Crime and peace

*International interventions to cope with rule of law challenges in Latin America*

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In 21st century Latin America, many countries face criminal violence on the scale of civil war. Whilst street gangs and drug traffickers defy the state's monopoly on the use of force from below, high-level government corruption and human rights violations by state actors defy the legitimacy of the state from the inside. What the international community can do to assist states that face the simultaneous challenge of bottom-up and top-down rule of law undermining crime is the central question guiding this dissertation. This dissertation includes three in-depth case studies of Plan Colombia, the ICC preliminary investigation of Colombia, and the International Commission Against Impunity in Guatemala (CICIG).

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Crime and Peace
CRIME AND PEACE

International interventions to cope with rule of law challenges in Latin America

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“Peace or Violence – Qu’est-ce que j’en sais moi ?”

- Stromae
When I was living in Guatemala for the first time in 2005, I was struck by the level of criminal violence in the country. Violent crime was so massive that in Guatemala, in times of formal peace, more people were dying of violence than on average died during Guatemala’s gruesome 36-year civil war. How can peace be more violent than war? It seemed obvious to me that impunity must have something to do with it. Of the approximately 6000 murders per year in Guatemala, only 2% were solved at the time.

Another country that fascinated me was Colombia. In that country, the decades-old civil war has interacted in myriad ways with drug-related crime. Are the FARC a guerrilla army, financing their liberation struggle with the proceeds of drugs; or are they a drug trafficking organization legitimizing their violence with a discourse of revolution? And what about the paramilitaries: are they parties to an armed conflict or rather just drug criminals? Or are the civil war and drug-related crime not separable, as the phrase ‘The War on Drugs’ may seem to suggest?

What the distinction between ‘war’ and ‘organized crime’ means, and what to make of the seemingly anarchic crime escalation in Latin America, are the questions that sparked this research. Furthermore, I noticed an innovative intervention in the field of international criminal law gaining remarkable results: CICIG, the International Commission Against Impunity in Guatemala. When I started law school in 2003 my main source of inspiration was the ICC, which had started operations in 2002. But as time progressed, the limitations of the ICC became ever more apparent to me. The potential of alternative approaches interested me, in particular CICIG. The Commission revolutionized criminal law in Guatemala. When prominent Guatemalan lawyer Rodrigo Rosenberg was murdered in 2009, a post-mortem published video appeared in which Rosenberg accused then-president Colom of his murder. The Guatemalan political order was shaking on its foundations. CICIG brought evidence – witness testimony, but also phone taps and ballistic analysis – to court in a way rarely if ever seen before in

In the final phase of writing my master’s thesis, a breakthrough occurred in Guatemala: thanks to the intervention of CICIG, Claudia Paz y Paz, a renowned human rights activist, was appointed Attorney General. This appointment sparked my interest, and together with my friend and documentary maker Joey Boink I approached Claudia Paz y Paz and asked if we could make a film about her. She agreed, and Joey and I followed her for three months late 2011. Whilst filming, I learned that the picture I had formed of CICIG in the course of my master’s thesis was incomplete. I decided that I wanted to deepen my understanding of CICIG and of what was going on in Guatemala, and started my PhD.

This PhD thesis would not have been possible without the inspiration and support of my *promotores*: Harman van der Wilt, who supervised my master’s thesis, encouraged me to consider doing a PhD, and guided me through the process with gentle yet resolute care; Guénaël Mettraux, who kept me sharp with immediate and insightful comments on all the draft chapters I submitted; and Denis Abels, who provided me with dozens of valuable suggestions. I could honestly not have wished for a better team of supervisors.

I owe many more for their inspiration and encouragement. Two persons in particular have inspired me. Claudia Paz y Paz, in the course of filming *Burden of Peace*, showed me the PhD thesis she had written on cultural genocide at the University of Salamanca. As she was leading the process that would culminate in arrest warrants for genocide against two former heads of state, she confirmed me in the idea that doing a PhD myself would be the right choice. And Iván Velásquez, prosecutor and investigative judge from Colombia, who unraveled *parapolítica* before indicting former and acting presidents in Guatemala as CICIG Commissioner. Both are the ultimate embodiment of integrity, and both have made this world a bit better through their relentless efforts in favor of justice. They have inspired me to join the Dutch Public Prosecutor’s Office after nearly five years at the University of Amsterdam, and
I hope to be able to contribute to the legacy of their bright examples.

Any effort at naming everybody who contributed one way or another to this thesis would inevitably lead to an incomplete result. I shall therefore be concise. I want to thank my colleagues at the criminal law department of the University of Amsterdam, everybody involved in the making of Burden of Peace, and everybody who provided me with input on my research questions, particularly in Guatemala and in Colombia. My friends, in particular my fantastic paranimfen, who provided me with unconditional support and companionship. Speaking of unconditional support and companionship, where would I have been without my parents and my little brother? In the course of writing this thesis, little Ivan entered this world, making it bright and light. This thesis has in common with little Ivan that it would never have seen the light of day if it weren’t for Hanna. If it weren’t for you Hanna, I would not have started this PhD thesis, let alone finish it. Thank you.
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In 21st century Guatemala, a country formally in peace, more people die of violence than did on average during the 36-year Guatemalan civil war. Chances that a murderer in Guatemala would face justice hovered around 2% at the turn of the century. An innovative United Nations intervention under the name International Commission Against Impunity in Guatemala (CICIG) has tried to ameliorate this situation starting in 2007. Colombia has been facing a civil war and a war on drugs for the past decades. Whether any given act of violence is considered part of the civil war or rather an expression of organized crime is oftentimes subject of controversy. Whilst the bilateral military aid program from the United States called Plan Colombia tilted the military balance in the favor of the Colombian state, the International Criminal Court (ICC) has entertained the question whether crimes against humanity or war crimes were being committed in Colombia over the past decade.

In this thesis, I intend to provide an analytical framework that examines the impact widespread crime has on the functioning of the rule of law, moving beyond the distinction between organized crime and civil war. Moreover, I provide three in-depth case-studies in the light of that analytical framework: of CICIG, of Plan Colombia, and of the ICC’s preliminary examination into the situation in Colombia.

In this introductory chapter I set out my theoretical framework and the structure of my thesis. Central to my theoretical framework is an understanding of the rule of law as a concept that developed historically in the context of strong states, and that is employed contemporaneously as a tool to strengthen weak states. In its contemporary more instrumental employment, the rule of law is best perceived of as a dynamic process aiming at the prevention of arbitrary force both by state and non-state actors. In this function, the rule of law is undermined by crime from within as well as from without. My theoretical framework, which I elaborate in the next paragraph, stems from the following problem statement.
1 Problem statement and research question

My problem statement is threefold. First, I observe that the relation of the state vis-à-vis violence in many countries, including Guatemala and Colombia, is ambivalent. Rather than a strong repressive state that is responsible for the majority of the violence being exercised on its territory, I see a weak state that is incapable of enforcing its monopoly on the use of violence, or is unwilling to do so. Private actors of various sorts are exercising violence on a scale that resembles civil war, in the absence however of a central conflict. In these situations, we do not see a guerrilla army fighting government forces, or militias from a certain ethnic or religious group fighting militias or state forces representing another group, or state forces terrorizing a civilian population. Rather, what we see is decentralized, seemingly anarchic violence, with a wide range of economically motivated actors that exercise violence, whilst the state is incapable of halting them. Typical expressions of this kind of violence are the maras, the tattooed street gangs active in Latin America, or narcos, bloodthirsty drug dealers who are on most-wanted lists of many countries. The scale of criminal violence makes the situation look like war. The state’s monopoly on the use of violence is ineffective. The distinction between organized crime and civil war becomes blurred.

For citizens to enjoy freedom and security and for the rule of law to prevail, this situation gives rise to a dual challenge. On the one hand the rule of law must of course rein in the state in its use of force. On the other hand, the state must also be empowered vis-à-vis those who exercise violence on their own account. If the state is not the main perpetrator of violence on its territory, merely telling the state what it may not do does not suffice.

Second, I observe that the state is not merely an impotent bystander overwhelmed by criminals besieging it from outside either. Of course there are violent outside actors, whom I term pariah criminals, who can make organized crime look like civil war if there are many of them. But there are also criminals who
undermine the rule of law from within the state, whom I term elite criminals. They have long-term interests, exercise control over the state, and rely more on high-level corruption than on open violence. Rather than intimidating or murdering judges, they prefer to control the procedures through which judges are appointed. Rather than bribing police officers, they appoint police chiefs. Through their influence over state institutions, they paralyze the justice apparatus from within.

Given the prevalence of crime inside the state, the ‘fragile state’ label is misleading. The qualification ‘fragile’ tends to portray the state merely as an impotent by-stander, rather than an active accomplice in the violence and the crime. Indeed, states should of course be strengthened to confront criminal violence, but merely increasing the repressive capacity of fragile states vis-à-vis criminal violence does not suffice. Any effort at improving the performance of the rule of law must take into account that rule of law undermining crime comes not only from outside the state, but is also present within it. This means that the challenge for the rule of law is actually threefold. The arbitrary use of force by the state must be prevented, the suppression of outside violent crime must be facilitated, and the state apparatus must be cleansed from corrupt and criminal elements from within.

Third, I observe that international efforts to promote the rule of law in crime-affected countries face serious shortcomings. Billions of dollars spent during decades of rule of law promotion abroad have failed to deliver strong justice institutions in many recipient countries. The legal instruments of the United Nations crime suppression conventions are useful to promote cooperation between successful states, but face serious challenges in addressing elite rule of law undermining crime, as cooperation between law-enforcement authorities is problematic if those authorities are working at the service of criminal interests. International criminal law is materially limited to genocide, war crimes and crimes against humanity, to the exclusion typically of corruption or narcotics trafficking, and is therefore ill suited to comprehensively target pariah and elite rule of law undermining crime.

In sum, what concerns me in this investigation is how the international community can contribute to the rule of law’s
threefold challenge in countries that face high levels of crime: prevent the arbitrary exercise of force by the state; enable the state to suppress pariah violence; and enable the justice institutions to cleanse the state from elite crime from within. This brings me to the following research question that is central to this thesis:

how can the international community most effectively promote the rule of law in countries that are facing high levels of privately organized violence and state criminalization?

The ultimate purpose of this investigation is to identify recommendations for future international interventions. But before delving further into problems of state weakness and state criminalization, and international interventions therein, let us examine the theoretical framework within which to assess potential recommendations.

2 Theoretical framework – rule of law and its undermining

The starting point of this investigation is the rule of law, its effectiveness in ensuring security and freedom for citizens, and its undermining. The rule of law is an essentially contested concept. As George Fletcher remarks, “legality and the ‘rule of law’ are ideals that present themselves as opaque even to legal philosophers.”¹ And as Margaret Jane Radin observes with regard to the rule of law, we lack a “canonical formulation of its meaning.”² Not only in legal philosophy, but also in the context of international development is the meaning of the rule of law contested. As one commentator notes, there is a situation of “conceptual anarchy (…) surrounding the very meaning of the

¹ George Fletcher, Basic Concepts of Legal Thought, Oxford University Press 1996, p. 12.
expression ‘rule of law’”. Although there seems to be near-universal agreement as to the desirability of rule of law as an abstract ideal, as to its concrete content there exists wide disagreement.

The canonical formulation of the meaning of rule of law is beyond what I pretend to develop here. What I do intend to provide is an account of the function of the rule of law in the context of efforts to strengthen weak or criminalized states, in order to understand how the rule of law is being undermined and to identify potential interventions. I will provide an analysis of the rule of law concept in its historical and philosophical context. The familiar debate between thin and thick perceptions of the concept represents a matter of degree. I argue that the extremes on the scale should be avoided: the rule of law is more than merely the negative value Joseph Raz purports it to be, but it is less than the conceptually overburdened version in which democracy, human rights and capitalism are all integrated into the rule of law. Moreover, the rule of law must be understood in its context, for it never operates in a vacuum.

Before we turn to the undermining of the rule of law, let us examine closer what the rule of law is. For the purpose of this study, it is crucial to keep in mind the difference between the rule of law as a philosophical concept developed over the course of centuries, and the rule of law as an instrument in contemporary international relations.

2.1 What is rule of law?

The major scholarly debate on the meaning of the rule of law is that between thin versus thick, formal versus substantive or minimalist versus maximalist conceptions of the rule of law.⁴ In

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a thin conception, rule of law means primarily government bound by law and sees to procedural demands to state actions. In a thick conception, rule of law also entails the respect for certain moral values, such as equality, fairness, or human dignity. The thin-thick divide is not so much a clear-cut divide in two, but rather a matter of degree.\(^5\)

Formal, or thin, conceptions of the rule of law depart from an essential separation of law from politics and morals. In a thin conception, the rule of law exists by the virtue of establishing the minimal conditions for law to be able to restrict arbitrariness in the ruler’s use of power, and accordingly to be able to allow citizens to plan their individual affairs. The *raison d'être* for the rule of law, then, is to restrain Leviathan and prevent the arbitrary exercise of official power. Ultimately, particularly as the conception of the concept gradually thickens, the purpose of the rule of law translates into promoting freedom.

British jurist Albert Venn Dicey popularized the phrase ‘rule of law’ in that sense in the 19th century.\(^6\) For Dicey, the principle objective of the rule of law is to discipline and regulate official power. He stipulates three key requirements: supremacy of law over arbitrary power; equality before the law of all, including government officials; and constitutional law as fundamental law, resulting from the ordinary law of the land. Living in 19th century England, Dicey makes little mention of considerations of law and order and effectiveness of the state monopoly on the use of force; he seems to presuppose those. Nor does he devote much attention to considerations of democracy or universal popular participation in decision-making; he seems to consider such matters not central to his idea of rule of law.

American legal theorist Lon Fuller was among those who expanded on the basic idea of rule of law in the 20th century. For a system of law properly so called to exist, and to possess what

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Fuller perceives of as the ‘internal morality’ of law, all legal rules must meet eight minimal conditions: generality; publicity; prospectivity; understandability; consistency; conformability; stability; and congruence.\(^7\) These principles reflect the requirement that the law should conform to standards that enable it effectively to guide action. This requirement is also at the heart of what the Austrian-British economist and political philosopher Friedrich Hayek understands by the rule of law, and of the way he perceives of the relationship between law and liberty.\(^8\) In as far as the rule of law is directed at the state, it foregoes the arbitrary use of power; and in as far as it is directed at the citizens, it enables them to plan their individual affairs.\(^9\)

To the principles relating to the procedural quality of the rules, the Israeli legal philosopher Joseph Raz adds institutional dimensions, designed to ensure that the legal machinery for enforcing the law is in effect capable of supervising conformity to the rule of law and provides effective remedies in cases of violation. Raz is very skeptical however about the inner morality of law, or of the value attached to the rule of law by so many commentators. He insists that the “rule of law is essentially a negative value. It is merely designed to minimize the harm to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be.”\(^10\)

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\(^9\) Law, according to Hayek, consists of rules that “are fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.” Friedrich Hayek, *The Road to Serfdom*, University of Chicago Press 2007 (originally published in 1944), p. 54. 

Raz brings an adaptation of Fuller’s requirements, coming to the following list of central constitutive attributes of the rule of law: 1) laws that are prospective, open, and clear; 2) laws that are relatively stable; 3) making of laws guided by open, stable, clear, and general rules; 4) an independent judiciary; 5) observance of principles of natural justice; 6) courts that have review power over the implementation of the other principles; 7) courts that are easily accessible; and 8) limited discretion of the crime-preventing agencies to prevent perversion of the law.\textsuperscript{11} In line with Hayek, Raz vehemently stresses the importance of law being capable of guiding the behavior of its subjects. Underlying this formal conception of the rule of law, as Richard H. Fallon jr. puts it, “is a picture of human beings as rational planners and maximizers, who reasonably demand to know in advance the legal consequences of alternative courses of action.”\textsuperscript{12}

The merit of thin conceptions of the rule of law is that they provide clarity as to what is part of the rule of law and what is not. Especially a formidably thin conception of the rule of law like that of Joseph Raz allows for a clear demarcation. In his words, it is “to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”\textsuperscript{13} Of course Raz’s standards of democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.” Joseph Raz, id., p. 211.

\textsuperscript{11} Id., p. 214-218.
prospectivity and independent courts are fundamental minimal components of the rule of law. But the kind of complete conceptual disconnect that Raz makes between morals, liberty, and rights on the one hand, and law on the other, is at odds with what societal function historically the development of the rule of law has had, and with what function the promotion of the rule of law abroad is supposed to have.

Such a formidably thin conception of the rule of law as Raz proposes indeed begs the question: why bother promoting it? Shouldn’t there be more to the rule of law than just the negative value of limiting the harm the law may do in pursuit of its aims? Surely a positive effect of the rule of law on values such as liberty must be presupposed for promotion of the rule of law to be worth the effort.

The risk of opening up one’s conception of the rule of law on the other hand is that one embarks on a process of gradual ‘substantivization’ ending up at equating ‘rule of law’ with ‘rule of good law’. When democracy, human rights, freedom, and justice all become constituent components of the rule of law, the rule of law gets conceptually overburdened up to the point where the concept ‘rule of law’ loses most if not of all of its analytical value. Moreover, one risks selectivity and opportunism in the operationalization of the rule of law concept. Free trade proponents may stress the protection of property and contract, whereas human rights advocates may stress the importance of civil and political rights, and security hawks may focus on border protection and tough criminal justice. If such diverse groups all claim to be defending the rule of law, and if everything that these groups think is good is brought under the rubric of rule of law, you end up right where you began: lack of clarity on what the rule of law is. This process of conceptual overburdening of the rule of

law is what made Judith Shklar exclaim that the rule of law has become the victim of “ideological abuse and general over-use”.¹⁵

A telling expression of conceptual overburdening is provided by the United Nations Secretary-General’s 1994 Framework for strengthening the rule of law, in which he lists as constituent elements of the rule of law, amongst many others, “a strong electoral system”, “free, responsible and flourishing mass media,” and “a strong civil society, including adequately trained, equipped, financed and organized non-governmental human rights organizations, women’s groups, labour unions and community organizations.”¹⁶ That arguably amounts to a substantive overburdening of the concept up to the point where it loses any analytical or policy value.

Indeed, when external actors promote the rule of law, they oftentimes overburden it to the extent that it is presented as a neutral good. However, it is not. The perceived neutrality of rule of law is explicable: when rule of law gets conceptually overburdened to the degree that it equates to development, security and good governance, how can anybody be opposed to the rule of law? As we shall see with regard to rule of law promotion abroad in Chapter 4, actors like the World Bank make use of this perceived neutrality, trying to make the concept as technocratic and a-political as possible by focusing on Hayekian efficiency and predictability.

The rule of law enjoys an aura of universal appeal that is extraordinary. Whereas one can debate the desirability of various levels of democracy or capitalism, hardly anybody shall openly declare to be against the idea of the rule of law. Even the notion of human rights provokes negative reactions in some quarters, but the rule of law as an unspecified abstract ideal can

¹⁶ UN Secretary-General, Strengthening the Rule of Law: Report of the Secretary-General, delivered to the General Assembly, UN Doc. A/49/512, 14 October 1994, at paras 5(b), 5(l) and 5(k) respectively.
appeal to a rare kind of neutral universality.\textsuperscript{17} However, as Fallon observes, “[t]he rule of law is a human ideal, and theories of the rule of law are inevitably framed to serve political or moral interests”.\textsuperscript{18} Moreover, when put into the practice of rule of law promotion, the rule of law is inherently not neutral. In fact, in that context the perceived neutrality of the rule of law is misleading.

To avoid the pitfalls of conceptual overburdening, it is important that one keeps in mind the fundamental difference between the rule of law on the one hand as it was developed historically by political philosophers and constitutional lawyers looking for ways to curb the growing power of central government, and on the other hand as an instrument to turn contemporary weak states into states that effectively enhance the wellbeing of their citizens. Historically, political philosophers and constitutional lawyers, confronted with states that were increasing their powers, sought solutions to the potential pitfalls of excessive state power. The concept thus developed in a context in which the state had substantial control over its citizens, and in which control mechanisms over that state were the primary concern. As James Madison already signaled however, “you must first enable the government to control the governed; and in the next place oblige it to control itself.”\textsuperscript{19} For most rule of law philosophers, who did not face the challenges of establishing state control like Madison, the first step was taken as a given. Even Aristotle, worried about the difficulty of framing general rules for all contingencies, seems preoccupied more with the risk of tyranny than with the risk of anarchy. Raz, but also Hayek and

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\textsuperscript{17} In the words of two commentators: “Despite the widely acknowledged ... principle [of the universality of human rights] and the existence of a Universal Declaration, human rights continue to be viewed with suspicion in the developing world ... On the other hand, no such divisive debate has emerged regarding the international promotion of the rule of law.” Adam Bouloukos and Brett Dakin, ‘Toward a Universal Declaration of the Rule of Law: Implications for Criminal Justice and Sustainable Development’, \textit{International Journal of Comparative Sociology} 42(1-2), 2001, 145-162, p. 157-158.
\textsuperscript{19} James Madison, \textit{The Federalist Papers} #51, 1787.
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Fuller, are largely silent on non-state-induced suffering. They are also largely silent on the larger questions of implementation, seemingly taking established and effective states for granted. Indeed, one of the most common starting points for discussing the rule of law is ‘government bound by law’. But what if there is no effective government to begin with?

Many rule of law practitioners and philosophers have witnessed or even experienced the lack of rule of law in a strong-state situation. A focus on Hayekian clarity and prospectivity, and on countering arbitrary exercise of state power, makes sense for those who might have suffered official arbitrariness in their lives. Hayek was living in London when the Anschluss brought his native Austria under the control of Nazi Germany. If one has suffered or witnessed tyranny – whether under fascism in South America or in Southern Europe, under communism in Eastern Europe and Central Asia, or in other contexts – it is only natural to focus on countering tyranny.

This focus on what strong states may do links the rule of law to the negative liberty of traditional liberalism. Raz is the most explicit on this point, saying that the rule of law is only a negative value, intended to minimize the harm that can be done by the law. Hayek and also Rawls are more insistent on equality before the law, and henceforth expect more to come out of the rule of law in terms of freedom, yet they too limit the positive effects of the rule of law to what the rule of law can prevent the state from doing. In situations of state weakness and criminalization, what the rule of law can empower the state to do however is at least as important. In such situations, there is a simultaneous dual challenge for the rule of law: not only to prevent tyranny and circumscribe the use of force by the state, but also to prevent anarchy and circumscribe the use of force by private actors.

The dual challenge is particularly evident in the exercise of criminal justice. The exercise of criminal justice, when done arbitrarily, is potentially among the greatest threats to liberty. In the contemporary context of weak states with high levels of crime, the relation between rule of law and criminal justice is twofold. On the one hand, indeed the arbitrary exercise of criminal justice remains a threat, as we shall see in the discussion
of mano dura in Chapter 3. But of equivalent importance is the lack of exercise of criminal justice, or impunity, vis-à-vis crime perpetrated by citizens and state actors alike. In situations of widespread crime and state weakness, where thousands die every year of violence and the perpetrators typically enjoy impunity, the supposed inner morality of law is of little use to citizens. Rather than merely restraining the state and its criminal justice apparatus, in such contexts the state and its criminal justice apparatus must be strengthened so as to be able to perform their functions.

Law and order and crime suppression may not have been central to the historical philosophical development of the rule of law concept. Moreover, increasing the capacity of the police has not always been a particularly popular policy aim in the circles of development cooperation and human rights activism that have dominated rule of law promotion abroad. However, in the face of escalating crime, a re-appraisal of the positive value of the rule of law and empowerment of the state and its justice system is essential.

Efforts to strengthen the rule of law in weak-state crime-infested contexts should take as their starting point the rule of law’s thin essence. The criteria as described by Joseph Raz are useful in this regard, for their focus on the independence and accessibility of the courts and on the limited discretion for crime-prevention agencies to prevent perversion of the law. In the context of strengthening the rule of law in weak states in the 21st century, that thin essence, developed in the context of strong states in the 20th century, should be complemented. Preventing a Hobbesian state of anarchy and providing security and law and order to citizens must take a central place in efforts to promote the rule of law. To distinguish the mere establishment of order from a legitimate violence monopoly, the state must adhere to the rule of law, described by the Secretary General of the United Nations in 2004 as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated,
and which are consistent with international human rights norms and standards.”

If we perceive of the rule of law as a ‘principle of governance’, and not as a binary rule, it is evident that adherence to the rule of law is a matter of degree. To guard against tyranny, and to foster the protection of human rights, internationally promoting the adherence to that principle is of instrumental value. If one wishes to protect people from the dangers of anarchy by strengthening weak states, including the adherence to the principle of governance we call the rule of law is essential. If one omits rule of law considerations in state strengthening efforts, one risks that citizens will be relieved from anarchy only to subsequently suffer tyranny.

International rule of law promotion aims to ‘fix’ dysfunctional rule of law institutions. One cannot fail to ask: why are those institutions dysfunctional in the first place? Who is benefitting from that dysfunctionality? Ultimately, the rule of law is about the distribution of power. Rule of law developed as a check on the power of the monarch. Today, in weak states confronted with widespread undermining crime, promoting the rule of law means that those that are presently benefitting from impunity shall be adversely affected. Notwithstanding efforts to present the rule of law as a neutral and a-political good, law in practice shares with politics the central stake: distribution and exercise of power.

This is true for practically all fields of law. From matrimonial law and women’s inheritance rights to the regulation of land property, any legal reform entails distributional effects. In a society with a low literacy rate, efforts to promote the formal state-sanctioned legal system to the detriment of informal systems shall disempower illiterates to the benefit of the state. If political dissidents or marginalized rural groups protest on the streets, the justice system can approach them as citizens exercising their right to free expression or

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alternatively as inciters to be prosecuted. That is the kind of question judges, legislators and governments must answer. By pretending that the rule of law is a neutral instrument aiming only for efficiency and predictability, actors like the World Bank have refused to acknowledge the questions of distribution and exercise of power that are inherent in any legal reform. Rule of law practitioners should acknowledge the intrinsically political nature of all their work rather than hide behind a facade of perceived neutrality just because they want to avoid accusations of neo-colonialism or because, in the case of the World Bank, their statutes do not allow them to get involved in political matters. Indeed, by hiding behind formal facades of neutrality, often interventions turn out to be merely status quo enforcing.

For the rule of law, however conceived, to fulfill any function at all, a measure of collective adherence to it is required. Such collective adherence may consist of citizens taking pride in their being law-abiding. If a community – for example an inner-city community in the United States – only experiences coercive criminal law manifestations, it is unlikely that a collective adherence to the rule of law emerges and that the rule of law prevails. Collective adherence to the rule of law requires true protection, also against powerful criminals, even against the state itself; and not mere repression of alleged offenders. If a community – for example in rural Guatemala – experiences barely any state presence at all, the emergence of collective adherence to the rule of law is even less likely. When abiding by the law seems to be the exception rather than the rule, the rule of law crumbles. It is not so much the substance of the laws that is flawed, but rather their uneven and incomplete application. The adherence to the ideal of the rule of law, as Guillermo O'Donnell put it, is compromised by the feeling that “to follow the law voluntarily is something that only morons do and that to be subject to the law is not to be the carrier of enforceable rights but rather a sure signal of social weakness.”

In order to gain a better understanding of the rule of law, especially in the context of efforts to strengthen the rule of law in foreign countries, it is most useful to perceive of the rule of law as a process, or a principle, rather than an outcome. Or as O’Donnell puts it: “Contrary to technocratic and positivistic views, we should never forget that the law, in its content and application, is largely (like the state of which it is a part) a dynamic condensation of power relations, not just a rationalized technique for the ordering of social relations.”22 The rule of law functions in a political and societal context, without consideration of which the rule of law loses its meaning. Or in the words of Judith Shklar: “law is a form of political action, among others, which occasionally is applicable and effective and often is not. It is not an answer to politics, neither is it isolated from political purposes and struggles. Above all, it is not something that is ‘there’ or ‘not there.’”23 The rule of law can only be appraised, in fact as well as in value, in its actual operations. I follow up therefore on Lon Fuller’s plea for jurists to turn away from “endless debates about definitions”, and towards “the social processes that constitute the reality of law.”24

2.2 How is the rule of law undermined?

‘Undermining crime’ is a concept that has recently come to dominate Dutch debates on law enforcement. The essence of the concept is the consideration that crime be assessed by the undermining effect it may have on society, on the financial-economic system, and on the state. Central therein is the relation

between the criminal ‘underworld’ and the legal ‘upperworld’.\textsuperscript{25}

The concept has been used more in a political and policy context than in a scientific context.\textsuperscript{26} When the concept is analyzed in a more systematic way, Dutch authors have recognized that the concept’s definition, and its distinction vis-à-vis organized crime, is unclear, and that the concept has virtually been absent in the English language literature.\textsuperscript{27}

The Dutch concept points out two different expressions of the undermining effect of crime. On the one hand, there is growing concern over the capacity of criminals to actively shield activities from the intervention of authorities, for example through elaborate networks of neighborhood informants. On the other hand, there is growing concern over the interrelatedness (‘\textit{verwevenheid}’) between criminal actors and legal actors, including lawyers, bankers, real estate brokers, and also state officials.

Before the concept of undermining crime rose to prominence, Dutch analysts and practitioners applied the concept of organized crime as defined by Fijnaut a.o.\textsuperscript{28} A distinction was made between organized crime on the one hand, which represents the underworld, and ‘organization-crime’ on

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\textsuperscript{25} See Emile Kolthoff and Sjaak Khonraad, ‘Ondermijnende aspecten van georganiseerde criminaliteit en de rol van de bovenwereld’, \textit{Tijdschrift voor Criminologie} 58(2), 2016, 77-91.
\textsuperscript{26} See also Dirk Korf, Simone Luijk and Miranda de Meijer, \textit{Criminele samenwerkingsverbanden – Ontwikkelingen in aanpak en duiding van effectiviteit}, Bonger Instituut voor Criminologie 2018, p 24-25.
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the other, which would represent the upperworld.\textsuperscript{29} The ‘undermining’ frame, rather than focusing on the criminal activity per se or on the nature of the perpetrator, focuses on the effects of crime.

The idea to approach the threat posed by organized crime from the point of view of the undermining effects it has is worthwhile. However, the Dutch concept of ‘undermining crime’ still tends to present crime rather one-sidedly as a virus-like threat to society coming from the outside. Growers of marijuana, smugglers of cocaine, mobile home dwellers, and outlaw motor gangs provide the most-cited examples of undermining crime. However, more respected members of society of course also undermine society and the financial-economic system through criminal acts. That the marijuana economy in the Dutch medium-size city of Tilburg is estimated to be worth 800 million euros on an annual basis\textsuperscript{30} is undermining of legitimate business, but so is the lack of effective prevention of money laundering that forced ING Bank to pay 775 million euros in a settlement with Dutch authorities in 2018.\textsuperscript{31} The added value of the ‘undermining’ point of view towards crime is that it leads us to focus more on the effects of crime, and less on the activities of organized crime per se. It makes little sense then to limit the discussion to classic organized crime actors like drug traffickers and outlaw motor gangs, who have always had the foremost attention of law enforcement. If applied consistently, the undermining frame could be likened to the harm-reduction point of view on drug policy. A focus on limiting the detrimental effects of certain behaviors, like organized crime or drug abuse, can guide policymaking more effectively than unwavering attempts at the suppression of such behavior per se.

\textsuperscript{29} ‘Georganiseerde criminaliteit’ v ‘organisatie-criminaliteit’.
\textsuperscript{30} See RIEC Zeeland West-Brabant en Oost-Brabant, Integraal Afpakteam Brabant, Tilburg University (2013). Integraal appel, een confronterend straatbeeld van criminele ondermijning van de samenleving. Oosterhout: RIEC.
In analyzing the undermining effects of crime, I distinguish two different kinds of undermining crime that I term ‘pariah’ and ‘elite’. Pariah crime is outsider crime, committed by violent thugs who are willing to confront the state. Pariah crime is undermining of the rule of law particularly in its direct defiance of the state’s monopoly on the use of violence. In Latin America, the violent street gangs known as *maras* provide the clearest instance of pariah crime. Elite crime on the other hand is insider crime, committed by wealthy and influential criminals who work within the state. To put it bluntly: whereas pariah criminals intimidate, kill or bribe police officers or judges, elite criminals appoint police chiefs and judges.

