177.

¹⁵² *See id.*

¹⁵³ Hillebrecht & Huneeus, *supra* note 103, at 314.

¹⁵⁴ GISSEL, *supra* note 95, at 176-77.

The ICC's different approaches in Colombia and Uganda, where it quickly indicted LRA commanders, thus explain why its involvement helped efforts to end conflict in Colombia but hurt them in Uganda.¹⁵⁵

Whether the peace accord will hold and how many perpetrators the Colombian courts will punish remains uncertain,¹⁵⁶ but the OTP deserves credit for contributing to Colombians' efforts to end atrocities and secure legal accountability for perpetrators. In the Colombia case, Bensouda and her staff seem to have recognized the potential of tools beyond investigating and prosecuting individual cases. Their patient, strategic efforts to contribute positively to the complex dynamics that shaped the peace negotiations exemplify an approach that is more promising than the ICC's conventional judicial work.

* * *

Four key conclusions emerge from the analysis in this Part. First, the ICC's effects on mass atrocity and judicial accountability merit much more study, for they are only partially understood. The pace of scholarship has accelerated, with significant publications in the last five years, but most of the important findings are supported by just one study. A number of works examine the ICC's effects on phenomena, such as peace processes, that may in turn affect atrocity levels. The few that clearly document ICC influence on atrocities or prosecution levels are unable to specify the channel of influence—that is, what aspect of the ICC's existence, status, or activities causes the effect, and through what intermediate steps, if any. Second, there is only thin evidence that the Court's investigations, indictments, and prosecutions of individual perpetrators reduce atrocity or advance accountability—and some evidence that those cases exacerbate conflict and thus potentially atrocity. Third, the Court's unimpressive record of indicting defendants it then fails to capture, maintain a case against (such as the Kenyan defendants), or convict may have profoundly undermined its ability to deter potential perpetrators. Fourth and finally, ICC activities beyond the investigation and prosecution of individual cases—including during preliminary examinations—provide potentially powerful opportunities to prevent atrocities and promote judicial accountability, if conducted strategically. The success of regional human rights institutions in advancing those goals through similar indirect means, described in the next Part, reinforces our conclusion that the ICC has allocated its resources ineffectively. The Court should reallocate resources away from investigating and prosecuting cases, and toward other activities that

¹⁵⁵ See *supra* text accompanying note 95. Reilly's in-depth analysis of the two cases concludes, "If the ICC plays an oversight role in conflict situations, . . . it acts as a guarantor for peace negotiations. However, if the ICC plays a prosecutorial role, and therefore represents an active threat of prosecution for leaders, it acts as a spoiler . . ." Reilly, *supra* note 96, at 18. The contrast between Colombia and Uganda thus adds nuance to the theory that prosecuting atrocities exacerbates conflict by giving combatants an incentive to keep fighting to avoid prosecution.

¹⁵⁶ See Hillebrecht & Huneeus, *supra* note 103, at 325-29; Nicholas Casey, *Colombia's Peace Deal Promised a New Era. So Why Are These Rebels Rearming?*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/world/americas/colombia-farc-peace-deal.html>.

can contribute to dynamics that increase domestic prosecutions and decrease atrocities, including through ending conflicts.

IV. THE IMPACT OF REGIONAL HUMAN RIGHTS INSTITUTIONS

This Part evaluates the record of regional human rights institutions in promoting accountability and preventing mass atrocity. We find that the success of the European and Inter-American institutions reflects their integration with and influence on national legal and political systems. Those derive from the institutions' creative and strategic engagement, over time, with national-level actors, political dynamics, and legal doctrines. Section A examines the European Court of Human Rights. Section B covers the Inter-American Human Rights System, consisting of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Section C examines the African Regional Human Rights System, including the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which have not yet achieved comparable impact.

A. European Court of Human Rights

The European Court of Human Rights ("European Court" or, in this Section, "Court") has been widely considered one of the most influential and effective international human rights institutions in the world. Since 1959, the Court has overseen compliance with the 1950 European Convention on Human Rights and Fundamental Freedoms ("European Convention" or in this Section "Convention"). A leading scholar of international courts calls it "the crown jewel of the world's most advanced international system for protecting civil and political liberties."¹⁵⁷ That system is credited with raising the level of protection of human rights throughout Europe, through States' compliance with its remedial orders in individual cases; their reform of statutes, regulations, and administrative and judicial procedures pursuant to the Court's interpretations of the Convention; and their incorporation of human rights considerations into policymaking.¹⁵⁸ Like other regional institutions and the ICC, the European Court has found mass atrocities more vexing than other human rights violations, but it appears to have contributed to preventing them and securing criminal

¹⁵⁷ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 125 (2008); accord Robert Harmsen & Karen McAuliffe, *The European Courts*, in ROUTLEDGE HANDBOOK OF EUROPEAN POLITICS 263, 269 (José M. Magnone ed., 2015); Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 792 (2006).

¹⁵⁸ To be sure, the Court's impact has varied somewhat from country to country. See generally A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller & Alec Stone Sweet eds., 2008). Italy, Turkey, Russia, Ukraine, Greece, Romania, Poland, Hungary, and Bulgaria have failed to implement Court judgments in many cases. See Parliamentary Assembly of the Council of Europe, *Implementation of Judgments of the European Court of Human Rights*, Doc. 13864, Sept. 9, 2015, at 9.

accountability for them. Ordering more specific steps to prevent recurrence, as the Court has started to do, is likely to enhance its effectiveness in pursuing both goals.

The European Court has wider jurisdiction than the Inter-American and African Courts, covering all forty-seven Member States of the Council of Europe, with 820 million inhabitants,¹⁵⁹ any of whom may file a petition with the Court. Its annual budget, \$89 million, vastly exceeds those of its Inter-American and African judicial counterparts, \$5 million and \$12 million, respectively, in 2018.¹⁶⁰ The result is dramatically more judicial activity: in 2018 the European Court's forty-seven full-time judges disposed of over 42,000 cases, dismissing 40,023 and deciding 2,738 on the merits.¹⁶¹ By comparison, the Inter-American Court issued approximately 250 merits decisions from 1988 to mid-2019, and the African Court approximately 30 from 2013 to mid-2019.¹⁶² (The Inter-American and African Commissions handle thousands of additional individual petitions each year.)

This Section analyzes how the European Court shapes States' human rights behavior (in Subsection 1), then evaluates its record in preventing and securing criminal accountability for mass atrocities specifically (in Subsection 2).

1. Impact on Human Rights in General

The European Court significantly influences the behavior of European States. Up to 1995, States fully implemented all but one of the judgments issued by the Court and its now-defunct sibling, the European Commission on Human Rights. The end of the Cold War increased demands on the European human rights system, in quantitative and qualitative terms. The Court's jurisdiction expanded between 1990 and 2008 from 21 states, nearly all west European democracies, to 47, nearly half recently emerged from authoritarian communism. The new States had worse human rights records, confronting the Court with intractable, systemic failures and atrocities.¹⁶³ Nonetheless, the Court's impact on State behavior remained remarkable: between 1998 and 2018, States fully

¹⁵⁹ See *The Court: General Presentation*, EUR. CT. OF HUM. RTS.

<https://www.echr.coe.int/Pages/home.aspx?p=court&c=> (last visited Nov. 17, 2019). All of those countries have ratified the European Convention and accepted the European Court's compulsory jurisdiction over complaints by individuals against them. The Court has no formal connection to the European Union (EU), but all twenty-eight EU members (including the United Kingdom) are also members of the Council of Europe.

¹⁶⁰ See *infra*, Table 1.

¹⁶¹ EUROPEAN COURT OF HUMAN RIGHTS, 2018 THE ECHR IN FACTS AND FIGURES 8 (2019). States, too, can lodge complaints against other States, but have done so only 31 times since 1959. See *Inter-State Applications*, EUR. CT. OF HUM. RTS. (last updated Sept. 11, 2019), https://echr.coe.int/Documents/InterState_applications_ENG.pdf.

¹⁶² See *Decisions and Judgments*, INTER-AM. CT. HUM. RTS.

http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (last visited Nov. 17, 2019); *Contentious Matters: Finalized Cases*, AFR. CT. OF HUM. & PEOPLES' RTS.

<http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#finalised-cases> (last visited Nov. 17, 2019).

¹⁶³ See *infra* text accompanying notes 181-182.

implemented the Court's judgments in 18,437 cases, leaving 6,151 still under the supervision of the Council of Europe's Committee of Ministers—a full compliance rate of approximately 75%.¹⁶⁴

The Court secures a remedy for a vast number of individual victims whom national systems have failed.¹⁶⁵ Every year, each of its 2,000-plus merits decisions is processed by the respondent State, which generally pays the ordered damages and considers other “individual measures” to make the petitioner whole and “general measures” to prevent repetition of the violation in other cases. Collectively, the decisions expand the Court's already extensive jurisprudence on States' human rights obligations, a web of requirements that European States take seriously.

The Court's systemic impact has also been impressive, inducing States to change numerous practices to address the causes of violations.

[D]espite the fact that general measures are undoubtedly the most difficult to implement and monitor, hundreds of such measures have successfully resulted in the creation of new, or significantly modified, laws and public institutions designed to prevent the recurrence of future convention violations.¹⁶⁶

Examples include building new detention centers, training child welfare workers, creating and overseeing ethics commissions, and expanding courts' staffs.¹⁶⁷

In many States, the Court's influence has been more profound: it has altered governance practices in ways that enhance human rights. Executive officials, legislators, and judges regularly take affirmative measures to ensure that administrative and judicial practice, legislation, executive policy, and case

¹⁶⁴ After the Court issues a judgment finding a violation of the Convention, it passes the case to the Committee of Ministers, which monitors the respondent State's compliance. *See* Committee of Ministers, Council of Europe, *12th Annual Report 2018*, 51 (Apr. 2019) (unimplemented judgments pending before Committee as of end of 2018); *id.* at 52 (number of cases closed by year, 1998-2018). The compliance figure may be approximate because the numerator does not include cases closed before 1998, while the denominator may include some cases that date from before then. However, the number of cases closed per year has risen rapidly since the late 1990s (the Committee closed 116 cases in 1998 and 171 in 1999, compared to 3,691 in 2017 and 2,705 in 2018), *id.* at 52, as has the number of new cases the Court has decided and thus added to the Committee's docket, *id.* at 51. Therefore, the failure to include pre-1998 data is unlikely to affect the compliance rate dramatically.

¹⁶⁵ The individual remedies these victims receive often include financial compensation and sometimes more specific reparation. For example, an applicant fired in violation of her human rights might receive her job back. *See Individual Measures*, COUNCIL OF EUR., <https://www.coe.int/en/web/human-rights-convention/individual-measures> (last updated Nov. 17, 2019).

¹⁶⁶ OPEN SOCIETY JUSTICE INITIATIVE, *FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS* 52 (2010) [hereinafter *FROM JUDGMENT TO JUSTICE*].

¹⁶⁷ *Id.* at 41. It is true that structural human rights problems in several States have persisted for decades despite repeated Court rulings. Half or more the Court's docket consists of “repetitive cases” that involve an issue—such as slow trials in Italy—that the Court has previously addressed, but that the State has not cured. *See* Dinah Shelton, *Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights*, 16 *HUM. RTS. L. REV.* 303, 320 (2016) (citing the Court's conclusion in 2014 that 34,000 of 69,900 pending cases were repetitive).

decisions comply with the Convention as interpreted by the Court in cases against all States, not just their own.¹⁶⁸ All State Parties have incorporated the Convention into their national law.¹⁶⁹ While national courts do not always defer to the Court's interpretation of Convention rights and remedies, they accord it great weight.¹⁷⁰ Many States have institutionalized compliance with the Convention in bureaucratic routines.¹⁷¹ Based on the most extensive study of the impact of the Court, by thirteen scholars examining eighteen countries, Helen Keller and Alec Stone Sweet conclude:

[N]ational systems are increasingly porous to the influence of the [Convention] and the case law of its Court. . . . [J]udges once prohibited from engaging in judicial review of statute now do so routinely, with reference to European rights. . . . Thousands of discre[te] legal and policy outcomes have been altered [by legislators, executives, and judges] as a result of the influence of Convention rights.¹⁷²

The Court's judges deserve credit for their institution's influence. They have carefully, strategically built its power since the 1950s.¹⁷³ Judges have shown doctrinal creativity, sophistication about the potential and limits of judicial power, and understanding of political context within Member States. Doctrinal innovations—such as allowing States a “margin of appreciation” in implementing their Convention obligations—have given the Court flexibility to choose when to confront States and when to defer. Over decades, the Court “has carefully constructed its reputation, gradually developing its role and expanding the influence of the Convention over national legal orders but at the same time considering states’ reticence toward this ‘menace’ to their sovereignty.”¹⁷⁴ As States’ compliance with individual judgments has increased the Court’s authority, its judges have become bolder and have employed their “jurisprudential tools to engender a slow but constant change of the sphere of sovereignty of the modern [European] state, . . . incremental[ly] ero[ding] state power.”¹⁷⁵ Post-judgment enforcement has also grown more assertive. The

¹⁶⁸ See generally OPEN SOCIETY JUSTICE INITIATIVE, FROM RIGHTS TO REMEDIES: STRUCTURES AND STRATEGIES FOR IMPLEMENTING INTERNATIONAL HUMAN RIGHTS DECISIONS (2013) (cataloging numerous domestic processes and structures for implementing international court decisions, in executive, legislative, and judicial branches).

¹⁶⁹ Helfer, *supra* note 157, at 137.

¹⁷⁰ *Id.*; see also Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Orders*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 677, 705 (Helen Keller & Alec Stone Sweet eds., 2008).