Widespread pariah crime leads to the blurring distinction of civil war and organized crime that shall be analyzed in more detail in Chapter 2. In the face of pariah threats, the state may appear weak and in need of strengthening. The millions of dollars earned by drug trafficking organizations and the violent control street gangs exercise over poor neighborhoods translate into a direct challenge by organized crime groups of the state’s monopoly on the use of force. The pariah threat is real enough in many countries and should by no means be downplayed.

There is another side to the story however. Many states are not merely threatened by pariah criminals from the outside, but are also corrupted and criminalized from within. When criminal elements exercise control over the state, or, put differently, when state actors are at the service of organized crime interests, I speak of elite rule of law undermining crime. Elite crime can exist in so-called fragile states, in repressive authoritarian states, and also, but of course to a minor degree, in states that are considered successful. Elite crime ultimately relates to the blurring of the distinction between organized crime and the state. Elite crime is undermining of the rule of law particularly in the effect it has on judicial independence and on the functionality of the legislative process.

We shall see the interplay between pariah and elite crime in the case studies. In both Colombia and Guatemala, the fight against pariah crime takes center stage in the image the respective states try to project. Guerrillas in the case of Colombia, *maras* in the case of Guatemala, and *narcos* in both cases, are
consistently portrayed as the prime enemies of the state and of society. In the meantime however, both countries provide ultimate examples of elite crime and state criminalization. In Colombia, the collusion between paramilitary groups and politicians was referred to as parapolítica. In Guatemala, parallel structures within the state with their roots in the internal armed conflict are referred to as CIACS, illegal bodies and clandestine security apparatuses. In both cases, as the state was busy presenting itself as engaging in the fight against pariah threats, the threat from within was flourishing.

In terms of crime-fighting across Latin America, I notice three interrelated trends: militarization of policing, privatization of public security, and mano dura or penal populism. Militarization tends to put the state above the law, with emergency decrees and military jurisdictions. Moreover, militarization of policing has an escalating tendency as well as a tendency to lead to an increase in human rights violations. Privatization of public security means a delegation of the monopoly on the use of violence from the state to private actors, which moreover tends to lead to an increase in human rights violations. Both militarization and privatization have tremendous institutional opportunity costs, as the police and other criminal justice institutions have to compete for resources with the military and private security companies. Mano dura or penal populism refers to tough on crime zero tolerance policies, like pleas in favor of the death penalty, or harsh sentencing for drug offenders or gang members. Mano dura leads to prison population spikes and, whilst ignoring prevention as well as rehabilitation, tends to lead to an escalation of violence and to an increase of human rights violations. I am curious what effects these policies have on levels of pariah crime and elite crime respectively, and ultimately on the rule of law.

This brings us to a framework of the rule of law that should not only restrain the state’s use of force but that should also strengthen the state’s capacity to suppress crime. This rule of law is being undermined by pariah criminals from the outside and by elite criminals from within. Meanwhile, state policies of militarization of policing, privatization of public security, and mano dura further erode the rule of law. I shall develop this
framework further in Chapters 2 and 3. What does this framework tell us about what can be done?

2.3 What can be done?

So-called fragile states that face widespread crime have received increasing attention from the international community over the past decades. Then-president George W. Bush declared in 2002 that the security of the United States is threatened more by fragile states than by strong, conquering ones. He made his statement in the context of the War on Terror, but the War on Drugs, regional insecurity and migration expanded international concern for fragile, crime-infested states. The international community feels that it should assist fragile states in their suppression of crime, particularly of those criminal phenomena that carry transnational consequences, such as narcotics trafficking and trafficking in persons.

Such assistance has taken various forms. First of all, most obviously and directly related to my problem statement, there have been decades of rule of law development aid. Based on a voluntary exchange between donor countries and recipient countries, billions of dollars have been spent under the guise of rule of law promotion. Secondly, transnational criminal law is of course directly concerned with the curbing of organized crime. The framework, with at its center the Palermo Convention, is built on the premise that there are trustworthy and effective state institutions that can cooperate transnationally. Thirdly, there is the framework of international criminal law, with the Rome Statute at its center. The framework is materially limited to genocide, war crimes and crimes against humanity, generally excluding drug trafficking and corruption. Yet under certain circumstances both elite and pariah rule of law undermining crime can amount to crimes against humanity or war crimes; and the current material reach of international criminal law is of course not set in stone.

I shall analyze the potential and the shortcomings of rule of law development aid, transnational criminal law, and international criminal law in general terms, before turning to three in-depth case-studies: the bilateral military aid program of the United States under the name Plan Colombia, the International Criminal Court’s preliminary examination into the situation in Colombia and the application of the positive complementarity doctrine, and the United Nations backed International Commission Against Impunity in Guatemala, CICIG.

3 Methodology

To get to this theoretical framework, I have relied first on legal and political philosophy. Some authors whose insights I rely on particularly include Norbert Elias, Charles Tilly, Martin van Creveld, and Steven Pinker, as far as the pacification of societies by states and the differences between war and crime are concerned; and Joseph Raz and Friedrich Hayek as far as the rule of law, and in particular its thin essence, is concerned.

Complementing the legal and political philosophy are more empirical sources. I have used historical studies into the international promotion of the rule of law, and rely on media and NGO as well as academic reporting on contemporary issues of crime, militarization, privatization, and mano dura.

This framework of rule of law, violence and its classification, pariah and elite crime, militarization, privatization, and mano dura, is used in the second, more empirical part, to analyze international legal interventions. In analyzing international legal interventions, I first map the general legal framework applicable: most notably the UN crime suppression conventions, and international criminal law as epitomized in the Rome Statute. Then I analyze more in depth three particular experiences: Plan Colombia, the ICC preliminary examination in Colombia, and CICIG in Guatemala. I analyze these three cases in light of their contribution to curbing elite and pariah rule of law undermining crime, and in light of their relation to militarization, privatization, and mano dura.
The three in-depth case studies that I conduct, two set in Colombia and one in Guatemala, serve a dual purpose. First of all, studying the development of violence and crime in Colombia and in Guatemala and state reactions thereto serves to test my assumptions about the rule of law, about the blurring distinction between organized crime and civil war, about elite and pariah crime, and about militarization, privatization, and mano dura. Second, studying three different interventions allows me to identify recommendations for future interventions.

My case selection started off with CICIG, the International Commission Against Impunity in Guatemala created in 2007. CICIG is an unprecedented kind of intervention. It does not entail the creation of an international or hybrid tribunal, and instead operates fully within the ambit of the national legal order. Within that national legal order however the Commission has extraordinary powers, including the capacity to act as a co-prosecutor, to propose legislative reform, and to contribute to judicial vetting; powers no rule of law development aid project has ever had. This institutional setup had led to groundbreaking results already when I started this investigation in 2012, and continued to deliver substantial results throughout the end of the Commission’s mandate in 2019.\(^3\)

My case selection continued with the identification of countries that face similar issues of the blurring distinction between organized crime and civil war. Colombia is the prime example in the Western hemisphere of this blurring distinction, with drug traffickers buying their way into paramilitary command positions, a practice known as paraportes, and with guerrillas claiming to be fighting a liberation struggle whilst the

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3\(^3\) At the time of writing, Guatemalan president Jimmy Morales had announced that he would not seek extension of the CICIG mandate beyond September 2019. Alejandro Giammattei won Guatemala’s August 2019 presidential election and is to assume office in January 2020. He was accused by CICIG and the Public Prosecutor’s Office of involvement in the extrajudicial execution of prisoners in the time he was the director of Guatemala’s penitentiary system, and as a result spent ten months in prison in 2010-2011. It is not expected that president Giammattei shall reinstate CICIG.
government accuses them of being narco-terrorists. Moreover, and crucially for this investigation, Colombia hosted two very different kinds of international intervention: Plan Colombia and the ICC’s preliminary examination.

Plan Colombia is a militarized bilateral aid program run by the United States. Its design and development perfectly illuminate the relations between counter-insurgency, counter-narcotics and counter-terrorism. Moreover, Plan Colombia is a prime example of the militarization of policing. The preliminary examination into Colombia is the ICC’s longest running examination. For the ICC, the Colombia examination serves as showcase for the nascent doctrine of positive complementarity. I study the ICC’s preliminary examination into Colombia to learn more about the potential role of international criminal law in the suppression of rule of law undermining crime.

To deepen my understanding of Plan Colombia, the preliminary examination of the ICC into the situation in Colombia, and CICIG, and the respective country situations, I spent three months in Guatemala (spring 2014) and three months in Colombia (fall 2015) to conduct informal interviews. In Guatemala, I worked on the final phase of Burden of Peace, a documentary about Claudia Paz y Paz, at the time Attorney General of Guatemala. The access I accordingly had to the Public Prosecutor’s Office under Paz y Paz served to deepen my understanding of the issues facing the Guatemalan criminal justice system. In Colombia, I spent time at the Universidad del Rosario and I did an assignment for Uldi Jimenez, magistrate at the Justice and Peace Tribunal. Access to the Justice and Peace Tribunal greatly enhanced my understanding of the situation in Colombia. In both Guatemala and Colombia, I conducted dozens of informal interviews with representatives of academia, civil society, diplomatic community, media, government and judiciary. I do not rely systematically or formally on the interviews I conducted, but they serve to deepen my general understanding of the interventions I study and the countries in which they operate. Besides interviews, and participatory research at the Public Prosecutor’s Office in Guatemala and the Justice and Peace Tribunal in Bogotá, I conducted literature studies on Guatemala and Colombia, ranging from general
national history to contemporary issues. I rely on NGO and media reports extensively. For CICIG and the ICC, I also rely on CICIG and ICC annual reports.

The three interventions I study in depth all relate directly to strengthening the rule of law. CICIG’s mandate is aimed at the dismantling of parallel security structures that act with impunity, “defined as the de facto or de jure absence of criminal, administrative, disciplinary or civil responsibility, all of which,” according to the agreement between the United Nations and the state of Guatemala creating CICIG, “weaken the rule of law, impeding the ability of the State to fulfill its obligation to guarantee the protection of the life and physical integrity of its citizens and provide full access to justice (…)”.34 Plan Colombia had as its stated goal, from its beginning in 2001, to assist the Colombian state in “its efforts to fight the illicit drug trade, to increase the rule of law, to protect human rights, to expand economic development, to institute judicial reform, and to foster peace.”35 The ICC is more implicit in its positive complementarity mission to strengthen the rule of law in Colombia, framing the goal of its efforts in terms of encouraging Colombian authorities to uphold their international legal obligations to counter impunity.36

I conduct a qualitative, narrative analysis of all three interventions, examining their stated purpose, implementation, and effects. I do not conduct an extensive cross-case comparison, but rather aim at within-case analysis, since the three interventions show substantial variation in scope. To start with, in terms of the financial resources put at the disposal of the three

34 Acuerdo entre la Organización de Naciones Unidas y el Gobierno de Guatemala relativo al establecimiento de una Comisión International Contra la Impunidad en Guatemala (CICIG), 12 December 2006, preamble.
35 US Department of State, Bureau of Western Hemisphere Affairs, Fact Sheet Plan Colombia, 14 March 2001.
36 See for example OTP ICC, ‘The role of the ICC in the transitional justice process in Colombia’, speech by James Stewart, Deputy Prosecutor of the International Criminal Court, Bogotá and Medellín, Colombia, 30-31 May 2018.
interventions I study, the differences are immense. Plan Colombia has cost upwards of 10 billion USD over its eight-year lifespan. CICIG has cost an estimated 250 million USD over its twelve-year lifespan. The ICC has an annual budget of around 150 million USD, of which a portion goes to the Office of the Prosecutor, of which a portion goes to preliminary examinations, of which a portion goes to the investigation into the situation in Colombia. It would be impossible to make sweeping generalizations about the respective effects of these interventions given that the financial resources spent on them vary so enormously. Moreover, the institutional design and stated purpose of the three interventions vary. Plan Colombia, a bilateral aid program between the United States and Colombia, aims explicitly at reducing narcotics production and trafficking. The ICC, an international court created by a multilateral treaty with well over a hundred signatories, aims at reducing impunity for international crimes. CICIG, a commission created by bilateral treaty between the United Nations and Guatemala, aims, most comprehensively, at reducing impunity across the board and dismantling parallel structures.

Although the three cases I study vary substantially in scale and scope, they merit joint analysis in this investigation. What these three international interventions have in common is that they operate on the crossings of civil war and organized crime, peace-building and state-building, and the suppression of pariah and elite rule of law undermining crime. The ultimate aim of this study is to distill recommendations for future international interventions aiming at improving the rule of law in the face of widespread crime. The three cases have enough in common to be worth the effort of examining them in conjunction.

4 Relevance

In the field of international criminal law, there is a strong focus on war and punishment. Studying widespread crime in times of formal peace lags behind. Yet, tens of thousands of people die every year as a result of decentralized criminal violence and state omission or complicity therein, in countries that are formally at
peace. The ICC, between its creation in 2002 and the time of this writing in 2019, has detained not more than fifteen suspects, of whom only two had leadership government positions.\(^{37}\) In the meantime, the national justice system in the small and so-called fragile state of Guatemala has indicted seven former or acting presidents in less than ten years, two for genocide and five for corruption. International criminal law, as an academic discipline and as an actual activity and regime, risks losing relevance if it continues to focus on the international adjudication of Rome Statute core crimes. More attention should be paid to the empowerment of national systems in the face of rule of law undermining crime short of the more centralized violence that is classically perceived as constituting war crimes or crimes against humanity.

Indeed, whereas much scholarship focuses on centralized violence and violence that is ethnically, politically or racially motivated, understanding of state criminalization and criminal undermining of the rule of law is lagging behind. As former Venezuelan minister and Carnegie Distinguished Fellow Moisés Naím stated with regard to what he calls mafia states, “[t]he analytic frameworks that governments are currently applying to the problem are primitive, based on outdated understandings about organized crime. Addressing this dearth of knowledge will require law enforcement authorities, intelligence agencies, military organizations, media outlets, academics, and nongovernmental organizations to develop and share more reliable information.”\(^{38}\)

\(^{37}\) Jean-Pierre Bemba was a vice-president of the DRC, Laurent Gbagbo was president of Côte d’Ivoire. Both were acquitted by the Court. Gbagbo’s political associate and cabinet member Charles Blé Goudé was also acquitted. The other detainees before the ICC were essentially pariah militia leaders. The Kenya case before the ICC, involving president Kenyatta and vice-president Ruto, was abandoned by the prosecutor. Sudan’s former president Omar Al-Bashir was indicted by the ICC in 2009, but has not been transferred to the Court.

The World Bank dedicated its World Development Report 2011 to conflict, security and development. The report was influential, raising awareness of the magnitude of criminal violence around the world. In its own words, the report “draws on research from a variety of fields, particularly research on the risk of civil war, largely because it is further advanced than research on violent organized crime, trafficking, gang activity, or terrorism.”\(^{39}\) In a similar vein, the Geneva Declaration pointed to the magnitude of non-conflict violence in its Global Burden of Armed Violence 2011 Report, calling for an integrated approach towards armed violence that goes beyond the common distinctions of organized/collective versus interpersonal/individual, and of conflict/politically motivated versus criminal/economically motivated.\(^{40}\) And as Louise Shelley remarks with regard to the challenge of transnational crime, corruption and terrorism: “American policy-makers in the post 9/11 world have focused almost exclusively on terrorism, whereas their European counterparts have focused much more on transnational crime. Neither community’s policy-makers are doing the integrative thinking that is required by this new challenge.”\(^{41}\) The new challenge posed by organized crime, violence and corruption is growing. With this study, I hope to be contributing to a more sophisticated understanding of organized crime and the rule of law, particularly in Latin America.

This investigation accordingly aims to contribute to a number of academic and policy debates. First, my analysis of the distinction between organized crime and civil war relates to the growing field of scholarship on ‘greed versus grievance’ and ‘new wars’, which includes prominent contributions by Paul Collier

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and Anke Hoeffler,\textsuperscript{42} Martin van Creveld,\textsuperscript{43} Mary Kaldor,\textsuperscript{44} John Mueller,\textsuperscript{45} and Herrfried Münkler.\textsuperscript{46} The particularities of how drug trafficking, other organized crime activities, and corruption translate into pariah and elite rule of law undermining crime in Colombia and Guatemala merit special consideration in the ‘new wars’ debate. Moreover, the discussion on what is war and what is crime relates directly to the current debate in international criminal law as to whether situations of widespread organized crime can trigger the jurisdiction of the International Criminal Court.

Second, this investigation contributes to criminology and organized crime research. There is a tendency in academia as well as in policy to focus on transnational organized crime. Supposedly, whereas domestic organized crime is menacing, transnational organized crime is even more so. This investigation challenges the conventional wisdom that if crime operates transnationally so should law-enforcement, and focuses instead on the undermining effects crime has \textit{nationally}, and on how that can be countered nationally, whether or not with international assistance.

Third, this investigation relates to the scholarship on ‘state fragility’. I am very critical of the concept of state fragility, for it tends to excessively aggregate disparate characteristics of states and leads to arbitrary scaling. Moreover, the state fragility concept favors state-building as a solution to external threats, without adequately taking into account state criminalization from within. Therefore, through the concept of ‘rule of law undermining crime’ and its division between pariah and elite

\textsuperscript{43} Martin van Creveld, \textit{The Transformation of War}, The Free Press 1991
\textsuperscript{45} John Mueller, \textit{The Remnants of War}, Cornell University Press 2004
expressions, I aim to sophisticate understanding of the origins and the potential solutions to so-called state fragility.

Furthermore, this investigation of course aims to contribute to scholarship on Guatemala and Colombia. There is relatively little scholarship on Guatemala, particularly in the English language. The most important analyses of CICIG have been produced by NGOs, in particular the studies by the Washington Office on Latin America, the Open Society Institute, and the International Crisis Group. This study is to my knowledge the first extensive scholarly study on CICIG. On Colombia there is more scholarship. In particular on the relationship between the civil war and transitional justice on the one hand and drug trafficking and regular justice on the other a lot of analysis is available, on which I build. This study is the first to my knowledge to explicitly bring together Plan Colombia and the militarized War on Drugs on the one hand, and the ICC preliminary examination and international criminal law on the other, into one joint framework. Most of the scholarship on Guatemala and on Colombia is in Spanish. The Spanish and the English academic debates are largely separate. I try to bridge that by incorporating original Spanish sources in my research.

Essential to this research on rule of law undermining crime is the state’s ability to diminish violence on its territory. I endorse the central claim of Steven Pinker in his influential *The Better Angels of Our Nature,* that the state has been pivotal in decreasing levels of violence across the world over the past centuries. Pinker’s view is rather western-centric however, and he fails to adequately consider the rising, indeed civil-war-like,

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levels of violent crime in Latin America. This investigation purports to contribute to filling that gap, by expanding the implications of his view to contemporary Latin America.

Indeed, thousands of people are dying every year as a result of the phenomenon I analyze. Venezuela is descending into anarchy. Outside of Latin America, Duterte is bringing mano dura to new levels in the Philippines. Bolsonaro seems keen on following his example in Brazil. We see anarchic violence, corruption and rule of law undermining crime as well as mano dura and privatization and militarization of public security increasing in many countries across the world.

The problems that result from this are of concern to the international community as a whole. They occur particularly in countries with poorly developed institutions and economies, legacies of violence, and rapidly growing populations. These problems cannot be contained, and will spill over regionally.

There is development in terms of interventions. Plan Colombia serves as apparent inspiration: Joe Biden called for a Plan for Central America and the Mérida Initiative has been referred to as Plan Mexico. CICIG also serves as inspiration for calls for similar commissions in countries such as Honduras, El Salvador and Mexico. The ICC’s preliminary examination in Colombia is ongoing, and opening an investigation in Mexico is under consideration. A joint analysis of Plan Colombia, the ICC’s preliminary examination in Colombia, and CICIG, in the light of rule of law undermining crime, can, I hope, inform decision makers in their quest for effective assistance mechanisms in the future.

53 See for example: ‘CICIG, un modelo exportable para Honduras’, La Prensa, 4 September 2015.
55 See for example: ‘Cicig en Mexico: Cicim’, Milenio 17 August 2015.
5 Outline

The present study consists, besides introduction and conclusion, of five chapters. The question guiding chapter 2 is what it means to speak of ‘war’ or of ‘peace’. It analyzes the history of monopolization of violence through warfare and state-making. It signals that the scale of decentralized economically motivated violence in many countries is such that the distinction between organized crime and civil war has become blurred. The role of the state in many countries is not merely one of impotence vis-à-vis outside violence however, as state fragility and state-building theories would point out, but also one of complicity.

Chapter 3 deals further with how the state relates to organized crime. It goes into the development of organized crime and develops the framework of elite and pariah rule of law undermining crime. The chapter then also analyzes in depth the implications of three oft-seen approaches to the suppression of crime: militarization of policing, privatization of public security, and penal populism or mano dura.

In Chapter 4 I look at different international reactions to rule of law undermining crime. The chapter considers rule of law promotion abroad, the system of crime suppression conventions with the Palermo Convention at its heart, and the international criminal law framework with the Rome Statute at its heart. It further notes that an international response capacity to rule of law undermining crime is unlikely to emerge given the control elite criminals have over the exercise of the national sovereignty of their respective states.

This gives way to my case studies. In Chapter 5 I analyze two interventions in Colombia: the bilateral military program between the United States and Colombia under the name Plan Colombia, and the preliminary examination of the ICC into the situation in Colombia. Colombia is a case in point for the dual phenomena of state weakness and state criminalization; and for the blurring distinction between organized crime and civil war. In Chapter 6, I analyze the International Commission Against Impunity in Guatemala (CICIG).
CHAPTER 2 STATE WEAKNESS

1 Introduction

In pre-state societies where raiding and feuding went along unchecked, the violent death toll was extremely high by modern standards. Perhaps Thomas Hobbes was slightly exaggerating the extent to which life was 'nasty, brutish and short' in pre-state societies. However, as Norbert Elias\textsuperscript{56} and later Steven Pinker\textsuperscript{57} amongst others aptly pointed out, the rise of the state played a crucial role in internally pacifying hitherto very violent societies.\textsuperscript{58}

With Leviathan more or less effectively suppressing the private use of violence on its territory, a new potential monster was created. When two states clash with each other, or when the state puts its full weight behind the suppression or even the extermination of a certain part of its population, the consequences in terms of human suffering and human lives lost can be enormous. Leviathan having pacified society, the next step was to pacify Leviathan.

The pacification of Leviathan took various forms across the globe. Measures of domestic democratic and judicial accountability developed, reining in the use of force by the public executive. International law emerged as a normative system prescribing what states were and were not allowed to do. Certain behavior of states in the conduct of armed conflict was outlawed by the Conventions of The Hague (1899 and 1907) and Geneva (1864, 1906, 1929). In reaction to the horrors inflicted upon civilians by unrestrained Leviathans during the course of the

\textsuperscript{56} Norbert Elias, \textit{The Civilizing Process}, Blackwell Publishing 1994 (originally published in 1939)
\textsuperscript{58} Or as Azar Gat put it: “Hobbes’ image of an endemic state of ‘warre’ and lack of security in the absence of state authority has been found to be perhaps somewhat overdrawn, but not by that much.” Azar Gat, \textit{War in Human Civilization}, Oxford University Press 2006, p. 13.
Second World War, in 1948 the Genocide Convention and the Universal Declaration of Human Rights were adopted.

Massive warfare between states was for centuries a dominant source of deadly violence in the world. After the Second World War, the incidence of war between states, or intra-state warfare, declined significantly. However, the incidence of inter-state warfare, or civil war, remained high. Civil war is, in essence and for the purpose of this study, a violent conflict in which a state is fighting a domestic group that violently challenges the state’s legitimate authority to govern. The state or the rebel group, or both, may receive third state support. The violence is politically, ethnically and/or religiously motivated, and rather centralized.

In the 21st century, major civil warfare has declined. Notwithstanding the great human toll that civil wars in Syria, Iraq, Colombia, Afghanistan, Sri Lanka and other countries imposed, the majority of victims of lethal armed violence in the 21st century died not as a result of conflict-related violence, but rather as a result of what is commonly labeled ‘criminal violence’. According to the Global Burden of Armed Violence 2011 report, every year at least 526,000 people die violently, of which more than 75% in non-conflict settings. In most people’s view, it is violent crime – not terror, war, disease or famine – that represents the single greatest threat to their personal security.

States have a responsibility to guarantee the security of their citizens. In the face of massive violent crime that in scale and scope resembles armed conflict, many states find themselves

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59 There must also be a minimum level of actual violence to speak of civil war. The minimum of 1,000 battle-related combatant fatalities within a twelve-month period is broadly accepted in the literature, following the Correlates of War Project.

60 Geneva Declaration, Global Burden of Armed Violence 2011, Cambridge University Press. Important qualification to these data: the Global Burden of Armed Violence 2011 counts only direct violence-deaths. ‘Excess mortality’ caused by famine, disruption of healthcare systems, etc., that are the result of armed conflict, are not counted.

overwhelmed. In such circumstances, excessive and unchecked state strength is not the prime source of the problem. Rather, state weakness and the state’s incapacity to enforce its monopoly on the use of force contribute to massive human suffering.

At the international level, state weakness, state fragility and state failure have been the object of growing concern. Prior to 9/11, peripheral states with sovereignty deficits were regarded primarily as a humanitarian matter. But since the attacks carried out by Al Qaida were so intimately connected to state weakness in Afghanistan, weak or fragile states became a priority to the West. As George W. Bush famously stated in the 2002 National Security Strategy of the United States of America, “America is now threatened less by conquering states than we are by failing ones.” Kofi Annan also underlined the importance of addressing state fragility, albeit for reasons beyond US national security, stating in his 2005 In Larger Freedom Report that “if states are fragile, the peoples of the world will not enjoy the security, development, and justice that are their right.”

In this chapter, I shall first discuss the formation of the state’s monopoly on the use of force and the role of warfare therein. Then I shall discuss how the effectiveness of the state’s monopoly on violence has been eroded in many countries due to an almost anarchic proliferation of violence and crime beyond the monopoly control of the state. This leads me to questioning the distinction between civil war and organized crime. Finally I shall analyze state fragility, failure, and criminalization, concluding that the diagnosis of ‘state fragility’ is multi-faceted, which requires a multi-faceted response including but not limited to the strengthening of the repressive capacity of the state.

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2 Warfare and the state monopoly on violence

The state in its modern form was born in Europe. In feudal Europe, local strongmen organized protection rackets. Having disarmed and subjugated the civilian population around their stronghold, these strongmen would engage one another. The competitive pressure amongst local strongmen led to an eat-or-be-eaten dynamic, with the ultimately inevitable result of violence monopolization.\(^{64}\)

The competitive pressure that led to the monopolization of violence materialized through warfare. As Charles Tilly famously put it, “states made war, and war made states.”\(^{65}\) In trying to account for the great variation over time and space in the kinds of states that have emerged, Tilly places “the organization of coercion and preparation for war squarely in the middle of the analysis.”\(^{66}\) He points to a unique set of arrangements in Europe as of 1490 that would change the way statehood and warfare came to be understood. As states mounted larger, disciplined military forces, they fought declared wars that ended by formal peace settlements. Any expression of violence other than declared war between aspiring monopolists gradually came to be seen as illegitimate by those very same aspiring monopolists, and came to be outlawed by them.\(^{67}\)

A watershed moment in the development of the concept of the state in many accounts of the history of state formation and warfare in Europe is the Peace of Westphalia of 1648. Pre-Westphalia, distinctions between state, army and people were not on the foreground. During Antiquity, for example, ‘the


\(^{66}\) Id., p. 14.

\(^{67}\) Id., p. 164.
Athenians’ waged war and concluded treaties, rather than the abstract entity ‘Athens’. In the Middle Ages, war was seen as a continuation of religion or as a continuation of justice, in just war theory, not necessarily as a continuation of politics, as Clausewitz would later famously describe war.

Post-Westphalia, the distinctions between state, army and people began to intensify. The idea of the territorial state, rather than the state based on tribe, kinship, or religion, gained prominence, just as the first modern maps started to appear between 1600 and 1650. Geographic expansion and consolidation became the most important object of armed conflict by far. Tilly observes in this regard that in earlier times, “the differences among soldiers, bandits, pirates, rebels, and lords doing their duty blurred into a continuum of coercive action. (...) From the sixteenth century onward, the situation changed fundamentally. Consolidation of the state system, segregation of military from civilian life, and disarmament of the civilian population sharpened the distinction between war and peace.”

As states continued to fight deadly wars with one another, they also continuously intensified the internal monopolization of the means of violence. States that could draw large, durable military forces from their own populations had a crucial military advantage over their competitors. Therefore, in order to be able to project military force externally, states had to internally disarm their subjects. Norbert Elias provided a seminal account

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69 See also the impressive work by Azar Gat, War in Human Civilization, Oxford University Press, 2006, particularly p. 232-323 and 401-443.
72 With regard to the process of internal pacification and state formation in France, Tilly notes that Louis XIII (king of France from
of the internal pacification of societies in his classic *The Civilizing Process*.\(^{73}\) Originally published in 1939, his account of the pacification of human civilization initially fell on deaf ears given the horrors of the Second World War, but would later gain more favorable reception. Elias ascribes a central role to the increasing importance of money, and the benefit thereof for central rulers, leading to the demise of the independent, scattered warrior nobility and feudal lords across Europe. As the division of functions in the economy and the use of money, “the incarnation of the division of functions,”\(^{74}\) advanced, central rulers could intensify their monopolization of the use of force. The court became the organizational form of competition restricted by monopoly. Struggles are then not towards dispersing monopoly, but towards a different kind of control over the monopoly.\(^{75}\)

In this process, eventually the modern state emerged.\(^{76}\) As Max Weber famously put it, the state is a human community that successfully claims the monopoly on the legitimate use of physical force within a given territory.\(^{77}\) The idea that an entity we call a state holds the monopoly on the use of violence in a given territory has become firmly established in our political


\(^{74}\) Id., p. 303.

\(^{75}\) Id., p. 439.

\(^{76}\) For an ambitious historic account of the formation of states not only in Europe but also in China and India, see Francis Fukuyama, *The Origins of Political Order*, Profile Books 2011. Fukuyama is skeptical of the positive effects of state formation on human wellbeing from its very start, noting on p. 445: “The passage from band- and tribal-level societies to state-level ones represented, in some sense, a huge setback for human freedom. States were wealthier and more powerful than their kin-based predecessors, but that wealth and power led to a huge amount of stratification that left some masters and many others slaves.”

thinking. Even the champion of libertarianism, Robert Nozick, agrees that the state’s claiming of the monopoly on the use of force is morally allowed and even required.\textsuperscript{78}

State monopolization of violence played out differently in various parts of the world. The process was not as deep in the United States as it was in Europe, as is evidenced by US citizens’ insistence on their right to keep and bear arms, a right that few European citizens would claim. But in both Europe and North America, states have successfully liberated populations from the Hobbesian anarchical war of all against all.

This ideal-typical history of state formation, associated with Max Weber and Charles Tilly, is based primarily on the European experience, which has dominated thinking about state formation. Miguel Angel Centeno speaks in this regard of a “blinding empirical Eurocentrism”, with political sociology having “persisted in considering the western European pattern as a historical standard.” \textsuperscript{79} The process of state formation in Latin America differed from the European experience in important respects. The colonial histories of the various Latin American nations varied somewhat, with the amount of silver and gold and other geographical features largely determining the attractiveness and importance of the various colonial domains for the colonizer. However, variations across the continent notwithstanding, the conquest left indigenous populations decimated. The extractive colonial system imposed on Latin America, as opposed to the settler colonial system in North America, of course played a crucial role in Latin American post-independence state formation.\textsuperscript{80} The extractive, stratified system of colonial rule indeed persisted throughout the continent also after independence.

There is something of a paradox in the history of state formation and warfare in Latin America. Over the course of


\textsuperscript{80} See for example Daron Acemoglu and James Robinson, \textit{Why Nations Fail}, Profile Books 2012, p. 7-45.
roughly two centuries of independence, there have been only a very limited number of international wars. How is it possible that a continent that is so characterized by militarism in the public image, and that is so easily associated with military dictatorship, has seen so little formal warfare?