¹⁷¹ See Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993) (describing the impact of bureaucratic processes and management practices on States’ human rights performance).

¹⁷² Keller & Stone Sweet, *supra* note 170, at 677.

¹⁷³ See, e.g., Helfer, *supra* note 157; Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 L. & SOC. INQUIRY 137 (2007).

¹⁷⁴ Rădulețu, *supra* note 30, at 465; see also Helfer, *supra* note 157, at 138; Robert Harmsen & Karen McAuliffe, *The European Courts*, in ROUTLEDGE HANDBOOK OF EUROPEAN POLITICS 263, 270-71 (José M. Magone ed., 2014).

¹⁷⁵ Helfer, *supra* note 157, at 138 (internal quotation marks and citation omitted).

Committee of Ministers' supervision was once "timorous," in the view of the Open Society Justice Initiative, but by 2010 had become "quite rigorous."¹⁷⁶

The Court's impact on human rights has been indirect, through its effect on State officials' actions. That effect, in turn, has depended on other actors, including human rights activists, legislators, and the media, who have used the Court's decisions to shape others' perceptions, interests, and actions.¹⁷⁷ In short, the Court has affected the "causal ecosystem" that determines whether human rights violations occur—including mass atrocity—as well as the one that determines whether those responsible are prosecuted.

The Court recently has shifted its approach to remedies, demanding more specific reforms. Historically, upon finding a violation of the Convention, the Court has ordered the offending State to pay specific financial compensation for the victim, but left the State broad latitude to determine what other individual measures may be necessary to fully repair the harm to the victim and what general measures will ensure the violation is not repeated. The Court has left it to the Committee of Ministers to assess the adequacy of the steps taken. By contrast, the Inter-American Court has long ordered highly specific individual and general measures, along with compensation, including judicial investigation and prosecution of those responsible for human rights violations, reforms to law and administrative practice, and even symbolic reparations, such as formal apologies by the State.¹⁷⁸ Since the early 2000s, the European Court has shifted toward the Inter-American Court, ordering specific individual and general measures in some cases.¹⁷⁹ This innovation, if strategically employed and coupled with assertive follow-up by the Committee of Ministers, could enhance the Court's impact. In particular, regularly ordering States to investigate, prosecute, and punish those responsible could help expand criminal accountability for mass atrocity.

2. Impact on Mass Atrocity

During its first decades, the European Court seldom addressed grave violations of human rights such as torture and extrajudicial killing, and never on a mass scale.¹⁸⁰ Since the turn of the millennium, though, the Court's docket has

¹⁷⁶ FROM JUDGMENT TO JUSTICE, *supra* note 166, at 52.

¹⁷⁷ See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 312 (1997); 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, 775 (2008).

¹⁷⁸ Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 44 (2010).

¹⁷⁹ Helfer, *supra* note 157, at 147.

¹⁸⁰ Until the 1990s, the Court was called upon mainly to "protect[] individuals and groups from the excesses of majoritarianism in healthy democracies and resolv[e] the relatively minor and discrete conflicts of interests prevalent in any complex society." Helfer, *supra* note 157, at 129 (internal quotation marks omitted); accord FROM JUDGMENT TO JUSTICE, *supra* note 166, at 37-38. One of the few exceptions involved allegations that interrogation methods used by the United Kingdom with terrorist suspects in Northern Ireland constituted torture. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978). The largest-scale mass atrocities in Europe during this period, crimes against

“changed dramatically, involving more frequent allegations of systematic human rights abuses”¹⁸¹ and regular claims of “serious and pervasive human rights abuses such as extrajudicial killings, disappearances, torture, and prolonged arbitrary detention.”¹⁸² In 2016, twenty-five percent of the Court’s judgments finding a violation of the Convention (representing twenty-two percent of all judgments on the merits) included a violation of the right to life or of the prohibition of torture and inhuman or degrading treatment.¹⁸³ The shift in subject matter was caused by a shift in geography: seventy percent of the judgments in 2016 were against East European States that ratified the Convention after 1991.¹⁸⁴

Like other international institutions, the Court has struggled to affect the behavior of perpetrators in the high-stakes contexts in which mass atrocities can arise: Turkey and Russia have perpetrated those crimes while subject to the Court’s jurisdiction. However, the best interpretation of historical evidence suggests that the Court’s elaboration of detailed rules, along with the integration of both those rules and more general human rights norms into public discourse and State practice, have reduced the incidence of mass atrocities in Convention Member States increased the likelihood that those who commit them will be prosecuted. Subsection (a) examines the Court’s impact on mass atrocities in Turkey and Russia, which have perpetrated mass atrocities under the Court’s jurisdiction. Subsection (b) describes the Court’s influence on Member States’ counterterrorism policies since the 9/11 attacks, illustrating its preventative effect.

a. Promoting Accountability and Institutional Reform in Russia and Turkey

The largest-scale mass atrocities committed under European Court jurisdiction occurred in Turkey and Russia during counterinsurgency campaigns against, respectively, the separatist Kurdistan Workers Party (PKK) in the 1980s and 1990s and militants in Chechnya from 1999 to 2009.¹⁸⁵ We analyze the

humanity committed by Communist bloc States against their own populations, fell outside the Court’s jurisdiction because those States did not ratify the Convention until after 1989.

¹⁸¹ FROM JUDGMENT TO JUSTICE, *supra* note 166, at 38.

¹⁸² Helfer, *supra* note 157, at 129.

¹⁸³ *Violations by Article and by State 2016*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/Stats_violation_2016_ENG.pdf (last visited Nov. 17, 2019) (stating that the Court issued 829 judgments finding at least one violation and 134 judgments finding no violations); HUDOC database of European Court of Human Rights judgments (retrieving 208 Grand Chamber and Chamber judgments from January 1, 2016, through December 31, 2016, in English, finding a violation of Article 2 and/or Article 3); *see* European Convention, *supra* note 29, arts. 2 (right to life) & 3 (prohibition of torture and inhuman and degrading treatment).

¹⁸⁴ *See Violations by Article and by State 2016*, *supra* note 183 (showing 692 judgments involving Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, and/or Ukraine, out of 993 total judgments); *Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> (last visited November 14, 2019).

¹⁸⁵ Mass atrocities in Chechnya between 1994 and 1996, as well as those in the former Yugoslavia between 1991 and 1999, fell outside European Court jurisdiction because the Convention had not yet

European Court's impact on these cases to illuminate the potential of regional systems to address mass atrocity. Since deciding its first case on southeast Turkey in 1996,¹⁸⁶ the Court has found the Turkish State responsible for killings, torture, and disappearances, and/or failing to investigate adequately and prosecute those responsible in over 100 cases so far.¹⁸⁷ Since 2005, the Court has issued over 170 judgments against Russia for human rights violations by its security forces in Chechnya for the same kinds of atrocities.¹⁸⁸ The two governments have paid damages to the victims, but have undertaken few serious investigations, even fewer prosecutions, and almost no other measures to redress the harms to individual victims. Reforms to prevent future atrocities ("general measures") have also been rare. Still, close analysis reveals effects of the Court's actions that have contributed to accountability and prevention, and could support future positive developments.

Turkey and Russia vigorously resisted the Court's scrutiny in many cases, and the Court's determined response earned praise from many human rights activists and scholars. In the first southeastern Turkey case, the Court waived the Convention's requirement that applicants exhaust domestic remedies before seeking relief from the Court, due to the applicants' vulnerability to retaliation from the Turkish military were they to apply to the Turkish courts and the authorities' unwillingness to investigate violations by the security forces.¹⁸⁹ The Court waived exhaustion in other cases from southeastern Turkey and Chechnya, as well.¹⁹⁰ When the respondent government withheld key evidence, the Court sent staff to southeastern Turkey to interview witnesses and examine documents, and convened fact-finding hearings, acting as "a de facto court of first

entered into force for the States in which they occurred. See Chart of Signatures and Ratifications of Treaty 005, *supra* note 184 (showing entry-into-force dates). On the atrocities, see HUMAN RIGHTS WATCH, MAKING JUSTICE COUNT IN CHECHNYA: IMPLEMENTATION OF EUROPEAN COURT OF HUMAN RIGHTS RULINGS AGAINST RUSSIA 2 (2011), https://admin.hrw.org/sites/default/files/related_material/2011_Russia_ECHRIImplementation.pdf [hereinafter MAKING JUSTICE COUNT]; HUMAN RIGHTS WATCH, TIME FOR JUSTICE: ENDING IMPUNITY FOR KILLINGS AND DISAPPEARANCES IN 1990S TURKEY 1, 11 (2012), <https://www.hrw.org/sites/default/files/reports/turkey0912ForUpload.pdf> [hereinafter TIME FOR JUSTICE]; Dilek Kurban, *Europe as an Agent of Change: The Role of the European Court of Human Rights and the EU in Turkey's Kurdish Policies* 8-9 (Stiftung Wissenschaft und Politik Research Paper 9, 2014).

¹⁸⁶ Akdivar and Others v. Turkey, App. No. 21893/93, 1996-IV Eur. Ct. H.R. (Grand Chamber); see Kurban, *supra* note 185, at 15-16 n.66.

¹⁸⁷ See TIME FOR JUSTICE, *supra* note 185, at 10-11; Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUM. RTS. L. REV. 731, 745-49 (2016).

¹⁸⁸ Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 2008 EUR. HUM. RTS. L. REV. 732, 734 (2008) (date of first judgment); MAKING JUSTICE COUNT, *supra* note 185, at 5; Silvia Borelli, *Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights*, 46 ISR. L. REV. 369, 377 (2013). Hillebrecht refers to "over 210" cases "regarding Chechnya," although she does not indicate whether all of these alleged atrocities. Courtney Hillebrecht, *Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights*, 13 HUM. RTS. REV. 279, 289 (2012).

¹⁸⁹ Akdivar, 1996-IV Eur. Ct. H.R. at ¶¶ 70-77.

¹⁹⁰ See, e.g., Leach, *supra* note 188, at 739; 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, 524-26 (2011); Kurban, *supra* note 187, at 751-52.

instance.”¹⁹¹ This departure from regional human rights courts’ normal appellate role, complementing national legal systems, was costly and time-consuming for the Court, and likely stretched staff and judges’ capacity. In these cases, however, it represented an effective and flexible adaptation to the specific legal and political conditions it confronted.

In the southeastern Turkey and Chechnya cases, the Court has consistently stressed the respondent States’ duty to investigate and prosecute atrocities.¹⁹² In many cases in which the Court has found insufficient evidence to establish State responsibility for a particular violation, such as disappearances, the Court has found the State in violation of the relevant article of the Convention (e.g., Article 2 guaranteeing the right to life) based on failure to investigate and prosecute the perpetrators.¹⁹³

The Court’s impact on accountability and the incidence of atrocities in the Turkish and Russian situations has been mixed. Turkey and Russia have generally paid Court-ordered compensation,¹⁹⁴ but have made little effort to investigate or prosecute the atrocities for which the Court has found them responsible.¹⁹⁵ Human Rights Watch found that “[u]ntil 2008, there were no attempts in Turkey to investigate and put on trial members of the security forces for their involvement in gross and systematic violations of human rights” during the fight against the PKK through the 1990s,¹⁹⁶ and “only a handful” of soldiers had been charged by the end of 2015.¹⁹⁷ The result, according to the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and many other analysts, is a climate of “impunity” for atrocities.¹⁹⁸ Impunity reigns in Russia, too: as of 2011, according to Human Rights Watch, “[w]ith only one exception, the Russian authorities have not brought the direct perpetrators or any of those responsible to justice. This is true even in cases in

¹⁹¹ Kurban, *supra* note 187, at 747; see also Onder Bakircioglu & Brice Dickson, *The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey*, 66 INT’L & COMP. L.Q. 263, 281-82 (2017); Başak Çalı, *The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006*, 35 L. & SOC. INQUIRY 311, 321-22 (2010); Helfer, *supra* note 157, at 142-44; Sixty-six percent of all factfinding missions undertaken by the Commission or Court up to 2017 were to Turkey. Bakircioglu & Dickson, *supra* note 191, at 282 n.104.

¹⁹² See Borelli, *supra* note 188, at 373-74; see also Rădulețu, *supra* note 30, at 458-60.

¹⁹³ See, e.g., *Kharayeva v. Russia*, App. No. 2721/11, ¶¶ 62-67 (Eur. Ct. H.R. Nov. 27, 2014); see also Bakircioglu & Dickson, *supra* note 191, at 287; Kurban, *supra* note 185, at 16.

¹⁹⁴ Çalı, *supra* note 191, at 313; MAKING JUSTICE COUNT, *supra* note 185, at 1.

¹⁹⁵ See FROM JUDGMENT TO JUSTICE, *supra* note 166, at 53 (concluding that “[i]nvestigating and prosecuting gross human rights violations is [an] area in which implementation [of European Court judgments] has largely failed”). Dilek Kurban’s analysis found that, as of 2015, in 69% of 253 cases of enforced disappearance in the 1990s in the Kurdish region of Turkey (the southeast), the State had not opened an investigation. Kurban, *supra* note 187, at 766.

¹⁹⁶ TIME FOR JUSTICE, *supra* note 185, at 8.

¹⁹⁷ HUMAN RIGHTS WATCH, 2016 WORLD REPORT 580 (2016). Even fewer have been convicted: in 2015 there were acquittals in four cases, and no convictions. *Id.*; see also Christof Heyns (Special Rapporteur), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Follow-Up to Country Recommendations: Turkey*, ¶ 50, U.N. Doc. A/HRC/29/37/Add.4 (May 6, 2015) (noting that “only a handful of trials have been conducted in relation to the thousands of unresolved execution-type killings, deaths in custody and enforced disappearances suspected to have been committed by State officials and members of the PKK during the 1990s”).

¹⁹⁸ Heyns, *supra* note 197, ¶ 54; accord Bakircioglu & Dickson, *supra* note 191, at 292.

which the [European Court] has found that the perpetrators are known, and in some instances even named in its judgments.”¹⁹⁹ The Russian government “pay[s] reparations to placate the victims while ignoring the larger structural reforms mandated by the Committee of Ministers.”²⁰⁰

The Court has positively influenced both situations, however. It may have stopped atrocities in at least a few cases: according to Professor Emma Gilligan, Chechen security forces released several people they abducted—and might have tortured or disappeared—after the European Court issued emergency orders.²⁰¹ There is more evidence that the Court has slightly increased after-the-fact accountability. A recent study identified twelve trials for human rights violations in southeastern Turkey that had begun since 2008. None had resulted in convictions, though six were ongoing as of 2015.²⁰² A detailed account by Human Rights Watch of one unsuccessful prosecution (the “Temizöz case”) suggested that prosecutors had made a serious effort to obtain convictions.²⁰³ Frustrated by the Russian authorities’ recalcitrance, the Court in 2012 found that disappearances in Chechnya “result[ed] from systemic problems at the national level, for which there is no effective domestic remedy.”²⁰⁴ It proposed numerous reforms, including allocating more resources to investigations and creating a high-level body to investigate disappearances.²⁰⁵ While the government has continued to drag its feet despite annual questioning from the Committee of Ministers regarding implementation of this and other Court decisions on atrocities in Chechnya, the Committee reports that Russia has taken some steps, such as increasing investigative resources. The Committee’s reports describe extensive engagement with Russian government representatives over the implementation of Chechnya decisions, including detailed discussions of procedures and progress in individual investigations.²⁰⁶ It seems likely that pressure from Strasbourg accounts for this modest progress.

The Court may have contributed to accountability and prevention through more indirect means as well, although the magnitude of these contributions is

¹⁹⁹ MAKING JUSTICE COUNT, *supra* note 185, at 1; *accord* Borelli, *supra* note 188, at 378 n.48; Lapitskaya, *supra* note 190, at 527-29; René Prevost, *Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime*, 37 HUM. RTS. Q. 289, 318 (2015); Rădulețu, *supra* note 30, at 464; Freck van der Vet, *Transitional Justice in Chechnya: NGO Political Advocacy for Implementing Chechen Judgments of the European Court of Human Rights*, 38 REV. CENT. & E. EUR. L. 363, 365 (2013).

²⁰⁰ Hillebrecht, *supra* note 188, at 285.

²⁰¹ See Emma Gilligan, *The Costs of Peace in Chechnya*, CURRENT HIST. 266, 269 (Oct. 2015) (stating that Court orders have “secured the release of several individuals”).

²⁰² See Jessica G. Mecellem, *Human Rights Trials in an Era of Democratic Stagnation: The Case of Turkey*, 43 L. & SOC. INQUIRY 119, 126 (2018).

²⁰³ See TIME FOR JUSTICE, *supra* note 185, at 21-44; *Eight Suspects Acquitted over 21 Unsolved Murders in Turkey’s Southeast*, HÜRRIYET DAILY NEWS (Nov. 6, 2015), <http://www.hurriyetdailynews.com/eight-suspects-acquitted-over-21-unsolved-murders-in-turkeys-southeast--90824>.

²⁰⁴ *Aslakhanova and Others v. Russia*, App. No. 2944/06 ¶ 217 (Eur. Ct. H.R. Dec. 18, 2012).

²⁰⁵ *Id.* ¶¶ 222-37.

²⁰⁶ See Committee of Ministers, Council of Europe, *11th Annual Report*, at 138 (Mar. 2018); Committee of Ministers, Council of Europe, *Notes on the Agenda: H46-18 Group Khashiyev and Akayeva v. Russian Federation (Application No. 57942/00): Supervision of the execution of the European Court’s judgments*, CM/Notes/1324/H46-18 (Sep. 20, 2018).

difficult to assess. According to several analysts, its judgments on both southeastern Turkey and Chechnya have increased international and domestic awareness, particularly of State agents' direct role in the abuses and failed investigations.²⁰⁷ Similarly, the judgments have made it more difficult for the Turkish and Russian governments to deny those facts, and thus allowed international and domestic advocates, from the European Union to local NGOs, to focus on pressing for specific reforms.²⁰⁸

The European Court's influence has also flowed through the European Union, which in the 2000s pressed Turkey to implement reforms recommended by the European Court, as part of negotiations over Turkey's possible accession to the EU.²⁰⁹ In 2002, authorities lifted the state of emergency regime that had governed Kurdish areas since 1980²¹⁰ and in 2004 they abolished militarized State security courts and statutes of limitation for genocide and crimes against humanity.²¹¹ A variety of reforms to law, police training, and operational practice dramatically reduced torture by police.²¹² For example, Turkey eliminated the statute of limitations for torture in 2013²¹³ following the European Court's criticism that it inhibited accountability.²¹⁴ The government has rolled back safeguards against torture since a July 2016 coup attempt, but many of the "impressive . . . legal and administrative reforms and training . . . to prevent human rights violations"²¹⁵ of the kind that occurred in southeastern Turkey remain in place, and testify to the Court's influence.

Turkey's counterinsurgency tactics may have shifted since the 1990s to better respect human rights and, in particular, to avoid mass atrocity, although the evidence is far from conclusive. Beginning in August 2015, the Turkish military conducted its most intense military operations inside the country since the 1990s, again targeting the PKK and aligned groups in the southeast. The army sealed off several cities, warned civilian inhabitants to leave, and then attacked

²⁰⁷ See Bakircioglu & Dickson, *supra* note 191, at 280; Çalı, *supra* note 191, at 325; Gilligan, *supra* note 201, at 269; Lapitskaya, *supra* note 190, at 521; Dilek Kurban, Ozan Erözden & Haldun Gülalp, *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey* 48 (2008), <http://www.kureselincelemeler.org/Turkey%20case%20study%20report-final.pdf>.

²⁰⁸ See Gilligan, *supra* note 201, at 269; Kurban et al., *supra* note 207, at 5; cf. Mecellem, *supra* note 202, at 132; but see Çalı, *supra* note 191, at 333 (stating that the Turkish government maintains "a dismissive and defensive discourse about the actions of its security forces in the Southeast").

²⁰⁹ "The reforms were introduced in order to meet the so-called Copenhagen criteria [for EU membership], but several actually derived from Court judgments issued in Strasbourg." Bakircioglu & Dickson, *supra* note 191, at 290. Çalı's list of "major legal and administrative reforms affecting the southeast Turkey cases" contains eighteen changes from 1999 to 2004 alone. Çalı, *supra* note 191, at 328.

²¹⁰ Bakircioglu & Dickson, *supra* note 191, at 29.

²¹¹ Kurban et al., *supra* note 207, at 35, 47.

²¹² Nils Muižnieks (Commissioner for Human Rights of the Council of Europe), *Report Following his Visit to Turkey from 1 to 5 July 2013*, ¶¶ 5, 12, Council of Europe Doc. No. CommDH(2013)24 (Nov. 26, 2013).

²¹³ HUMAN RIGHTS WATCH, *TURKEY'S HUMAN RIGHTS ROLLBACK: RECOMMENDATIONS FOR REFORM* 4 (2014), https://www.hrw.org/sites/default/files/reports/turkey0914_ForUpload.pdf.

²¹⁴ See TIME FOR JUSTICE, *supra* note 185, at 46.

²¹⁵ Çalı, *supra* note 191, at 333.

using artillery barrages, aerial bombing, and infantry assaults. These tactics leveled large swaths of housing and other infrastructure and led to the deaths of approximately 1,200 local residents, some of whom may have engaged in violence against government forces, along with nearly 800 government personnel.²¹⁶ These are very serious human rights violations—yet are less atrocious than the army’s methods in the 1980s and 1990s; for example, security forces have not returned to their prior practice of extensive summary executions and disappearances. The four disappearances in the eighteen months from July 2015 and December 2016 reported by the United Nations are too many,²¹⁷ but far below the estimated average of approximately ninety every eighteen months from 1980 to 2001.²¹⁸ These violations are indefensible and cause terrible suffering, but their significantly smaller scale represents some progress that may have resulted, at least in part, from the European Court’s condemnation of those practices.²¹⁹ (We see little evidence that Russian military tactics have shifted to comport better with human rights norms.²²⁰)

b. Preventing Mass Atrocity During Counterterrorism Operations Since 9/11

The European Court’s impact on Member States’ counterterrorism operations since September 11, 2001, demonstrates how regional institutions can prevent and limit mass atrocity, as well as contribute to struggles for criminal accountability.²²¹ The Court and the Convention are key parts of an extensive web of norms and institutions that protect human rights in Europe, which also includes other instruments, intergovernmental organizations, and NGOs. Through both specific actions and generalized, diffuse channels of influence, that web has constrained European States’ counterterrorism strategies and limited their infringements on human rights.

Many European States might well have responded to the latest wave of terrorism by committing mass atrocity. The fact that they largely have not

²¹⁶ Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, ¶ 2 (Feb. 2017), https://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

²¹⁷ *Id.*, ¶¶ 45-46.

²¹⁸ See Yeliz Budak, *Dealing with the Past: Transitional Justice, Ongoing Conflict and the Kurdish Issue in Turkey*, 9 INT’L J. TRANSITIONAL JUST. 219, 235 n.98 (2015).

²¹⁹ Atrocities by the Turkish military and its allies in northern Syria in late 2019 may weigh against this hopeful conclusion. See, e.g., *Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies*, AMNESTY INT’L (Oct. 18, 2019), <https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>.

²²⁰ Recent campaigns have extensively violated human rights and international humanitarian law. Russia’s eight-day campaign in Georgia included indiscriminate aerial, artillery, and tank strikes that killed and wounded many civilians. See HUMAN RIGHTS WATCH, *UP IN FLAMES: HUMANITARIAN LAW VIOLATIONS AND CIVILIAN VICTIMS IN THE CONFLICT OVER SOUTH OSSETIA 7-9* (Jan. 2009). However, Russian tactics in Chechnya were so brutal that even moderately atrocious methods now might represent improvement.

²²¹ These counterterrorism operations have included independent and joint operations (with the United States and other allies), on their own territory and abroad, against transnational networks, local groups, and individuals.

demonstrates the capacity of the continent's strong human rights traditions and oversight institutions, including the European Court, to curtail abuse. State responses to terrorist acts often entail serious human rights violations, including mass atrocity.²²² Indeed, authoritarian and totalitarian regimes have often tried to justify such crimes by contending they are necessary to defeat terrorism—real or imagined. For example, military dictatorships in Chile and Argentina in the 1970s and 1980s argued that their large-scale torture, forced disappearances, extrajudicial killings, and arbitrary detention were necessary to combat violence by non-state actors that those regimes labeled “terrorism.”²²³ After September 11, 2001, the United States quickly jettisoned basic human rights principles and engaged in torture, arbitrary detention, and war crimes. European States' counterterrorism campaigns after the September 11, 2001, attacks, which intensified after bombings in 2004 in Madrid and 2005 in London, might have incorporated mass atrocities, or come close.

The European Court built an important and extensive body of jurisprudence relevant to counterterrorism operations before 9/11 and developed it further thereafter. Since the 1970s, the Court has elaborated on permissible interrogation techniques in counterterrorism, building on its 1978 ruling in *Ireland v. United Kingdom*.²²⁴ Since then, the Court has also considered how long States may lawfully hold terrorist suspects without charging them,²²⁵ the conditions under which they may be held,²²⁶ how they may be surveilled,²²⁷ how much force may be used to stop attacks,²²⁸ and other questions. The interactions of counterterrorism with political rights and freedom of religion have yielded additional lines of caselaw.²²⁹ Some analysts have praised the Court's counterterrorism jurisprudence for its “subtle . . . balancing of competing interests,”²³⁰ although many human rights activists, as well as some scholars, have criticized the Court for countenancing government human rights violations, while governments have criticized it for restricting them too much.²³¹ In addition,

²²² See WRIGHT, *supra* note 69, at 147-49. The current Egyptian dictatorship uses similar rhetoric to justify human rights violations of a similar nature and possibly similar scale. See AMNESTY INT'L, EGYPT: “OFFICIALLY, YOU DO NOT EXIST”: DISAPPEARED AND TORTURED IN THE NAME OF COUNTER-TERRORISM (July 13, 2016).

²²³ WRIGHT, *supra* note 69, at 148-49.

²²⁴ See, e.g., Aksoy v. Turkey, App. No. 21987/93 1996-VI Eur. Ct. H.R.; see *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

²²⁵ See, e.g., Brogan & Others v. United Kingdom, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85 (Eur. Ct. H.R. Nov. 29, 1988).

²²⁶ See, e.g., Frérot v. France, App. No. 70204/01 (Eur. Ct. H.R. June 12, 2007).

²²⁷ See, e.g., Szabó & Vissy v. Hungary, App. No. 37138/14 (Eur. Ct. H.R. Jan. 12, 2016).

²²⁸ See, e.g., McCann & Others v. United Kingdom, App. No. 18984/91 (Eur. Ct. H.R. Sep. 27, 1995).

²²⁹ See, e.g., Güler & Uğur v. Turkey, App. Nos. 31706/10, 33088/10 (Eur. Ct. H.R. Dec. 2, 2014); *United Communist Party of Turkey v. Turkey*, App. No. 19392/92 1998-I Eur. Ct. H.R.