As Miguel Angel Centeno puts forward in Blood and Debt, Latin American states were born into a non-competitive geopolitical surrounding. There were no strong neighbors against which state elites had to defend themselves, and anti-imperialism was the reigning idea. In Europe, statelets formed and gradually expanded their territory, eliminating all rival claimants. By contrast, in Latin America, states appeared post-independence with more territory than they could control to begin with. External recognition of their sovereign statehood – by their neighbors and by the international community in general – preceded the institutionalization of state presence acknowledged within the national territory itself. Moreover, the prime enemy for ruling elites was not a foreign elite, but the domestic masses and other endogenous groups. Militaries defined the critical state enemy as an internal one. Class interests, and racial interests, were always central; national interests came second. Colonialism left a legacy of significantly race-based elites, weary of internal enemies, creating a state oriented more towards repressing internal threats than to protecting the society from external menace.

The independence wars moreover were limited wars. Total wars are the kind of wars that fundamentally impact societies and states. Paradigmatic in this regard were the Napoleonic wars, with the levée en masse, and the two World Wars. Mass conscription required healthy, literate young men to

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83 Not to mention of course gender-based. The colonial heritage of patriarchy continues to influence Latin American societies to the present day.
fight. It required their willingness to die for their countries, which in turn led to the fostering of nationalism.  

Warfare in Latin America never had this character. The armed struggles for independence involved relatively small military operations when compared to the armies put to battle by Napoleon and his opponents. With the Iberian colonial authorities weakened by events back in Europe, the armed effort did not require the militarization of society throughout the continent. Also post-independence, with elites worrying more about the masses below than about any competing elites beyond the border, the needs for warfare were limited. Many of the wars that subsequently did occur on the continent were basically land grabs by more powerful neighbors, without any overly intense ideological, nationalistic, or ethnic hatreds. The ‘state-making as war-making model’ associated with Tilly is hence not entirely applicable to the Latin American experience. In Latin America, as Centeno puts it, “limited war made limited states.”

Crucial to the potential state-building effects of warfare is the way countries pay for war. Tilly’s state-making as war-making thesis is as much about coercion as it is about capital, as the title of his seminal book suggests. To pay for a war project, states have to raise revenues. If a state wants to fight a total war, it has to mobilize large segments of the population and of the resources available on the territory. Extensive taxation bureaucracies grew in the slipstream of military demands, at least in Europe and North America. In Latin America in contrast, such a dynamic of conscription, veteran benefits and bureaucratic fiscal development never came into being. The economies in Latin America were underdeveloped to begin with, and the independence wars brought little but economic havoc.

Difficult transport constrained the growth of taxable market exchange so crucial according to both Elias and Tilly in the European story. Weak central elites aiming to raise revenues for any potential warfare project, or for the centralization of the control of the means of violence within the territory, met fierce resistance. The resulting internal conflicts severely limited the extractive capacity of Latin American states. To avoid having to confront vested interests, central elites relied on external sources of finance, particularly customs duties. Raising customs duties requires very little state bureaucracy: a few soldiers at the main ports collecting duties suffice. There is no need to break the privilege of elites, for example the privileges of landowners in the case of instituting a land tax, or to penetrate the economy or the society. Other sources of financing included foreign loans, state control over commodity exports, and the printing press. Relying on commodity exports and loans is a strategy the newly independent states in Latin America copied from their old colonial master. Already in colonial times the state’s finances were dominated by gold and silver extraction rather than by taxation of market exchange. Colonial Spain was so incapable of taxing sufficient revenues from its own people, and it was so reliant on loans, that it was forced to declare bankruptcy ten times between 1557 and 1662. After gaining nominal independence, the new Latin American states remained dependent on foreign powers economically. As the new governments found it nearly impossible to impose domestic

89 See also Oscar Oszlak, ‘The Historical Formation of the State in Latin America: Some Theoretical and Methodological Guidelines for Its Study’, *Latin American Research Review* 16(2), 1981, 3-32, p. 24: “[I]t is clear that the custom duties on foreign trade, added to the loans contracted periodically, constituted, for decades, the primary – and almost exclusive – resources of the national state.”
taxes, they could not risk losing foreign trade, from which they derived such a great part of their income, thus severely limiting their possibilities for enacting protectionist policies aimed at developing the domestic economy.\textsuperscript{91}

In a context of limited wars, little geopolitical competition and elite focus on internal threats, Latin American states have consistently asked fairly little of their citizens, in terms of taxation or in terms of conscription for the army, and have accordingly offered fairly little in terms of public services. In the end, elites wanted to protect their privileges, and inclusion of broad segments of the population into a collective project was the last thing on their mind. As a result, contrary to their rapacious reputations, Latin American states have historically taxed a much smaller share of their national wealth than other, richer countries.\textsuperscript{92}

We see then a continent with poorly developed states, with little central control over the means of violence, and with little international warfare. This lack of collective state-building projects continues to affect Latin America. In particular, we see states that experience great difficulty in effectuating their monopoly on the use of violence, with citizens murdering each other and walking away unpunished. Taxation is very low, and in many places there is even competing ‘taxation’ – in the form of guerrillas or paramilitaries imposing ‘war taxes’, or in the form of widespread extortion by street gangs. Dominant states, in the Weberian sense of states truly dominating their societies, have barely come into being in most parts of Latin America. Latin American elites were primarily concerned with preserving the existing order, first through traditional oligarchic hegemony and


subsequently, upon the inclusion of broader segments of the population in the economic and political life of the nations, through bureaucratic-authoritarian regimes.93

The dissolution of the Soviet Union accelerated the eventual demise of the bureaucratic-authoritarian regimes in Latin America, giving further impetus to a wave of democratization that had originated in the early 1980s.94 Latin American states, whilst democratizing, also receded. Enticed to do so by structural adjustment programs promoted by the World Bank and the IMF, Latin American states privatized formerly state-owned enterprises, deregulated the economy, opened up to international trade, and took on a diminishing role in society. Organized crime was quick in occupying newly opened-up space. In the 21st century, the violence monopoly of the state is severely compromised in many Latin American countries.

Organized crime groups in many countries have higher budgets than law-enforcement agencies,95 and as a result oftentimes have a higher capacity for violence than the state. For a state to have an effective monopoly on the use of violence implies not only that other states do not exercise violence on its territory, but also that citizens generally do not kill each other, and that when they do, the state punishes them for defying its monopoly. The typical measure of lethal violence within a society is the number of violent deaths per 100,000 inhabitants per year. Steven Pinker forcefully suggests that this rate was in the 100s in pre-state societies, before Leviathans pacified societies,

prohibiting private individuals from killing one another, and claiming the monopoly on violence.\textsuperscript{96} Today, this rate is roughly 1 in the Netherlands. In the United States, it came down from around 10 in the 1980s to around 5 in the 21\textsuperscript{st} century. In Central America, the rate can be as high as 50.

Indeed, the 21\textsuperscript{st} century homicide rates in the Central American countries of Honduras, El Salvador and Guatemala are comparable to the casualty rate of the war in Iraq,\textsuperscript{97} and they are consistently higher than the average casualty rates of the Central American civil wars. In reaction to the violence and the inability of states to effectively protect populations, alternative security providers set up mechanisms for protection in exchange for payment. Semi-regulated private security companies, street gangs, paramilitary or guerrilla groups, and vigilante groups, all set up shop to fill the void left by the state. Indicative of the ineffectiveness of the state’s monopoly on violence is pervasive impunity. In many Latin American countries, the odds that a person who commits a violent crime meets a state reaction are very slim. Impunity rates of 90\% and above are not uncommon, signaling the shallowness of the state’s aspiration to be the only actor who may use violence.

Steven Pinker speaks of the historic ‘Great Crime Decline of the 1990s.’\textsuperscript{98} However, such a crime decline only occurred in the West. For many countries emerging from conflict after the Cold War, the opposite was true: they suffered a Great Crime Rise during the 1990s. What can be observed is an escalation of diffusely organized violence, to such an extent that the distinction between the two phenomena commonly known as

\textsuperscript{97} The war in Iraq has caused around 200.000 violent deaths between the US invasion of Iraq in 2003 and 2012, civilians and combatants combined, according to the Iraq Body Count Project, making for approximately 67 violent deaths per 100.000 inhabitants per year on average; below the 92 murders per 100.000 inhabitants per year in Honduras and 69 in El Salvador reported by the UNODC for 2011.
‘civil war’ and as ‘organized crime’, is undergoing a process of blurring. In this process, the state is undergoing varying degrees of ‘failure’ or ‘collapse’. The tyranny of a strong state that abuses its violence monopoly, unchecked, is not the main source of violence, in as far as it has ever been in Latin America. Rather, violence is spurred by the anarchy allowed by a state that is too weak, and by private violent actors that defy the state’s violence monopoly.

3 Of war and crime

Central to the idea of warfare is the state’s role in it as a violence monopolist, both internally and externally. An international armed conflict, or an international war, requires two or more states fighting each other, with at least one state exercising violence on the territory of another state. A non-international armed conflict, or civil war, requires a fight between two or more parties over who shall exercise the violence monopoly in a certain territory.

One of the most influential theorists of war was Carl von Clausewitz, a Prussian general who lived in the times of the Napoleonic wars. In his classic Vom Kriege (‘On War’), he famously described war as the continuation of politics by other means. In the Clausewitzian perception of warfare, so central has been the role of the state that the matter has become one of definition. As Martin van Creveld puts it: “To distinguish war from mere crime, it was defined as something waged by sovereign states and by them alone. (...) Whether intended or not, one result of the agreements was that non-European populations that did not know the state and its sharply-drawn division between government, army and people were automatically declared to be bandits.”

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As far as the internal use of force is concerned, every society, even the most pacified one, has incidents of violence.\textsuperscript{100} Violence can also be widespread and lead to the frequent disturbance of public order. If violence is systematically directed against the state or against certain groups, at a certain point we may speak of an armed conflict not of an international character, or a civil war. Civil war is different from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”\textsuperscript{101}

In relation to Common Article 3 of the Geneva Conventions of 1949, the most widely accepted criteria in order to speak of a non-international armed conflict are that the hostilities must reach a minimum level of intensity, and that non-state groups involved in the conflict be considered as parties to the conflict. In effect, the latter criterion means that the non-state group(s) active in the conflict possess organized armed forces, under a certain command structure and with the capacity to sustain military operations.\textsuperscript{102}

Additional Protocol II to the Geneva Conventions of 1977 has a slightly different material scope. First, it introduces a requirement of territorial control, requiring of dissident armed forces or other organized groups that they “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement

\textsuperscript{100} See North, Wallis and Weingast, \textit{Violence and Social Orders}, Cambridge University Press 2009, p. 13: “Regardless of whether our genetic makeup predisposes humans to be violent, the possibility that some individuals will be violent poses a central problem for any group. No society solves the problem of violence by eliminating violence; at best, it can be contained and managed.”

\textsuperscript{101} Additional Protocol II to the Geneva Conventions (1977), Article 1 paragraph 2.

this Protocol." Second, Additional Protocol II only applies to armed conflicts between a state and non-state armed groups, whereas Common Article 3 can also apply to armed conflicts occurring only between non-state armed groups.

What any perception of armed conflict has in common, other than the requirement that the violence must meet a minimum level of intensity, is the requirement that there be an ‘adversary’, another party to the conflict, that is capable of carrying out military actions under a certain command structure. The notion of ‘party to the conflict’ moreover implies that there is a central conflict, for example over control of government or over control of a certain territory, and that the objective of the war is victory over the adversary. Another universal requirement is that there be rules or laws. As Van Creveld phrased the centrality of the rules or laws of war: “A body of men that is not clear in its own mind about these things is not an army but a mob.”

However, many situations in Latin America, as well as in other parts of the world, today do not quite fit within this model. On the one hand, violence may be so widespread that it seems misplaced to speak of mere isolated and sporadic acts of violence. With thousands of people dying every year, what are formally the homicide statistics of countries in peace resemble the figures of civil war casualty tolls. In popular speech this leads to notions of the war on drugs, or gang wars, or the war on terror.

On the other hand, in many situations there is no central conflict to which two or more groups are parties. When violence is clearly politically, ethnically or religiously motivated, it is

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103 Additional Protocol II to the Geneva Conventions (1977), Article 1 paragraph 1.
104 See Martin van Creveld, The Transformation of War, The Free Press 1991, p. 90. He continues: “It is true that different societies at different times and placed have differed very greatly as to the precise way in which they draw the line between war and murder; however, the line itself is absolutely essential. Some deserve to be decorated, others hung. Where this distinction is not preserved society will fall to pieces, and war – as distinct from mere indiscriminate violence – becomes impossible.”

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possible to identify a central conflict and the parties thereto. But for example in the drug-related violence in Mexico and Central America, there are no clear political, religious, or ethnic motivations. Nor does the violence follow a pattern of the state versus centralized challengers. Rather, a diverse range of economically motivated privately organized violence entrepreneurs is willing to use violence to further their interests, and the state is incapable of stopping them. Are we dealing here with high-intensity crime, or actually with low-intensity conflict?

International law on non-international armed conflict puts forward objective criteria to speak of war: central command, control over territory, and a certain minimum level of violence. The motivation of the parties is no formal legal requirement. But in the political debate about the relation between organized crime and armed conflict, much seems to depend on the motivation of the violence.

Politically motivated rebel movements, like the FARC in Colombia, or the LRA in Uganda and neighboring countries, sometimes tend to develop into economically motivated organized crime groups. When these groups lose interest in ending, or winning, the conflict, and instead gain an interest in the open-ended continuation of the conflict, they become more of an organized crime group than a party to a civil war. On the other hand, privately motivated warlords might adopt a political agenda to legitimize or cover up their crimes. It is increasingly difficult to draw the line between economically motivated, and politically or ideologically motivated, violence; and between civil war and organized crime.

105 On this process, especially in the context of the need for self-financing for the FARC and the LRA, see Geneva Declaration, Global Burden of Armed Violence 2011, p. 29: “ideological goals fade and their activities resemble the self-perpetuating business model of organized criminal groups. This shift has important policy implications: in circumstances where armed groups have become criminalized, political compromises such as power-sharing offers may be less effective as some groups find it more interesting to remain ‘violence entrepreneurs’ that profit from their established criminal operations.”
3.1 Greed versus grievance in civil war

There is an extensive literature on the subject of civil wars. One of the most prominent debates in this regard is the ‘greed versus grievance’ debate: are civil wars caused by economic motivations, or by political, social, ethnic, or religious motivations?

In 2000, Paul Collier and Anke Hoeffler published a World Bank Policy Research Working Paper under the title ‘Greed and Grievance in Civil War.’ Relying on a wide range of proxies, they attempted a statistical analysis into the causes of civil war. They concluded that greed offers more explanatory power as to the outbreak of civil war than grievance.

The work, as well as subsequent work by the authors, drew a wide range of followers as well as critics. The statistical model, with its various employed proxies, offers an easily understandable, simplified view on such a complex, and important, phenomenon as civil war. Through the use of statistics, the work gained an aura of scientific-ness. It received praise for its clarity, but also attracted criticism for its oversimplification. In particular, many argued that greed and grievance interconnect in complex ways and cannot be so sharply separated. For example, in trying to establish a proxy for the economic motivations behind civil war, Collier and Hoeffler consider the recruiting costs for a rebel movement. They argue that for a rebel group to grow, and to initiate an actual civil war, the group must recruit new members, and that this recruitment is facilitated by high unemployment. They then propose education as one of the proxies for the state of the labour market, bringing in the proportion of young males enrolled in

\[\text{Proportion of young males enrolled in school} = \frac{\text{Number of young males enrolled in school}}{\text{Total number of young males}}\]

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secondary education as a variable.\textsuperscript{108} The correlation between low male secondary education enrolment and the outbreak of civil war is then presented as supportive of the greed thesis. However, low, or unequal, enrolment may of course also give rise to grievance among parts of a population. That is to say, greed and grievance cannot be separated but must rather be analysed in their complex and various interactions.

There are more ways in which greed and grievance interact. For example, control over natural resources may at first sight seem a purely economic motivation. However, control over natural resources is not merely about direct personal profit-making, but also about political power, distribution of wealth, and relationships between dominant and minority groups within states.\textsuperscript{109} The UNODC argued in that regard that there is “a big difference between seeing natural resource wealth as an enabling factor and seeing criminal greed as a primary cause of conflict.”\textsuperscript{110}

In a 2008 paper, Collier and Hoeffler moved beyond greed and grievance as alternative motivations for violence, to consider the feasibility hypothesis.\textsuperscript{111} In essence, they argue that motivations do not determine the occurrence of civil war, but rather that factors that are important to the financial and military feasibility of rebellion do. There might be a lot of people motivated by either greed or grievance or both, but if the financial and military circumstances are not conducive to rebellion, civil war will not break out. However, if the circumstances are ‘right’ (or, better-put, wrong), civil war is more likely to occur. This thesis in effect boils down to saying that war breaks out in countries where outbreak of war is likely,

without offering much explanatory power or direction of possible solution.

Greed and grievance are two potential motivations behind violence. What has become clear in the greed and grievance debate is that the two are not easily separable. As Paul Collier’s former employer, the World Bank, noted in the 2011 World Development Report, joining a rebel movement or joining an organized crime gang are choices that at the individual level show a high level of similarity. The World Bank refers in that regard to surveys that “found that the main motivations young people cited for becoming rebels or gang members are very similar – unemployment, idleness, respect, and self-protection, all well ahead of revenge, injustice, or belief in the cause.” Here again, respect and self-protection are portrayed as alternatives to injustice or belief in the cause, whereas of course these motivations are intimately linked and not easily separable.

3.2 ‘New wars’

One may ask, like Collier and Hoeffler do, whether civil wars are motivated by greed or by grievance. Alternatively, one may ask whether any given situation of widespread violence should be characterized as civil war to begin with, or whether it should be characterized as high-intensity crime. Indeed, the motivations behind violence may determine to a large degree if we speak, if not legally than at least in wider discourse, of organized crime or of civil war.

Martin van Creveld is a military historian from Israel whose 1991 book The Transformation of War carries the subtitle The Most Radical Reinterpretation of Armed Conflict Since Clausewitz. Van Creveld claims that Clausewitzian trinitarian war of government-army-people pitted against one another has become obsolete. In his view, a broad range of expressions of organized violence that does not follow the rules of ‘civilized warfare’ is awaiting the world. “As new forms of armed conflict multiply and spread, they will cause the lines between public and

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private, government and people, military and civilian, to become as blurred as they were before 1648.”

When the lines between public and private become blurred, it becomes increasingly difficult to draw a line between war and crime. This is a process that is particularly visible in certain parts of Latin America in the 21st century, but by no means only there. As Van Creveld observed in 1991: “Once the legal monopoly of armed force, long claimed by the state, is wrested out of its hands, existing distinctions between war and crime will break down much as is already the case today in places such as Lebanon, Sri Lanka, El Salvador, Peru or Colombia. Often, crime will be disguised as war, whereas in other cases war itself will be treated as if waging it were a crime.” In these instances the central violence monopoly is not challenged with a view on replacing control over it, but rather with a view on destroying it altogether.

Harvard’s cognitive scientist Steven Pinker is less pessimistic. In The Better Angels of Our Nature, his phenomenal study of the decline of violence in human history published in 2011, he claims that violence has gone down consistently over the past millennia and centuries. Like Van Creveld twenty years earlier, he observes the blurring distinction between war and crime: “in parts of the developing world, warlords dress up their brigandage in the language of political liberation movements, making it hard to draw a line between casualties in a civil war and homicides from organized crime.” He stresses however the consistent decline of violence in human history.

Although the end of World War II marked the end of major warfare between great powers, in Pinker’s view three kinds of organized violence continue: ‘low-intensity conflicts’ or ‘new wars’, with great civilian suffering, like for example in the DRC; mass killing of ethnic and political groups; and terrorism.

114 Id., p. 204.
116 Id., p. 104.
117 Id., p. 356-455.
believes however that all three have become much less lethal century after century. Pinker makes no explicit mention of the War on Drugs or other forms of organized crime, presumably falling within his category of low-intensity conflict.

His view is very western-centric however. It may be true that the world has become a safer place as time progressed. It may even be true, as Pinker claims, that it is a misperception to think of the 20th century, with its two world wars, as the most violent century in human history. However, that the world is becoming safer goes only for the West. In Western Europe, Japan, Australia, and some other places, the homicide rate is in the 1 per 100,000 per year range. In the US, it is 5. For sure, the West is getting safer, spurred by what Pinker refers to as the Rights Revolutions (civil rights, women’s, children’s, gay, and animal rights) as non-violent movements capable of bringing down violence in human communities. But in Mexico, Central America, Colombia and Venezuela, the homicide rates have been between 20 and 100 in the 21st century.

Mary Kaldor published New and Old Wars – Organized Violence in a Global Era in 1998. She gives a detailed case study of the ‘new war’ of Bosnia Herzegovina, arguing that the international community failed to adequately understand the nature of the conflict there. “Essentially, it was conceived as a problem of borders and territory, not as a problem of political and social organization.” She also gives a damning account of trade liberalization in countries where the state used to exercise control, and where self-organized market institutions have not yet been given the time to develop: “policies of ‘structural adjustment’ (...) effectively mean the absence of any kind of regulation. The market does not, by and large, mean new autonomous productive enterprises; it means corruption, speculation and crime.”

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118 Id., in particular ‘Was the 20th Century Really the Worst’?, p. 233-241.
120 Id., p. 61.
121 Id., p. 86.
international community's efforts, Kaldor is rather optimistic, especially about the demise of ‘old wars’: “[w]ar, as we have known it for the last two centuries, may, like slavery, have become an anachronism.” However, she also sees reason for caution, noting that “war, like slavery, can always be reinvented. The capacity of formal political institutions, primarily nation-states, to regulate violence has been eroded and we have entered an era of long-term low-level informal violence, of post-modern warfare.”

Herrfried Münkler, in The New Wars originally published in 2002, also asks whether we can still speak of war if the final objective sought is not victory over the adversary, but rather self-preservation and enrichment. He speaks of what he calls the ‘overpopulation warrior’, warlords without land and resources. In old days this was a rural phenomenon, referred to also by Norbert Elias as knights without land, typically late-born offspring of nobility, who went on Crusades and other missions of conquest to acquire what they considered their due. Today, Münkler sees in modern urban violent conflict and child soldiers a similar form of overpopulation-driven violence.

John Mueller, in his The Remnants of War published in 2004, makes a similar argument. He argues that there is a great similarity between the ‘unofficial’ wars during the Hundred Years’ War (~1350-1450), and wars in the Third World today. During the Hundred Years’ War, the official war consisted of campaigns in the name of the kings, whereas in between princely campaigns, soldiers moved out of royal field armies and into various freebooting activities. This pattern is reminiscent of what became known as sobels – soldiers by day, rebels by night –

122 Id., p. 201.
123 Id., p. 201.
in Sierra Leone. Mueller hence sees a decline of global order and warfare, back to pre-modern patterns. However, he perceives of this not as the ‘new wars’ like Münkler (The New Wars, 2002) or Kaldor (New and Old Wars, 1998) but rather as simply the final remaining form of warfare:

“In fact, one may be set to wondering whether many of these enterprises are war at all. Wars are fought to achieve victory (and, often, its attended spoils); economically profitable enterprises that one hopes will go on forever are called businesses, and if they are illicit, they are called crime. (...) But even if we consider criminal civil conflicts to be warfare, we are dealing increasingly not with a new kind of war but with the residue of warfare. It is not, as Van Creveld would have it, that such warfare has risen to dominance. Rather it is that, increasingly, warfare of that sort is just about the only kind still going on: criminal warfare is the residual, not the emerging form.”

Maybe these strong assertions made in 2004 as to the end of warfare more classically perceived came too soon. For example in Syria in 2019, we see an ethnically, religiously and politically motivated civil war including interference by the United States, Russia, Turkey, Iran, and other global and regional players. The old form of warfare is still present in the world. But what is more, in the case of Latin America, to perceive of the rise of violent crime as a residue of old days seems mistaken. In many countries in Latin America, violent crime is not residual but rather fundamentally escalating.

A related concept, practically merging organized crime and armed conflict, is that of ‘resource insurgency.’ In the words of the RAND Corporation: “Resource insurgencies are cases in which insurgents do not seek to win control of the state or

establish their own government but simply to eliminate state interference with their exploitation of natural resources (such as diamonds, drugs, or timber). Cases of warlordism and ungoverned territories are similar to resource insurgencies, but in these instances the state does not sufficiently combat the rejection of its authority to earn the case the *insurgency* label.”\(^{129}\) In this view, ‘insurgency’ presupposes a dual minimum: that state authority is rejected, but also that the opposition by the state to that rejection is sufficiently strong. By the second criterion, the situation in Somalia would probably not qualify as an insurgency, since the Somali state is not providing sufficient resistance to the rejection of its authority. Insurgency presupposes two (or more) adversaries; there can be no insurgency without the active involvement of the state. However, apart from pointing to the necessary role of the state to be able to speak of an insurgency, the concept of ‘resource insurgency’ is little more than a total conceptual fusion of organized crime and civil war.

A concept closely related to both armed conflict and organized crime is terrorism. A warring party can commit an act of terrorism in times of war; criminals can also commit acts of terrorism in times of peace. A single act of terrorism is typically short of a situation of war, but acts of terrorism, targeting civilian populations with the aim of instilling fear, are typically considered the most harmful expressions of organized crime. In situations of war, terrorism is almost a civilian strategy, rather than a military strategy, for it avoids direct confrontation with enemy armed forces, yet using terror against civilian populations may contribute to the defeat of the enemy. Michael Waltzer

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described terrorism as “the continuation of war by political
means.”

As far as the distinction between organized crime and
terrorism goes, the most fundamental distinction is that an act of
terrorism is committed with the aim of instilling fear in a
population, whereas an act of organized crime is committed with
the aim of gaining a financial or other material benefit. This
distinction evokes further questions. For example, what is the
motivation of somebody who engages in organized crime to
finance terrorism? Or what is the motivation of somebody who is
grieved and commits violent acts that instill fear in the
population, and who gets rich in the process? According to Andre
Standing, “the labels used by international commentators can be
artificial and there is a blurring between what is understood as
organized crime and what is considered terrorism.” To avoid
having to make a clear-cut distinction as to what is terrorism and
what is not, some commentators suggest the ‘crime-terror-
continuum’. Colombian authorities have made frequent use of terms
like ‘narco-guerilla’, or ‘narco-insurgency’ more broadly, to
express the fusion that had occurred between the armed conflict
and organized crime groups. In 1983 Peruvian president
Belaunde Terry added to this discourse the term ‘narco-

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131 See also James Cockayne, ‘Transnational Organized Crime: Multilateral Responses to a Rising Threat’, *Coping with Crisis Working Paper Series* 2007, p. 10: “Many commentators distinguish between crime and terror on the basis of the motivations of those involved in each activity: criminals are essentially motivated by greed, terrorists by grievance.”


terrorism. All these terms alike form a state-inspired discourse that may lead to a near-complete conceptual merger, by which concepts of insurgency, terrorism and drug trafficking become fused and lose their conceptual distinctiveness; and by which the state is presented as the victim of illegitimate violence. It is becoming increasingly evident that the distinctions between theoretically separable phenomena are not as clear-cut in practice. Greed-driven civil wars, ‘new wars’, and the crime-terror continuum are all attempts at reconciling theory with reality in a time of rapid change and increasing uncertainty. As armed conflict and organized crime are evolving, so is the role of the state.

4 State fragility

What can be observed is, thus, a blurring of the distinction between civil war and organized crime, which leads many to wonder whether, for example, groups like the FARC are a party to a civil war, or merely an organized crime group. But what about the state in all this?

There is a burgeoning field of literature focusing on state failure and, more recently, state fragility. If we think of a failed state, the first state that comes to mind is Somalia. Indeed, thinking about ‘state failure’ was to a considerable extent shaped by the case of Somalia in the 1990s. The failed state concept gained international prominence in the context of the War on Terror. Afghanistan’s harboring of Al Qaida was an indication of, as George Bush would assert in his National Security Strategy, a new reality in which weak states were a bigger threat to US security than strong, conquering states. With the rise not only of

136 See also William Easterly and Laura Freschi, ‘Top 5 reasons why ‘failed state’ is a failed concept,’ Aid Watch 13 January 2010.
international terrorism but also of transnational organized crime and irregular migration, the failed state, as a threat to the West, became ever more prominent.

Notions of ‘state failure’ or ‘state collapse’ seem to suggest a deterioration from past success. However, some quasi-states have never been effective states to begin with.\footnote{137} What a ‘successful state’, as opposed to a ‘failed state’, should look like is moreover far from undisputed. Such considerations are reflected in a change of discourse, favoring ‘state fragility’ over ‘state failure’. For example, the oft-cited Failed States Index, published by Foreign Policy and Fund for Peace since 2005, changed its name into the Fragile States Index in 2013. The CIA-funded State Failure Task Force disaggregated its object of inquiry, abandoning the use of the term ‘state failure’, and changing its name to ‘Political Instability Task Force’.\footnote{138} The World Bank’s Low Income Countries Under Stress (LICUS) office changed its name in 2005 to the Fragile States Unit, and then (merging with the Post-Conflict Unit) to Fragile and Conflict-Affected Countries Group.\footnote{139}

To think of weak states as a single group of states, that can even be ranked on a scale of ‘state fragility’, is problematic however, irrespective of the labels used. State fragility is typically defined very broadly. For example, the International Network on

\footnote{137} As Jennifer Milliken and Keith Krause observe: “One (somewhat ironic) way to think about the contemporary anguish over state collapse is to note that what has collapsed is more the vision (or dream) of the progressive, developmental state that sustained generations of academics, activists and policy-makers, than any real existing state.” Jennifer Millikan and Keith Krause, ‘State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies’, \textit{Development and Change} 33(5), 753-774, 2002, p. 762.


Conflict and Fragility, supported by the OECD, describes fragile states as having a “weak capacity to carry out basic functions of governing a population and its territory and being unable to develop mutually constructive and reinforcing relations with society.”\textsuperscript{140} In 2016, the OECD provided a new definition, stating: “Fragility is a combination of exposure to risk and insufficient coping capacity of the state, system, and/or communities to manage, absorb or mitigate those risks. Fragility can lead to negative outcomes, including violence, the breakdown of institutions, displacement, humanitarian crises, or other emergencies.”\textsuperscript{141}

Such excessively broad descriptions lead to grouping together a very wide range of indicators, from violence to social services provision, declining GDP, corruption, and inequality, under the umbrella concept of ‘state fragility’. Individually, most of these underlying concepts are clear enough in themselves. Levels of violence can be compared by the reasonably clear measure of number of violent deaths per 100,000 inhabitants per year. Inequality can be compared by the reasonably clear measure of the Gini coefficient. Likewise, child mortality, life expectancy, or enrolment in primary or secondary education are objective measures. Although carrying complications, measuring perceptions of corruption by Transparency International leads to a reasonably clear and comparable picture of corruption.\textsuperscript{142} Grouping a selection of these concepts together under the aggregate concept of ‘state fragility’ however tells us nothing new about state behavior, and obscures more than it reveals.

Indeed, by defining a fragile state broadly as a state that lacks the capacity to carry out basic functions, a very wide range of countries get the label applied to them. The top-10 of the Fund

\textsuperscript{140} OECD, Supporting Statebuilding in Situations of Conflict and Fragility, OECD Publishing 2011, p. 21.
for Peace and Foreign Policy Fragile States Index of 2017 for example includes states as diverse as newly independent South Sudan, war-torn Syria, invaded Afghanistan and Iraq, and the endemically weak Somalia, Central African Republic and Democratic Republic of the Congo. Nobody would argue that these are robust states, but grouping them together as ‘fragile states’ is of little added value.

By grouping together and ranking ‘fragile’ states, similarity is looked for where differences might be more substantial. Crucial underlying factors are obscured. Whether the regime in place lacks capacity, or rather lacks commitment and will, to deliver basic services, is ignored. Rather than attempt to explain state fragility, circular descriptions are relied on. Robert Rotberg for example, in his influential work on state failure, takes rising violence as an indicator of deteriorating state capacity to provide security. 143 That rising violence and deteriorating state capacity to provide security are intimately linked is beyond doubt; the two are virtually synonymous. Rotberg provides little clarity as to whether insufficient state capacity causes rising violence, or the other way around.