²³⁰ Donald W. Jackson, *Detention and Treatment of Suspected Terrorists under the European Convention of Human Rights*, in COURTS AND TERRORISM: NINE NATIONS BALANCE RIGHTS AND SECURITY 112, 128 (Mary L. Volcansek & John F. Stack, Jr., eds. 2010).

²³¹ Compare UK: *European Court Ruling Sends Mixed Message on Torture*, HUM. RTS. WATCH (Jan. 18, 2012), <https://www.hrw.org/news/2012/01/18/uk-european-court-ruling-sends-mixed-message-torture> with Helen Fenwick, *Post 9/11 UK Counter-Terrorism Cases in the European Court of Human Rights: A “Dialogic” Approach to Rights Protection or Appeasement of National Authorities?*, in CRITICAL DEBATES ON COUNTER-TERRORISM JUDICIAL REVIEW 302 (Fergal F. Davis & Fiona de Londras eds., 2014) with Alan Travis, *Theresa May Criticizes Human Rights Convention After Abu*

cases with no terrorism connection have generated an extensive web of rules that States must respect in designing and carrying out counterterrorism strategies. For example, suspects must be granted access to counsel soon after detention, dramatically reducing the likelihood of torture.

Human rights concerns, including the Convention's strictures as interpreted by the Court, have influenced European governments' counterterrorism strategies and practices since 2001, although the degree of that influence is the object of dispute.²³² As Section IV.A.1, above, explains, the Convention and the Court's jurisprudence shape the policies and daily practice of the executive, legislative, and judicial branches of European governments. Furthermore, counterterrorism cooperation programs of the European Union and Organization for Security and Cooperation in Europe, as well as of the Council of Europe, make extensive reference to the European Convention. In 2002, the Committee of Ministers of the Council of Europe adopted *Guidelines on Human Rights and the Fight Against Terrorism*, recognizing the Convention and the caselaw of the Court as "a primary source for defining guidelines for the fight against terrorism."²³³ In the eighteen years since 9/11, European counterterrorism strategies and tactics have been subjected to extensive review within governments and—in many cases—by external experts, the media, and citizens. While much of that review has focused on their effectiveness in preventing attacks, a good deal has focused on human rights. Offices within governments tasked with protecting human rights, including legal advisers to ministries and security forces, inject human rights considerations into debates over policy and its day-to-day implementation. In part because of the European Convention and Court, human rights have been incorporated into both the personal value systems of influential individuals and the institutional structures and routines of European States.

Since 9/11, no European State (except possibly Turkey and Russia) appears to have systematically employed counterterrorism methods that fall within our definition of mass atrocity.²³⁴ The numerous small-scale—and some large—

Qatada Affair, GUARDIAN (July 8, 2013), <https://www.theguardian.com/world/2013/jul/08/theresa-may-human-rights-abu-qatada>.

²³² Compare, e.g., Kendall W. Stiles, *The Dissemination of International Liberal Norms: The Case of the ECHR and the UK*, 39 CAN. J. POL. SCI. 135, 144 (2006) (concluding that "where questions of terrorism are concerned, policy elites in Britain are willing to set aside Convention restrictions, both formally and informally") with Olivier Cahn, *The Fight Against Terrorism and Human Rights: The French Perspective*, in A WAR ON TERROR? THE EUROPEAN STANCE ON A NEW THREAT, CHANGING LAWS AND HUMAN RIGHTS IMPLICATIONS 467, 484 (Marianne Wade & Almir Maljević eds., 2010) (concluding, before the 2015 institution of a state of emergency, that France had "provided its security services with legal tools that certainly contribute to the French antiterrorism system now being regarded as effective, while safeguarding its overall consistency with the provisions of the European Convention on Human Rights").

²³³ COMMITTEE OF MINISTERS, COUNCIL OF EUROPE, GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM 16 (2002).

²³⁴ This is not to say that these States' counterterrorism practices have respected human rights. To the contrary, some have seriously violated them. See, e.g., *France: Prolonged Emergency State Threatens Rights*, HUM. RTS. WATCH (July 22, 2016), <https://www.hrw.org/news/2016/07/22/france-prolonged-emergency-state-threatens-rights>; *UK: Human Rights Watch Challenges Surveillance*, HUM. RTS. WATCH (Sep. 14, 2014), <https://www.hrw.org/news/2015/09/14/uk-human-rights-watch-challenges-surveillance>. The Court has condemned Italy and Macedonia for permitting the CIA to abduct suspects

scale—terrorist attacks in the United Kingdom, France, Belgium, and Germany just since 2015 show that European States continue to struggle to prevent terrorism. As they do so, they are likely to press the limits of human rights, testing the European Convention and European Court. However, without the continent’s extensive system of norms and institutions protecting human rights, with the Convention and Court at its center, European States might well have been tempted to follow the United States and many African, Latin American, and Asian countries in resorting to war crimes, torture, and other mass atrocities after terrorist attacks.

B. Inter-American Human Rights System

The Inter-American Commission on Human Rights was created in 1959 as a subsidiary organ of the Organization of American States (OAS) and began work in 1960.²³⁵ The Inter-American Court came into legal existence in 1978, and began operation in 1979.²³⁶ The Commission oversees compliance by OAS members with the American Declaration of the Rights and Duties of Man²³⁷ and compliance by the parties to the American Convention on Human Rights with that treaty.²³⁸ The Court hears cases alleging violations of the Convention by parties that have recognized its jurisdiction.²³⁹ (References in this Section to “Commission” and “Court” refer to these Inter-American institutions.)

The Inter-American system has been a central player in the Western Hemisphere’s relatively successful transition from authoritarian to civilian rule, with the concomitant reduction in mass atrocity and the advance of accountability. Further, the norms established in the Americas, largely by the Inter-American system, have served as the baseline for assessing the responsibility of State and third-party actors for abuses, such as disappearance, and for ensuring some degree of accountability during transitional periods and beyond. The Inter-American system, as outlined below, has done this primarily by stimulating domestic authorities to develop and implement plans and policies

on their territory who were later tortured, and Poland, Lithuania, and Romania for hosting secret CIA torture centers. See *Abu Zubaydah v. Lithuania*, App. No. 46454/11 (Eur. Ct. H.R. May 31, 2018); *Al Nashiri v. Romania*, App. No. 33234/12 (Eur. Ct. H.R. May 31, 2018); *Nasr & Ghali v. Italy*, App. No. 44883/09 (Eur. Ct. H.R. Feb. 23, 2016); *El-Masri v. The Former Yugoslav Republic of Macedonia*, 2012-VI Eur. Ct. H.R. at ¶ 361; *Al Nashiri v. Poland*, App. No. 28761/11 (Eur. Ct. H.R. July 24, 2014).

²³⁵ See *About the IACHR*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Nov. 14, 2019).

²³⁶ See *I/A Court History*, INTER-AM CT. OF HUM. RTS., <http://www.corteidh.or.cr/historia-en.cfm> (last visited Nov. 14, 2019).

²³⁷ DAVID WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 328 (2007).

²³⁸ American Convention, *supra* note 29, art. 44.

²³⁹ *Id.* art. 62(3). Both institutions may also hear cases involving violations of other human rights treaties to the extent that those treaties permit such jurisdiction. For a thorough overview of the standards and practice of the Inter-American Commission and Court, see JAMES L. CAVALLARO ET AL., *DOCTRINE, PRACTICE, AND ADVOCACY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (2019).

to account for torture, forced disappearances, and summary and extrajudicial executions.

Mass atrocity has been at the center of the work and rise to prominence of the Inter-American system since the 1970s. In Argentina in 1976, a military junta launched a ferocious campaign of forced disappearances and torture against guerrillas, union organizers, liberation theologians, students, journalists, and everyone else it perceived as a threat. The Commission soon began pressing the regime to allow it to visit the country to investigate the human rights violations, finally securing permission in 1979. The Commission was not deceived by the dictatorship's elaborate efforts to conceal its atrocities. Instead, it skillfully documented heinous abuses and issued a damning report in 1980. The Commission's visit and report provided crucial international validation of the scale of the atrocities and the State's responsibility for them, feeding concern in Washington and European capitals that translated into pressure on the junta. The government truth commission later found that forced disappearances sharply declined during the Commission's engagement. Leading social scientists Keck and Sikkink agree.²⁴⁰

The Commission engaged in similar, real-time documentation and reporting on abuses in Central and South America and in the Caribbean, issuing reports on the human rights situations in countries throughout the Hemisphere with brutal military regimes. Between 1977 and 1988, the Inter-American Commission issued twenty-one reports on human rights situations in thirteen countries—all either controlled by a military or revolutionary regime or in transition to democracy.²⁴¹

Although created in 1979, the Inter-American Court did not hear its first contentious cases—three matters involving forced disappearances in Honduras—until 1986. The Court's ground-breaking decision in *Velásquez Rodríguez v. Honduras* established a standard for State responsibility that has been adopted by national and international systems worldwide.

In the years of transition to democratic rule, mass atrocity and accountability continued to guide the work of the Inter-American system. In the late 1980s and early 1990s, the Inter-American Court and Commission worked in synergy with an increasing number of sympathetic, newly democratic governments and

²⁴⁰ See MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 107-08 (1998) (summarizing figures from annex to truth commission report). The regime forcibly disappeared 4,105 people in 1976, 3,098 in 1977, 969 in 1978, 181 in 1979, and 83 in 1980.

²⁴¹ See, e.g., Inter-Am. Comm'n H.R., Third Report on the Situation of Human Rights in Chile, O.A.S. Doc. OEA/Ser.L/V/II.40, doc.10 (1977); Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Argentina, O.A.S. Doc. OEA/Ser.L/V/II.49, doc.19 corr.1 (1980). In all, the Commission issued twenty-one reports between 1977 and 1988 on the human rights situations, in general, or on particular issues in thirteen countries under military, revolutionary, or transitional regimes: Chile (1977, 1985); Uruguay (1978); Paraguay (1978, 1987); Panama (1978); Nicaragua (1978, 1981, 1983); El Salvador (1978); Haiti (1979, 1988); Cuba (1979, 1983); Argentina (1980); Colombia (1981); Guatemala (1981, 1983, 1985); Suriname (193, 1985); and Bolivia (1985).

vigorous, experienced civil society movements.²⁴² Peace agreements ended civil wars in Guatemala and El Salvador, reducing the motivation and opportunity for national armies and rebel movements to victimize civilians. By the 1990s, mass atrocities had largely abated. (The main exceptions were Peru, until the fall of Fujimori in 2000, and Colombia). With the end of civil conflicts, the Inter-American Commission and Court turned to promoting investigation and punishment of mass atrocities that had already occurred and to advancing institutional reforms to prevent them from recurring. The Inter-American institutions received legitimacy from friendly governments and civil society actors, and a reputation for effectiveness from national-level successes driven mainly by the latter. Legitimacy and reputed effectiveness translated into further influence.

The impact can be measured not only in the caselaw and standards on mass atrocity and accountability established by the Inter-American Commission and Court, but also in the domestic accountability processes and reforms stimulated by the pressure of Inter-American standards and engagement. These measures include high-profile criminal prosecutions, including in Argentina, Chile, and El Salvador, outlined below; state-sponsored truth commissions; constitutional and statutory reforms; and legislative initiatives including reparations to victims of mass atrocities in numerous countries. While violence continues to plague Latin American societies—particularly in the context of criminal law enforcement and drug trafficking—the Inter-American system has played a central role in transforming the causal ecosystems that determine the incidence of politically motivated mass atrocity in many countries in the Hemisphere, dramatically reducing it.

A second, essential measure of the impact of the work of the Inter-American system has been criminal investigations and prosecutions of those responsible for mass atrocity. Throughout the region, in many cases years and decades after the abuses themselves, prosecutors have initiated prosecutions of State agents responsible for torture, forced disappearance, and mass killings. Initially, amnesty laws prevented these criminal processes. The work of the Inter-American Commission and Court to delegitimize amnesty laws has been a central, if not the central, force moving individual State judiciaries and legislatures to overrule or repeal amnesties, thus allowing prosecutions. As we explain below, the Commission issued historic determinations holding the amnesty laws in Argentina and Uruguay to violate the American Convention in 1992.²⁴³ A decade later, the Court, in the *Barrios Altos* case against Peru, reached the same conclusion.²⁴⁴ To date Argentina, Chile, El Salvador, Peru and Uruguay

²⁴² Key transitional moments included the inauguration of democratic governments in Argentina in 1983, Brazil and Uruguay in 1985, and Chile in 1990, and the end of civil wars in Guatemala in 1996 and El Salvador in 1992.

²⁴³ See *Herrera et al. v. Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. Comm'n H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992); *Mendoza et al. v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. Comm'n H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992).

²⁴⁴ *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (March 14, 2002) (holding that "all amnesty provisions, provisions on prescription and the establishment of measures

have removed barriers to prosecutions of those responsible for mass atrocity. In 2005, the Argentine Supreme Court ruled two decades-old amnesty laws unconstitutional, citing the Inter-American Court's decision in *Barrios Altos v. Perú* throughout its decision.²⁴⁵ In July 2016, the Supreme Court of El Salvador ruled that an amnesty law passed shortly after the end of its twelve-year civil war was unconstitutional.²⁴⁶ In September 2016, the Second Court of San Francisco de Gotera reopened an investigation into the 1981 killing of hundreds of civilians by government forces in El Mozote.²⁴⁷

The Inter-American institutions' realistic attention to political context, their level of power, and the process of building it over time have been essential to their success. For example, in the early 1990s the Commission found that amnesties in Argentina and Uruguay contradicted those States' international human rights obligations. However, it chose not to bring that question to the Court for a legally binding determination, out of concern that the Court might uphold the amnesties—or strike them down but have its authority weakened if the States defied the ruling.²⁴⁸

Alexandra Huneeus has examined the effect of decisions of the Inter-American system by analyzing the connection between sentences requiring investigation and prosecution and subsequent investigations and prosecutions in States in the Americas. She concludes, as we analyze in Section V, that the impact of the sentences of the Court has been nearly as significant as that of the ICC, ICTY and ICTR *combined*, despite its relatively modest budget.