If grouping such a diverse range of states together is already problematic, subsequently ranking them is even more so. Of course there is wide agreement as to the extremes of state fragility. Somalia is the case in point for a maximum score on state failure. The country had no effective government for years and for a long time failed to issue passports that would be broadly recognized internationally. On the other side of the spectrum, it is reasonably clear that Canada and Switzerland are robust, successful states. But how to understand, and rank, the cases in between is far from clear-cut. Some countries score relatively high on social services provision, whereas others have relatively high scores on the absence of violence. Weighing such disparate characteristics of a country on a single scale is prone to arbitrariness. For example, in the 2017 Fragile States Index,

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143 Robert Rotberg, ‘Failed States, Collapsed States, Weak States: Causes and Indicators’, Wilson Center 2011, p. 22: “If [violence] rises precipitously because of skirmishes, hostilities, or outright civil war, the state can be considered crumbling.”
Russia (67) is ranked as more fragile than Ukraine (90); and China (85) is ranked as more fragile than El Salvador (92). A scale of state fragility on which the Chinese state is more fragile than the Salvadoran state is void of substance and meaning, and can hardly guide international policy making.

Leaving aside the excessive aggregation and arbitrary scaling of highly diverse countries, the failed or fragile state concept plays a crucial role in thinking about crime and war. In United Nations Secretary-General Boutros Ghali’s 1992 *Agenda for Peace*, the peacemaking, peacekeeping and peacebuilding discourse was based on ideas of parties to a conflict that had to be disarmed and reconciled. This vision of conflict came to be replaced, as far as the ‘new wars’ are concerned, by the framework of statebuilding. The state, from being one party to a conflict, evolved into the framework for the solution. If the problems of war and peace cannot be brought down clearly to contests between coherent warring parties – which can be solved by negotiation and conflict resolution – but are rather seen as the result of the absence or weakness of state institutions, then strengthening those institutions becomes the way to manage violence and social conflict. A positive effect of thinking about the state in those terms is that it forced humanitarian actors to question their practice of bypassing the state to provide aid directly to populations in need.

But thinking about a uniform group of ‘fragile states’ is potentially very harmful. At its most problematic, the ‘fragile state’ lens may tend to favor state strengthening with a focus on the capacity to deter and repress violent actors, turning a blind

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eye to democracy and equitable rule.\textsuperscript{147} In that regard, the ‘failed state’ menace in the War on Terror replaced Cold War considerations in strongman support from the West. Strongman support to contain the threat of international terrorism, transnational crime or migration, combined with treating a heterogeneous group of countries as a uniform group of ‘fragile states’, is prone to sweep under the rug considerations of state repression, corruption, and criminalization.

5 Conclusion

In many situations in the world today, the problem that is causing people to die of violence is not a monopolistic violent state that is too strong, but rather a state that is too weak. In a vicious cycle of violent crime, impunity, corruption and state failure, ultimately, the state retreats from the position of having the monopoly on the legitimate use of violence to a position of being one amongst many violent actors. However, perceiving of the state merely as a victim of outside illegitimate violence would be a mistake.

During the Cold War, civil wars were oftentimes proxy wars framed in political terms. After the end of the Cold War, superpower support for armed groups practically disappeared, which forced violent actors to fund their fighting through internal predation. Chaotic situations of violence in which pro-government, anti-government and purely economically motivated violent actors engage in shifting coalitions ensued, making the distinction between civil war or low intensity conflict on the one hand, and organized crime or high intensity crime on the other, increasingly meaningless.\textsuperscript{148}


\textsuperscript{148} See also Geneva Declaration, \textit{Global Burden of Armed Violence} 2011, p. 32: over the past decade, drug-related violence in Mexico has “acquired an increasingly organized and paramilitary character”
Many a statesman has been complicit in the process of the blurring of the analytically distinct concepts of organized crime and armed conflict. Richard Nixon referred to drug abuse as ‘public enemy number one’ in 1971 and declared the ‘War on Drugs’. Even earlier, in 1965, Lyndon Johnson had declared the ‘War on Crime’.149 Although in large measure destined for domestic electorates, the use of the term ‘war on crime’ can lead to confusion in policy. Crime is combatted by law-enforcement efforts, not by waging war. A full-blown victory against crime is not possible; there will always be a certain level of crime in any society, especially in a free one. George W. Bush brought confusion to new heights in the context of the ‘War on Terror’, when his administration invented the label of ‘unlawful combatants’, attempting to create a legal vacuum category outside of the scope of the Geneva Conventions, and the international laws of war generally, as well as outside of the scope of United States domestic criminal law. The first slogan of the Party in George Orwell’s Nineteen Eighty-Four reads: ‘War is Peace’.150 It is not without reason that the distinction between war and peace was the very first that was abolished in Orwell’s dystopian world of doublethink. President Rafael Correa of Ecuador said of organized crime: “It is a war, dear soldiers, that we are obliged to confront and win.”151

Historically, the distinction between war and crime has always been complicated. Indeed, war and crime are so intimately related that the process of state monopolization of violence has been referred to by Charles Tilly both as war, when

marking a “transition from the gangsterism of traditional narco hit men to paramilitary terrorism with guerilla tactics.”


150 George Orwell, Nineteen Eighty-Four, Secker&Warburg 1949.

151 See El Universo, ‘Rafael: FF.AA. deben salir a las calles a combatir delitos’, 26 April 2012. Spanish original: “Es una guerra, queridos soldados, que estamos obligados a enfrentar y ganar.”
he stated that “the state made war, and war made the state”;\textsuperscript{152} and as crime, when he wrote about “state-making as organized crime”.\textsuperscript{153}

Various attempts at reconciling theory with the current violent reality emerged, with scholars and practitioners proposing concepts including greed-driven civil wars, ‘new wars’, and the crime-terror continuum. States in the meantime have proven eager to promote a discourse that portrays them as victims of illegitimate violence beyond their control. The state fragility discourse focuses on state capacity, excessively aggregating a wide range of social, economic and institutional indicators. States like Mexico and Colombia speak of narco-terrorism or narco-insurgency.

The consequence of such discourse may be not only the delegitimizing of political violence, but also a call for strong state repression. However, state weakness is not the only problem. Many actors within the state have an interest in the existing situation of state weakness. States are not only suffering from weakness caused by bottom-up violent challenges to their legitimate authority, but are also in many cases criminalized from within. Although the problem of state weakness may seem to have an obvious solution – state strengthening – there are many dangers. Whereas some states may be fragile due to external factors, many fragile states are criminalized from within. Simply strengthening the state shall then be of little avail.

CHAPTER 3 ORGANIZED CRIME AND THE STATE

So-called fragile states are not merely besieged from the outside by illegitimate violent actors. The state may want to portray itself as the innocent bystander, overwhelmed by narco-terrorists. But such a dichotomous relation, between the benevolent state and malevolent outside criminals, would be an over-simplification of state-crime relations.

In this chapter, I shall analyze the relation between organized crime and the state. After an overview of the literature on organized crime, I propose two concepts: pariah rule of law undermining crime and elite rule of law undermining crime. The framework of pariah and elite rule of law undermining crime serves to see clearly the shortcomings of oft-employed anti-crime policies in Latin America: privatization, militarization, and mano dura.

1 The nature of organized crime

The way organized crime is organized has been evolving over the past decades. It is common to distinguish between four main models of organization in global organized crime: hierarchies, networks, markets, and clans. A hierarchy operates on the basis of rules from a central authority whereas a network operates on the basis of trust among independent entities. A market, in contrast, operates on the basis of competition, whereas a clan operates on the basis of ethnic and family loyalty and of ‘status contracts’ rather than bureaucratic ‘purposive contracts’.154

The archetypical hierarchy of a ‘mafia organization’, with a supreme boss, his ‘lieutenants’, and ‘foot-soldiers’ all integrated into one relatively stable structure is what for a long time has determined the most common associations with the concept of ‘organized crime group’. Popular culture and the entertainment industry contributed to the dominance of the idea of organized crime as the activities of The Godfather-like organizations. Pablo Escobar and his Medellín-cartel were also a clear example of this hierarchical organization model.

After the downfall of the Medellín cartel in Colombia the Cali cartel was able to continue the dominance of the hierarchical organization model for some time. But upon the dismantling of the Cali cartel, small cartels or cartelitos, numbering in the hundreds, took its place. The vertical, integrated organization that controlled the whole chain, from production through processing to trafficking, and that had money-laundering, bribery and killing ‘services’ in-house, was replaced by a network of smaller, often specialized organizations.

What can be discerned is that throughout the world organized crime groups mirror the trends of international business. Whereas the likes of Henry Ford had become successful through the creation of large, vertically organized structures, run along Weberian bureaucratic lines, international business in the age of post-Cold War globalization has increasingly come to rely on flatter forms of organization, in a more horizontal network-like mode of operation. Similarly, organized crime changed. It has become less centralized, more open to new-comers, and more diffuse. This created new challenges for law-enforcers. Whereas the fight against the Medellín cartel in Colombia centered around the fight against Pablo Escobar, and the Medellín cartel effectively disintegrated after the death of its leader, the new situation of hundreds of

cartelitos requires an approach beyond the targeting of individual leaders.

From the perspective of law-enforcement policy, an oft-cited distinction in how to address organized crime is that between seeing organized crime as a set of criminal actors, or as a set of illicit activities. The more traditional view is to approach organized crime as a set of criminal actors. Organized crime, in that view, is what full-time criminals engage in exclusively. As the United Nations Office on Drugs and Crime (UNODC) notes: “When organized crime first rose in prominence, law enforcement authorities may have focused on an opponent that organized similarly to themselves (...) that the enemy was a kind of anti-government or criminal corporation.” The ‘enemy’ however is not necessarily an anti-government criminal corporation. The ‘enemy’ is actually more likely to be a network of individuals and organizations that may very well be represented within the government.

Alternatively, one can approach organized crime as a set of illicit activities. What becomes visible then is that organized crime is not exclusively done by full-time criminals, but is actually an illicit activity that a wide range of actors engages in. Organized crime in this view is not a homogeneous actor, but rather a broad range of activities that may serve as a source of finance for both state and non-state groups. Organized crime

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159 As the International Peace Institute noted, transnational organized crime “is no longer just a matter for specialist criminal organizations: it is now an essential strategic activity for many armed groups around the world, and a source of funding for terrorists, corruption politicians,
may sustain armed conflict, and actors who start out as organized crime groups may even become militarized.

Indeed, perceiving of organized crime as a broad range of illicit activities performed by an equally broad range of loosely connected individuals and organizations requires a change of the perception of the problem from the side of law-enforcement. When trying to suppress the activities of a hierarchically organized opponent, it makes good sense to target individual leaders. However, when the activities that one wants to suppress stem not from hierarchical organizations but rather from a wide range of actors active in a network or a market, other strategies are warranted.

Some call for a reorientation of the fight against crime, from an exclusive focus on classic law-enforcement to also include a market-based approach. With regard to transactional crimes, this is a potentially valid concern. Transactional crimes are illicit deeds that fulfill a market demand, like narcotics production and trafficking, human smuggling, or illegal gambling. In particular in the case of narcotics, moving away from the exclusive law-enforcement lens and adopting complementary lenses, such as public health but also market dynamics, is essential, albeit not uncontroversial. A large proportion of global organized crime is indeed driven by market demands and market logic. Countermeasures, to be effective, must disrupt those markets, and not just the criminal groups that exploit them, for the latter are easily replaced.

The market-based approach however has much less to offer when it comes to so-called predatory crimes: illicit behavior that does not so much fulfill a demand, but rather preys upon warlords, and rogue governments.” International Peace Institute (IPI), ‘Transnational Organized Crime’, IPI Blue Papers No. 2, 2009, p. 4.

societies, like corruption, extortion, or sexual violence. Global organized crime has become less and less dependent on drugs. Although illicit drugs are still the largest single market for organized crime, the United Nations Office on Drugs and Crime estimated that only between one third and one fifth of the revenues of transnational organized crime groups around the globe come from drug sales.\textsuperscript{161} Factors that have contributed to the decreasing role of narcotics for worldwide organized crime include crackdowns on large drug trafficking organizations like the Medellín and Cali cartels, improved international cooperation, and new opportunities opening up as the Cold War had ended, globalization increased and new technologies were introduced. As a result, property crime, the smuggling of migrants, trafficking in human beings, fraud, and cybercrime increased. Also, one must not forget that tax evasion is by far the greatest criminal activity in terms of revenue, especially in the United States, where drugs revenues represent 0.7\% of GDP according to UNODC, and tax evasion 5.7\%.\textsuperscript{162} Although not as evident as the pariah crimes committed by drug traffickers and street gangs, tax evasion can have severely adverse effects on the functioning of society and of the rule of law. In most countries in the world, drug trafficking typically comes in as the second largest single source of illicit revenue, after tax fraud, or third, also after counterfeiting.

Instead of looking inward, at how organized crime is organized and whence it derives its profits, one can also look outward, at how organized crime relates to society and to the state. Does organized crime form part of society, or is it something external to it? The stereotype of the mafia in the United States heavily influenced the public perception of crime, in policy and academia as well as in popular culture. It led to the idea of organized crime as outside of legitimate society; or as an external, virus-like threat by ‘uncivil’ society. However, in reality rarely does organized crime operate as an external predator. More often, organized crime is an internal problem created by contradictions in so-called civil society.

\textsuperscript{161} See also UNODC, \textit{World Drug Report 2017}, Booklet 3.
\textsuperscript{162} See also UNODC, \textit{World Drug Report 2017}, Booklet 3, p.23.
In that sense it is also crucial to include corruption and so-called white-collar crime, or serious economic crime, in our perception of organized crime. Serious economic crimes are often excluded from organized crime statistics and perceptions. The result, according to Andre Standing, “is the popular belief that gangsters do organized crime and businessmen do white-collar crime – the two cannot be compared because one originates from the dangerous underworld and the other from respectable business.”

However, in the end, the two cooperate and reinforce one another.

Peter Lupsha distinguishes organized crime by its different ‘social strategies’: symbiotic, parasitic, and predatory. An example of symbiotic organized crime would be the mafia in Italy, which did not target existing authority so much for revenues but rather for protection. Parasitic organized crime does not seek to supplant or destroy existing authority, but does target it for revenues. Predatory organized crime “preys on the resources of states and other existing authority structures, engaging in a violent existential competition.”

Louise Shelley brings the number of crime-state-relation ideal-types down to two: traditional and new. ‘Traditional’ organized crime grows with the state, is parasitic on nation states, benefits from public contracts, and has long-term financial objectives for which it engages in money laundering in for example real estate. ‘New’ organized crime on the other hand thrives on the absence of effective governance, coincides with terrorists as far as weakening the state is concerned, and aims mainly if not exclusively at short-term survival. Shelley asserts

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that Italian and Japanese organized crime have profited from public contracts in the post-war reconstruction effort possibly as much as from their strictly illegal activities.167

Shelley’s ‘new’ organized crime and Lupsha’s ‘predatory’ organized crime fit in well with Collier’s greed-driven civil war or with the various analyses of ‘new wars’. However, the distinction between ‘traditional’ and ‘new’ organized crime in this sense is misleading. Indeed, many of the major contemporary phenomena of organized crime are what Shelley terms ‘traditional’ in the sense that they are embedded within the state and profit from siphoning of state resources more than anything else. A more useful distinction in my view is that between pariah crime on the one hand, and elite crime on the other.

2 Rule of law undermining crime

Organized crime as a concept is virtually impossible to conceive of in the absence of a state, for crime is commonly defined as a transgression of the law, and the law is commonly perceived as state-given. In the absence of a state, in popular speech the notion of organized crime even loses its appeal. The situation in Somalia, for example, in the absence of an effective state, is referred to more often in terms of terrorism, warlordism, piracy, and general lawlessness, than in terms of an organized crime problem.

By defining crime as a transgression of the law, the proper relationship between organized crime and the state should be one of law-enforcement, between law-breaker and law-giver. The most typical word to describe ‘improper’ relations between organized crime and the state is ‘corruption’. Corruption is a rather broad concept, applicable to both the public and the private sector. The United Nations Convention Against Corruption does not even provide a definition for the term,

167 Id.
limiting itself to defining public officials. In popular speech, corruption is typically associated with public officials putting their private interests above the public interest, or in any case with a conflict of interests in which an official or employee allows his or her private interest to prevail. Private benefit on the part of public officials or their associates, in for example the process of public contracting, is a familiar phenomenon all over the world. The word ‘corruption’ is also frequently applied to prosecutors or judges who allow criminals to get away with their acts unpunished. The term ‘corruption’ hence covers both praying for resources and ensuring non-interference with criminal acts.

Crime and corruption are universal phenomena that no single country in the world is immune to. It is illusory to end crime or to end corruption or impunity; a certain level of crime will always exist. In terms of lethal violence, Steven Pinker estimates that 1 violent death per 100,000 inhabitants per year is more or less the lowest a human society can strive for; he calls it “the blessed 1-per-100,000-per-year rate of modern Europe.” It will not get much lower than that. Likewise, a society absolutely free of corruption is impossible. It is hence not a matter of how to end crime and corruption, but rather how to bring crime and corruption to socially acceptable levels.

Every crime, by definition, is a transgression of the law. It may appear tautological to speak of ‘rule of law undermining crime’. However, the idea behind the concept ‘rule of law undermining crime’ is that certain levels and forms of crime, by eroding and defying the state monopoly on the legitimate use of violence, have particularly detrimental effects on the rule of law.

What characterizes rule of law undermining crime is either a structural willingness on the part of organized crime actors to engage in confrontation with the state, or a durable collusion between the state and organized crime. What a master criminal in a country like the Netherlands, or in any country with

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a reasonably functioning rule of law, typically does, is to try to conceal his (or her, of course) actions from the authorities. He will raise smoke curtains, try to hide his identity, use middlemen, and do anything to avoid getting caught. If he is caught, he will deny his alleged involvement in any criminal act as much as possible. A master criminal in a country like the Netherlands will consider bribing some officials in for example customs to get shipments of drugs through. But he will not normally consider bribing a prosecutor or a judge, let alone a legislator. If formal charges are pressed, he will hire a top-notch lawyer to construct an inventive defense. He might consider fleeing abroad to stay out of the hands of the authorities. But murdering or bribing a judge will not readily come to his mind, for it will be of no avail. His strategy will be to stay under the radar and avoid the authorities.

When criminals are structurally willing however to take on the authorities – when they bribe, intimidate or murder state officials rather than hide from them – is when crime becomes rule of law undermining. It is impossible to say that certain crimes *per se* are not mere transgressions of the law but rather rule of law undermining. The crime that undermines the rule of law in Latin America is fueled to a high degree by the proceeds from drug trafficking and human trafficking, as well as by administrative corruption. These offenses are committed across the globe, and need not always translate into the fundamental undermining of the rule of law. More than the type of offense, what is relevant is the effect on the state.

Two kinds of rule of law undermining crime can be distinguished: ‘pariah’ and ‘elite’. Pariah rule of law undermining crime is outsider crime, committed by criminals who are willing to confront the state. The effectiveness of the state’s monopoly on the use of force is directly challenged. Elite rule of law undermining crime on the other hand is insider crime, committed by criminals who work through or within the state. The legitimacy of the state is challenged.
2.1 Pariah crime

A typical example of pariah rule of law undermining crime is provided by the activities of street gangs, or maras. Mareros tend to be heavily tattooed young people from poor neighborhoods. They wreak havoc upon their communities, engaging in extortion and other violent crime. They can even evolve into proto-terrorist organizations, attacking the population with the aim of instilling fear.\textsuperscript{170} In the process they wreak havoc upon their own lives. The average life expectancy for a marero is low.\textsuperscript{171}

Fear for mareros is widespread, among bus drivers, shop owners and other victims of extortion; among the community in general; and also among law-enforcement. People who join maras tend to feel neglected by the state and have no interest, nor the required sophistication, to develop durable relations with state agents. The image of the fear-inciting young man with a heavily tattooed face, who together with his fellow mareros controls his neighborhood by force, is the perfect example of the pariah rule of law undermining criminal. When the control mareros exercise over a neighborhood reaches the level that the police dare not enter unless in large numbers and heavily armed, the undermining of the rule of law is complete.

The pariah rule of law undermining criminal activity par excellence is widespread extortion. In Guatemala, in gang-controlled urban areas – so-called zonas rojas or red zones – practically every single bus driver and shop owner is the victim of extortion. Since 2010, every year between 100 and 200 bus drivers were killed in Guatemala by extortionists,\textsuperscript{172} making

\textsuperscript{170} For example, in Guatemala mareros were allegedly behind the attack with a remotely detonated bomb on a bus in 2011, killing six. See BBC, ‘Bus bomb blamed on gang kills six in Guatemala City’, 4 January 2011.\textsuperscript{171} Gerardo Mendez, a priest in San Salvador, said, when asked about the life expectancy of gang members: “Forty... I’m being generous. Normally, these kids live to be 35.” See Jasmine Garsd, ‘How El Salvador Fell Into A Web Of Gang Violence’, National Public Radio 5 October 2015.\textsuperscript{172} See for example Saul Elbein, ‘The Most Dangerous Job in the World – How did 900 bus drivers end up dead in Guatemala City?’, New
driving a bus the deadliest profession of the country well ahead of being a fireman or police officer. Widespread extortion directly targets not only the state’s monopoly on the use of force, but also the state’s monopoly on taxation.\textsuperscript{173}

Pariah rule of law undermining crime also exists in the Netherlands,\textsuperscript{174} albeit by comparison to Latin America as if in an embryonic stage. Mayors of mid-size towns in the south of the Netherlands speak of ‘rule of law undermining crime’\textsuperscript{175} when it comes to the ostensible displays of power by criminals. What concerns those mayors most is not the fact as such that certain individuals make money by production of and trafficking in illicit substances. Illegal profit-making activity per se does not threaten civil peace or governance. What concerns them is the fact that these individuals distort the regular economy by investing their ill-gotten gains in legal businesses, and that they threaten public officials. Accounts of Dutch mayors living under police protection as a result of those threats are increasing.\textsuperscript{176} Actual violent attacks on Dutch mayors by powerful and wealthy criminals are very rare of course. But the idea behind the growing concern of Dutch mayors is clear enough. They see a competition between the state and criminal organizations, frequently related to outlawed motor gangs, over the control of public space. Mayors note with great concern that criminals no longer systematically hide from the authorities, but that they have come to openly challenge them. In a developed country like the Netherlands, the odds are of course hugely in favor of the state. But in some other countries this is much less so.


\textsuperscript{174} See for example Pieter Tops and Jan Tromp, \textit{De achterkant van Nederland – Hoe onder- en bovenwereld verstregend raken}, Balans 2017.

\textsuperscript{175} In Dutch: ‘rechtsstaat ondermijnende criminaliteit’.

\textsuperscript{176} See Pieter Tops and Jan Tromp, \textit{De achterkant van Nederland – Hoe onder- en bovenwereld verstregend raken}, Balans 2017.
The activities of drug trafficking organizations, or narcotics, also fall largely in the category of pariah rule of law undermining crime. In so far as they are pariah criminals, narcotics manage to be on most-wanted lists of multiple countries for prolonged periods of time, and they use extreme violence not only against their competitors but also against state officials and sometimes even against the population in general. Leading narcotics, whether in Mexico, Central America or Colombia, may control large areas, through which they move with ostensive display of power and wealth. Just like with maras, this kind of narco crime pits the state against criminals.

Prime among the expressions of pariah rule of law undermining crime in their explicitness are narco-mantas, banners left in public spaces by drug trafficking organizations with messages written on them directed at state officials, at the population or at competing groups. There can be rather mixed messages. For example, in 2006 in Acapulco, Mexico, next to seven dead bodies a note was left saying: “We don’t give a damn about the federal government and here’s the proof.” On the other hand, in 2011 Mexican drug cartel the Zetas left a narco-manta saying: “We are not terrorists nor guerillas. We are dedicated to our work and the last thing we want is to have trouble with the government, not with the Mexican government and even much less so with the American government.” Apparently being an ordinary criminal is sometimes better than being party to a civil war. The manta ended with the words “our respect to the Mexican government.”

Leaving aside apparent expressions of respect for the government, pariah criminals confront the state on two levels. Most common is to confront specific individual state officials, for example police officers perceived to favor a rival group, or a specific prosecutor or judge who is perceived to be a threat. This also occurs in the Netherlands on a minor scale, with specific

mayors who are perceived to be particularly tough on criminal practices being threatened. The next level is when pariah criminals confront the state more generally, leading for example to terrorist-like attacks on police stations. Pablo Escobar offered a reward for any police officer killed, allegedly leading to the murder of 600 police officers in Medellín in the early 1990s. In 2012, Colombian organized crime group the Urabeños similarly offered a reward for every police officer killed. In Michoacán, Mexico, in retaliation of the arrest of an important leader, organized crime group La Familia Michoacana ordered the execution of twelve federal police officers on 13 July 2009. In Guatemala, in March 2017, in reaction to a prison riot that had left two dead, mareros of the Barrio 18 gang launched a series of attacks on police stations and patrolling officers, killing three police officers.

Pariah rule of law undermining crime, then, is characterized by a bottom-up violent challenging of the state’s monopoly on the use of force. Pariah criminals do not hide from the state nor do they operate within it, but rather operate in direct violent confrontation with the state.

2.2 Elite crime

Whereas pariah rule of law undermining crime operates in confrontation to the state, elite rule of law undermining crime in contrast works within the state. A perfect example is the political project of Otto Pérez Molina and his Partido Patriota government in Guatemala. In an all-encompassing scheme, exposed by CICIG, the entire state was co-opted by criminal actors subordinate to the president, from the tax collection authority

182 See chapter 6.
and customs to the penitentiary. Another perfect example of elite rule of law undermining crime is the parapolítica scandal in Colombia, where Colombian politicians and paramilitaries supplemented by drug traffickers traded votes in elections for impunity and money. The elite rule of law undermining criminal activity par excellence then is influence trafficking: using one’s influence in for example judicial nomination procedures to one’s private benefit.

Pariah crime is bottom-up outsider crime, seeking impunity from without by bribing, intimidating or killing state officials. It thrives on the absence or weakness of the state. Elite crime on the other hand is top-down insider crime, seeking impunity from within by influencing appointments of state officials and legislation. It thrives on a permeable and stably corrupt state. In contrast to pariah criminals, elite criminals have a long-term interest in stability. They invest ill-gotten gains in land ownership and real estate development. The economic effects of this can very clearly be seen in Medellín, where, fueled by the inflow of narco-dollars, a real estate boom occurred. Elite rule of law undermining crime requires extensive contacts with the national and also the international financial system. Business-like criminal networks make widespread use of tax-havens for money laundering, through Panama and the British Virgin Islands, but also Switzerland and Luxembourg.

But crucially, elite rule of law undermining crime requires criminal control over the state. Such control can take various forms. The typical point of entry is the electoral process. Criminal actors can capture candidates running for public office, by financing political campaigns or by proposing their own candidates. Electoral competition can be ‘regulated’ by cleansing the ballots of candidates who are perceived to be most hostile to organized crime interests, through intimidation or murder. On

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183 See chapter 5.
the level of political candidates, organized crime can exercise an agenda setting influence, by inciting so much fear that candidates dare not even speak of certain ‘sensitive’ organized crime related matters. Finally, voter intimidation can serve to assure the desired electoral result.¹⁸⁶

Criminal capture of the electoral process is facilitated by various factors. Virtually unlimited campaign spending increases the risk of criminal influence on the electoral process. A weak regulatory framework for campaign financing, coupled with a weak enforcement of the regulations that do exist, also increase vulnerability. Decentralization further heightens the risks, as by decentralizing government functions, lower levels of government with a lower resilience to criminal capture offer higher gains in case of their capture.¹⁸⁷ A weak party system also aggravates the situation, as by lack of fee-paying mass party memberships, and of coherent program-driven political parties, single-person platforms with criminal funding have higher chances of success in the electoral competition.

Campaign financing and attempting to exercise control over the electoral process serve two sorts of purposes. First, there are purely criminal purposes, like getting protection for illegal activities and illegally acquired wealth, and facilitating illegal shipments. Financing and proposing politicians, and thus gaining control over the political process, may prove more efficient for criminal business than influencing individual political actors through bribing, blackmailing or intimidating them. Second, it serves social purposes: gaining social respectability for criminal actors.

Corruption, and illegal or controversial campaign financing, are of course familiar across the world. Accepting payments from powerful companies, in return for government contracts, occurs in many countries, as does the diverting of public funds officially destined for other purposes towards the

costs of political campaigns. However, even more worrisome than accepting payments of otherwise legitimate corporations or misusing public funds, is the accepting of payments from criminal organizations.

A crucial difference between pariah and elite criminals can be discerned in the use of violence. Take for instance how pariahs and elites go about paralyzing the freedom of the press and ensuring that certain things go unpublished about. Mexico is one of the most dangerous places for journalists to work in. Since 2000, more than a hundred media workers were murdered in Mexico, and in 2016, according to Reporters Without Borders, Mexico was the third deadliest country for journalists in the world, only behind Syria and Afghanistan.\(^{188}\) Several newspapers have decided to close down, and it is evident that journalists out of self-protection simply do not address certain topics. Pariah criminals murder journalists. When elite criminals censor the media, they do so typically much less violently. The principal way elites censor the media is by owning them. The family of former president Santos owns or used to own important media outlets in Colombia for example.\(^{189}\) In Guatemala, a large portion of the mass media is owned by Mexican-born entrepreneur Remigio Ángel González, who is under investigation by CICIG for his role in the Partido Patriota’s scheme of criminalizing the Guatemalan state.\(^{190}\) If elites do not own the media already they may buy them. They are selective in spending on advertisements, and when they are in power they may prohibit or sanction media for alleged unlawful behavior. But they do not typically assassinate journalists.

Elite criminals also rarely join forces with terrorist organizations, although in the context of the armed conflict in Colombia the coalition between state elites and paramilitaries provides an exception. Large established criminal organizations


\(^{189}\) See for example John Paul Rathbone, ‘The history and politics of Colombian media’, \textit{Financial Times} 3 June 2013.

\(^{190}\) See for example \textit{Proceso}, ‘Magnate mexicano de medios es vinculado con red de corrupción en Guatemala’, 6 June 2016.
rely on the preservation of state structures for their long-term financial interests. Pariah criminals have no need for statebuilding, nor for supporting the existing financial system, for they do not rely on land ownership or real-estate or sophisticated money-laundering. Large, old established groups may have interests for example in stocks, or in tourist resorts, and thus do not want terrorist attacks or other, violent destabilization.

In countries like Colombia and Guatemala, traditional political elites reject newcomers who owe their newly made fortunes to drug trafficking. In Colombia, rejection of the new elites by the traditional elites was somewhat softened by the fact that they had a common enemy in the guerrilla. In Guatemala, the families who traditionally form the elite of the country see with anxiety the rising influence of new-coming narco-elites. The accession of *narcos* into the top echelons of society is epitomized by the term ‘narco-bourgeoisie’: pariahs evolving into elites.

Elite rule of law undermining crime is more often than not a remarkably national endeavor, contrary to popular perception. Many commentators stress that organized crime works internationally, disregarding borders, whereas law enforcement agencies have to respect the borders of their jurisdiction. Moises Naím for example says that law enforcement agencies are “hamstrung by the fact that they are inherently national, whereas the largest and most dangerous criminal organizations, along with the agents of mafia states, operate in multiple jurisdictions.” Of course drug trafficking organizations or human smuggling networks by their nature operate in multiple jurisdictions. But with regard to elite rule of law undermining crime, the idea that internationally operating criminals outsmart national law enforcement agencies is largely a misconception. Some of the most expansive, and indeed most dangerous and harmful, projects of state criminalization, like Pérez Molina’s


cooptación del estado or Uribe’s parapolítica, are principally national projects. Of course these projects have international dimensions, for money laundering purposes for example, but the essence of these projects is national. It is exactly the control an elite criminal project exercises over a national state that allows its profitability, continuity and impunity.

2.3 State criminalization

The ultimate result of the vicious cycle of violent crime, corruption and impunity can be a total fusion of criminal and government actors. Examples of this include the parapolíticos of Colombia, a contraction of ‘paramilitaries’ and ‘politicians’; or the clandestine parallel security structures of Guatemala known as CIACS. For situations where the state leadership and the leaders of organized crime are the same people, Moisés Naím proposes the term ‘Mafia states’.193 The word ‘mafia’ however is reminiscent of a type of hierarchical organized crime organization that has lost its prevalence over the past decades.194 A more apt term would be ‘criminalized state’. Traditional scholarship applied the concept of the ‘criminalized state’ to Nazi Germany,195 but the term can also be used to describe a state that furthers the goals of organized crime groups, which is the sense in which I use the term.