As Huneeus writes:

[T]he Inter-American Court of Human Rights has made national prosecution of gross, state-sponsored crimes a centerpiece of its regional agenda. The Court . . . regularly orders states to investigate, try, and punish those responsible for gross human rights violations as a form of equitable relief. Then, through another interpretive twist, it supervises states' implementation of its orders: it holds mandatory hearings and issues compliance reports that aspire to hasten and guide the progress of national criminal processes. The Court has decreed and is actively monitoring prosecutions of international crimes in roughly fifty-one cases across fifteen states. Pursuant to its orders in these cases, states have launched new criminal

designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance.”)

²⁴⁵ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, “Julio Simón et al. c. Poder Judicial de la Nación,” No. 17.768, S. 1767. XXXVIII (Arg.) (ruling Laws Nos. 23.492 (1986) and 23.521 (1987) unconstitutional).

²⁴⁶ Supreme Court, July 3, 2016, Judgment Regarding Law No. 486 of March 20, 1993, 44-2013/145-2013 (El Sal.).

²⁴⁷ See Second Court of First Instance, San Francisco Gotera, Morazán, Sept. 30, 2016, El Mozote Massacre, Penal Case 238/90 (El Sal.).

²⁴⁸ Cavallaro & Brewer, *supra* note 177, at 819.

investigations, exhumed mass graves, moved cases from military to civil jurisdiction, overturned amnesties, bypassed statutes of limitations, and created new institutions and working methods to facilitate prosecution of such crimes. Indeed, at least thirty-nine prosecutions launched pursuant to the Court's orders have yielded convictions.²⁴⁹

To provide greater context, we consider below the influence of the Commission and Court in Argentina, Chile, and Brazil. The three cases enable comparative assessment of the impact of the Inter-American system on accountability within each country, as well as the development of the regional mechanisms themselves. All three countries experienced significant periods of authoritarian, military rule—17 years in Chile, 7 years in Argentina and 21 years in Brazil—based on extensive, gross violations of human rights that rose to the level of crimes against humanity. In all three states, military authorities summarily executed, forcibly disappeared, and/or tortured thousands of people. In both absolute and relative terms, however, the levels of slaughter were higher in Argentina and Chile than in Brazil. So too was the degree of engagement between local human rights activists and the Inter-American system. These similarities and differences facilitate analysis of the efficacy of the regional human rights system in the short and long terms.

1. Argentina

On March 24, 1976, a military coup deposed President Isabel Perón, second wife of Argentine leader Juan Perón and his successor in the presidency on his death. The years immediately prior to 1976 had seen high levels of tension between insurgent groups and counter-insurgency forces.²⁵⁰ Still, atrocities rose dramatically after the coup, including the widespread use of forced disappearance to attempt to eliminate all opponents and stifle dissent. Over the course of the next few years, security forces rounded up thousands of suspected guerrillas, sympathizers, union organizers, student leaders, and others. After wholesale secret detention and torture, Argentine security forces killed thousands and eliminated their victims without a trace, in significant measure by drugging them and forcing them off planes to their death at sea.²⁵¹

In 1979, as noted above, the Argentine government allowed the Inter-American Commission to visit the country. During its visit, the Commission gathered evidence of thousands of forced disappearances. The domestic and international

²⁴⁹ Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Bodies*, 107 AM. J. INT'L L. 1, 1-2 (2013).

²⁵⁰ As Keck and Sikkink write in their review of this period, "[e]ven before the military coup of March 1976, international human rights pressures had influenced the Argentine military's decision to cause opponents to 'disappear,' rather than imprisoning them or executing them publicly." KECK & SIKKINK, *supra* note 240, at 103-04.

²⁵¹ On the Argentine practice of drugging detainees and forcing them to their deaths from planes, see HORACIO VERBITSKY, *THE FLIGHT: CONFESSIONS OF AN ARGENTINE DIRTY WARRIOR* (1996).

attention created by the Commission's visit is credited by many, including Keck and Sikkink, with prompting a significant reduction in forced disappearances.²⁵²

In 1982 and 1983, after seven years of military rule, the junta lost control of Argentina, due to an economic downturn brought about by the Latin American debt crisis and the humiliating defeat at the hands of the British Navy in the Falklands/Malvinas War. In late 1983, Raúl Alfonsín was elected president on a human rights platform.

Ernesto Sábato, a respected author, headed a truth commission that gathered thousands of pages of testimonies and evidence of forced disappearances. Within a year, trials (and later, some convictions) of the junta leaders followed.²⁵³ But after the initial wave of prosecutions, the military and its supporters began to push back, including through armed uprisings. Fearful of a new coup, the Argentine Congress passed two laws to halt investigations and prosecutions for Dirty War abuses. In 1989 and 1990, Alfonsín's successor, Carlos Menem, pardoned those in prison for atrocities, including the junta members.

Over the next fifteen years, activists would press for accountability with a broad range of actions, from trials that sought truth (since punishment had been barred), to symbolic actions, such as public shaming of known dirty war criminals. In Argentina, the Inter-American system played a crucial role throughout the two-decade period of transition.

In 1992, the Inter-American Commission issued a final report in a case against Argentina (and a parallel case against Uruguay), holding the two nations' amnesty laws in violation of the American Convention on Human Rights. These decisions faced significant resistance by the governments of Argentina and Uruguay. These States questioned the Commission's decision indirectly in a request for an advisory opinion. The effort, in legal terms, backfired as the Court largely affirmed the competencies of the Commission. The Commission's 1992 decision would prove vital to civil society groups pressing for accountability domestically.

Years later, the Inter-American Court definitively held that amnesties such as Argentina's were inconsistent with the Convention.²⁵⁴ While the case addressed legislation in Peru, it provided clear guidance for courts throughout the region on the Convention's standards for accountability in cases of massive human rights violations, including mass atrocity.

In 2005, the Argentine Supreme Court ruled its amnesty laws invalid, directly applying the holding in *Barrios Altos* to Argentina.²⁵⁵ Shortly thereafter,

²⁵² *Id.* at 107-108.

²⁵³ Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIAMI INTER-AM. L. REV. 491, 502 (1987).

²⁵⁴ *Barrios Altos v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 51 (Mar. 14, 2001).

²⁵⁵ The Supreme Court applied the *Barrios Altos* ruling regarding the invalidity of amnesty laws in the Simon Case. See generally Santiago Legarre, *Crimes against Humanity, Reasonableness and the Law: The Simon Case in the Supreme Court of Argentina*, 5 CHINESE J. INT'L L. 723 (2006).

prosecutors throughout the country reopened investigations and prosecutions into grave rights abuses committed three decades earlier. Over the past decade plus, these prosecutions have continued, targeting high profile defendants, such as junta leader Jorge Videla.²⁵⁶ Today, the consensus position of the major Argentine political parties repudiates the military dictatorship and its legacy of gross violations of human rights and recognizes the legitimacy of the Inter-American human rights system in the domestic political and legal order.

2. Chile

On September 11, 1973, military forces seized power in Chile, violently overthrowing democratically elected socialist President Salvador Allende. The military government of General Augusto Pinochet oversaw widespread repression that included the forced disappearance of approximately 3,000 people and the detention and torture of thousands more. The military junta restricted basic civil rights, censored media publications, and forced through a new Constitution in 1980. In 1978 it promulgated an amnesty to block future prosecution of its crimes.

In October 1988, the government orchestrated a referendum on Pinochet's continuance in power. In the face of pressure within Chile and from outside, the military was unable to impose its will through the plebiscite, yet exerted significant control over the transition and beyond. Patricio Aylwin won elections a year later and took office in March 1990. Before handing over power, however, the military government created numerous institutional means to restrict the new democratic government's power, including seats in the upper legislative house for various military allies and significant autonomy for the military. These arrangements, along with Pinochet's vocal threats to intervene in politics after the transition, restricted the new authorities' ability to reverse the amnesty law.

Throughout the decades of military rule, the Inter-American human rights system played an important role in these legal and political developments. During the years of Pinochet's rule, the Inter-American Commission produced a series of reports on rights abuse in Chile. These reports both maintained international pressure on Chile (relevant to the junta's decision to accept the outcome of the 1988 plebiscite), and also established a historical record that could add to the basis for prosecutions years later.

In this context, the October 1998 arrest in London of former dictator Augusto Pinochet at the request of Spanish investigating judge Baltasar Garzón sent shock waves throughout Chile, energizing the human rights and accountability movement and forcing Chilean diplomats to promise advances in dormant investigations and prosecutions.

²⁵⁶ *Argentina: Ex-Dictators Are Convicted of Arranging to Steal Dissidents' Babies*, N.Y. TIMES (July 6, 2012), <http://www.nytimes.com/2012/07/06/world/americas/argentina-ex-dictators-are-convicted-of-arranging-to-steal-dissidents-babies.html>.

After his return to Chile, Pinochet lost much of his support. In this context, pressures to reopen investigations and to not apply the amnesty law intensified. The Inter-American Court played a helpful role in 2006 by ordering the government of Chile to investigate and prosecute those responsible for the September 1973 extrajudicial killing of Luis Alfredo Almonacid Arellano, thus providing legal and political support for Chilean judges seeking not to apply the 1979 Amnesty Law.²⁵⁷ At this writing, a consensus prevails among the political class in Chile and in society broadly regarding the illegitimacy of the military dictatorship and its record of human rights abuse and in support of the Inter-American human rights system.

3. Brazil

On March 31, 1964, a military coup ousted president João Goulart, ushering in more than two decades of military rule. The first several years of military rule involved restrictions on political participation and rights abuse, but only after 1968, under Institutional Act No. 5, did the regime routinely employ the harshest forms of repression. The Brazilian coup was the first in a wave that would later reach southern cone neighbors Argentina, Uruguay, and Chile. The military regime arrested and tortured thousands of dissidents. It also forcibly disappeared hundreds. While this represents a serious and worrisome number, it is far less in absolute terms, and less still in per capita terms, than the number disappeared in Argentina or Chile.

In Brazil, until recently, the role of the Inter-American system had been quite limited. Rights groups filed some petitions with the Commission during the worst years of the military dictatorship—just nine petitions filed from 1970 to 1974²⁵⁸—but this number paled in comparison to the numbers of denunciations filed in Argentina and Chile. During its visit to Argentina in 1979, for example, the Commission received thousands of petitions denouncing specific instances of forced disappearance.

Interestingly, it was not until the Inter-American Court ruled against the Brazilian amnesty law in the case of *Julia Gomes Lund and others vs. Brazil* in November 2010,²⁵⁹ together with the assumption of the presidency by former torture victim and political detainee Dilma Rousseff, that Brazil moved to create an official, national truth commission. Four years later, in December 2014, the Truth Commission submitted its final report to the president. In the intervening period, many states in Brazil followed suit, creating state-level truth commissions. At the same time, a special division of the federal office of the

²⁵⁷ Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 65 (Sept. 26, 2006).

²⁵⁸ See FLÁVIA PIOVESAN, DIREITOS HUMANOS E O DIREITO CONSTITUCIONAL INTERNACIONAL 257 (4th ed., 2000).

²⁵⁹ Gomes Lund et al. v. Brazil, Judgment, Inter-Am. Ct. H.R. (ser. C), at 113 (Nov. 24, 2010).

prosecutor opened scores of investigations and criminal complaints in ten cases.²⁶⁰

The years following the termination of the work of the truth commission took a dangerous turn for human rights in Brazil. Economic stagnation and mass protests in 2013 marked the beginning of a significant change in national politics, as disenchantment with limited growth fueled protests and political mobilization against the ruling Workers' Party. In addition, what began as an investigation into a car wash (known as *Operation Lava Jato*, for its Portuguese name) mushroomed into a sweeping inquiry and prosecution of widespread corruption in Brazilian politics. The *lava jato* investigation engulfed many in the ruling party and the opposition, but its focus was clearly on the Workers' Party and former President Lula. These forces encouraged a successful push by center and right parties to impeach President Dilma Rouseff in 2015 and 2016. Then, the 2018 elections swept extreme right-wing candidate Jair Bolsonaro into office. Bolsonaro, a former military officer and Congressman, has repeatedly questioned basic principles of rule of law and human rights. In 1999, Bolsonaro revealed his views on mass atrocity: "[Things] will only change on the day that we break out in civil war here and do the job that the military regime didn't do: killing 30,000. If some innocent people die, that's fine."²⁶¹

Bolsonaro represents violent opposition to the core principles of human rights and the rule of law. As one of us (Cavallaro) and Fernando Delgado explained in 2012, Brazil at that time had among the lowest levels of public support for democracy in the Western Hemisphere. We posited that this resulted from the relatively limited accountability for human rights violations during the dictatorship, which in turn resulted in part from Brazil's failure to engage with international human rights oversight.

[A]ccountability for the gross violations of human rights committed by agents of the military dictatorship in Brazil (1964-1985) has, on the whole, been extremely limited. . . . We suggest . . . a causal relationship between, on the one hand, this failure of accountability and, on the other, the incomplete support for democracy in Brazil, the continued severe human rights abuses in the country, and the legitimacy gap plaguing human rights defenders in Brazil today.²⁶²

²⁶⁰ See MINISTÉRIO PÚBLICO FEDERAL, GRUPO DE TRABALHO JUSTIÇA DE TRANSIÇÃO: ATIVIDADES DE PERSECUÇÃO PENAL DESENVOLVIDAS PELO MINISTÉRIO PÚBLICO FEDERAL 2011/2013 (2014).