When high-level corruption does not quite cover the extent of the collusion, state criminalization sets in. This means not merely that state officials are pillaging the state coffers whilst

193 Id.
194 See also the critique to Moisés Naím by Peter Andreas in Foreign Affairs: “the word ‘mafia’, with origins in nineteenth-century Italy, has now been so used and abused in popularized descriptions of organized criminal activity that it has lost much of its analytic value.” Peter Andreas, ‘Measuring the Mafia-State Menace: Are Government-Backed Gangs a Grave New Threat’, Foreign Affairs 91, 2012, 167-171.
turning a blind eye to various organized crime activities, but rather that the state apparatus is actively put to the service of organized crime interests. Criminalized states in the sense of organized crime capture can be perceived as an additional subcategory to ‘failed states’, in the sense that becoming criminalized defeats the societal purpose of the state. However, in the case of criminalized states it is not primarily about absence of state institutions but rather about the process of their capture and criminalization. Moreover, although criminalized states fail their societal function, they can be rather effective at fulfilling private enrichment purposes of those in power.

Mexico is a further good example of a state that has undergone, and is undergoing, a process of partial criminalization rather than a process of failure in the sense of Somalia or Haiti, or a process of ‘kleptocratization’ in the sense of Mubarak’s Egypt or Suharto’s Indonesia. Under the PRI, Mexico’s ruling party from 1929 to 2000, the state and organized crime operated in a mode of more or less peaceful co-existence. Law-enforcement action on drug traffickers was relatively low, as was violence committed by drug-traffickers against the state. This turned for the worse since then-president Calderon declared war on the cartels in 2006. Hundreds of Mexican state officials have been murdered over the past decade, and many more have been accused of being on the payroll of the cartels. The United Nations High Commissioner for Human Rights estimated that over 150,000 people were killed in Mexico’s drugs war between 2006 and 2015. The Mexican

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199 See Statement of the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, on his visit to Mexico, 7 October 2015.
state as a whole is not failed: education and health care services are being provided in large parts of the territory, and Mexico is a G20 and OECD member state that maintains over eighty embassies around the world and formed part of the United Nations Security Council most recently in 2009-2010. On the 2017 Fragile States Index, Mexico ranks 88th, considered less fragile than states like China, Russia, Israel, or India. But the substantial control of organized crime over the state at various levels is evident. Take for example the sequence of events surrounding the disappearance of 43 students in Iguala in 2014, probably the most emblematic instance of recent mass violence in Mexico. The students have not been found at the time of writing. The mayor of Iguala and various local police officers were arrested for their involvement in the disappearance. However, the official investigation by Mexican authorities failed to clarify the exact course of events. A subsequent international investigative commission was obstructed and hence did not succeed at uncovering the exact course of events either. What the international investigators did uncover was that the Mexican Attorney General’s Office, the army, the federal police, state police, and local police were all complicit in covering the truth.

Transnational organized crime groups may use the pretext of armed conflict, or that of being a political group, for their organized crime activities, like both paramilitaries and guerrillas in Colombia have done. Then, as we saw in the previous chapter, the distinction between organized crime and armed conflict may become blurred. But in the case of state criminalization, ultimately elements of the state may become not merely incidentally infiltrated by but rather virtually identical to organized crime. These groups then take the state itself as cover

for their criminal activities; the distinction between organized crime and the state becomes blurred. If this is not addressed, crime-fighting and law-enforcement become a chase for one’s own tail.

3 Counterproductive crime-fighting

A fragile state, confronted with an escalation of criminal violence, may deploy various strategies to counter crime. Some state policies that purport to react to pariah crime leave elite crime unaddressed. Particularly counterproductive in many countries in Latin America in this regard are militarization of policing, privatization of security, and mano dura.

3.1 Militarization of policing

There was a time when the distinction between police and military was not so clear-cut as it supposedly is today. As Charles Tilly notes, “only during the nineteenth century did European states establish uniformed, salaried, bureaucratic police forces specialized in control of the civilian population. They thus freed their armies to concentrate on external conquest and international war.”

Similarly, in Latin America, in earlier times armies and police forces showed remarkable overlap. In some countries, armies even served as correctional facilities. However, as the division of functions and the state monopolization of the legitimate use of violence advanced, the use of force was increasingly separated between its internal and

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external component. The external dimension sees to the absence of the use of force on a state’s territory by a third state. That dimension is most evidently violated in the case of a foreign invasion, against which the army is supposed to protect the state and the population. The internal dimension sees to the absence of the use of force on a state’s territory by other – endogenous – groups, such as street gangs, drug trafficking organizations, or organized crime groups, against which the police is supposed to protect the state and the population.

Militaries are, at least in their ideal typification, meant to defend the sovereignty of a state, and to exercise maximum deadly force against enemies. But they have come to be used for a variety of other activities, from disaster relief and development work to fighting drugs criminals. This trend is by no means limited to Latin America, but can for example also be seen in the Dutch navy. Once a military force that fought the navies of England, Spain and other countries, it has acquired more and more law-enforcement roles. Some of the major operations for the Dutch navy today include anti-drugs operations in the Caribbean, anti-piracy operations for the coasts of East-Africa, and anti-human smuggling operations in the Mediterranean. In 2014 the Dutch navy contributed to the humanitarian mission in reaction to the Ebola outbreak in West Africa. With partial exceptions, such operations are in principle civilian in character, not military.

The United States military is similarly taking on an ever-widening range of traditionally civilian tasks all over the world. Whereas many civilian government agencies are facing budget cuts, the US military budget keeps growing year after year. Naturally, the Department of Defense ends up with more capacity than its civilian counterparts, and hence the military is called in to perform tasks traditionally associated more with civilians. For example, Department of Defense personnel outnumber State Department personnel by a ratio of 100 to 1,\(^\text{205}\) leading to many tasks previously carried out by civilian diplomats and


\(^{205}\) Id., p. 91.
development workers being carried out by the Pentagon. As a result, in Latin America the US Southern Command is engaged in a range of engineering and humanitarian projects. This sends a powerful, worrying message, “that building schools, paving roads and pulling teeth are appropriate military roles, even though they are not so in the United States.”

In the former Yugoslavia, military forces from NATO were pushed into the law-enforcement realm, because of the weakness of domestic and international police and criminal justice institutions. This creates tremendous inherent complications, since police forces and military forces are trained for different tasks. The adverse implications include the classification of useful evidence as military intelligence, and the inadequate treatment of crime scenes from the viewpoint of evidence gathering. United Nations peacekeeping missions have similarly adopted policing roles, with multi-dimensional missions comprising both the military task of peacekeeping and the civilian task of law-enforcement.

Whereas western militaries are becoming increasingly active in a law-enforcement capacity outside of their own territories, in Latin America militaries are increasingly being deployed in a domestic law-enforcement role. As organized crime groups became stronger and better armed, their threat became perceived as beyond the capacity of the police. One of the clearest examples of this dynamic can be seen in Mexico under president Calderón (2006-2012). Arguing that Mexican drug cartels were too powerful to handle by the police force – plagued


by corruption as it was – Calderón deployed tens of thousands of military personnel on Mexican territory to fight domestic drug criminals.\textsuperscript{209} In a similar vein, president of Ecuador Rafael Correa said in 2012: “A poor country cannot afford to have its armed forces only for conventional warfare.”\textsuperscript{210}

The result of deploying the military to suppress domestic criminal threats was rather predictable: it led to an escalation of violence. Deploying the military against a domestic crime threat has a certain sense of self-fulfilling prophecy: the more you treat a problem as a military one, the more it becomes one. Faced with better-armed state forces, the drug cartels responded in kind and resorted to ever-heavier weaponry. Whereas prevention, intelligence and evidence gathering are cornerstones of police work, the military relies more on the use of deadly force. Violent confrontations between the military and the private armies of drug cartels became a frequent phenomenon. Drug trafficking organizations recruited former Mexican and Guatemalan army special forces to increase their capacity for violence. With violence on the rise, the comparative advantage of those specialized in violence rather than in other aspects of the narcotics business grew. The former special forces members recruited by the cartels cut their ties to their cartel bosses and started their own organization: the Zetas. The Zetas brought the counter-insurgency terror tactics some of them had learned during the Guatemalan civil war onto the ‘battleground’ of the War on Drugs, and committed some of the most infamous crimes of recent Latin American history, such as the San Fernando, Mexico, massacre killing 193 people; the killing of 27 farmers in the Los Cocos farm in Guatemala; and the Monterrey casino attack killing 52 people, all in 2011.

Unfortunately, the trend of militarizing domestic security receives considerable support from international donors,

\textsuperscript{210} See \textit{El Universo}, ‘Rafael: FF.AA. deben salir a las calles a combater delitos’, 26 April 2012. Spanish original: “Un país pobre no puede darse el lujo de tener unas Fuerzas Armadas solo para el caso de una guerra convencional.”
particularly the United States. As the World Bank noted in its 2011 World Development Report, “[i]t is much harder for countries to get international assistance to support development of their police forces and judiciaries than their militaries.”

When militaries and police forces have overlapping roles, they come to compete. In the context of War on Drugs aid to Bolivia, for instance, “police and military officers ... competed for U.S. drug-control funds, prestige, and decision-making power.”

That the US military shall not act in a law-enforcement role on US territory is engrained in US military culture, and enshrined in the 1878 Posse Comitatus Act. In the 1980s, US Congress discussed a broader military role in counter-drug policy. Secretary of Defense at the time Frank Carlucci opposed such a role, stating: “I remain absolutely opposed to the assignment of a law-enforcement mission to the Department of Defense. I am even more firmly opposed to any relaxation of the Posse Comitatus restrictions on the use of the military to search, seize and arrest.”

While the Department of Defense was fairly comfortable with a role in detection and monitoring of air and sea traffic, which were seen as familiar military activities, it was very wary of becoming involved in such civilian tasks as arrest and seizure.

In Latin America on the other hand, militaries have always been inward-looking. Indeed, as discussed in chapter 2, militaries were the first autonomous institutions to emerge in the newborn states of Latin America. Accordingly, militaries were quick in assuming domestic roles. After a long period of military rule in many countries on the continent, most countries today are ruled by democratically elected civilians. However,

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civilian police forces are underfunded, corrupt, and overwhelmed by the violence in their countries. Many countries, from Mexico and Guatemala to Colombia, Peru and Brazil, have hence turned again to the military for relief. This militarization of policing is problematic in various respects.

First of all, there is an increased risk of human rights abuses. Especially in Latin America, with its recent history of civil war and military repression, deploying the military for civil security tasks has led to increases in reported human rights abuses. In Mexico, for example, accounts of the military torturing detainees have risen sharply. In 2014, the Mexican military killed 22 people in the village of Tlatlaya. Whilst the military claimed that the victims died in an armed confrontation with the army, forensic analysis showed that many of them were executed. Militaries are not trained to arrest suspects, nor are they trained to de-escalate civil protests. When in 2012 indigenous K’iche protestors in Guatemala gathered to protest rising electricity prices, changes to the education system and the lack of constitutional recognition for indigenous ancestral authorities, they were met by the Guatemalan army. Seven unarmed protestors died in the confrontation. Such violations moreover oftentimes go unpunished, as the civilian justice system, which is overwhelmed and ineffective to begin with, has limited jurisdiction over the military.

Second, a role for the military in civilian tasks poses severe risks to constitutional governance. Indeed, one of the core elements of recent democratization efforts in Latin America consisted precisely of pushing back the military from civilian and

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215 See for example FIDH, ‘México: Informe sobre presunta comisión de crímenes de lesa humanidad en Baja California entre 2006 y 2012’, October 2014
political life. Bringing the military out of the barracks and onto the streets brings the military back into peacetime democratic governance. What this can lead to is clearly seen in Guatemala, Honduras and El Salvador, where former or active-duty military men were appointed to lead various key ministries, ranging from the Ministry of Defense and the police force to social security institutes.\textsuperscript{218} The military risks becoming re-politicized, and playing a central role in the political life of democratic nations.

Third, deploying the military for law-enforcement tasks oftentimes leads to ineffective policing and crime fighting. If the criminal threat consists of, for example, a small private army guarding a narcotics site, it may make sense to request the army to assist the police in the use of force. But from that point on, the military is ill equipped to fight crime. For example, tracing and disrupting financial flows is key to dismantling criminal networks. The military lacks the capacity to do that. Securing a crime scene and gathering evidence similarly is a task for which the military is ill equipped. The Mexican army is more interested in killing drug kingpins in armed confrontations and in seizing drugs than in mapping and dismantling criminal networks. As an anonymous U.S. official is quoted as saying: “No one seemed to be in a position to question the wisdom of smashing up places, learning nothing, carrying off drugs, and calling it a blow against organized crime.”\textsuperscript{219} In urban settings, the military’s assistance may be of value to ensure the safety of police entering the most violent, gang-controlled neighborhoods. But pacifying such neighborhoods requires the building of community trust. Community policing\textsuperscript{220} is not what militaries are trained to do.

Militarization of policing may drive up the costs of business for transactional crimes such as drug trafficking and human smuggling, but it does very little in terms of dismantling criminal networks, or in terms of countering other crime, such as community violence, or government corruption and money laundering.

Finally, and crucially, calling in the military brings tremendous institutional opportunity costs. Although calling in the military at first sight may appear as a very tempting policy option when faced with a criminal problem the police are not effectively dealing with, in the long term this only aggravates the problem of police capacity and trust. Every dollar spent on military deployment on the streets cannot be invested in the police force. If every time a problem seems too big to handle for the police the military is called in, police capacity will never increase. If the problem appears so big that it is militarized, suspects may get executed rather than investigated and prosecuted. The justice system, which is ineffective to begin with, may in turn find very little public and political support for addressing human rights abuses committed by what large parts of the population perceive to be tough crime-fighters. The justice system, from prevention, investigation and prosecution to rehabilitation, receives competition from an alternative system: that of military repression. The repressive capacity of the military gets invested in, whilst the police, but also the public prosecutor’s office, the courts, the penitentiary and the rehabilitation agencies, are starved from resources.

The Inter-American Court of Human Rights has expressed its concern over the increasing role of the military in essentially law-enforcement tasks, holding in a 2006 judgment involving Venezuela that “(...) the States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces.”221 The Inter-American Commission on Human Rights similarly

221 Inter-American Court of Human Rights, *Montero Araguren et al. (Detention Center of Catia) v Venezuela*, Judgment of 5 July 2006, Series C No. 150, §78.
expressed its concern over the increasing role of the military in addressing domestic criminal threats in its 2009 report on citizen security and human rights, stating that “practice teaches us that it is advisable to avoid the intervention of the armed forces in matters of internal security since it carries a risk of human rights violations.”\textsuperscript{222} Even then Secretary of Defense of the United States Leon Panetta urged Latin American countries to use the police and not the military for law-enforcement tasks.\textsuperscript{223}

Of course the threat posed by transnational drug trafficking organizations, street gangs, and other organized crime actors is at a scale that blurs the distinction between organized crime and civil war. But as the Washington Office on Latin America remarked, “[b]ecause they are a gray area, it does not follow that they should be assumed by armed forces trained to defeat an enemy with maximum force.”\textsuperscript{224} Moreover, if one of the problems is police and judicial corruption, the most appropriate line of action is to strengthen state capacity to counter corruption. Militarization of the response to the criminal threat may counter certain forms of pariah crime, but it cannot form a response to elite crime.

3.2 Privatization of public security

As organized crime starts to resemble civil war, and as the distinction between police and military roles is undergoing a process of blurring, so too is the distinction between public and


\textsuperscript{223} See \textit{Reuters}, ‘Panetta urges Latin America not to use military as police’, 8 October 2012.

private roles blurring. Or, put differently: we see an increasing privatization of hitherto publicly provided security.

Private military entrepreneurs, or mercenaries, are of course an age-old phenomenon. As Charles Tilly notes, “[f]or several centuries, European states found the system of hire-purchase through returns from taxation a convenient way to build armed force.” Since Napoleon, warfare has relied less on the private influx of force and has assumed a more public character. In recent times however, private military companies are enjoying a revival.

At the military extreme of the spectrum of private security providers, we see companies that can provide combat-ready personnel to be deployed overseas. Particularly notorious in that regard were the activities of companies like Blackwater in Iraq. A more positive example is the intervention by Executive Outcomes (EO) in Sierra Leone. EO, a South Africa based private military company, was hired by the elected government of Sierra Leone to restore order and intervened with 200 armed personnel in 1995. The EO intervention in Sierra Leone was fairly effective, displacing a rebel group and restoring the democratically elected and internationally recognized government to power. Kofi Annan, haunted by the experience of Rwanda in 1994 and apparently looking rather favorably upon the EO experience in Sierra Leone, famously said that when “we had need of skilled soldiers to separate fighters from refugees in the Rwandan refugee camps in Goma, I even considered the possibility of engaging a private firm. But the world may not be ready to privatize peace.” Even though the world may not be

ready to privatize peace, we do see increasing involvement of private companies in armed conflicts around the globe, with both highly capable states like the United States, and states on the brink of failure like Sierra Leone, contracting private providers for security and military services.

Similar to military roles, also police roles are undergoing a renewed process of privatization around the world. Martin van Creveld notes with concern the trend of governments hiring private companies for tasks as central to sovereignty as running prisons. “It is as if policy makers in many places are determined to bring the “police century” (1830-1945) to an end. Against the background of evidence that public faith in the police is declining, the task of fighting criminals may revert back to the ‘thiefcatchers’ in whose hands, in most countries, it had been until the time of the French Revolution and beyond.”

Today, private security guards vastly outnumber public police forces personnel in many countries, including the United States and the United Kingdom. Back in 1994 there were already three times more private security agents than public police officers in the United States.

In the global North, private security began its contemporary rebirth in the 1960s. The increase in the numbers of private police seen since that time reflects a remarkable change in their status. As David Bayley notes: “Through World War II, private security was looked on as a somewhat unsavory occupation. It had the image of ill-trained bands of thugs hired by private businesses to break strikes, suppress labor, and spy on one another.” In the global North, this image has apparently improved, and private security companies are hired by

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232 Id., p. 587.
governments to perform such state-sanctioned tasks as the security controls at airports. In the global South however, the private security market is much less effectively regulated.

The civilian or ‘police’ side of the spectrum of private security provision offers an enormously wide range of providers, ranging from neighborhood watches to shopping mall guards. In Latin America, civilian private security companies are a booming business, employing an estimated 4 million people across the continent, and accounting for a 30 billion USD annual turnover.\(^{233}\) The process of privatization of security occurs both top-down and bottom-up. As far as top-down privatization is concerned, we see private security companies in the form of large corporations, sometimes even publicly traded. These companies have large corporations and even governments as their clients, and they may even run prisons.\(^ {234}\) In a simultaneously occurring bottom-up process, we see neighborhood watches, vigilantism, or even gang activity, appearing as alternative security providers. In the countryside as well as in marginalized urban areas, citizens increasingly take security and justice into their own hands, ultimately leading to a rise in lynchings of suspected criminals.

The public monopoly on the use of violence, formally in the hands of the state, gets increasingly shared with private actors. Growing privatization is a reaction to ineffective state action. For example, moves to privatize prisons as undertaken in Peru, Argentina and Chile are reactions to the appalling track record of state management of the prison system. In Buenos Aires, Argentina, the provincial legislature passed a law allowing only private security to guard bars and nightclubs, according to


many because of the high levels of corruption accompanying police duty to such businesses.235

The ultimate manifestation of the privatization and commodification of security is the rise of ‘mass private property’, spaces which are privately owned but to which the public has right of access and use, like shopping malls and residential communities. As David Bayley put it: “The world is no longer divided simply between privately owned space used by its owners and the numerous public streets used by the public. By blurring the distinction between the public and the private, mass private property attenuates and marginalizes government’s responsibility for security.”236

Mass private property is a rising phenomenon in Latin America, and in many respects a natural reaction of wealthy people to the rise of violent crime. A striking example of mass private property is ‘Ciudad Cayalá’ in Guatemala, a privately owned mini-city comprising homes, shops, restaurants and parks and a church. Projected to eventually cover an area of over 300 hectares, Ciudad Cayalá is the perfect gated community. Public police are nowhere to be seen. Instead, private guards on Segways patrol the streets. Everything reeking of poverty, overt violence or disorderly conduct is discreetly kept outside. Public transportation barely connects to Ciudad Cayalá – visitors come by car, for the domestic employees and shop personnel a shuttle service connects a nearby bus-station to one of the entrances. Guatemalan public police need to ask permission to enter the streets of this mini-city, which although at first sight appearing to consist of public streets remains private property nonetheless.237

The privatization of public security carries risks similar to those of the militarization of policing. First, the risk of human

rights abuse grows. Private security guards are often minimally trained, and private security companies have a poor track record of screening personnel and of keeping track of their firearms. Reports of abuse by private security personnel are frequent. Incidents of vigilantism escalating into serious human rights violations are similarly on the rise, and as long as the victims are social pariahs the state does little to counter vigilantism. Second, the massive use of private security companies represents tremendous institutional opportunity costs. All the funds that private individuals and companies spend on the services of private security companies cannot be invested in the police. Efforts at regulation of private security companies by fragile states are mostly futile. The reason private security companies prosper in Latin America in the first place is state weakness. It should be no surprise that the state is incapable of enforcing its regulatory framework upon the booming private security business.

### 3.3 Penal populism / mano dura

The rule of law serves to protect people from tyranny as well as anarchy, but at the same time the rule of law finds itself under pressure from both. Top-down attacks on the rule of law are exemplified by coups d’état and authoritarianism. When bottom-up violent crime undermines the rule of law, and when at the same time the elites are not committed to the rule of law, a fundamental menace to the rule of law appears in the form of penal populism. This is particularly apparent in many Latin American countries, where penal populism is known as mano dura.

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Penal populism is of course not unique to Latin America. Especially since Lyndon Johnson declared the War on Crime in 1966, politicians running for office in the United States do so on tough on crime campaigns across the country. Some of the most egregious results of penal populism in the United States include three-strikes-you’re-out policies and the inflated penalties on the possession of crack cocaine. 240 One of the results is that the United States is the country with the largest proportion of its population incarcerated in the history of the world excluding slavery. 241 The United States is a strong state and can sustain such undesirable effects and maintain order this way, albeit at very severe detriment to millions of human lives.

Penal populism however also got exported to weaker and criminalized states. In the slipstream of the export of neoliberalism from the United States to Latin America, epitomized by Milton Friedman and the Chicago Boys, came the export of the penal state, epitomized by Rudy Giuliani and the New York Boys. 242 Structural adjustment programming in Latin America had severe economic effects, particularly leading to large numbers of economically marginalized persons in urban areas. In these urban areas, with little public service provision, crime and insecurity rose. Politicians cannot promise government-sponsored large-scale job creation as long as they adhere to neoliberal policies. So instead, in reply to social protests and social demands for increased security, they promised mano dura.

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Mano dura (literally: tough hand) stands for zero tolerance tough-on-crime-policies, employed notably in for example El Salvador, Guatemala, Puerto Rico and Colombia. The mano dura way of combating delinquency focuses on repressive action against the highly visible street gang violence, leaving prevention of gang membership and rehabilitation of convicts on a second plan. In many countries these policies have led to massive incarceration of actual and alleged gang members. Gang membership as such is often penalized. Suspicion of gang membership is easily aroused – having tattoos or making a certain hand sign can be sufficient ground for arrest.243 Prison systems become determined by gang life and serve to reinforce gang identification and recruitment more than anything else. Prisoners live in abhorrent circumstances and the unnatural death of inmates is a frequent phenomenon – some of the worst incidents up to date including the 2012 Honduras prison blaze that killed over 350 inmates, the 2016 prison riot in Mexico that left 52 dead, or the 2017 prison riot in Brazil that left 56 dead.244

Under mano dura, incarceration rates sky-rocket,245 with overpopulated prisons as a result. Given the abysmal state of the prison systems in many Latin American countries, one would want to lock up as few people as possible. Yet, under mano dura the notoriously weak, underfunded, overpopulated and dangerous prisons have only come to accommodate more and


more inmates. As the judicial system is also notoriously weak, a great portion of inmates, in many countries even a majority, is not even convicted, but remains in pre-trial detention for prolonged periods of time.\textsuperscript{246} Mass arrests of alleged gang members serve to show to the public that something is being done to counter insecurity, but a long-term vision or even the capacity to process the arrests is lacking. In El Salvador, of a total of 19,000 arrests carried out under \textit{Plan Mano Dura}, only 5\% even led to the formal opening of a criminal case, the rest being set free for lack of evidence.\textsuperscript{247}

That \textit{mano dura} entails near-authoritarian powers for the government is accepted by electorates desperate of escalating insecurity, especially if they live in countries without a history of meaningful democratic participation. In discussing the future of policing and crime-control policies, David Bayley argued that “[d]emocratic societies may fear crime, but they fear authoritarianism more.”\textsuperscript{248} That may be true for established democratic societies such as the United States and the United Kingdom. But in crime-infested countries like Guatemala, El Salvador, or Brazil, people tend to fear crime much more than they fear authoritarianism – and semi-authoritarian projects win at the polls, to the detriment of the rule of law. Indeed, we see that especially in ‘post-conflict’ situations or in other situations of ethnic, religious, political or nationalist tensions, elections can have a potentially escalating effect on violence. This effect has been well theorized and investigated, for example by Michael Mann with regard to ethnic violence,\textsuperscript{249} or by Jack Snyder with

\textsuperscript{247} Jeannette Aguilar Villamariona, 'Los efectos contraproducentes de los Planes Mano Dura', \textit{Quórum: Revista de pensamiento iberoamericano} 16, 2006, 81-94, p. 82.
regard to nationalist violence. In contexts of criminal violence, the relation between democratic processes and the extent of violence is much less investigated. But as the recent experience with *mano dura* in Latin America seems to suggest, democracy does not inherently make crime-infested places less violent. Under *mano dura*, whilst citizens suspected of criminal behavior fall below many of the protective safeguards of the law, the state, often through executive order or decreeing a state of emergency, grants itself the power to act above the law. When suspected criminals die at the hands of state officials, the latter are typically not held accountable.

The *mano dura* fight against pariah criminals can lead to the most egregious acts of violence committed by state actors. In Guatemala, in a toxic mix of tough-on-crime *machismo* and escalating violence, a parallel structure formed within the Interior Ministry with the goal of cleansing the country of undesired elements. The most publicized incident this parallel structure was responsible for was the extrajudicial execution of seven inmates in the infamous Pavón prison in 2006. In Colombia, *mano dura* coalesced with counter-insurgency, and petty thieves were executed and presented as guerrilla casualties in the so-called *falsos positivos* scandal.

Instead of containing problems of violent crime, *mano dura* exacerbates them. With a near-exclusive focus on repression and virtually no attention whatsoever for rehabilitation and prevention, *mano dura* policies turn into a vicious cycle of mass incarceration and recidivism amongst marginalized youth gang members. Moreover, *mano dura* in weak or criminalized state contexts reinforces and deepens inequalities. Those who find themselves inside prisons are generally not the most harmful criminals, but rather the

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251 See Chapter 6.
252 See Chapter 5.
poorest.\textsuperscript{254} Extrajudicial violence in the meantime becomes ever more normalized, contributing ultimately to a climate in which lynchings of suspected criminals becomes more accepted.\textsuperscript{255} While \textit{mano dura} policies make the state apparently engage in the fight against social pariahs – gang members, drug addicts and dealers, street prostitutes – high-level corruption goes unchecked. \textit{Mano dura} policies are harmless to elites, whilst extremely damaging to marginalized populations and to the latter’s relation with the state.

\textit{Mano dura} policies moreover tend to escalate. In El Salvador the answer to the limited success of the official \textit{mano dura} policy was the adoption of an official \textit{super mano dura} policy.\textsuperscript{256} In Guatemala, after \textit{Plan Escoba} (literally: Operation Broom) under president Portillo (2000-2004) had failed to deliver more security, former army general Otto Pérez Molina was elected in 2012 on the explicit promise of \textit{mano dura}. In the Philippines, president Rodrigo Duterte has brought penal populism and state brutality in the suppression of alleged criminals to unprecedented heights. It is estimated that his self-declared war on delinquency and drugs has cost the lives of around 7,000 persons between June 2016 and March 2017 alone.\textsuperscript{257} Law-enforcement officials seem to have gotten a license from the government to kill alleged drug users with impunity. Already in October 2016, when the estimated death toll of the spree of extrajudicial killings of suspected criminals and drugs users

\textsuperscript{254} Haugen and Boutros speak of “a perfectly upside-down world where falsely accused poor people rot in prison because their cases can’t get processed, and violent predators run free to brutalize the poor because their cases can’t get prosecuted.” Gary Haugen and Victor Boutros, \textit{The Locust Effect}, Oxford University Press 2014, p. 144.

\textsuperscript{255} For an account of the relation between state-induced \textit{mano dura} policies and vigilante practices such as lynchings, see Angelina Snodgrass Godoy, \textit{Popular Injustice – Violence, Community and Law in Latin America}, Stanford University Press 2006.


stood at 3,000, ICC Prosecutor Fatou Bensouda issued a statement declaring that her office shall closely follow developments in the Philippines to assess whether there are grounds to believe that crimes against humanity are being committed.\textsuperscript{258} In his campaign, Duterte publicly promised to kill 100,000 criminals if elected president.\textsuperscript{259}

Problematically, tough-on crime policies vis-à-vis social pariahs tend to receive considerable public support. When the extrajudicial killings were on full course, Philippine president Duterte remained popular.\textsuperscript{260} In El Salvador and Guatemala, strongmen were elected on the promise of more \textit{mano dura}, even when previous similar policies had failed to deliver the hoped-for results. In contexts of escalating criminal violence and lack of historically established rule of law institutions, at the polls, \textit{mano dura} projects frequently win, pitting the democratic process against the rule of law.

\section*{4 Conclusion}

We saw in the first chapter how the anarchic escalation of privately organized violence can lead to the blurring of the distinction between organized crime and civil war. In this chapter, crime is conceptualized not by reference to the number of violent deaths it produces, but rather in terms of its effects on the rule of law. Certain manifestations of crime are particularly detrimental to the rule of law. Two kinds of such ‘rule of law undermining crime’ can be distinguished: pariah and elite. Whereas the ultimate consequence of pariah rule of law undermining crime is the blurring of the distinction between

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\item \textsuperscript{258} ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines’, 13 October 2016.
\item \textsuperscript{259} See \textit{The New York Times}, ‘Rodrigo Duterte’s Talk of Killing Criminals Raises Fears in Philippines’, 17 May 2016.
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organized crime and civil war, the ultimate consequence of elite crime is the blurring of the distinction between organized crime and the state, in a process of state criminalization.

The distinction between pariah and elite rule of law undermining crime has relevance for policy. Pariahs are sought after universally. They directly diminish the effectiveness of the state’s monopoly on the use of violence, and defy the state’s monopoly on the use of violence from the outside. Elite criminals on the other hand are not so universally sought after. They have political connections and are not the stereotypical bloodthirsty criminals that everybody instinctively wants to see imprisoned. They threaten the legitimacy of the state from within.

Pariahs run from justice. If a case against elite rule of law undermining criminals makes it to court on the other hand, the problem may be the evidence, or judicial independence; but in general, elite criminals avoid having to run. Ultimate pariah criminals include El Chapo Gúzman, Osama Bin Laden, or Joseph Kony: vehemently sought after by various countries they still manage to stay out of the hands of the authorities for prolonged periods of time. With elite crime on the other hand, the whereabouts of the suspects are known, yet they enjoy protection from within or they manage to hide the criminal nature of their behavior.

In the fight against rule of law undermining crime, it is essential to recognize that it is not a matter of ‘the state versus criminals’. The state is not merely weak and threatened from the outside, as analyzed in Chapter 2. Organized crime is not a distinct, external threat that can be eliminated.\textsuperscript{261} The state is oftentimes a part of the problem.

\textsuperscript{261} As Ivan Briscoe and Elisa Dari put it: “Through an almost unconscious or reflex use of caricatures, concepts and labels, and in spite of sound analysis, the international community upholds the belief that its universal goal, whether in developed or fragile states, is to target, combat and dismantle a cohesive entity made up largely of full-time professional criminals.” Ivan Briscoe and Elisa Dari, ‘Crime and error: why we urgently need a new approach to illicit trafficking in fragile states’, Clingendael CRU Policy Brief, 23, May 2012, p. 3.
Moreover, many states, when confronted with an escalation of criminal violence, deploy strategies that are ultimately further undermining the rule of law. It is the state's duty to provide security to its citizens. When security provision is militarized and privatized, the rule of law crumbles. Human rights violations increase, and the police and other elements of the public justice sector are starved of resources as the military and private security providers soak up an increasing part of the scarce resources available. A final frequently occurring state policy is *mano dura*. As *mano dura* policies exclusively target pariah rule of law undermining crime, in a framework that discredits and paralyzes the rule of law, elite rule of law undermining crime remains untouched.

For the international community, and for international law in particular, the escalation of criminal violence in fragile states poses fundamental challenges. International criminal law was developed primarily in response to centralized, politically, religiously or ethnically motivated mass violence. It has difficulties in responding to decentralized criminal violence. The international crime-suppression conventions, such as the Convention Against Corruption or the Convention Against Transnational Organized Crime, lack enforcement mechanisms. States that are not only besieged from the outside by pariah criminals but are also controlled from the inside by elite criminals, hide behind their shield of captured sovereignty to prevent international interventions. In the next chapter, I shall analyze the legal frameworks applicable to captured states and escalating criminal violence.
CHAPTER 4 INTERNATIONAL RESPONSES TO ORGANIZED CRIME

Besides efforts of the international community to increase the capacity of domestic rule of law institutions through bilateral or multilateral aid programs, for a long time the international community did little about organized crime. Indeed, organized crime was long perceived as a relatively minor threat to the international community, adequately dealt with on the domestic level.\textsuperscript{262} Awareness of the fundamental challenge posed by rule of law undermining grew after the end of the Cold War. However, the international legal and institutional response has been insufficient.

In this chapter, I shall first analyze the Law and Development Movement and rule of law development aid. Then I shall analyze the development of the international legal frameworks relating to organized crime: the crime suppression conventions, including the Palermo Convention and the United Nations Convention Against Corruption; and international criminal law as epitomized in the Rome Statute. I conclude that efforts to increase domestic capacity as well as efforts towards creating an international capacity to counter rule of law undermining crime have been insufficient, and that new approaches are needed.

1 Rule of law promotion abroad

The end of the Second World War abruptly heralded the beginning of a new field: that of rule of law promotion abroad. Directly after the end of the war, defeated Germany, Italy and Japan were in need of renewed constitutional orders. In the

slipstream of the end of the Second World War came also the demise of colonialism. Former colonies were in need of functioning political systems, which together with a perceived need for assistance in Latin America triggered the emergence of the worldwide field of rule of law promotion. Promoting the rule of law abroad was expected to bring peace and prosperity across the globe.

The field of rule of law promotion has had its ups and downs over the past decades. The first ‘wave’ was known as the ‘Law and Development Movement’ (LDM). The LDM was born in United States academic and foreign aid circles and remained strongly U.S. dominated throughout its peak in the 1960s before eventually collapsing in the 1970s. The post-Cold War dominance of liberal democracy as the ‘default model of governance’ led to renewed prominence for the promotion of the rule of law abroad. The second ‘wave’, which was referred to by Thomas Carothers’ seminal 1998 article as ‘The Rule of Law Revival’, is essentially still on-going.

1.1 Law and Development Movement

When the Second World War was over, US foreign policy became vastly ambitious. The process of decolonization coincided with US political and economic dominance. The International Monetary Fund and World Bank embodied a belief in the promotion of economic development worldwide. Economic development in the capitalist sense of the word required functioning legal systems that protect property rights and supply a reliable and efficient mode of dispute settlement, it was believed. The US government aid agencies, non-governmental organizations and the international financial institutions (IFIs) on the one hand, and academic lawyers on the other, found each

other in an ambitious, optimistic agenda of promoting development through law. In the 1960s, what became known as the Law and Development Movement (LDM) reached its peak.

The intellectual base of the LDM was articulated in Law and Society thinking. Law and Society moves away from the idea of law as a mirror of society that functions to maintain social order, and towards the idea of law as a regulative ideal. The next step taken is to see law as an instrument towards development. Development in this context equaled progress and was perceived of as a neutral uncontested good. The instrumentalization of law produced ‘leading law reform’, in which law did not follow or reflect changes in societies but actually led those changes. The belief in leading law reform was not only apparent in efforts to promote the rule of law abroad; the same kind of thinking was also guiding the civil rights lawyers’ perspective on domestic law in the US.

The leading law reform paradigm within Law and Society thinking produced an approach to rule of law promotion abroad that fitted perfectly within the political agenda of the IFIs and the US at the time. For the IFIs, rule of law promotion served as the delivery mechanism for their market economy development agenda, whereas for US foreign policy towards developing nations the rule of law was framed as what distinguished the US from the Soviet Union and what made the former’s foreign policy more legitimate than the latter’s. The LDM reflected basic ideas about who is in the lead in the relationship between law and society and in that between the US and the Third World. With academic ideas and political interests coinciding, LDM programs mushroomed.

Many LDM professionals worked from a mechanical perspective of law reform, perceiving of themselves as the likes

of agronomists and development economists. The result of this mechanical thinking was that many efforts were targeted at specific institutions – the criminal code, the judiciary, the police, the penitentiary system – as ends in and of themselves. Commonly, the interventions of choice were the construction of physical legal infrastructure – i.e. courthouses, police stations, prisons – and the transplanting of legal institutions. The adversarial criminal system was considered to work well, so US criminal legislation was transplanted almost literally word for word to foreign jurisdictions. The reasons why those institutions had not evolved endogenously in the first place were not considered to be central to the whole enterprise.

The movement suffered from a perceived urgency for action and an unconcern for theory. Many LDM interventions were emergency responses to a perceived acute need for rule of law reform, without thoroughly thinking through the final goal of the rule of law promotion, let alone the full sequence of steps to reach that goal. The action-orientation was not limited to practitioners but also affected scholars.

The mechanical institution-centered approach to leading law reform taken by LDM professionals was bound to fail. First of all, the rule of law is not so much about institutions as it is about culture, both popular and professional. Whereas institutional façades can be constructed in relatively short periods of time, underlying cultural changes take a lot more time – probably generations – and require different kinds of interventions. LDM professionals were very eager to bring their legal knowledge to foreign jurisdictions, much like proponents of industrialized mass agriculture were eager to bring their knowledge to foreign countries, without paying due attention, as Montesquieu would have it, to the climate of each country, to the quality of its soil or to the principal occupation of the natives.


\[269\] Id., p. 475: “[a]t least among those who publish, the interest has been more in helping to bring about development than in studying it.”
Failure to scrutinize assumptions about the degree to which Third World ‘target’ countries should and could be modeled to resemble their Western counterparts led to interventions that were naïvely centered on formal institutions. By focusing on the achievement of short-term superficial institutional goals, the long-term deeper cultural perspective was lost out of sight. What LDM professionals from the United States failed to acknowledge is the deep-rooted difference between their home country and developing nations with regard to collective attitudes towards the law. As Rosa Brooks observed, in the United States, “where there is a preexisting and broad cultural commitment to the amorphous bundle of values we call ‘the rule of law’ – it makes perfect sense to see the law as an instrument of social change.”

However, citizens of countries coming from colonial rule, conflict and/or authoritarianism have a historical experience of law as a mere instrument of oppression. Without a collective commitment to the idea of the rule of law, or a ‘culture of lawfulness’, assuming that the law and legal institutions can be leading instruments in achieving social change is at least naïve.

Second, the movement did not address the interests that were entrenched in an absent or poorly functioning rule of law. That is to say, there are always people who benefit from the lack or poor quality of rule of law and have an interest in the preservation of that situation. Their eagerness to get to the action made LDM professionals fail to thoroughly analyze the history and the power structures of the countries that they hoped to transform. They supposed that ‘better’ rule of law, much like ‘better’ agriculture or ‘better’ healthcare, would meet little resistance. Failing to consider that powerful groups might have a strong interest in preventing the success of LDM interventions, superficial improvements in rule of law institutions were not protected from subsequent undoing by entrenched interests. If LDM professionals had paused to ask why their proposed institutions had not evolved endogenously, they would have identified those groups who have an interest in preventing the

emergence of strong rule of law institutions. They did not consider such questions pertinent however.

Third, the LDM professionals appropriated the process of rule of law reform. With reference to their rule of law reform interventions, they spoke of ‘target countries’ rather than ‘host countries’\textsuperscript{271} and of ‘the state being reformed’ rather than ‘the state that is reforming’.\textsuperscript{272} Issues of ownership and local buy-in have gained prominence in development cooperation efforts in a whole range of policy fields over the last decades. The logic behind the metaphor of building igloo-like shelters for tsunami-or earthquake-affected populations – that look fancy and modern on pictures and are constructed in a short period of time but that barely correspond with the preferences of the aid-recipients\textsuperscript{273} – also applies to many rule of law promotion interventions. If LDM practitioners from the West come to a ‘target’ Third World country, telling the local justice community how to do things, leave a revised criminal code and subsequently leave the country, the local justice community experiences the revised criminal code as an institution that is foreign to them and that was imposed upon them – they do not perceive it as ‘theirs’.

Fourth, the perception of the law as an instrument towards development required an operationalization of the desired development that is the eventual goal of rule of law promotion interventions. The dominant goal was economic growth, to be achieved through state policies of import substitution industrialization combined with the establishment of institutions capable of delivering predictable and efficient justice, which would in turn attract foreign investment. Once economic growth was achieved, the spillover or trickle-down


effects would follow: in general, of the spoils of development from the elites to the poor; and in specific of law, from economic law to democracy and human rights. Because of the dominance of economic growth as the goal, and the belief in the inevitability of spillover effects, various forms of authoritarian bureaucratic rule were accepted. The belief in the inevitability of trickle-down effects turned out to be grossly misplaced.

Eventually, the LDM collapsed under bitter self-critique. The results of many LDM interventions were disappointing, while at the same time confidence in the role of law in US society, and of the United States in the world, declined in the wake of the Watergate scandal and the war in Vietnam.274

1.2 Rule of Law Development Aid

With the LDM discredited by its own former protagonists, rule of law promotion lost its prominence in international development cooperation circles. The human rights movement of the 1970s and 1980s was influential in its critique on American and European support to authoritarian regimes in Latin America and Africa, with the anti-Pinochet and the anti-apartheid causes two of the best-known examples. With the fall of the Berlin wall and the disintegration of the Soviet Union, former Soviet states, Eastern European satellite states and Soviet-backed authoritarian regimes across the globe came within reach of the West. With ‘The End of History’ announced by Fukuyama, liberal democracy came to be seen as the default mode of governance for all countries. Rule of law promotion abroad, that had collapsed under self-critique in the 1970s, revived.

The new Rule of Law Revival,275 ‘second-generation rule of law promotion’,276 or rule of law development aid, tries to learn from the shortcomings of the LDM. Crucially, the aim is to move away from perceiving institutions as ends rather than as means. Henceforth, at least rhetorically, there is a lot of emphasis on underlying cultural changes that have to occur before institutions can achieve the ends for which they are promoted or created. The end is no longer a modern spacious courthouse, but rather an independent judiciary, for which the former is a means. The new phrase of choice became ‘will to reform’,277 deepening the targeting of institutions from physical infrastructure to identifying and supporting ‘change agents’ within the institutions whilst simultaneously suggesting local ownership. It was assumed that those change agents were to be found among the leadership of rule of law institutions.

Parallel to the embracing of the ‘will to reform’, the centrality of the state was replaced in important respects by the centrality of the (external) market. Import substitution industrialization and the development of the internal market ceded primacy to liberalization in the economic sphere. The IMF’s infamous structural adjustment programming, which amongst other measures recommended that states privatize formerly publicly held service providers like electricity and telecommunications, was expected to attract foreign investment to developing countries. To protect that foreign investment, predictable and efficient justice mechanisms were needed. Privatization of public service companies hence strengthened the call for rule of law reform.

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277 See Thomas Carothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Carnegie Endowment for International Peace Working Papers, January 2003, p. 9. Carothers is skeptical about the significance of the new approach however; at p. 10: “Though taken within the rule-of-law aid community as a crucial new insight, the focus on will to reform was a smaller step forward than it initially appeared.”
Whereas the intellectual underpinnings of the LDM could be traced to Law and Society and leading law reform thinking, the basis for rule of law development aid is the belief in the naturalness or the inevitability of dual transitions to a market economy and to democracy. Given the peace and prosperity enjoyed in many western capitalist democracies, and the almost total demise of communism as a viable alternative, the attractiveness of the belief in dual transitions is not so hard to understand. As the rule of law was ascribed a central role in both market economies and in democracy, the dual transitions belief provided fertile ground for the field of rule of law promotion abroad to flourish.

Although a considerable amount of time and ample opportunity for learning lessons from the LDM era had passed by, the current rule of law development aid is still suffering from shortcomings that were also familiar to the LDM. The shared shortcomings can be summarized by the persistence of emergency interventions that aim at top-down superficial institutional changes hoping for the occurrence of trickle-down effects, without going to the heart of the matter.

First, there still exists theoretical confusion as far as the goal of the whole enterprise is concerned; or, paraphrasing Judith Shklar, the term ‘rule of law reform’ is still overused and misused. Both the Law and Development Movement and rule of law development aid came into being as emergency action, responding to societies coming from colonialism (LDM) or from communism and/or violent conflict (rule of law development aid) or that otherwise were in urgent need of functioning states. When the Ceausescus were shot in Romania, when the former Yugoslavia disintegrated amidst massive violence, when the Central American civil wars came to an end, and when various African societies struggled to move from conflict towards a certain degree of ‘post-conflict’, the need for a functioning state apparatus to prevent continuation of violence was acute. Rule of law practitioners moved in and got to the action straight away. Eager to avoid accusations of neo-imperialism, they stressed the neutral character of the rule of law that they were promoting.

278 Id., p. 3.
Goals relating to human rights, democracy, international security, domestic security, and economic development were selected from to justify various ‘rule of law’ interventions. Moreover, to bolster the defense against accusations of neo-imperialism, great emphasis was placed on holding elections as soon as possible, to gain domestic democratic legitimacy for the work being done. ‘Promoting’ or ‘creating’ an overburdened rule of law is an intricate matter however. Elections are a relatively straightforward phenomenon, implementation of which is familiar to the international community, both at home and abroad.\textsuperscript{279} Of course making a country more democratic is a laudable aim. But it should not be confounded with making a country more rule of law abiding.

Second, while focusing on markets and democracy, security sector reform was treated as a domain separate from rule of law promotion. This separation has various causes. Prominent among them is the decision by US Congress to ban foreign development aid from being used for police training, after US-trained police had been found to commit human rights abuses in Latin America.\textsuperscript{280} With police forces banned from receiving US foreign development aid, US-funded rule of law promotion efforts focused on judiciaries and legislatives, whilst most work with security actors was left to military aid programs. The people working on rule of law programs tended to be law school graduates, interacting only intermittently with the security specialists who hail from police and military academies.\textsuperscript{281} Law and order and crime suppression moreover


were not central to the historical philosophical development of the rule of law concept, and increasing the capacity of the police was not a particularly popular policy aim in circles of development cooperation and human rights activism. It is even counter-intuitive to those who have experienced the damage that unrestrained state power can do, from racial segregation and oppression in the United States to Pinochet’s regime in Chile. The result is that security sector reform and rule of law reform are often treated as separate policy areas, administered by different agencies and farmed out to different contractors, and that rule of law practitioners in as far as they target the police focus primarily on human rights training and restraining police action, rather than on increasing police capacity vis-à-vis criminal violence.

Third, many efforts remain superficial. For example, both Guatemala and Colombia changed from an inquisitorial, Spanish-inspired criminal law system to a US-inspired accusatorial one. Both Guatemala and especially Colombia underwent sweeping decentralization processes. But in countries that suffer from an escalation of criminal violence, the problem that lies at the heart of the rule of law’s dysfunctionality is not the presence or absence of an inquisitorial or an accusatorial criminal law system; both have proven in countries throughout the world to be capable of delivering acceptable results. Nor is it a matter of centralization or decentralization; both highly centralized and highly decentralized legal and political systems have proven to be potentially effective. In effect, with a change in the fundamental power structures underlying the system lacking, the results of shifting to an accusatorial system and of decentralizing were virtually absent.

Fourth, as far as economic development is concerned, in most programs the goal is the promotion or creation of a functioning capitalist market economy. Belief in spill-over or trickle-down effects still apparently undergirds many

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interventions that at first sight merely increase the earnings and power of a powerful and prosperous few. The focus on the promotion of functioning market economies is reflected in the focus on Hayekian predictable and efficient justice. Once predictable and efficient justice is achieved, it appears to be assumed, economic development will be followed by an increase in living standards of the whole population, and the justice standards will spill over to other branches of law. This belief in trickle-down effects is no less naïve today than it was a couple of decades ago.

2 Crime suppression conventions

The idea of an international legal framework to counter organized crime has its origin in the anti-narcotics treaties. The first foundations of this framework can be traced back to the 1909 Opium Conference in Shanghai and the 1912 Hague International Opium Convention. The 1961 Single Convention on Narcotic Drugs synthesized the mandates of the nine drug-related treaties dating back to 1912 and marked the beginning of the modern anti-narco-trafficking regime.\textsuperscript{283} The 1971 Convention on Psychotropic Substances incorporated manufactured drugs such as methamphetamines and LSD in the framework, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances carried further-reaching obligations on States Parties to criminalize possession, purchase and cultivation of illegal drugs, whilst also laying down rules of extradition and mutual legal assistance and criminalizing the laundering of narco-trafficking profits. Still in force, these three conventions represent the legal backbone of the international war on drugs.

Transnational organized crime and narcotics have since changed. The old paradigm divided states into ‘consumers’ and

‘producers’ of illicit drugs, but recent diversification of production and consumption means that very few states are solely ‘consuming’ or ‘producing’ states. Organized crime has moreover become much more than narcotics, as organized crime groups diversified, corrupting governments and getting involved in money laundering, human trafficking, arms trafficking, and various other licit and illicit activities. The threat of organized crime has gained increasing recognition. When world leaders gathered to consider the great challenges to human development worldwide at the dawn of the new millennium, they included fighting transnational crime in their Millennium Declaration.  

Against this background, the framework for harmonization, criminalization, legal assistance, law enforcement cooperation and extradition that had been created to fight drug trafficking was to be extended to all forms of organized crime in a more general transnational organized crime treaty.  

All this built up to a special convention signed in 2000, that became known as the Palermo Convention.

### 2.1 Palermo Convention

The centerpiece of the crime suppression convention system is the United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, which has as its stated purpose “to promote cooperation and to prevent and combat transnational organized crime more effectively.” Prior to the Palermo Convention, various international treaties had targeted one type of illicit activity, with drug trafficking treaties being the most potent. The Palermo Convention is the only

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284 United Nations Millennium Declaration, 8 September 2000, para. 9.
convention that addresses transnational organized crime as an overarching problem. Signed in December 2000 in an optimistic mood, the signatories were unaware that concern for global terrorism would overshadow concern for transnational organized crime per 11 September 2001.

The Palermo Convention defines its subject matter in a somewhat circular way. An ‘organized criminal group’ is “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”287 ‘Serious crime’ is subsequently defined as “conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”288 From child pornography to financial fraud, from drug trafficking to bank robbery, the potential material range of the Convention is enormous. Of course the Convention only applies to offenses that are transnational in nature, meaning that an offense a) is committed in more than one State; b) is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; c) is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or d) is committed in one State but has substantial effects in another state.289

The Palermo Convention has near-universal ratification with 189 parties.290 States that ratify the Convention commit themselves to a series of measures against transnational organized crime. They must adopt domestic legislation

290 In October 2017, nine UN member states were not party to the convention: Bhutan, Congo, Iran, Palau, Papua New Guinea, Solomon Islands, Somalia, South Sudan, and Tuvalu.
criminalizing the offenses of participation in an organized criminal group, laundering of the proceeds of crime, corruption, and obstruction of justice. They must also adopt frameworks for extradition, mutual legal assistance and law enforcement cooperation. Instituting a regulatory and supervisory regime for banks in order to counter money-laundering, and adopting, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of proceeds of crime, is also called for.

Other than the obligation to create certain domestic criminal offenses, the terms of the Convention are extremely permissive. Further cooperation is encouraged, but respect for sovereignty reigns supreme in the language of the Palermo Convention. For example, with regard to mutual legal assistance, Article 18 stipulates that a State Party may deny the request for mutual legal assistance, if “the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests.” This effectively leaves full discretion to the authorities of States Parties to consider requests for mutual legal assistance, without the Palermo Convention fundamentally impacting the equation.

Determined as the States Parties are to deny safe havens to criminals, part of the ideal vision of the Convention is that of states concluding joint investigations. Article 19 of the Palermo Convention deals with joint investigations, and stipulates that “States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby (...) the competent authorities may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such

291 United Nations Convention against Transnational Organized Crime, Articles 5, 6, 8, 23, respectively.
292 Id., Articles 13, 18, 27, respectively.
293 Id., Articles 7 and 12, respectively.
294 Id., Article 18 para. 21 sub b).
investigation is to take place is fully respected.”

It is clear that the signatories to this Convention were only willing to commit themselves to intentions, not to real obligations towards one another.

The Palermo Convention, the result of a protracted negotiation process that did not occur in a crisis, reads as a reflection of the lowest common denominator amongst virtually all states of the world, aware perhaps of the growing threat posed by transnational organized crime to international security and stability, but unwilling to commit to real changes in the status quo. Even in as fundamental an element in international anti-crime cooperation as extradition, the Convention changes little. Countries that have no extradition treaty in force between them, but that do require the existence of such a treaty to carry out extraditions, may consider the Palermo Convention as the legal basis for extradition in respect of any offense to which the Convention applies. But other than that, the Convention does not change anything, stating that extradition “shall be subject to the conditions provided for by the domestic law of the requested State Party.”

Similarly, mutual legal assistance may be declined on the ground of absence of dual criminality. The Palermo Convention reaffirms the existing relations of extradition and mutual legal assistance without changing them.

The problem with mutual legal assistance and similar cooperation mechanisms is that they can only be a tailpiece in the fight against rule of law undermining crime, for in general such cooperation can only occur between effective and like-minded governments. But how are countries with less well-

295 Id., Article 19, italics added.
298 Id., Article 16 para 7.
299 Id., Article 18 para 9.
300 See also Cyrille Fijnaut, ‘Transnational Crime and the Role of the United Nations in Its Containment through International Cooperation:'
established rule of law institutions supposed to be cooperated with?

The Convention calls on states to enhance their cooperation with developing countries, with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime, and to provide financial, material and technical assistance. However, there are no obligations on developed nations to do so, only the familiar intention to do so to the extent possible. The Palermo Convention, and its three supplementary protocols against trafficking in persons, migrant smuggling, and illicit trafficking in firearms, played a role in norm development, domestic criminalization, and agenda setting. But in the words of the White House: “The key challenge remaining is to promote wider implementation of the Conventions through support for capacity building and by otherwise encouraging international partners to dedicate the necessary political capital and resources toward realizing the potential of these groundbreaking instruments.”

Implementation through support for capacity building encounters two phenomenal obstacles. First, especially since the worldwide economic crisis set in in 2008, resources from donor countries are scarce. And second, these efforts mostly fail to pierce through the veil of national sovereignty behind which organized crime manages to hide. As a result, the legal instruments of the UN crime suppression conventions are useful to promote cooperation between successful states, but fail to address rule of law undermining crime in weak or criminalized states.

The Palermo Convention has furthermore suffered from the overshadowing of the organized crime threat by terrorism and proliferation, which are acute short-term threats compared to the more long-term corrosive threat of transnational

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organized crime. As the International Peace Institute notes: “Compared to UNSCR 1373 on counterterrorism and 1540 on counterproliferation, the transnational organized crime regime is more about building state capacity and creating a framework for coordinated (albeit nationally led) action rather than mandating specific efforts to combat transnational organized crime. It creates a baseline for coordination but does not establish global standards that states have to meet.”

Since criminals are motivated by profit, one of the keys is to go after their money. In that regard, the United Nations Convention Against Corruption and the international anti-money-laundering regime may provide additional opportunities for the global fight against organized crime.

2.2 UN Convention Against Corruption

The most harmful consequences of organized crime are widespread violence and the undermining of the rule of law, as seen in the preceding chapters. But for the criminals concerned, violence and the undermining of the rule of law are merely instrumental to their direct aim, which is to make money. The illicitly acquired wealth then provides criminals with power and status. For illicit money to most effectively lead to power and social status, criminals require money laundering and corruption. Laundering money is the perversion of the economic and financial system, investing ill-gotten gains in the legal economy so that criminals can acquire legally recognized real estate and stakes in businesses. Corruption is the perversion of the legal and political system, investing resources to obtain impunity, additional money, and status.

The global anti-corruption regime developed distinctly from the global anti-narcotics or anti-organized-crime regime. A watershed in global anti-corruption efforts was the unilateral enactment by the United States in 1977 of the Foreign Corrupt

Practices Act (FCPA). The FCPA was created by the Carter administration, prompted in part by the Watergate investigations revealing illegal contributions not only to the Nixon re-election campaign but also to foreign political parties. Crucially, the FCPA criminalized the ‘supply’ side of bribery: not only is the taking of bribes (‘demand’ side) a criminal offense, but also the offering of a bribe by a United States company to a foreign official would from now on constitute a criminal offense under U.S. law. United States businesses, affected by the domestic prohibition of bribing officials abroad, did not want to suffer adverse consequences from having to compete with multinational corporations based in less stringent countries, and pressured the United States government to push for a level playing field internationally. The U.S. urged ECOSOC to consider an international convention, but those talks were abandoned in 1981.

The end of the Cold War led to increased attention for the issue. Various regional initiatives formed, including the Organization of American States (OAS) Convention Against Corruption in 1997 and the OECD Anti-Bribery Convention in 1999. The OECD Anti-Bribery Convention requires of its member states that they adopt national legislation against the bribery of foreign government officials in international business transactions, and has a relatively vigorous monitoring

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mechanism. Following up on those regional anti-corruption initiatives as well as on the Palermo Convention, in 2003 the United Nations Convention Against Corruption (UNCAC) was signed. Similar to the Palermo Convention, the UNCAC has near-universal ratification.

Part of the UNCAC sees to the prevention of corruption, calling upon states to create preventive anti-corruption bodies. The convention also obliges States Parties to criminalize both supply-side and demand-side corruption, influence trafficking and illicit campaign and political party financing. The UNCAC furthermore requires States Parties to engage in international cooperation to fight corruption. In the field of asset recovery, rather than merely a penalty approach towards seizing and freezing of assets, the UNCAC envisions a more profit-oriented perspective in its attempt to create mechanisms to recover stolen assets.

The UNCAC also calls for the integrity of the banking system, and contains familiar measures to prevent money-laundering. The modern anti-money-laundering regime was established in 1988. Against the background of the rising economic power of internationally operating drug cartels,

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309 UNCAC, Articles 15 and 16, call for criminalizing the bribery of national and foreign public officials in mandatory terms. As far as the intent required for corruption is concerned, UNCAC Art. 28 furthermore states: “knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.”
310 UNCAC, Article 18. For more about the crime of influence trafficking, see also chapter 6.
311 UNCAC, Article 7.
313 UNCAC, Article 14.
particularly the Medellín and Cali cartels, at the time, the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was the first convention to oblige parties to make drug-related money-laundering activities a criminal offense.\textsuperscript{314} In 1989, the G7 created the Financial Action Task Force on Money Laundering (FATF). The FATF made 40 recommendations to strengthen the integrity of the financial system, starting with ratification and implementation of the 1988 UN Drugs Convention. Based at OECD headquarters in Paris, the FATF was followed by various FATF-Style Regional Bodies (FSRBs), evaluating the anti-money-laundering measures taken by states in their respective region, and providing training for law enforcement officials and helping countries develop financial intelligence units in coordination with UNODC.\textsuperscript{315} The FATF approach includes the naming and shaming of states that do not comply with the recommendations and that allow their financial systems to be vulnerable at least, and abused at worst, for the laundering of ill-gotten gains.

Implementation of the UNCAC and of the related anti-money-laundering regime is problematic, to say the least. In contrast to the Palermo Convention, there is some review mechanism in place for the UNCAC. The peer-review mechanism, established by the Conference of States Parties in 2009, is based on countries filing self-reports as to how they do in terms of implementation of the UNCAC, and comments on that report by fellow States Parties. The process sees very little public input, since civil society groups or anti-corruption watchdogs are not invited to participate; and equally little public output, as the self-reports nor the reactions thereupon are published. The fact that the country reports are confidential is at odds with UNCAC’s spirit of transparency, and the lack of involvement of NGOs and academia in the review process is particularly uneasy, as Article 13 of the UNCAC provides that member states should take


measures to promote the participation of civil society and NGOs by allowing the public to contribute to the decision-making process and by ensuring the public’s access to information.\textsuperscript{316} Given that some of the world’s most corrupt countries like Honduras, Afghanistan and Russia, are among the States Parties, the lack of transparency of the review mechanism, and the lack of implementation of the UNCAC more generally, should come as no surprise.

The strongest international anti-crime regimes based on intergovernmental cooperation are the anti-narcotics and anti-money-laundering regimes. These regimes rely on near-universal ratification of the underlying instruments, lots of resources from developed nations, and institutional capacity in the form of the UNODC, the FATF, and various other bodies. Yet even these regimes are ineffective. Decades of law-enforcement and military action against drug production and trafficking have not prevented the flows of drugs entering consumer markets to remain constant, or even to grow.\textsuperscript{317} The UNODC estimated that much less than 1%, probably around 0.2%, of the proceeds of crime laundered via the financial system is seized and frozen.\textsuperscript{318} Whether in the context of the Palermo Convention, the UNCAC or the anti-money-laundering regime, intergovernmental cooperation is up to date largely ineffective in strengthening the law-enforcement capacity of unwilling states.

\section*{3 International criminal law}

The Rome Statute of the International Criminal Court provides another international legal framework which may address rule of law undermining crime. The Rome Statute gives the International Criminal Court (ICC) jurisdiction over genocide, 

\textsuperscript{316} UNCAC, Article 13.
\textsuperscript{317} See also UNODC, \textit{World Drug Report 2017}.
war crimes and crimes against humanity. Under certain circumstances, rule of law undermining crime may amount to war crimes or crimes against humanity.

For crimes to constitute war crimes, there must be an armed conflict. As alluded to in Chapter 2, it is not always clear-cut whether there is an armed conflict or not. However, the threshold to speak of an armed conflict in international law is rather high. In today’s situation of Latin America, it seems that no country other than Colombia would meet the threshold. I will get back to the possible commission of war crimes in Colombia in the Colombia case study.

Crimes against humanity are a different story. Certain acts can constitute crimes against humanity if they are part of a widespread, systematic attack against a civilian population, pursuant to an organizational policy. Especially the more violent expressions of rule of law undermining crime and mano dura may, under certain circumstances, amount to crimes against humanity.

Looking at the context of rule of law undermining crime in Latin America, two types of acts may be qualified as potential crimes against humanity: 1) crimes committed by state agents in the context of the fight against drugs and organized crime; and 2) crimes committed by organized crime groups.\textsuperscript{319} Qualifying acts of state agents as crimes against humanity is, from a legal doctrinal point of view, not overly problematic. That the crimes in casu are being committed in furtherance of a state policy and form part of a widespread and systematic attack against a civilian population would still need to be proven,\textsuperscript{320} but there are no

\textsuperscript{319} The following text is derived in part from Hanna Bosdriesz and Sander Wirken, ‘Privatization and increasing complexity of mass violence in Mexico and Central America: exploring appropriate international responses’, in Harmen van der Wilt and Christophe Paulussen (eds.), Legal Responses to Transnational and International Crimes – Towards an Integrative Approach, Edward Elgar 2017, 245-271.