²⁶¹ Mariana Simões, *Brazil's Polarizing New President, Jair Bolsonaro*, in *His Own Words*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/world/americas/brazil-president-jair-bolsonaro-quotes.html>.

²⁶² James L. Cavallaro & Fernando Delgado, *The Paradox of Accountability in Brazil*, in AFTER OPPRESSION: TRANSITIONAL JUSTICE IN LATIN AMERICA AND EASTERN EUROPE 86, 86 (Vesselin Popovski & Mónica Serrano eds., 2012). The other factors noted were "the extended effects of the country's top-down transition, the comparatively lower numbers of victims of mass atrocity, at least by Latin American standards; [and] the surge in crime that accompanied the transition to democratic rule." *Id.*

Brazil's relative isolation with regard to the Inter-American system manifested itself in a significantly lower number of petitions to the Commission and matters litigated in the system, relatively late ratification of the American Convention (1992), and delayed acceptance of the contentious jurisdiction of the Court (1998). In 1994, for example, there were just two petitions pending before the Inter-American Commission; the first contentious case against Brazil was not submitted until 2005. By then, the system had decided thousands of matters against other authoritarian regimes in the Americas.

The failure of accountability in Brazil, we argue, is directly related to the limited role and applicability of the Inter-American system. By contrast, in Argentina and Chile, while the degree of commitment to human rights has varied, neither has turned away from core human rights principles so dramatically. This, we argue, is a result—at least in part—of how embedded the Inter-American human rights system has become in those States and how much influence the system has exerted to promote accountability and a culture of human rights. Earlier, the visibility of the work of the Commission likely led the Argentine junta and the Chilean regime to limit abuses.

C. African Regional Human Rights System

The African regional human rights system has struggled to reduce human rights violations, including mass atrocities, and to induce States to investigate and prosecute those responsible for them. Younger and less supported by its Member States, it has had much less impact than its European and Inter-American counterparts. For this reason, and because the African system has received less scholarly attention, it yields fewer insights into how international institutions can promote the goals of concern to us and we devote less space to it.

Two African institutions are dedicated to the protection and promotion of human rights across the continent: the African Commission on Human and Peoples' Rights, which opened in 1987, and the African Court on Human and Peoples' Rights, which opened in 2006.²⁶³ The Commission and Court oversee Member States' compliance mainly with the African Charter on Human and Peoples' Rights ("African Charter" or "Charter"), which entered into force in 1986.²⁶⁴ (We use "Commission" and "Court" in this Section to refer to the African Commission and African Court.) Fifty-four States are party to the

²⁶³ Several regional courts also address human rights questions occasionally, but also deal with other disputes, such as over trade. See FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 487-94 (2d ed. 2012). In addition, several organs of the African Union have human rights-related responsibilities. See *id.* at 169-205; Christof Heyns & Magnus Killander, *The African Regional Human Rights System*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES* 509, 523-24 (Felipe Gómez Isa & Koen de Feyter eds., 2006).

²⁶⁴ Protocol to the African Charter, *supra* note 29, art. 3. The Court has jurisdiction over cases involving the African Charter "and any other relevant Human Rights instrument ratified by the states concerned." *Id.*

African Charter—all of the members of the African Union (AU, formerly the Organization of African Unity (OAU)) except Morocco.²⁶⁵

1. African Commission on Human and Peoples' Rights

Scholars of the African Commission generally agree that its contribution to human rights has been modest, and even minimal.²⁶⁶ Frans Viljoen concludes that “on the whole the Commission has failed” to effectively protect human rights.²⁶⁷ Scholarship on the Commission remains thin, so its work may be having impact under the surface.²⁶⁸ Still, Rachel Murray and Elizabeth Mottershaw report that there is “an increasing sense of frustration among litigants and others about the integrity and reputation of the African Commission,”²⁶⁹ while Viljoen judges that “the Commission’s track record does not inspire confidence.”²⁷⁰ Some recent changes, including the creation of the African Court, give some reason to hope that the Commission may have more effect in the future, however.

The Commission’s primary activity consists of evaluating individual complaints of human rights violations by State parties to the Charter. These can be submitted directly to it by individuals, groups of them, or NGOs, after exhaustion of available domestic remedies.²⁷¹ However, scholars agree that States largely ignore the Commission when it finds them to have violated human rights in particular cases and recommends remedies.²⁷² The most extensive study

²⁶⁵ See List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights, AFR. UNION (June 15, 2017), https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf.

²⁶⁶ See, e.g., RACHEL MURRAY & DEBRA LONG, THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 4 (2015); VILJOEN, *supra* note 263, at 295-99; Gina Bekker, *The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations*, 13 HUM. RTS. L. REV. 499, 500-501 (2013); Heyns & Killander, *supra* note 263, at 538; Makau Mutua, *The African Human Rights Court: A Two-Legged School?*, 21 HUM. RTS. Q. 342, 353 (1999) (characterizing the creation of the African Court as “an acknowledgment of [the Commission’s] general ineffectiveness”). *But see* Manisuli Ssenyonjo, *Responding to Human Rights Violations in Africa*, 7 INT'L HUM. RTS. L. REV. 1, 40 (2018) (concluding that the Commission has “greatly contributed to the regional protection of human rights in Africa”).

²⁶⁷ VILJOEN, *supra* note 263, at 297.

²⁶⁸ See MURRAY & LONG, *supra* note 266; VILJOEN, *supra* note 263, at 289-390.

²⁶⁹ Rachel Murray & Elizabeth Mottershaw, *Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights*, 36 HUM. RTS. Q. 349, 372 (2014).

²⁷⁰ VILJOEN, *supra* note 263, at 298.

²⁷¹ *Id.* at 304; African Charter, *supra* note 29, art. 56. The Commission can hear inter-State complaints, but only one has ever been filed. Ssenyonjo, *supra* note 266, at 10.

²⁷² Bekker, *supra* note 266, at 515; Murray & Mottershaw, *supra* note 269, at 350-51; Lutz Oette, *Litigation Before the African Commission on Human and Peoples' Rights and the Struggle Against Torture in Sudan*, 54 SUDAN STUDIES FOR SOUTH SUDAN AND SUDAN 20, 30 (2016); Ssenyonjo, *supra* note 266, at 20; George Mukundi Wachira & Abiola Ayinla, *Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy*, 6 AFRICAN HUM. RTS. L.J. 465, 466-467 (2006) (stating that “the attitude of state parties . . . by and large has been generally to ignore these recommendations [made by the Commission after finding violations of Charter rights], with no attendant consequences” (internal citations omitted)). The only effort to comprehensively survey State compliance covered only decisions issued from 1994 to 2004. It found that States had fully complied in only six of the forty-four cases studied. See Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 AM. J. INT'L L. 1, 5 (2007).

of the impact of the Commission's findings recognized that, in theory, those findings could influence State behavior in a variety of ways beyond inducing respondent States to follow recommendations in individual cases. For example, Commission findings could inform national courts' application of the Charter to cases before them.²⁷³ The authors found little evidence that these and other hypothesized effects actually occurred, however.²⁷⁴

Africans have suffered mass atrocities in dozens of instances since the Commission was created in 1987, yet the Commission has had no discernible impact on their incidence. Article 58 of the Charter creates a procedure by which the Commission can sound the alarm about "serious or massive violations of human and peoples' rights," by referring them to the Assembly of Heads of State and Government of the AU (formerly that of the OAU).²⁷⁵ Early in its lifetime, the Commission referred a number of cases to the Assembly under Article 58, but the Assembly took no action.²⁷⁶ As Chidi Odinkalu notes, the OAU Assembly was the regional organ "whose members were most likely to be self-interested or deeply implicated in mass atrocities."²⁷⁷ By 2006 the Commission had given up on the Article 58 referral procedure, but did not craft an alternative approach to mass atrocity situations.²⁷⁸ Field investigations were impossible in most cases, because governments were unable or unwilling to protect Commissioners and their staff.²⁷⁹ In the few cases the Commission did investigate, such as Zimbabwe and Darfur (Sudan), its reports had little impact on the AU.²⁸⁰ The Commission has seldom ordered provisional measures to protect individual complainants while it considered their cases, and when it has, "states almost uniformly disregarded them."²⁸¹ "[B]y never filling the lacuna left by the [OAU] Assembly's inaction [on the Commission's Article 58 referrals], the Commission remains without a coherent strategy to deal with" such atrocities.²⁸²

Much of the Commission's weakness stems from forces outside its control. Resource scarcity, poverty, unscrupulous leaders, weak institutions, ethnic

²⁷³ See MURRAY & LONG, *supra* note 266, at 69-86.

²⁷⁴ *Id.* The other activities of the Commission, such as periodic reports by State parties and Commission field visits to States, have had similarly modest impact. See *id.* at 45-50, 63-66; VILJOEN, *supra* note 263, at 296-97; Heyns & Killander, *supra* note 263, at 528-29.

²⁷⁵ African Charter, *supra* note 29, art 58(1). The Charter does not define "serious or massive violations," and the Commission has never done so either, but the Commission's practice suggests an understanding of the term similar to what we refer to as "mass atrocities," although perhaps broader. See Rachel Murray, *Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms*, 17 NETHERLANDS Q. HUM. RTS. 109, 110-14 (1999).

²⁷⁶ See Heyns & Killander, *supra* note 263, at 527-28.

²⁷⁷ Chidi Anselm Odinkalu, *From Architecture to Geometry: The Relationship Between the African Commission on Human and Peoples' Rights and Organs of the African Union*, 35 HUM. RTS. Q. 850, 862 (2013).

²⁷⁸ Heyns & Killander, *supra* note 263, at 528.

²⁷⁹ Odinkalu, *supra* note 277, at 863.

²⁸⁰ *Id.*

²⁸¹ VILJOEN, *supra* note 263, at 306.

²⁸² *Id.* at 295-96. The Commission arguably has taken a significant stand against mass atrocities by refusing to allow States to derogate from any of their human rights obligations even when faced with genuine emergencies, such as civil wars. See, e.g., *id.* at 333-34.

tensions, and outside predation have led to more frequent incidents of mass atrocity within the jurisdiction of the African regional human rights institutions than within the jurisdictions of the European or Inter-American regional human rights institutions.²⁸³ Unlike in Europe and Latin America, no powerful bloc of African States has exerted sustained pressure on others to improve their human rights performance. In the view of some scholars, African States deliberately hamstrung the Charter and Commission, meaning them to serve only as fig leaves to disguise the States' disregard for human rights.²⁸⁴ The Commission's recommendations are generally not considered to be legally binding.²⁸⁵ States have compromised the Commission's independence by appointing Commissioners who are closely connected to, and even employed by, their home governments.²⁸⁶ The Commission's limited budget and the AU's "cumbersome" hiring procedures keep its staff tiny, averaging just five legal officers, and resource constraints "seriously impair the efficiency and professionalism of [the Commission's] Secretariat."²⁸⁷ Under these circumstances, the Commission has been unable to help prevent mass atrocity or promote accountability for it.

2. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was created by a protocol to the African Charter.²⁸⁸ The Court began work in 2006²⁸⁹ and issued its first decision on the merits of a case in 2013.²⁹⁰ However, it has not yet played a significant role in preventing atrocity crimes, even though such crimes have occurred in many places across the continent since its creation, including Burundi, Egypt, Libya, and South Sudan.²⁹¹ The Court has not issued an advisory opinion or merits decision in a contentious case that is relevant to atrocity crimes. Its sole relevant action has been to order provisional measures in a case brought by the Commission against Libya during the "Arab Spring" regarding the Gaddafi regime's violent repression of protests. Just nine days after receiving the Commission's application, the Court ordered Libya to refrain from violating

²⁸³ See Heyns & Killander, *supra* note 263, at 541.

²⁸⁴ See Bekker, *supra* note 266, at 505-06; Makau Mutua, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM. HUM. & PEOPLES' RTS 5, 7-11 (1993). The Charter has been criticized as less protective of human rights than other major human rights treaties. See, e.g., Mutua, *supra* note 266, at 358-60.

²⁸⁵ See, e.g., FROM JUDGMENT TO JUSTICE, *supra* note 166, at 96; VILJOEN, *supra* note 263, at 339.

²⁸⁶ See VILJOEN, *supra* note 263, at 290-91; Bekker, *supra* note 266, at 500 n.3.

²⁸⁷ VILJOEN, *supra* note 263, at 293-94; see also Bekker, *supra* note 266, at 500 n.3 (noting the Commission's "lack of funding"); Murray & Mottershaw, *supra* note 269, at 366 (characterizing the Commission as "under-resourced").

²⁸⁸ Protocol to the African Charter, *supra* note 29.

²⁸⁹ See African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], 8th Ordinary Sess., *Activity Report of the Court for 2006*, at 3, Assembly/AU/8(VIII) (Jan. 29-30, 2007).

²⁹⁰ Mtikila v. Tanzania, No. 011/2011, Decision, African Commission on Human and Peoples' Rights [Afr. Ct. H.P.R.], (June 14, 2013), <http://en.african-court.org/index.php/55-finalised-cases-details/843-app-no-011-2011-rev-christopher-r-mtikila-v-united-republic-of-tanzania-details>.

²⁹¹ See HUMAN RIGHTS WATCH, 2019 WORLD REPORT 101 (2019) (Burundi); *id.* at 184-86 (Egypt); *id.* at 358-59 (Libya); *id.* at 536-39 (South Sudan).

human rights.²⁹² There is no evidence that the Court's order had any impact on the ground, however, as the Gaddafi regime continued to attack civilians.²⁹³

Blame for the Court's inaction lies largely with the States themselves and with the Commission. No State has submitted a complaint to the Court over atrocity crimes, and only nine of the thirty States that recognize the jurisdiction of the Court have allowed it to receive complaints against them from individuals or NGOs.²⁹⁴ The Commission can refer complaints to the Court against any of the thirty State parties, yet has done so only in only a few cases and only one—the Libya case—involving atrocity crimes.²⁹⁵

The Court may be waiting to address mass atrocities until it has accumulated more influence over States, which may come if States develop a habit of complying with its orders in cases with lower political stakes.²⁹⁶ In 2015, the Court declined a request by NGOs for an advisory opinion on whether the Rome Statute obligated African States that were members of the ICC to arrest Sudan's then-president, Omar Al Bashir, whom the ICC had indicted.²⁹⁷ The Court turned down the request using exceptionally thin and formalistic reasoning, laid bare by a dissenting judge.²⁹⁸ The majority may, however, have been wise to evade the highly contentious issue of whether one State should arrest the incumbent leader of another. The legal merits of the case favored the NGOs, but the Court was less than ten years old, had little sway with African citizens, and had yet to issue a high-profile decision, let alone induce implementation. Its judges had little hope of changing the politics around the Al Bashir case. Had they ruled that States must arrest him, and been ignored, they would likely have highlighted their Court's weakness and thus diminished its authority.

African Court judges recognize that it will take time to build their Court's influence and that they can promote it through activities beyond judging cases, as Nicole De Silva shows.²⁹⁹ Early on these judges observed that they “‘need[ed] to strengthen a judicial culture’ in African states,” expand the Court's jurisdiction, and increase its authority.³⁰⁰ They took measures that included

²⁹² Afr. Comm'n H.P.R. v. Great Socialist People's Libyan Arab Jamahiriya, 004/2011, Order for Provisional Measures, African Commission on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 25 (Mar. 25, 2011), http://www.africancourtcoalition.org/images/docs/judgements/Order_for_Provisional_Measures_against_Libya.PDF

²⁹³ See, e.g., *Libya: Indiscriminate Attacks Kill Civilians*, HUM. RTS. WATCH (Apr. 17, 2011) <https://www.hrw.org/news/2011/04/17/libya-indiscriminate-attacks-kill-civilians>.

²⁹⁴ See *Welcome to the African Court*, AFR. CT. OF HUM. & PEOPLES' RTS., <http://en.african-court.org> (last visited Nov. 17, 2019).

²⁹⁵ See Murray & Mottershaw, *supra* note 269, at 367.

²⁹⁶ “Habit” is a shorthand for political and institutional arrangements and norms, both formal and informal, that can develop over time.

²⁹⁷ Request for Advisory Opinion by the Coalition for the International Criminal Court, et al., No. 1 of 2015, Order Striking Out Request, p.4, Nov. 29, 2015. Six months earlier the Court had declined a similar request that the NGO requesters apparently failed to pursue. Request for Advisory Opinion by the Coalition for the International Criminal Court, et al., No. 1 of 2014, Order Striking Out Request, June 5, 2015.

²⁹⁸ See *id.*, Dissenting Opinion of Judge Ouguergouz, at III.

²⁹⁹ De Silva, *supra* note 18, at 288-89.

³⁰⁰ *Id.* at 288.

“African Court officials [including judges] travelling across Africa, holding workshops with the Court’s full range of stakeholders, including governmental officials, national judges, civil society organizations, and the media.”³⁰¹ The Court’s appreciation that international institutions must develop their power through engagement with other actors, and readiness to invest in activities beyond judges’ traditional role of hearing cases and issuing decisions, may help develop the institution into one able to prevent and secure accountability for mass atrocity—as the European Court and Inter-American Court and Commission have become.

V. COMPARING INTERNATIONAL CRIMINAL TRIBUNALS AND REGIONAL HUMAN RIGHTS INSTITUTIONS

Preventing mass atrocities, and securing criminal accountability for those who commit them, are among the most compelling purposes of the international system. As we have seen, the European Court and Inter-American System have significantly advanced both goals, while the African Commission and Court and the ICC have struggled. This Part analyzes the reasons for that divergence. It argues that the best way for the ICC to overcome its current crisis is to take lessons from the regional mechanisms’ approach and its effective implementation in Europe and the Americas. Our analysis incorporates new data on the comparative costs (and thus efficiency) of these institutions.

The Inter-American System and European Court have built an impressive record in reducing the incidence of mass atrocities and securing criminal accountability for them. Mass atrocity is now rare in their jurisdictions, although not eliminated. Perpetrators are much more likely to be prosecuted than in past decades, although this is hardly certain. The Inter-American System has had the most success. The influence of the Inter-American Commission and Court has no doubt been enhanced by a series of political transitions that have swept perpetrators of mass atrocities from power. Still, these institutions have played central roles in the development of norms and legal doctrines that successor democratic regimes—and activists pressuring them—have used to delegitimize perpetrators, erode their political power, and eventually prosecute them. The European Court of Human Rights has tried with increasing vigor to pressure the Turkish and Russian governments to investigate, prosecute, and punish mass atrocities in the Kurdish southeast and Chechnya, with some results. It also has succeeded in preventing State counterterrorism campaigns from devolving into mass atrocity.

The African system has managed less so far. The African Commission’s structural weaknesses, the massive scale of human rights violations in the countries over which it has jurisdiction, and many African States’ thin commitment to human rights have prevented the Commission from contributing significantly either to efforts to secure criminal accountability for mass atrocities

³⁰¹ *Id.*

or to prevent them. The African Court is too young to assess confidently, although its judges are making efforts to develop its influence.

What accounts for the achievements of the Inter-American System and European Court? Their judges, commissioners, and staff have labored for decades to build their institutions' authority. Through multiple channels, they have affected the behavior of domestic politicians, prosecutors, and judges, and through them the potential perpetrators of atrocities, such as police, soldiers, and rebels. That is to say, these international institutions have altered the complex causal ecosystems that determine whether atrocities are committed in particular situations, and the distinct ones that determine whether those responsible are identified, prosecuted, and punished. These three institutions have employed varying methods—Alexandra Huneus and Mikael Rask Madsen contrast the Inter-American Commission's "political approach" with the two courts' "legal diplomacy"—but all have skillfully, strategically, and patiently balanced confrontation with and deference to national actors, informed by appreciation of national political, legal, and in some cases social and military contexts.³⁰²

These regional bodies have been most effective when they have understood their limitations and found ways to contribute to locally driven efforts. All the institutions we have assessed were designed as complements to national political and legal systems. Their designers viewed domestic actors as primarily responsible for preventing human rights violations, including mass atrocity, and holding perpetrators accountable when they occurred. "[S]upranational tribunals will generally have the greatest impact when their procedures and judgments are relevant to the actors working to advance specific human rights in these countries, including not only State agents but also human rights organizations, social movements, and the media."³⁰³

Whether the ICC will develop similar influence remains to be seen. To be sure, at seventeen years of age, it has had much less time to do so than the 60-year-old European Court and Inter-American Commission and the 40-year-old Inter-American Court. While there is meaningful scholarship on its impact, that corpus is small and not yet conclusive.

Yet the ICC's high profile, and cost, may give it less time to prove its worth to States, potential perpetrators, the media, and victims. Rather than following those regional institutions in building its credibility and power gradually, the ICC appears to have squandered both, as indictees have evaded capture, politicians have intimidated witnesses until the cases against them collapsed, and half of the few defendants who have faced trial have walked free after acquittal. As political scientist Mark Kersten recently commented: "Acquittals are part and parcel of any normal criminal court. . . . However, whenever a case involving mass

³⁰² Compare Alexandra Huneus & Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16 INT'L J. CON. L. 136, 145 (2018) (Inter-American Commission) with *id.* at 146 (Inter-American Court) and *id.* at 146-47 (European Court).

³⁰³ Cavallaro & Brewer, *supra* note 177, at 775.

atrocities essentially collapses at the ICC, it does damage to the perception of the Court as a credible and effective institution of international justice.”³⁰⁴

The problem is not that the ICC lacks resources. Table 1 compares the budgets of the ICC and the regional bodies, compiled from their respective reports. The ICC’s budget vastly exceeds those of all of the regional institutions. Between 2011 and 2018, the ICC cost about fifteen times as much as the Inter-American Commission and the African Court, twenty-four times as much as the African Commission, and thirty-three times as much as the Inter-American Court. The European Court of Human Rights appears comparatively extravagant at 58% of the cost of the ICC—until one considers that only a fraction of its 2,700 merits decisions each year involve mass atrocities. (The same is true of the other regional institutions’ dockets.) We estimate the portion of the European Court’s budget attributable to mass atrocity by computing the proportion of its decisions that involve violations of bodily integrity rights—the rights to life and freedom from torture, inhuman treatment, and slavery and forced labor. This method produces an inflated figure because many of those cases would fall outside the ICC’s jurisdiction and our definition of mass atrocity.³⁰⁵ Yet the ICC’s budget is more than four times the resulting (over-)estimate of the European Court’s budget attributable to mass atrocities.

³⁰⁴ Mark Kersten, *Some Quick Reflections on the Gbagbo Acquittal at the ICC*, JUST. IN CONFLICT (Jan. 18, 2019), <https://justiceinconflict.org/2019/01/18/some-quick-reflections-on-the-gbagbo-acquittal-at-the-icc/>.

³⁰⁵ See *supra* text accompanying notes 30-33. For example, most of these cases do not arise from situations in which such human rights violations occur on a mass scale.

Table 1. International human rights institution budgets by year, 2011-2018 (thousands of nominal U.S. dollars)

	2011	2012	2013	2014	2015	2016	2017	2018	Avg.- 2011- 2018	As % of ICC
	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	
ICC	144,020	139,756	152,862	161,369	144,894	154,397	163,081	173,919	154,287	100%
European Court	86,351	91,568	94,840	96,185	80,759	85,911	88,823	89,330	89,221	58%
Bodily integrity cases (est.)*	39,107	37,890	38,674	38,423	39,216	35,961	30,716	30,656	36,330	24%
African Comm'n	7,943	5,692	8,489	5,645	5,923	5,581	5,526	6,320	6,390	4%
African Court	9,390	8,563	8,970	8,620	9,858	10,286	10,315	11,820	9,728	6%
Inter-American Comm'n	9,837	8,963	9,585	10,416	10,368	10,170	11,256	13,371	10,496	7%
Inter-American Court	3,982	3,638	5,302	5,520	4,566	4,568	4,758	5,251	4,698	3%

Source: Compiled by authors from institution documents.

* Budget attributable to bodily integrity cases, estimated by dividing the number of decisions finding violation of right to life or freedom from torture, inhuman or degrading treatment, or slavery or forced labor, including failure to investigate those, by total number of decisions finding violation of any Convention right, and multiplying the quotient times the total Court budget.

The analysis in this Article suggests that a misconception of the relationship of the International Criminal Court to national political and judicial systems has led to a misallocation of these resources: the ICC's judges and prosecutors have over-emphasized their own investigation and prosecution of individual cases of mass atrocities, and under-emphasized other means of reducing mass atrocity and securing accountability, including prosecutions by national authorities. They have, in short, seen themselves as *primary* agents of international justice, rather than—as the framers of the Rome Statute envisioned—*secondary, complementary* actors in a more complex system of accountability and prevention that operates both transnationally and within States. Their focus on traditional judicial activities and over-confidence in the impact of law and courts reflect a legalism that misapprehends the sources of political and social change.³⁰⁶

Pragmatism, as well as principle, dictates that the ICC should follow regional human rights institutions by complementing other actors' efforts rather than focusing on trials in The Hague. The ICC's poor prosecution record shows that its prosecutors and judges have moved too aggressively on individual cases. They have overestimated states' willingness and capacity to arrest indictees (such as former Sudanese President Omar Al Bashir) and to protect witnesses against intimidation. They may have brought cases to trial without sufficient evidence, such as that against former Côte d'Ivoire President Laurent Gbagbo.³⁰⁷ These failures have both stemmed from and exacerbated the ICC's lack of authority. Instead of patiently building its influence, as the European Court and Inter-American institutions did, the ICC has rushed to confront individuals who had the guile or power to evade or defy it, often with support from States.

National legal systems possess key advantages in prosecuting mass atrocities. These partly explain the success of the Inter-American System, especially, in securing accountability for mass atrocities. For most cases, the vast bulk of investigative activity, including interviewing witnesses and collecting documents and physical evidence, must occur in the country where the crime occurred. Local investigators and prosecutors are more likely than their international counterparts to speak relevant languages and understand the myriad aspects of their country's history, politics, social structure, and culture that may be relevant to how particular atrocities occurred and who can be held criminally responsible. They therefore can work more quickly and accurately, with less assistance from hired experts.

These and other factors make national systems more cost-efficient than the ICC when investigating and prosecuting mass atrocity cases, as well as quicker and more effective. To be sure, part of the vast gap between the ICC's and

³⁰⁶ See, e.g., Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. LAW & SOC'Y 411, 412-24 (2007).

³⁰⁷ After the Gbagbo and Bemba acquittals, the ICTY's first Prosecutor commented that the ICC OTP needed "to expend greater effort in ensuring that cases brought to trial are fully investigated and supported by sufficient evidence." Richard Goldstone, *Acquittals by the International Criminal Court*, EJIL: TALK! (Jan. 18, 2019), <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>.

regional institutions' budgets arises because the latter outsource expensive investigation and prosecution functions to national systems. But this is not the whole story—national systems also perform those tasks more economically than the ICC does. Scale yields some economies: national systems maintain large teams of investigators, prosecutors, and judges to handle ordinary crimes in the country. Others stem from location and expertise: national investigators and prosecutors need not pay for flights from The Hague or, in many cases, translators. Finally, ICC salaries far exceed those in the national justice systems of middle- and low-income countries, where most mass atrocities occur.