\textsuperscript{320} Mexico has, for example, responded to reports of widespread torture by state agents and the qualification of such acts as crimes against humanity by claiming that there is no state policy to commit
The situation is more complex with regard to the crimes committed by organized crime groups. Whether such crimes can be considered crimes against humanity depends, amongst other factors, on one’s interpretation of the word ‘organization’ in Article 7 of the Rome Statute.\footnote{321} While the text of the Rome Statute makes clear that non-state actors can commit crimes against humanity, it is not clear-cut what types of organization are capable of doing so. The majority of the ICC Pre-Trial Chamber in the Kenya authorization decision holds that “the formal nature of a group and the level of its organization should not be the defining criterion”.\footnote{322} Rather, the determination of whether a group qualifies as an organization under the Statute should be made on a case by case basis and should be based on its capacity to infringe basic human values.\footnote{323} 

\footnote{321}{For a discussion of crimes against humanity in the context of organized crime activities in Colombia, and the organizational policy requirement of Article 7 of the Rome Statute, see Hector Olásolo, ‘Is international criminal law an appropriate mechanism to deal with organised crime in a global society, in in Harmen van der Wilt and Christophe Paulussen (eds.), \textit{Legal Responses to Transnational and International Crimes – Towards an Integrative Approach}, Edward Elgar 2017, 50-70.}

\footnote{322}{Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, \textit{Situation in the Republic of Kenya} (ICC01/09-19), Pre-Trial Chamber II, 31 March 2010, paras. 90 and 93.}

\footnote{323}{See Kenya authorization decision, paras. 91-93. For an opposing view, see Dissenting opinion of Judge Hans-Peter Kaul, Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, \textit{Situation in the Republic of Kenya} (ICC01/09-19), Pre-Trial Chamber II, 31 March 2010, para. 51; see also Claus Kress, ‘On the outer limits of crimes against humanity: the concept of organization within the policy of torture. Rather, the State seems to regard instances of torture by state agents as a series of unconnected incidents. See also Darryl Robinson, ‘Mexico: the war on drugs and the boundaries of crimes against humanity’, \textit{EJIL Talk}, 26 May 2015; and Rodrigo Aguilera, ‘Mexico’s human rights challenge’, \textit{Huffington Post}, 23 April 2015.}
This broad conception of ‘organization’ is warranted given the challenges of the modern world, where many of the worst atrocities are no longer committed by state or state-like entities.\textsuperscript{324} However, not every organized crime group can qualify as organization under the Rome Statute. In order to be able to distinguish between international crimes and other organized crime, it has been suggested that only organized crime groups large enough to be able to launch a widespread attack against a civilian population could qualify as organizations in the sense of Article 7 of the Rome Statute.\textsuperscript{325} The big cartels operating in Mexico and Central-America have been identified as examples of such organizations.\textsuperscript{326}

Some of the crimes perpetrated by some of the big organized criminal groups in Latin America may thus be qualified as crimes against humanity. However, the qualification remains problematic. The big organized crime groups in Latin America are far from homogeneous. In general, most organized crime groups are organized horizontally, in a network-like structure, rather than hierarchically, the way armies or militarized rebel groups are organized. Some factions even operate as franchises of the main brand, sometimes with only minimal interaction with the main organization.\textsuperscript{327} It is doubtful whether the nominally supreme leader of an organized crime group has actual effective control over the actions of his subordinates. Besides the large requirement: some reflections on the March 2010 Kenya decision’, \textit{Leiden Journal of International Law} 23, 2010, 855-873.

\textsuperscript{324} See also Charles Jalloh, ‘What makes a crime against humanity a crime against humanity?’, \textit{American University International Law Review} 28, 2013, 381-441, pp. 430-432.


\textsuperscript{327} See for example, on Mexican organized crime groups claiming to belong to the Zetas: John Bailey, ‘What do the Zetas and McDonald’s have in Common?’, \textit{InSight Crime} 5 December 2011. Note that Al Qaeda adopted a similar strategy of decentralization and franchising; see for example Ben Hubbard, ‘The Franchising of Al Qaeda’, \textit{The New York Times} 25 January 2014.
groups, there is an enormous number of smaller groups. Are such smaller groups capable of individually launching a widespread attack against a civilian population? Or can such a widespread attack also exist as a result of the actions of a number of small groups operating in the same area? Such questions remain unanswered. Even in its most encompassing interpretation, the ‘crimes against humanity’ label thus covers only a small part of the crimes committed, thereby ‘elevating’ them above other, similar crimes in a way that might seem artificial from the point of view of those experiencing the violence on a day-to-day basis. Even more importantly, the crimes against humanity framework fails to address some of the most essential characteristics of rule of law undermining crime: the economic motives fueling the violence, the horizontal organization, the role of corruption, and the states’ inaction in the face of that violence which allows for its perpetuation.  

The framework of international criminal law was developed with the purpose of addressing mass atrocity crimes, committed by centralized actors, whether states or non-state groups. Materially, crimes against humanity require the existence of a widespread and systematic attack, and of an organizational policy. Moreover, international criminal law has developed various doctrines relating to modes of liability. From  

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328 Human trafficking is the only illicit (profit-driven) activity classified as a crime against humanity. Pillaging can be a war crime.  
329 There is a footnote in the ICC Elements of Crimes which does seem to allow the argument that government inaction, when the result of infiltration by organized crime, could potentially fulfil the policy requirement for crimes against humanity. This footnote states that the policy to which the proscribed acts are linked may also be implemented “by a deliberate failure to take action, which is consciously aimed at encouraging” the attack against the civilian population. See ICC Elements of Crimes p. 5 fn. 6 (Article 7 under 3). However, this footnote also makes it clear that this can only be applied “in exceptional circumstances” and that the existence of a policy of inaction should be proven and cannot be inferred from the lack of action alone. See also Charles Jalloh, ‘What makes a crime against humanity a crime against humanity?’, *American University International Law Review* 28, 2013, 381-441, pp. 425-426.
joint criminal enterprise to *Organisationsherrschaft* and command responsibility, the modes of liability associated with international criminal law are designed to move beyond the accountability of material perpetrators, and to address intellectual authors of crimes within hierarchical organizations. International criminal law thus serves to hold accountable a limited number of individual leaders for their responsibility in centrally organized mass violence. As argued in Chapter 3, rule of law undermining crime does not typically rely as much on centralized leadership. To address, for example, the systematic attacks against civilians by paramilitary groups in Colombia, and the complicity of the Colombian state therein, international criminal law and the Rome Statute may be relevant. To address the widespread, almost anarchic panorama of rule of law undermining crime, the international criminal law framework is less suitable.

Institutionally, the international criminal law framework, and the qualification of certain crimes as crimes against humanity, is also of limited added value. Domestically, international criminal law may be of value, in particular with regard to modes of liability doctrines, when domestic courts apply international criminal law directly. But oftentimes, domestic courts are not applying elementary domestic laws to begin with, let alone that they shall apply international law to go after those carrying most responsibility. Presumably, the main practical advantage of the qualification of certain facts in terms of crimes against humanity is that it brings a situation within the jurisdiction of the ICC. The best-known instance of a situation of organized crime and the suppression thereof brought to the attention of the ICC Prosecutor is the situation in Mexico. ICC Prosecutor Luis Moreno Ocampo explicitly declined to exercise the jurisdiction of the ICC with regard to Mexico.

If the ICC were willing to open an investigation, or even to issue arrests warrants, what would it be able to contribute by doing so? The leaders of organized criminal groups, pariah

\footnote{330 See in particular chapter 5.}
\footnote{331 See also Taylor Baronich, ‘Bleeding Mexico’, *Oregon Review of International Law* 17, 2015, 111-155.}
criminals like ‘El Chapo’ Guzman, are already vehemently sought after by various national governments. The rather distant threat of an ICC arrest warrant would add very little in terms of the probabilities of capturing, prosecuting and sentencing such pariah suspects.

With regard to elite rule of law undermining crime the ICC may play a useful, albeit limited, role. In particular, an ICC investigation or the prospect thereof may have some influence on state officials. State actors oftentimes have a central role in the escalation of violence and rule of law undermining crime, not only by omission and corruption but also by commission of human rights violations in mano dura policies. State actors responsible for these acts are not pariahs universally sought after whose whereabouts are unknown; rather, they are public figures, whose whereabouts are perfectly known but against whom their respective states do not act. With regard to these elite criminals, the ICC may be of significance. The scope for action for the ICC is extremely limited of course, in terms of its material and territorial jurisdiction as well as in terms of its financial and human resources. Money laundering, corruption and omission are not easily brought into the material definitions of crimes against humanity. However, widespread human rights violations in the course of mano dura or counterinsurgency policies may very well be qualified as crimes against humanity, and ICC action against such acts or the prospect thereof may serve to emphasize that, even in the face of a severe threat like organized crime groups, there are certain methods the state can never legally apply.

However, for a sustainable solution to the various forms of rule of law undermining crime proliferating in Latin America today, the framework of international criminal law is overly limited. Materially, international criminal law is limited to genocide, war crimes and crimes against humanity, and many acts crucial to rule of law undermining crime, like corruption and money laundering, fall outside of its scope. Moreover, international criminal law focuses on a small number of individual leaders carrying the greatest responsibility. The escalation of rule of law undermining crime in Latin America today is characterized by the wide range of responsible actors,
and not by central leadership. When addressing politically, ethnically or religiously motivated violence, perpetrated by a group with strong centralized and charismatic leadership, prosecution of one or a few individual leaders may have substantial effects. But when addressing anarchic rule of law undermining crime, the prosecution of just a handful of individual leaders is oftentimes not effective. Although the framework of international criminal law may be of some use as the ultimate stick vis-à-vis government officials committing human rights violations through mano dura or counter-insurgency tactics, we must recognize that the framework was not designed to address rule of law undermining crime, and is not well suited to do so.

Crucially moreover, the essence of international criminal law is formulating prohibitions. Emphasizing what the state should not do is an insufficient approach vis-à-vis weak and criminalized states. One of the main challenges in this situation is exactly to have states undertake effective action against organized crime groups. At the same time, we need a normative framework for what an acceptable anti-narcotics and anti-organized-crime policy would look like, that avoids the pitfalls of counter-insurgency and mano dura.

### 4 International response capacity and national sovereignty

In 2004, the United Nations High-level Panel on Threats, Challenges, and Change, identified transnational organized crime as one of six clusters of threats with which the world must be concerned now and in the decades ahead. In 2010, the UN Security Council noted “with concern the serious threat posed in some cases by drug trafficking and transnational organized crime to international security in different regions of the world”

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332 See also Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, 31 December 2009, para. 3 and fn. 4, citing a group of Latin American civil society groups to this effect.
and invited the Secretary-General of the United Nations ‘to consider these threats as a factor in conflict prevention strategies, conflict analysis, integrated missions’ assessment and planning.’ 333 The UNODC declared that “[t]he control of crime must be seen as part of the larger project of global governance.” 334

Notwithstanding these expressions of international concern, not enough has been done in terms of policy and institutional innovation to tackle the threats posed by organized crime. Proposals to create an international response capacity to escalating problems of organized crime have surfaced from time to time. The White House suggested to “launch a new International Police Peacekeeping Operations Support Program to enhance policing and law-enforcement capacity in ungoverned spaces.” 335 The focus in the White House proposal is on ungoverned spaces, like large parts of the territory of Somalia, and not on spaces governed by infiltrated or criminalized states. James Cockayne has suggested the creation of a ‘Standing Police Capacity’ that “may need to be accompanied by an expansion of ready-action detention and judicial capacity.” 336 Just like in the White House proposal, such a Standing Police Capacity would be accommodated within the United Nations Department of Peacekeeping Operations (DPKO). An alternative locus for the creation of a more effective international response capacity would be the UNODC. Yet another alternative would be the creation of special tribunals, for example an International Narcotics Court. 337 The International Peace Institute suggested

334 Id., p. 18.
the deployment of civilian ‘blue suits’, along the lines of military ‘blue helmets’, to build the long-term security that protects societies against organized crime and conflict.\textsuperscript{338} However, the IPI is silent on what legal framework those ‘blue suits’ should apply, national law or some form of international law; and under what mandate such ‘blue suits’ should be sent, whether under Chapter VII of the UN Charter or not.

An international response capacity to the process of state criminalization, along the lines of a capacity to respond to natural disaster or to conventional warfare, has not moved forward however, nor is it likely to do so in the near future. The post-WWII international law paradigm is based on respect for state sovereignty on the one hand, and the prevention of certain serious crimes that are of concern to the international community as a whole on the other. If states commit genocide, war crimes or crimes against humanity, their sovereignty no longer reigns supreme and may in fact cede to the concerns of mankind as a whole. If states fail to prevent genocide, war crimes or crimes against humanity a nascent ‘responsibility to protect’ even befalls upon the international community.\textsuperscript{339} But if rule of law undermining crime is eroding the state’s authority and legitimacy, the international legal framework does not pierce through the veil of state sovereignty, notwithstanding the fact that such crimes have a capacity similar to that of international crimes to create international crises.

Absent a truly international response capacity, there are various multilateral forums. Of course, the UNODC plays an important role in coordination of joint efforts. However, the great majority of its budget is earmarked, primarily for counter-narcotics programming, effectively turning UNODC in large measure into a counter-narcotics project-implementation


\textsuperscript{339} See for example Carsten Stahn, ‘Responsibility to protect: Political rhetoric or emerging legal norm?’ \textit{American Journal of International Law} 101(1), 2007, 99-120.
Then there is also the forty-state UN Commission on Crime Prevention and Criminal Justice, a subsidiary body of the UN Economic and Social Council, which is generally recognized as the central body for UN policy setting in this field. But there are many more multilateral forums dealing with issues related to organized crime. The UN Commission on Narcotic Drugs (CND) decides which drugs belong to which schedules of the drug control treaties, and serves as an information-sharing regime. The Commission on Crime Prevention and Criminal Justice (CCPCJ) also serves to share information but, according to the International Peace Institute, has in recent years “amounted to little more than a talking shop for crime control policy experts from capitals with little influence over broader multilateral strategy.” There is the UN Global Commission on Drug Policy, the UN Global Program Against Money Laundering, Proceeds of Crime and the Financing of Terrorism (GPML), the International Policing Advisory Council to be set up by UN DPKO, the UN Police Adviser, the Conferences of Parties of the Palermo Convention and the UN Convention Against Corruption, and of course various regional forums and initiatives.

In the context of a threat to international peace, the UN Security Council may act. Particularly when organized crime actors are active in a context of armed conflict or terrorism, they may come within the reach of the UN Security Council, and may face international sanctions. Sanctions against six Libyan

343 China has pressed the point that the Security Council’s consideration of organized crime and trafficking must be limited to countries in conflict or post-conflict situations, or at most to conflict prevention situations. See James Cockayne, ‘The UN Security Council and Organized Criminal Activity: Experiments in International Law
human traffickers were approved by the UN Security Council in 2018.\textsuperscript{344} Unilateral sanctions were issued by the United States in 2011 against transnational organized crime groups in Mexico, Japan, Italy and Eastern Europe, freezing their assets and criminalizing aiding those organizations.\textsuperscript{345}

Then of course there is Interpol. The International Criminal Police Organization has as its primary mission to facilitate the sharing of information between national police forces. It does have some elements of a nascent international response capacity, especially since in 2006 the UN Security Council decided that information gathered by UN sanctions committees be incorporated into Interpol databases.\textsuperscript{346} Ultimately however the truly international capacity of Interpol is extremely limited.

Moreover, the financial stakes are extraordinarily high, although of course difficult to adequately assess. The United Nations Office on Drugs and Crime (UNODC) estimated transnational organized crime’s annual turnover worldwide to be 870 billion USD.\textsuperscript{347} For any efforts countering rule of law undermining crime to be successful, substantial resources are required. Interpol had an annual budget of roughly 125 million euros in 2017.\textsuperscript{348} UNODC received around 375 million USD in

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\textsuperscript{345} White House, ‘Executive Order 13581 – Blocking Property of Transnational Criminal Organizations’, 25 July 2011.
\textsuperscript{347} See UNODC, press release 16 July 2012: ‘New UNODC campaign highlights transnational organized crime as a $870 billion a year business’.
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CICIG receives around 25 million USD per year, whereas the ICC had a total budget of around 140 million euros in 2017. The combined budgets of Interpol, UNODC, CICIG, and the ICC, in other words, amount to around 0.1% of what UNODC itself estimated transnational organized crime to be worth.

In the absence of an effective international response capacity, a more successful fight against rule of law undermining crime depends on the performance of domestic justice systems. In order for international efforts aimed at increasing domestic capacity to succeed, they need to come with real powers – as we saw earlier in this chapter, traditional rule of law development aid oftentimes does not suffice. International efforts moreover must move beyond the law in the books, and insert themselves within the law in practice. In certain situations, the law in the books may be the problem – when laws in Uganda criminalize homosexuality, or when laws in Jordan force female victims of rape to marry their rapist, for example. But the essence of the problem in most states that are facing rule of law undermining crime is not the law in the books. As Eric Posner, amongst others, repeatedly points out with regard to international human rights law, and as Gary Haugen and Victor Boutros, amongst others, point out with regard to domestic laws, there are plenty of laws that prohibit murder, rape, and corruption. The problem is in the enforcement of those laws. Broken rule of law institutions utterly fail to enforce the laws that are formally in force.

The root of the lack of enforcement lies not in the transnational nature of crime. An oft-heard concern with regard to the activities of transnational organized crime is that they do

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350 See also chapter 6.

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not respect borders, whereas law-enforcement authorities have to.\textsuperscript{354} But the most menacing rule of law undermining crime projects are primarily national. They control their national law enforcement institutions, and are untouchable not because they move between jurisdictions but rather because they control their domestic jurisdiction.\textsuperscript{355}

Of course, there are criminals hiding the criminal nature of their activities or obscuring their identity by making use of multiple jurisdictions and multiple law enforcement regimes. And of course, there is some ‘water-ballooning’, for example when production of coca relocated from Colombia to Peru and Bolivia as enforcement in Colombia rose; or when trafficking routes relocated from the Caribbean to Central America and the Mexico-US border as enforcement increased on the Caribbean route. But it is not as if the criminal individuals of the world are on a journey to find the jurisdiction least likely to apprehend them. Criminals, although operating transnationally, typically have a strong connection to their home base. It is their support system: judicial systems they control, family and friends to keep them out of the hands of zealous law-enforcement or enemies, terrain they are familiar with. Trafficking routes of course seek the path of least resistance, but rule of law undermining crime in general is not a mobile phenomenon that can relocate its operations according to law enforcement pressure. Rather, rule of law undermining crime persists by virtue of its control or contestation of national sovereignty.

Criminalized states, or states undergoing a process of criminalization, are controlled by elements that would have a lot to lose from improved criminal justice systems. Hence, they oftentimes actively oppose international efforts at improving those systems. Save situations in which the Security Council mandates an operation, domestic capacity building efforts have to operate within the realms of sovereignty. Typically, Security Council action turns out to be feasible only in situations where

\textsuperscript{354} See e.g. International Peace Institute (IPI), ‘Transnational Organized Crime’, \textit{IPI Blue Papers} No. 2, 2009, p. 8: “(...) TOC can operate in a borderless world, while crime control stays trapped within borders.”

\textsuperscript{355} See also chapter 3, paragraph 2.2.
sovereignty is weakest: on the high seas in dealing with piracy, and in countries where the government has lost effective control over parts of its territory altogether and where the threshold of armed conflict has been reached, most notably in Afghanistan, Central African Republic, Democratic Republic of Congo, Haiti, Somalia and Libya.\textsuperscript{356} By shielding behind the national sovereignty, that has been captured by criminal elements, rule of law undermining crime manages to keep international interventions at bay.

What we witness, then, is the emergence of under-governed or criminally governed territories in which the international community cannot intervene because the captured sovereign state blocks intervention. Outside assistance is allowed in infrastructure and poverty alleviation but not in the core of the domestic rule of law institutions. If intervention is blocked, a dangerous status quo may emerge. Unless a government accepts intervention, or is forced to accept intervention because of the deterioration of security, the situation may just muddle on in the form of a ‘durable disorder’.\textsuperscript{357} Such a situation, in which the state remains ‘sovereign enough’ to prevent intervention or outright collapse, yet its domestic rule of law is severely undermined by organized crime, can have disastrous effects on human security also beyond the borders of criminalized states, as can be seen for example with the migratory pressure from Central Americans on the Mexico-US border.

Sometimes inroads in those sovereignties that shield criminal actors and under-governed territories are present. Colombia being a party to the Rome Statute and the Guatemalan government agreeing to the creation of CICIG are two examples.


Under what kind of circumstances such inroads emerged shall be discussed in the case studies.

5 Conclusion

There is a need for new approaches towards countering rule of law undermining crime. International efforts thus far have predominantly had a narrow focus on terrorism and drug trafficking, cross-border crimes with direct impacts in the West. The focus on the transnationality of the offense, and its direct impact, stands in the way of the consideration of the indirect impact that rule of law undermining crime eventually has.

Establishing new international tribunals or expanding the jurisdiction of the ICC will be of little avail. Quite regularly, after an analysis of what goes wrong in terms of national implementation of the Palermo Convention and the enforcement of national laws in national jurisdictions, we hear a call for a new international jurisdiction.358 But how that would help is never explained. How is that international jurisdiction to gain custody over suspects? And would resources not be more efficiently

358 For example, Stewart Patrick and James Cockayne argue: “The United States and its international partners should explore the possibility of setting up a complementary, international judicial framework that could prosecute criminals if local judicial systems are deemed incapable of holding a fair trial. (...) This might include prosecuting egregious violent crime under the mandate of the ICC, establishing a distinct body to try such cases, or setting up hybrid international-national courts.” Stewart M. Patrick and James Cockayne, ‘Options for Strengthening the Global Regime Against Transnational Crime’, in Council on Foreign Relations, ‘The Global Regime for Transnational Crime’, 25 June 2013. Haugen and Boutros are very critical of the historical trend that the human rights movement since WWII has focused on international enforcement mechanisms rather than local public justice systems for the common poor. See Gary Haugen and Victor Boutros, The Locust Effect, Oxford University Press 2014, p. 167 and further.
spent improving existing, but insufficiently functioning, domestic judicial systems, rather than setting up new jurisdictions?

Ultimately, rule of law undermining crime is a national problem. That organized crime operates transnationally whereas law-enforcement is bound by borders is frequently voiced as a major concern. Kofi Annan for example writes in the foreword to the Palermo Convention: “If crime crosses borders, so must law enforcement.” Of course international cooperation between law-enforcement authorities is crucial. But the core of the problem is not that otherwise capable and benign law-enforcement authorities are outsmarted by jurisdiction-crossing criminals. The most menacing rule of law undermining criminal projects, like cooptación del estado in Guatemala and parapolítica in Colombia, are national projects, not international ones. In order to achieve structural and sustainable progress, international efforts should focus on strengthening national judicial, legislative and prosecutorial processes from within.

When the international community supports attempts at improving the security situation in a given country whilst upholding rule of law standards, a positive example can be set, offsetting the popular demand for mano dura or counter-insurgency approaches. The idea that it is possible to guarantee security whilst upholding the rule of law has to gain credibility by the setting of affirmative examples that this is indeed possible. Prosecutors must be trained to carry out high-profile prosecutions against suspects that are widely considered to live above the law, whilst police forces are enabled to apprehend the suspects, judges to give them a fair trial, and penitentiaries to detain them. Establishing positive examples with regard to hitherto ‘above-the-law’ suspects enhances the credibility of the rule of law in providing security, creating popular confidence in the rule of law.

Crucially, in recognition of the political nature of the task at hand, efforts at countering rule of law undermining crime must come with real powers, in order to pierce through the veil of national sovereignty behind which elite criminals hide. Rule of

law work meets much more opposition than poverty alleviation or infrastructural work, and should hence be supported by real power counterbalancing the vested interests that will rise in opposition. Domestic capacity building in the course of rule of law development aid, the crime suppression conventions, and an international response capacity have all proven insufficient. In the subsequent case studies, I shall analyze three international interventions in light of their contribution to countering rule of law undermining crime: Plan Colombia, the ICC in Colombia, and CICIG in Guatemala.
1 Introduction

Like many nations of Latin America, Colombia suffered a very violent conquest by Spaniards, an era of violent and exploitative colonial rule, and a violent struggle for independence. Subsequently, Colombia also saw a lot of violence as an independent nation. Founding fathers Simón Bolívar and Francisco de Paula Santander resorted to violence to resolve their disputes within the first decade of independence. There were many civil wars, small and big. The turn of the 19th century was particularly violent, with the Thousand Days’ War (1899-1902) taking the lives of an estimated 120,000 people. In 1903, with the support of the United States, the province of Panama declared its independence from Colombia.

After the Second World War, political violence in Colombia got even more widespread. When populist Liberal Party leader Jorge Eliécer Gaitán was murdered in Bogotá in 1948, followers of Colombia’s Liberal and Conservative parties engaged in mutual atrocities. In what became known simply as The Violence (‘La Violencia’), an estimated 200,000 people got killed between 1948 and 1958. When the leaderships of the two traditional political parties brokered a power sharing agreement, including the agreement to deliver presidents of the Republic on a rotating basis, the massive violence between conservatives and liberals came to an end. The new power distribution, known as the National Front, was a phenomenally closed system, almost immediately to be violently challenged. Inspired by the successful violent overthrow of the Batista dictatorship in Cuba, left-leaning dissidents took up arms against the Colombian state, starting an insurgency that lasted from 1964 until the present day.360

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360 Although the Colombian government and the FARC signed a peace agreement in 2016, peace talks with the ELN have stalled. Moreover,
Besides intra-elite violence and the communist insurgency, another kind of violence emerged with increasing intensity in the 1980s: criminal violence fueled by the drug trade. Colombian organized crime groups had been active with some success in exporting marijuana to the United States in the 1960s and 1970s, but the rise of cocaine meant a real game-changer for Colombia. In the late 1970s and in the 1980s, the market for cocaine expanded spectacularly, as crack cocaine wreaked havoc upon America’s inner cities while powder cocaine became immensely popular among wealthier U.S. citizens. The sheer size of the earnings in the cocaine trade changed the violence panorama in Colombia significantly.

At first drug violence appeared to come from relatively centralized sources: from Pablo Escobar and his infamous Medellín cartel, and from the big successor cartels of Cali and Norte del Valle. Pablo Escobar was one of the wealthiest persons of the planet, appearing on Forbes’ billionaires list from 1987 until his death in 1993. When the big cartels dissolved under severe pressure of U.S. and Colombian law enforcement, a multitude of smaller criminal organizations emerged to participate in the highly lucrative narcotics trade. Those smaller organizations also engaged in a range of other criminal activities, from extortion and kidnapping to illegal mining.

The armed enforcement wings of the drug trafficking organizations found that some of their interests coincided with those of landowners and other wealthy business people under threat by the guerrillas, and they joined forces. What once started as locally organized self-defense groups in areas of little state presence quickly grew into an expansionist national project of paramilitarism. Led by the Castaño brothers, whose father had been killed by the FARC, paramilitary groups united under the umbrella of the AUC (Autodefensas Unidas de Colombia). Officially established as an organization to fill in the void left by the state in the task of defending innocent civilians and business owners from the guerilla forces, the AUC quickly became a central player in Colombia’s narcotics trade. The great majority of atrocities

the future of the peace deal with the FARC is uncertain since hardliner Iván Duque was elected president of Colombia in 2018.
committed in the late 1990s and in the early 2000s was committed by the paramilitaries.\textsuperscript{361}

The Colombian state in the meantime had gone through severe turmoil. The violent conflict between the state and the Medellín cartel of Pablo Escobar ended in the death of Escobar on a Medellín rooftop in 1993, but not before also having taken the lives of Minister of Justice Rodrigo Lara Bonilla in 1984 and presidential candidate Luis Carlos Galán in 1989, amongst many others. In 1985, rebels of the M-19 guerrilla group took over the Palace of Justice in Bogotá. The military raid on the Justice Palace led to an escalation in which around a hundred people died, amongst whom eleven of the twenty-four Supreme Court Justices.\textsuperscript{362} The peace talks between the FARC and the Colombian state during the administration of Belisario Betancur (1982-1986) resulted in the creation of the \textit{Unión Patriótica} in 1985, a political party in which the FARC and the Colombian Communist Party participated. In the second half of the 1980s, between 2,000 and 3,000 of its members were killed, including presidential candidates Jaime Pardo in 1987 and Bernardo Jaramillo in 1990, silencing directly the larger part of those within FARC in favor of a negotiated settlement, and bolstering indirectly those convinced that the continuation of warfare was the only option.\textsuperscript{363}

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\textsuperscript{362} The Inter-American Court found the Colombian state responsible for serious human rights violations during the events of the Palace of Justice siege, including the forced disappearance of ten persons. See Inter-American Court of Human Rights, \textit{Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia}, Judgment of 14 November 2014. Colonel Plazas Vega, who led the army operation, was convicted in 2010 for the disappearance of some of those inside the Palace. He was absolved however by the Supreme Court for alleged lack of evidence in 2015.

\textsuperscript{363} The massive and systematic killing of UP members is oftentimes characterized as a political genocide. See for example Iván Cepeda Castro, ‘Genocidio político: el caso de la Unión Patriótica en Colombia’, \textit{Revista CEJIL} 1(2), 2006, 101-112.
\end{flushleft}
Pablo Escobar was taken down by a coalition including the Colombian authorities, United States authorities, and enemies of Escobar from the underworld who had united under the acronym ‘los Pepes’ (those Persecuted by Pablo Escobar). Coordination between criminal enemies of Escobar and the Colombian state however created new problems of its own. The campaign of president Samper (1994-1998) turned out to have been co-financed by the Cali cartel, leading to a legitimacy crisis for the Colombian government and the withdrawal of visas to the United States for many government members including president Samper himself.

President Pastrana (1998-2002) attempted to revive the peace talks with the guerilla. He was even prepared, controversially so, to grant the FARC a demilitarized zone the size of Switzerland. In the meantime however, Pastrana negotiated military cooperation with the United States and built up military capacity to fight the FARC. The attempts at negotiating an end to the war with the FARC failed. With the peace talks with the guerilla failed, paramilitarism still expanding, and drug violence still rampant, the state’s monopoly on violence became ever more challenged. A dramatic turnaround came with the election of hardliner Álvaro Uribe to the presidency in 2002.

Before becoming president, Uribe was the governor of Antioquia, the state of which Medellín is the capital. As governor, Uribe had been an enthusiastic supporter of the creation of CONVIVIR, legalized self-defense groups. As president, his so-called ‘Democratic Security’ policy implied fighting all-out war with the guerillas in order to bring military defeat upon them, whilst negotiating with the paramilitaries. Uribe’s policies, although bringing heavy losses upon the FARC, did not win the war. The negotiated demobilization of the AUC moreover turned out to be rather superficial, with many members abandoning the process or never entering it in the first place, giving rise to ‘neoparamilitarism.’ The Colombian armed forces in the meantime had grown in size and capabilities, in large measure due to the enormous support for Uribe’s policies from the United States through the so-called Plan Colombia.
The ‘success’ of Plan Colombia and of Uribe in enhancing the Colombian military however came at a heavy price. Over 3,000 civilians, oftentimes handed over to the military by paramilitaries, had been killed by the military, dressed up as guerrillas and presented to the public as FARC casualties. The so-called falsos positivos scandal was one of the worst instances of human rights violations committed by any state in Latin America in the 21st century.

Uribe and his followers have always insisted that the AUC was a party to Colombia’s armed conflict, but that the AUC had demobilized in 2005 and the conflict was from that moment on only between the government of Colombia and the guerrilla. The 2005 AUC demobilization was only partial and superficial however. What some commentators refer to as ‘neoparamilitarism’ is referred to by the government of Colombia consistently as ‘bacrim’: criminal bands. “They are criminal bands. They are not illegal armed groups,” declared Uribe’s former Defense Minister and successor as president, Juan Manuel Santos. But many agree that these groups are the direct successors of, or even the same people as, the erstwhile paramilitaries.

Uribe’s successor, President Santos, succeeded in reaching a peace accord with Colombia’s strongest guerrilla group, the FARC. If an accord with the ELN, the last remaining guerrilla grouping, is also reached, then Colombia’s civil war will have officially ended, and the country shall officially be considered ‘post-conflict’. It is far from certain however whether levels of violence and crime will actually decrease. The demobilization of the AUC was followed by the rise of ‘bacrim’ or neoparamilitarism. The effective demobilization of all of the FARC’s estimated 18,000 fighters is unsure, particularly after the 2018 election of hardliner Iván Duque as president. Some of

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365 Declaración del Presidente Juan Manuel Santos al concluir el Consejo Nacional de Seguridad en la Case de Nariño, 7 February 2011, Sistema Informativo del Gobierno.
those fighters are likely to refuse to disarm and to continue their criminal activities, independently or joining one or another of the bacrim. The ‘civil war’ label will be removed from the conflict, but will violence really diminish?