The other goal on which this Article focuses, preventing future atrocities, also supports a preference for national-level prosecution. Political leaders and military commanders who might order or commit atrocities, as well as the media and ordinary citizens whose attention and pressure could influence them, may pay more heed to decisions by judges in their own countries than ones by foreigners far away in The Hague. Journalists can follow proceedings conducted in their own country and national language more easily and at lower cost than those at the ICC. Citizens thus receive more information about local proceedings. Defendants may find it more difficult to delegitimize a court staffed by local judges, whose proceedings are comprehensible to journalists and the public, than a “foreign” court.³⁰⁸

The ICC should follow the European and Inter-American regional systems not only in aiming to promote national prosecutions, but in taking a more sophisticated approach to reducing atrocities and increasing accountability. It should recognize that its influence flows through many channels, usually indirectly, and often independently of its individual cases. Indeed, its eagerness to prosecute may exacerbate conflict and atrocity, as it may have in Uganda. The court's weakness in investigating, prosecuting, and judging cases; the greater effectiveness, efficiency, and legitimacy of national-level proceedings; and the evidence of the court's indirect impact described in Section III.C support our conclusion that the ICC should focus less on investigating and prosecuting cases itself. Instead, the court should focus more on influencing national-level political and legal dynamics to increase national prosecutions and decrease atrocity through means other than its own cases, including during preliminary examinations.

The ICC can exert this influence through many kinds of actions.³⁰⁹ Its staff can assess national proceedings and press national authorities to move more aggressively; advocate against amnesties (as in Colombia); and track political, military, and legal developments. They can educate, pressure, and ally with politicians, military leaders, diplomats, conflict mediators, human rights groups,

³⁰⁸ See, generally, Marko Milanović, *Establishing the Facts About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*, 47 GEO. J. INT'L L. 1321 (2016) (analyzing the causes of widespread skepticism among Serbs toward the ICTY's findings).

³⁰⁹ Many academics and activists have offered insightful analysis of how the Court can stimulate and support national prosecutions and shift the causal ecosystem of atrocities. E.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. J. INT'L L. 53, 85-105 (2008).

the media, and the public. The ICC should expand its outreach activities and build the capacity of local activists, prosecutors, and judges.³¹⁰ A recent book-length report by Human Rights Watch documented the impact of OTP efforts to foster national-level accountability during preliminary examinations.³¹¹ It offered a rich array of ideas for increasing the court's impact. For example, the ICC could do more to "focus[] public debate through media and within civil society on the need for accountability," share OTP analysis with human rights activists advocating domestic prosecution, and mobilize international aid to strengthen national courts.³¹²

Such efforts will require subtle judgment and deep expertise in the politics, legal systems, and in some cases military situations and social organization of the countries in which the ICC works. At each turn, ICC staff should consider how they can affect national and sometimes international actors, and dynamics that link them, to reduce the likelihood of future atrocities and promote national-level accountability. (In some cases, like Colombia, those objectives may be in tension.) They should recognize the limits of their influence and operate strategically to enhance it over time, within each situation and globally, with elites and the public, following the examples of the Inter-American Commission and Court and the European Court.

Critics may argue that lawyers and judges are incapable of understanding the complex political, social, and legal systems (what we have called causal ecosystems) that determine mass atrocities and national prosecutions, and thus should not try to affect them. A more limited ambition, to investigate and prosecute individual cases, may be safer. This skepticism has some merit. We do not believe lawyers are gods and we acknowledge that most lack skill in analyzing interactions among law, politics, and society. Indeed, the successes and failures described in this Article show that international legal institutions have limited sway and their judges and staff make mistakes. But we can expect more of those we charge with the extraordinarily important work of reducing atrocity and increasing accountability. The ICC should hire judges and staff, at least at the senior level, who are capable of engaging in the sophisticated analysis necessary to promote those goals. They need not perform this difficult work alone: the court will need staff with expertise beyond law, such as political advisors—whom it has been reluctant to engage³¹³—sociologists, and diplomats.³¹⁴ Academic institutions may be able to produce studies that help it design country-specific strategies.³¹⁵ This multidisciplinary, cooperative approach would remedy lawyers' limitations.

³¹⁰ Wierda, *supra* note 7, at 287-90; see also Jane Stromseth, *Justice on the Ground? International Criminal Courts and Domestic Rule of Law Building in Conflict-Affected Societies*, 50 *NOMOS* 169, 181-84, 188-90 (2011).

³¹¹ See *PRESSURE POINT*, *supra* note 119.

³¹² *Id.* at 2.

³¹³ Wierda, *supra* note 7, at 286.

³¹⁴ See Stromseth, *supra* note 310, at 210.

³¹⁵ The former United Nations Special Representative of the Secretary General for Business and Human Rights, John Ruggie, augmented his modest budget by convincing law firms and academics to conduct

Cost should not be an objection to our prescription.³¹⁶ The ICC's Prosecutor, Fatou Bensouda, has stated that by promoting national-level prosecutions and contributing to prevention, preliminary examinations "constitute one of the most cost-effective ways for the Office [of the Prosecutor] to fulfil the Court's mission."³¹⁷ The extreme expense of the ICC's individual cases means that reducing them modestly would free up considerable resources for other activities. For example, one or two fewer case investigations each year, and perhaps one fewer trial every several years, should translate into many more meetings with national politicians, contributions to training programs for local prosecutors on how to build mass atrocity cases, strategy sessions with local and international NGOs, and TV and radio interviews to explain to journalists and the public how atrocities begin and how they may be averted.

There have been signs that the ICC might move in the direction we urge. When it has used the threat of prosecution to foster domestic engagement, it has demonstrated the capacity for effectiveness. For fifteen years, the possibility of ICC intervention hung over Colombia, pressing the government, paramilitaries, and rebels to accept accountability mechanisms that had been left out of peace accords reached elsewhere in the Americas in previous decades. In effect, the OTP "transformed the preliminary examination from a threshold decision [on whether to bring criminal cases] into a platform for pressuring the State to comply with its obligations to hold actors criminally accountable."³¹⁸ The Court strengthened the position of civil society actors pressing for justice and pushed both State and rebel forces to accept accountability. Were the ICC to operate as strategically in other situations as it has in Colombia, it would multiply its impact. It would be acting more like a regional body, too.

We are not, of course, suggesting that the ICC abandon its prosecution function. Its influence depends in part on its being able to credibly threaten—explicitly or subtly—to prosecute perpetrators of mass atrocities if national authorities fail to do so. The ICC also needs to function as a backstop when national courts are too intimidated, corrupt, or overwhelmed to ensure accountability.

In exercising its investigation and prosecution function, however, the ICC must behave strategically and patiently develop legitimacy and authority, which it needs if it is to support prevention and accountability. It should adjust its work for greater impact, based on attention to context and sophisticated analysis of its effects on other actors. To be sure, the ICC must operate within its legal mandate and cannot compromise certain fundamental principles, such as defendants' right to a fair trial. But those inviolable parameters leave it much latitude. For example, prosecutors deciding when to release indictments can consider the

extensive research without charge to support his work. See JOHN GERARD RUGGIE, JUST BUSINESS 131, 133 (2013).

³¹⁶ The ICC's Member States should reverse their historical aversion to using court funds for activities other than investigation and prosecution. See Wierda *supra* note 7, at 100.

³¹⁷ Report on Preliminary Examination Activities: 2018, *supra* note 102, at 8.

³¹⁸ See Hillebrecht & Huneeus, *supra* note 103, at 295-96.

effect of their timing on ongoing conflict. Judges can devote space in their written decisions to explaining the events that led to crimes, in order to educate the media and citizens about warning signs.

The OTP should choose its cases more strategically, as well as investigate and prosecute them more effectively. Before indicting, and perhaps even before devoting significant resources to investigating, it should assess the chances that States will help apprehend the suspect in question. It certainly should indict only when it has enough evidence to nearly ensure conviction at trial and success on appeal, and confidence that it can prevent witness intimidation from scuttling its case. Those considerations may affect the choice of which situations to investigate formally: in some countries, the prospects for apprehending and convicting *anyone* may be dim, in which case the ICC may be wise to preserve its scarce human, financial, and reputational resources for other mass atrocity situations. (Sadly, it can choose from many.)

ICC judges, too, should consider their court's institutional needs as they craft its doctrine. While protecting defendants' rights and developing the law consistently with ICC and other relevant jurisprudence, they should avoid "naïve and pointless act[s] of formalism" and "depart[ures] from settled jurisprudence" based on "strikingly thin" reasoning—as Harvard professor Alex Whiting described the Appeals Chamber's 2018 reversal of the Bemba conviction.³¹⁹ The judges' termination of the ICC's investigation of U.S. war crimes in Afghanistan earlier this year may have avoided a fight with a superpower whose President relishes attacking weaker adversaries and particularly loathes international institutions. (The ICC should not always avoid such conflicts.³²⁰) However, the judges blundered by acknowledging, although obliquely, that their decision was based largely on the unlikelihood that the ICC could secure custody of any U.S. indictees.³²¹ That acknowledgment made the ICC look both unprincipled and powerless, and thus risked diminishing its credibility and influence.

One additional conclusion emerges from our analysis: States, and perhaps private funders such as foundations, should reinvest in regional human rights institutions, increasing their budgets. Regional institutions, especially the Inter-American System and European Court, have impressive records of reducing mass atrocities, as well as other human rights violations, and promoting accountability, at extraordinarily low cost—\$120 million per year for all

³¹⁹ See Alex Whiting, *Appeals Judges Turn the ICC on its Head with Bemba Decision*, JUST SECURITY (June 14, 2018), <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/>.

³²⁰ When considering the power of potential indictees, and their State supporters, the ICC must balance pursuing impartial justice, which requires taking on the powerful, with successfully apprehending and convicting defendants to build credibility as a threat to potential perpetrators and its authority in the international system. See KERSTEN, *supra* note 94, at 168-78. The difficulty of this tradeoff reinforces our prescription that the ICC should de-emphasize individual cases.

³²¹ International Criminal Court, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan," II-02/17, Apr. 12, 2019.

combined, less than two percent of the United Nations peacekeeping budget.³²² Just five or ten million additional dollars per year for each institution—a minimal percentage of States' foreign affairs and military budgets—would dramatically expand their capacity. They could hire more and better staff, process more complaints, conduct more investigations, and engage more extensively with governments, civil society, and experts.

VI. CONCLUSION

We share the aspiration of the Rome Statute to end mass atrocity, prosecute and punish those responsible, and deter future abuses. While no supranational legal institution can realize those ambitions on its own, the evidence presented in this Article shows that such bodies can play important roles—if they choose strategies that fit their capabilities and implement them effectively.

Human rights activists and States concerned with preventing mass atrocity and bringing perpetrators to justice should not focus exclusively on the ICC. Regional institutions are extraordinarily efficient as well as effective. Investing additional resources in them would save lives and enhance accountability.

While the International Criminal Court seems to have had some positive impact in its first seventeen years, it has woefully underachieved. Its prosecutors have picked too many fights they could not win, because they lacked sufficient evidence or the defendants were too powerful. Most indictees remain at large, several cases have collapsed, and only half of the defendants who have faced trial have been convicted, a far lower proportion than at other international criminal tribunals. The court's judges have contributed to these failures with suspect decisions that caught their own prosecutors—as well as international experts—by surprise and deprived their court of badly needed victories. The resulting series of failed cases has called into question whether the ICC can meaningfully contribute to its founders' vital goals.

The ICC will not realize its potential simply by doing the same thing better. To be sure, its prosecutors should select cases more carefully, investigate them more thoroughly, and argue them more persuasively. While the court's judges must uphold defendants' rights, they need not undercut their institution's influence by changing the law out of the blue.³²³ But the court as a whole, including State Parties as well as staff, needs to reconceive its strategy.

Regional human rights institutions provide an alternative model that aligns with the Rome Statute's basic vision of an International Criminal Court complementing, not replacing, action at the domestic level. This Article has

³²² *United Nations Peacekeeping: How We Are Funded*, UNITED NATIONS, <https://peacekeeping.un.org/en/how-we-are-funded> (last visited Dec. 11, 2019) (referring to the \$6.5 billion approved budget for UN peacekeeping operations for fiscal year 2019-20).

³²³ See Van Schaack, *supra* note 12.

demonstrated that regional institutions, led by the Inter-American System and European Court of Human Rights, use their limited powers creatively and strategically to shift the causal ecosystems that determine when mass atrocity occurs and when its perpetrators are held accountable. They contribute to those goals indirectly, through complex interactions with other international and domestic actors and various political, legal, and social forces. That model is both more effective and more efficient than the ICC's emphasis to date on investigating and prosecuting individual cases itself. As the ICC's role in Colombia illustrates, that court can have positive influence when it deploys its particular resources shrewdly and with sensitivity to domestic political context—like a regional institution. In some situations, bringing individual cases may be unnecessary, or even counterproductive.

The ICC can learn from its regional peers' cultivation of authority through decades of engagement and confrontation with national authorities, buttressed by human rights advocates in civil society. It should rebalance its strategy and resources, pursuing fewer individual prosecutions and expanding other efforts to change the views and behavior of politicians, military leaders, judges, and other actors. This new approach constitutes the beleaguered court's best hope for overcoming its current crisis of credibility and its most promising strategy for advancing the Rome Statute's noble goals.