In this chapter, I shall analyze the violence in Colombia and the legal reactions thereto. First, I shall analyze the weakness of the state, the ineffectiveness of its monopoly on the use of violence, and the blurring distinction between civil war and organized crime in Colombia. Second, I shall analyze the criminalization of the state. The story of the Colombian state's relation to the violence in Colombia is not merely that of state weakness; the state has also been captured by criminal interests and has participated in atrocities. In fact, the distinction between organized crime and the state has been very blurry during the times of paramilitarism and parapolítica. Third, I shall analyze the international reactions to the violence in Colombia. The U.S. assistance program under the name of Plan Colombia was one of the biggest foreign policy operations of the U.S. As of 1999, Colombia became the third recipient of U.S. military aid in the world only after Israel and Egypt.\footnote{See Douglas Farah in \textit{The Washington Post}, ‘US Ready to Boost Aid to Troubled Colombia’, 23 August 1999.} I shall analyze the design, implementation and effectiveness of Plan Colombia, before turning to another international intervention: the preliminary examination by the International Criminal Court (ICC).

\section*{2 State weakness}

The Colombian state has always struggled to exercise control over the entirety of its territory. A major contributor to this is of course Colombia’s geography: two vast mountain ranges cross the country. Its elites, ever since the days of colonialism, reside in high urban areas in the center of the territory, not minding too much about the jungle at the other side of the mountain range. Large estates, so-called \textit{haciendas}, which were land-intensive, capital-intensive and labor-extensive, have historically
dominated Colombia’s export-oriented agricultural economy. There were little industrial production or state-led social programs to absorb the abundant labor force. Farmers whose labor was redundant were forced to expand the agricultural frontier: they moved towards unexplored areas of the jungle and cleared them for subsistence farming and for coffee production. Far away from the control of the state – actually virtually abandoned by the state – these areas provided fertile ground for guerrilla activity. Possessing the right climatic and soil characteristics, the plots of land conquered from nature at the agricultural frontier turned out also to be exceptionally suitable for the cultivation of coca.

2.1 Rise of guerrilla and paramilitarism

The decade of political bloodletting known as La Violencia (1948-1958) came to an end through a power-sharing agreement between Conservatives and Liberals, excluding communists and other left-wing elements who quickly came to challenge the new status quo violently. The two main left-wing guerrilla groups that were formed in the 1960s and that exist until the present day are the FARC (Revolutionary Armed Forces of Colombia) and the ELN (National Liberation Army).367

The FARC rose to prominence especially at the agricultural frontier. Its natural constituency consisted of peasant self-defense groups, supplemented by militant communists. One of the most emblematic figures in the history of the FARC is alias Manuel Marulanda, also known as ‘Tirofijo’ (‘Sureshot’). He was born in a coffee-growing region to a peasant family aligned with the Liberal Party during La Violencia. Never having studied beyond fifth grade of primary school, he joined the Communist Party and led the FARC from its creation in the 1960s until his death in 2008. He embodies the FARC’s identity of rural, poor people, abandoned by the state, confronted with a

367 The FARC has signed a peace agreement with the Colombian government in 2016 and at the time of writing is in a process of demobilization.
legacy of political violence, rising up in arms against the central government. He also embodies the perseverance of the FARC’s struggle, having been presumed dead on various occasions, having been among the world’s most wanted fugitives, dying of a heart attack in the Colombian jungle at the estimated age of 80 years. Marulanda’s reign over FARC however also coincided with grave human rights violations committed by FARC members, for which he was severely criticized by Human Rights Watch and others,\textsuperscript{368} as well as increasing FARC involvement with the drug trade and other criminal activities.

The ELN on the other hand was considered more intellectual, its ranks comprising students, Catholics inspired by liberation theology, and left-wing intelligentsia. Whereas the FARC was affiliated to the Colombian Communist Party and to Moscow, the ELN was more directly inspired by Fidel Castro’s revolution and Che Guevara’s concept of \textit{foco} warfare.\textsuperscript{369} One of the most emblematic figures of the ELN was Camilo Torres Restrepo, a Catholic priest and academic who tried to reconcile Marxism and Catholicism. Under pressure from the government and from the Church leadership, Camilo Torres had to leave Bogotá and he joined the guerrillas of the ELN. He was killed in his first combat experience in 1966, and became a martyr for the ELN.

The guerrillas of the FARC, the ELN, and smaller groups such as the EPL and M-19, fought a protracted civil war with the Colombian state. After the decimation of the UP membership, the FARC rose to renewed prominence in the 1990s. President Pastrana (1998-2002) re-entered into negotiations with the FARC and granted the guerrilla movement recognized control over a demilitarized area the size of Switzerland. In the meantime, the elites and middle classes of Colombia had gotten increasingly irritated with the FARC, for their widespread practice of kidnapping for ransom, their extortion on the

\textsuperscript{368} See for example Human Rights Watch, ‘Colombia: Rebel Abuses Worsening’, 8 July 2001.

country’s highways, and their terrorist attacks on urban centers including Bogotá.

One of the primary functions, perhaps the primary function, of the state is to provide security. When the state fails to deliver security, it is only natural for citizens to self-organize against threats to their security. Hence, self-defense groups in territories abandoned by the state came into being; not only guerrilla groups who formed out of peasant self-defense groups, but also groups aligned to landowners and others who perceived of the guerrillas as the main threat.

Privately organized self-defense groups, willing to use force if attacked by guerrillas or others, are an old phenomenon. The bands that fought the Thousand Days’ War or that fought La Violencia can be perceived as privately organized violent groups, whose self-defense escalated into an offensive and destructive war. Law 48 of 1968 sanctioned private self-defense groups until 1989, and in 1994 the Colombian state sanctioned similar groups again under the name CONVIVIR.\(^\text{370}\) A ‘conventional’ civil war would be a bi-polar conflict comprising the state fighting communist rebels, like in Guatemala, El Salvador, and Nicaragua until 1979; or the state fighting right-wing rebels, like in Nicaragua after 1979. The most familiar situation is one of rebels who seek control over the state versus the government. In Colombia, because of its huge size and mountainous terrain, the conditions for a guerrilla war were perfect. The FARC managed to control substantial portions of the territory, where there was little to no state presence. But in reaction to the challenge the guerrillas posed to the state’s monopoly on the use of force, it was paramilitarism rather than state capacity that rose.

Especially in the late 1990s and the early 2000s, paramilitarism rose spectacularly. United under the AUC, paramilitarism was estimated to dispose of around 20,000 fighters at its height in 2002-2003.\(^\text{371}\) Paramilitarism always had


\(^{371}\) Officially around 31,000 members of the AUC demobilized, but it is widely believed that this represents an inflated number. Important paramilitary commander Freddy Rendón Herrera, alias El Alemán,
an ambivalent relationship with the state: on the one hand it was on the side of the Colombian state – and of the U.S. government for that matter – in the fight against the FARC. On the other hand, the AUC were a private militia exercising control over a substantial part of Colombia’s territory, and in the War on Drugs they were the adversary of the Colombian and U.S. governments. The Colombian government under president Uribe entered into controversial negotiations with the AUC, leading to their formal demobilization in 2005. I will come back to the story of the AUC, the involvement of the state, and the demobilization process, in the subsequent paragraphs.

The state appeared to be caught between the guerrilla and the paramilitaries, both controlling very substantial parts of the national territory. Both represented bottom-up pariah challenges to the rule of law and to the state monopoly on the use of violence. The Colombian state was actually close to collapse and failure.\textsuperscript{372} A self-reinforcing dynamic was created. The state failed to provide security to its main clients, i.e. the elites. Hence the elites had to pay private security companies for security in the cities, and they had to pay guerrillas or paramilitaries for security in the countryside. Why then pay taxes to the state? If the state does not receive taxes, its capacity to deliver security diminishes even further. This dynamic was crucially reinforced and maintained by the rise of cocaine.

2.2 Cocaine

The influence of cocaine on the development of Colombia’s civil war can hardly be overestimated. Colombia has consistently been at the center of the multi-billion-dollar worldwide trade in the illicit commodity, before 1994 primarily in trafficking, and

afterwards also in coca cultivation. Cocaine has played a crucial role in three interrelated processes: the weakening of the state, the blurring of the distinction between organized crime and civil war, and the criminalization of the state.

The most fundamental direct effect of narco money on the Colombian civil war was that it created an independent source of income for the warring parties to sustain the conflict. That is to say: for the guerrillas and for the paramilitaries, the narco trade became the main direct source of income. For the third warring party – the state – the relation to narco money was more ambivalent.

The narco trade is virtually impossible to regulate for the state, in as far as we define narcotics as illegal drugs. Sectors like illegal mining for emeralds and coal, and illegal logging, are lucrative sectors, but in principle these economic activities can be regulated by the state. For the coca trade this is not so, due to international legal regimes. In fact, the international prohibition of cocaine coupled with the substantial international demand for the commodity provided a unique advantage for both the FARC and for paramilitaries vis-à-vis the Colombian state. With Colombia’s geographic features and historic private organization of violence, this unique advantage leads almost inevitably to the further erosion of the state monopoly on the use of violence. All that the state can do, at least officially, with regard to the cocaine trade is suppress it. But the interests and the potential gains of the cocaine trade are too big, and the state’s initial monopoly on the use of violence too weak. Accordingly, a whole economy develops, based on cocaine and narco-dollars, that cannot be officially taxed; and a violent apparatus develops to protect that economy against the state. Erosion of the state monopoly on the


\[374\] The Oxford Dictionary defines narcotics, of which narco is an abbreviation, as: “An addictive drug affecting mood or behaviour, especially an illegal one.”
use of violence, and ultimately state criminalization, are nearly inescapable.

Probably the best-known episode of drug production and trafficking activities resembling civil war is the story of Pablo Escobar and his Medellín cartel. When the Colombian government threatened to extradite Escobar to the U.S., he and his fellow ‘extraditables’ waged a ‘war’ on the state, including the use of terrorist tactics. Escobar had a Minister of Justice and a presidential candidate murdered, amongst many other targeted assassinations. The Medellín cartel allegedly financed and supported the M-19 guerrilla attack of the Palace of Justice. In an effort to assassinate another presidential candidate, Escobar had a commercial passenger flight bombed, killing all 107 people on board. A bomb at the building of Colombia’s secret service in Bogotá killed 52 people and injured about 1000 more in 1989. Escobar and his Medellín cartel controlled a substantial part of the economy, of the territory, and of the population, and their conflict with the Colombian state led to thousands of casualties. Not only the CIA and the DEA but also U.S. military intelligence was involved in bringing down Escobar.

In order to avoid extradition, Escobar and his associates waged what was referred to as a ‘war’ on the state. But as self-declared ‘narco-capitalists’, they also had another enemy: the communist guerrilla. In 1981, a member of the Ochoa family, founding family of the Medellín cartel, was kidnapped for ransom. In reaction, drug traffickers and landowners formed MAS: Muerte A Secuestradores (Death to Kidnappers). The MAS

375 The level of involvement of Pablo Escobar in the events surrounding the Palace of Justice siege remains unclear. Paramilitary leader Carlos Castaño claimed that Escobar paid 1 million USD to M-19 to destroy archives in the Palace of Justice. Escobar’s close associate ‘Popeye’ claimed that Escobar had paid 2 million USD to M-19 to conduct the raid. Although it seems that there were relations between the Medellín cartel and M-19, there is no conclusive evidence that Escobar actually ordered the raid. See Carlos Cortés, ‘Los mitos de la toma del Palacio de Justicia. El Informe de la Comisión de la Verdad’, La Silla Vacía, 18 December 2009.

was the first major paramilitary organization in Colombia financed by drug money.³⁷⁷

Both the *Extraditables* and the MAS targeted the population at large. The *Extraditables* professed that they preferred a tomb in Colombia to a prison in the United States and played on patriotic sentiments. Later on they played on intimidation and fear. The MAS had some initial sympathy, as they portrayed themselves as a direct self-defense reaction to the kidnapping of a female family member. The MAS however also resorted to terrorism and widespread killing. But both the *Extraditables* and the MAS, although carrying out war-like activities against the state and against the guerrilla, and trying to win public support, were first and foremost expressions of organized crime. They did not claim a political agenda beyond their own interests: avoiding extradition and avoiding kidnapping.

The civil war of the FARC was increasingly tainted by *narco*-activities too. Although estimates vary widely, it is evident that cocaine has been a crucial source of income for the FARC for decades.³⁷⁸ Narco money was not the cause for the start of the war, but it sure played an important role in its continuation.

Gradually, drug money became not merely the means of sustaining the violent conflict, but rather, control over drug growing and smuggling areas became central to the dynamic of the entire conflict. When the Soviet Union disintegrated, many of the Cold War proxy civil wars in Latin America came to an end: the Contra War in Nicaragua in 1990, the civil war of El Salvador in 1992, that of Guatemala in 1996. In large part due to cocaine, the war of Colombia had acquired a different dynamic and outlived this process. Income from the drugs trade allowed a high degree of independence for the FARC. The infamous counter-insurgency logic of ‘taking away the water to eliminate the fish’ had been applicable in the Guatemalan civil war. Wiping over 600 Maya villages of the map effectively removed the ground from

under the feet of the Guatemalan guerrilla. But that counter-insurgency strategy was no longer a feasible military strategy in Colombia. The FARC needed very little ‘water’, in the sense of supportive civilian population, in order to survive. Control of narcotics had substituted control of population as main source of survival.

In turn, the armed guerrilla fighters who were not dependent in too large a measure on public support, and who made their money in the drug trade, increasingly turned effectively into little more than drug criminals. A self-reinforcing dynamic came into effect. In the 1980s and 1990s, the FARC suffered a legitimacy crisis as a result of their criminal activities, notably the practice of *pescas milagrosas* (extortion) and kidnapping of people like presidential candidate Betancourt. The FARC’s political party was annihilated. Yet, the FARC grew militarily and economically thanks to the drugs. The more involvement with drugs, the less legitimacy, the less other sources of revenues, and as a result the more dependent on drugs the FARC became.

The rise of cocaine also gave rise to the transformation of ‘civil self-defense’. In many parts of the country where the state was absent, landowners and others with vested interests united and formed self-defense groups to defend themselves against the guerrillas. In the beginning these groups were mainly defensive in nature, but when wealthy cocaine traffickers became involved, the nature of these groups changed. This process started with the MAS. Subsequently, the violent enforcement arms of the cartels took over the self-defense groups and turned them into offensive militias to reap a greater part of the cocaine markets. A national expansionist paramilitary project ensued under the name of the United Self-Defense forces of Colombia or AUC.

There were powerful dynamics at play reinforcing each other. The concentration of land ownership, both by narco-elites and traditional elites, implied the displacement of impoverished peasants. These peasants in turn provided a cheap and vulnerable labor force for coca growing. *Narco* profit-making fueled further concentration of land ownership. The concentration of land ownership, the displacement of impoverished peasants, and the viability of the narco business all
relied on the private provision of violence: paramilitarism. For narco-traffickers, land is a crucial commodity for multiple reasons: not only to grow coca and to process and transport coca and cocaine, but also to launder assets and to gain influence over public life and avoid arrest. In 1998, narcos owned land the size of Holland and Belgium combined, whilst with over six million uprooted citizens Colombia is ‘home’ to one of the largest populations of internally displaced people in the world. The rule over the acquired land served narco-paramilitaries to gain social and political recognition and to maintain some sort of credibility to the anti-subversive discourse. Although the situation perhaps did not amount to full legality, at least control over the land helped them get closer to social legitimacy. In this story, the state is partially an impotent bystander, and partially, as shall be explained in the next paragraph, an active accomplice.

It has always been difficult to determine the character of the AUC. Officially they were a counter-insurgency organization, whose agenda was to protect the country from communism and to do what the state would not or could not do. They presented themselves as a political-military movement which used the same irregular methods as the guerrillas. As Jasmin Hristov describes the self-portrayal of the AUC, “[i]ts members are not terrorists, nor common criminals, but rather persons who have found it necessary to violate the law because the Colombian state penalized the legitimate right of self-defense even though it is incapable of providing that defense.” Carlos Castaño, the leader of the AUC until his death in 2004, claimed that the Colombian state offered security and protection only for the oligarchy, leaving its middle classes abandoned. In that sense,

380 According to the Internal Displacement Monitoring Centre, which is considered one of the most reliable sources of information on internal displacement worldwide, the number of internally displaced persons in Colombia stood at 6.509.000 in March 2019, with Syria at 6.748.000.
paramilitarism rose, at least by its own account, as the middle-class self-defense equivalent of the guerrilla’s lower-class self-defense movement.

Paramilitarism soon turned predatory however. Paramilitaries were not that eager to militarily confront the guerrillas, who were hardened by decades of fighting and surviving in the jungle. Instead, paramilitaries preferred to terrorize the civilian population and engage in drug trafficking and other criminal activities. Paramilitaries even formed in regions with little to no previous guerrilla activity. Unless one would presume that paramilitaries formed as a preemptive defense measure against guerrilla activity, it seems that paramilitarism had become an offensive and expansionist project rather than a defensive project in reaction to guerrilla activity. There are even instances of guerrillas and paramilitaries doing narco business together.\textsuperscript{383}

Paramilitarism turned into the equivalent not of a liberation movement or a self-defense group, but rather into the equivalent of maras, violent street gangs. Instead of consisting of the lowest classes and engaging primarily in local drug dealing, paramilitarism consists of the middle- and upper classes and they engage in the international drug trade. Paramilitarism provided narrow self-defense, a sense of identity, and opportunities for moneymaking. Just like maras, paramilitarism attracted and brought together the most violent individuals in the society, without an effective state to keep them in check. Maras and paramilitaries alike moved from a defensive motive into the offensive, expanding their territorial control over neighborhoods and even entire cities and provinces through terror and predation.

Paramilitaries resorted to extortion, or what they themselves would call ‘raising war taxes’, not only of landowners

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\textsuperscript{383} See for example: \textit{El Tiempo}, ‘Prueban alianza de Farc y paramilitares para traficar coca’, 6 March 2004. The AUC was originally strongest in refining and smuggling cocaine, but sought to expand its influence down the chain of production, challenging FARC’s control over coca crop production. Instead of challenging FARC’s control over production, at times the AUC was willing to cooperate with the FARC.
but also of small stores and bus-drivers. When paramilitaries take over a town or a neighborhood, first they ‘cleanse’ it, of guerrillas and their sympathizers, and of ‘desechables’ (‘disposables’, i.e. including prostitutes, petty thieves, substance addicts, and homosexuals). They instill a climate of fear and terror. Then they establish control over existing gangs, and they come to arrangements with local security forces. Unchecked by the state or by any other force capable of countering them, paramilitaries soon assume the violence monopoly in the territory they control with the acquiescence or even collaboration of the Colombian army and police, and with the tacit support of the United States. As far as paramilitarism’s counter-insurgency strategy was concerned, it was based on massacring, depopulating and repopulating areas, and taking over control over the cocaine trade. As Colombian sociologist Francisco Gutiérrez Sanín put it: “The anarchy created by paramilitarism and the massive privatization of the Colombian conflict [led to] a repression that was extraordinarily homicidal and extraordinarily inefficient.”

Initially condoned or even welcomed by the state as an ally in the fight against the communist insurgency, paramilitarism became uncontrollable, as the narcotics income allowed for considerable independence of the paramilitary movement vis-à-vis the state. In Guatemala, the state created the paramilitary PACs, and dismantled them when the state had no more need for them. The PACs, or similar groups in Peru, could never gain autonomy vis-à-vis the state because they did not

385 Id., p. 94.
386 Francisco Gutiérrez Sanín, ‘¿Una Historia Simple?’, p. 33: “La anarquía generada por el paramilitarismo y la privatización masiva del conflicto colombiano” resultó en una represión “extraordinariamente homicida y extraordinariamente ineficiente.” Gutiérrez Sanín’s contribution to the report of the Truth Commission created by agreement between the FARC and the Colombian state: Comisión Histórica del Conflicto y sus Víctimas, Contribución al entendimiento del conflicto armado en Colombia, February 2015.
have sufficient autonomous financial means. Drugs gave those means to Colombian paramilitarism. Paramilitaries gained the capability to carry out military operations independently, and had all the resources imaginable for corrupting state officials. The Colombian state condoned the creation of paramilitary groups, but could not dismantle them when they wanted to because drug money had created independence from the state. By 1989, Decree 1194 demanded imprisonment for those involved with paramilitary groups, reversing the legality and legitimacy bestowed upon them by Law 48. But the paramilitaries had already escaped the control of the state.

Were the AUC a political movement, financing their violent resistance to the guerrilla through cocaine? Or were they cocaine traffickers, seeking political influence and social legitimacy through an anti-insurgency agenda? The answer to this question was not only relevant in terms of public support but got legal relevance when the AUC entered into negotiations with the Colombian government. The AUC would demobilize and enter into a transitional justice process in which they would receive alternative punishment for the crimes they had committed in the context of the civil war. The alternative punishment would initially not include any prison time at all, but eventually came to include a maximum of eight years in prison.\textsuperscript{387} ‘Purely’ narco activities however would not be included in the ‘alternative punishment’.\textsuperscript{388} It was therefore legally attractive for narco-traffickers to disguise their activities as related to the armed conflict.

According to high-ranking paramilitary commander Rodrigo Pérez Alzate, alias Julian Bolivar, who participated in the ‘Justice and Peace’ transitional justice process, the whole creation of the united paramilitary command structure under the name AUC had as its primary purpose to acquire a position to negotiate with the government.\textsuperscript{389} In 2000, a conference of

\textsuperscript{387} Ley 975 de 2005 (‘Justice and Peace Law’), Article 29.
\textsuperscript{388} Ley 975 de 2005 (‘Justice and Peace Law’), Article 10, under 10.5.
\textsuperscript{389} Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, M.P. Uldi Teresa Jiménez López, Radicación 110016000253200680012, Postulado: Rodrigo Pérez Alzate,
paramilitary commanders decided that demobilization would serve their interests and would be their middle-term goal. They decided to bring the AUC closer to the requirements of international law relating to armed conflict. For that, they needed centralized command.

In the meantime, various hitherto unconnected self-defense, private security and organized crime groups were drawn into the AUC framework. That way, the AUC leadership would gain leverage at the negotiation table, and criminals could benefit legally. It turned into a successful massive blackmailing of the Colombian state. The latter failed to ‘divide-and-rule’, failing to play the diverse criminal groups against each other and allowing the criminal groups to act united vis-à-vis the state.

The blurring distinction between organized crime and civil war is perfectly illustrated by what became known as ‘paraportes’, a contraction of ‘paramilitary’ and ‘passport’. During the demobilization negotiations, powerful drug lords could 'buy' the command of a paramilitary front, as an AUC franchise. Allegedly millions of dollars' worth of paramilitary front commanderships were sold to drug lords. These drug lords would then claim to have been politically motivated paramilitary combatants all along. The ‘paraporte’ was the purchase of paramilitary status by drug traffickers, in the hope that their criminal records would be cleansed in the transitional justice process; the distinction between organized crime and armed conflict was purposefully blurred.

Participants in the transitional justice process, so-called postulados, had to confess their crimes, contribute to reparations to the victims, and cease their criminal activities, in return for which they would receive an ‘alternative sentence’ of maximum eight years in prison. If the conditions are not met, the ‘ordinary’ sentence which can typically be as high as thirty years

Sentencia, 30 August 2013, footnote 226: “para efectos de negociación con el gobierno nacional nos constituimos como AUC.”

390 Id., p. 230: “acercar a las AUC a los requisitos de normas internacionales sobre conflictos armados.”

391 See for example Verdad Abierta, ‘Narcotráfico y su papel en el desmonte de los paramilitares’, 8 October 2008.
imprisonment would be carried out. A controversial issue was whether drug-trafficking activities of the *postulado* were to be included in the transitional justice process, or whether they were to be excluded from it and to be treated by the ordinary justice system. The Justice and Peace judges had to establish whether the *postulado* was engaged in drug-trafficking in the service of the counter-insurgent mission of the group, or whether the *postulado* was merely a narco-trafficker who had business and/or friendship relations with paramilitaries. Because the Justice and Peace process relied heavily on information provided by the *postulados*, and because in the context of the Colombian conflict the line between ‘pure’ *narco* and ‘pure’ paramilitary activity is blurred, this remained a contentious issue in the legal proceedings. For example, in the case against Salvatore Mancuso et al., in the first instance judgment drug-related charges were accepted and ‘legalized’ in the alternative eight-year sentence.\(^{392}\) The appeal judgment however revoked the ‘legalization’ of the drug-related charges, arguing that it had not been established with sufficient clarity that the drug-related activities formed an integral part of the counter-insurgent group’s activities.\(^{393}\)

Cocaine had come to drive Colombia’s civil war and had created new, perverse dynamics in the conflict. Originally, the guerrilla emerged to protect the interests of the poor, whilst, to put it bluntly, the paramilitaries emerged to protect the interests of the rich. But because of cocaine earnings, both guerrillas and paramilitaries soon had their own interests to fight for.

The economic impact of cocaine on Colombia has been substantial.\(^{394}\) Many Latin American nations went through


\(^{393}\) Corte Suprema de Justicia, Sala de Casación Penal, M.P. José Luis Barceló Camacho, Radicación 45463, Postulados: Salvatore Mancuso Gómez et al., Sentencia de Segunda Instancia, 25 November 2015.

\(^{394}\) One study estimated the share of Colombia’s GDP made up by the cocaine industry to have peaked at 6.3% in 1967. See Richard Rocha
periods of excessive inflation and currency crises; not Colombia though, with the abundance of *narco*-dollars in the country propping up the Colombian *peso*. Members of the Medellín cartel reportedly offered to pay Colombia’s $13 billion sovereign foreign debt in return for a guarantee of non-extradition. The rise of cocaine led to a self-reinforcing vicious dynamic: because of cocaine-earned purchasing power, in Colombia prices would rise, which in turn would make Colombian legal exports more expensive and less competitive, which in turn would force more people into cocaine. Ongoing concentration of land ownership in the hands of the *narco*-bourgeoisie also played its part. Cocaine trade has not only substantial macro-economic effects on Colombia, but also severe social effects. *Narco*-trafficking provided means of social advancement in large parts of the territory unparalleled by any legal alternative. Neo-liberal policies of deregulation, privatization and cutting down public expenditure only signed further relative increase of the economic and social importance of cocaine and of *narco*-capital. In the meantime, given the scarcity of livelihood alternatives and the violence panorama, for the individual peasant deciding to grow coca has oftentimes been, and in parts of the country remains, an absolutely rational choice.

With the AUC officially demobilized, and the FARC having signed a peace accord, Colombia’s civil war is almost over. Only the ELN is still in the process of finalizing peace negotiations with the government. But removing the civil war label from the AUC and FARC’s drugs activities does not remove their profitability. The AUC only demobilized partially, and many fear that a number of FARC fronts will not demobilize either. Instead, they continued

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drug activities and are referred to as *bacrim*, the Spanish acronym for criminal bands.

### 2.3 Bacrim

In 2005, the AUC officially demobilized. From the standpoint of the Uribe administration, two reasons for pushing through the demobilization stand out. First, the human rights violations and drug trafficking by its paramilitary allies became an unsustainable liability, especially in the relationship with the United States government. Second, it was mission accomplished: the FARC had been defeated in the crucial parts of the national territory. The AUC was no longer needed.

A transitional justice process under the name ‘Justice and Peace’ was devised. The Justice and Peace process was heavily criticized. The degree to which it delivered truth was not satisfactory, especially after the extradition of the top leadership to the United States. The degree to which the process delivered justice was not fully satisfactory to victims either, with maximum sentences of eight years. Reparations were wholly insufficient. But of all the professed goals of transitional justice processes, on one was the Justice and Peace process particularly unsuccessful: the guarantee of non-recurrence.

In fact, many paramilitary fighters did not participate in the Justice and Peace process at all. As some of the paramilitary leaders made use of the process to gain legitimacy and cleanse their criminal records, others decided simply not to participate and to continue their violence and drug trafficking. Vicente Castaño for instance, brother of Carlos Castaño, initially participated in the demobilization process but withdrew and was involved in the creation of the Águilas Negras, a notorious neo-paramilitary criminal organization. The ‘demobilization’ process of the AUC has been severely criticized for not actually amounting to a demobilization. The AUC were not fighting the

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398 See below, in Plan Colombia paragraph, for the extraditions of the paramilitary leadership.
state to begin with. Some of their leadership’s criminal records were whitewashed, whilst on the ground little changed.399

After the demobilization, the groups that held on to their weapons, and that continued drug trafficking and other criminal activities, were no longer referred to as paramilitaries. Whereas some speak of successor groups,400 or of ‘neo-paramilitarism’401 or ‘narco-paramilitarism’,402 the Colombian government prefers to speak of ‘bacrim’, criminal bands. The term ‘bacrim’ serves to explicitly make clear that these groups are not armed groups engaged in the civil war.403 The term also serves to express that the AUC has effectively demobilized, and that in effect a new situation has come into being. Many doubt the degree to which there really is a new situation however. As one political analyst notes, “whilst the academics were defending their definitions, the reality in the regions of Colombia did not change too much.”404

There are some real differences between the AUC and the bacrim. The AUC had a highly visible presence. AUC fighters wearing uniforms and carrying high-caliber weapons would carry out patrols, employing roadblocks and paramilitary bases. The bacrim tend to operate in a significantly less ostensive way. The AUC had a professed anti-subversive ideology and claimed that their reason of existence was fighting the guerrilla. The bacrim have a less explicit claim to a political agenda, although

401 Verdad Abierta, ‘¿Neoparamilitares o criminales?’, 21 December 2015.
403 As opposed to ‘grupo armado al margen de la ley’, illegal armed groups, a category that may comprise both guerrillas and paramilitaries, and that was invoked in the Legal Framework for Peace.
404 Juan Carlos Garzón, ‘Las bandas criminales ¿Qué son y cómo debe responder el Estado?’, Razón Pública, 16 March 2015. Spanish original: “Mientras los académicos defendían sus definiciones, la realidad en las regiones de Colombia no cambió demasiado.”
some bacrim do claim to have one. For example, one of the major bacrim, the Urabeños, call themselves ‘autodefensas gaitanistas’, claiming the heritage of Jorge Eliécer Gaitán, the populist Liberal politician murdered in 1948. Another major bacrim calls itself ERPAC, Ejército Revolucionario Popular Antiterrorista Colombiano (Revolutionary Popular Antiterrorist Colombian Army). But on the whole, the political agenda of the bacrim is much less explicit and much less consistent than during the times of the AUC.

The AUC controlled over one third of Colombia’s Congress. The bacrim have considerable regional influence but lack such national projection of their power. Although the AUC’s centralized command was far from fully effective, in name at least the AUC was unitary and vertically organized. The bacrim operate in varying coalitions amongst themselves, and also most bacrim internally resemble more of a network-like organization than hierarchical structures. The bacrim also lack any centralized military capability to take on the guerrillas, nor do they have the desire to do so, whereas the AUC occasionally did engage in combat with the guerrilla. The bacrim sometimes rely on sicarios (hit men) to provide their need for violent actions, and sometimes they offer their services as hit men to others. Bacrim violence often seemingly targets unionists, land restitution activists and social movements, but it seems likely that in many of these instances they actually operate as guns for hire.

Since the role of Mexican drug-trafficking organizations in bringing cocaine to the United States market has increased, present-day Colombian drug-trafficking organizations are getting a smaller share of the international cocaine earnings, and as a result they have to rely more on other criminal activities.

The demobilization of the AUC removed the ‘armed actor’ label from the paramilitary groups. However, some of the bacrim have gained such power and notoriety that the Colombian government is partially revoking its position. In May 2016, the

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405 See below, State criminalization paragraph, for the parapolítica scandal.
government announced that three of the *bacrim* would be considered armed actors, and that the use of lethal force by the military, including aerial bombardments, would from now on be authorized.407

The ‘armed actor’ label matters on the ground. The FARC was obviously considered an armed group in the civil war. Hence, FARC bases in the jungle were legitimate military targets. Under international humanitarian law as well as under Colombian law, it was allowed to bombard FARC bases, taking into consideration of course the principles of distinction, necessity, proportionality and humane treatment. Since the FARC was the adversary in a war, the Colombian army was allowed to eliminate FARC elements. In contrast, as long as the state is not at war with the *bacrim*, all the state may do is carry out judicial orders against them and try to arrest their members.

The fact that the Colombian government authorized aerial bombardments on three of the biggest *bacrim* implies that, at least in a military enforcement sense, they are considered actors in the armed conflict. The subsequent question to ask is whether they would then also be potential participants in peace negotiations. This is the most controversial implication of recognizing the *bacrim* as armed groups. There is a risk that if a group becomes strong enough militarily, it can compel the state to recognize it as an actor in the armed conflict. On the one hand, the state now has its hands free to apply the laws of war and to bombard bases of the group. On the other hand, the group now can demand that it be recognized as a potential partner for peace just like the AUC and the guerrillas, and that its criminal records be whitewashed in a peace negotiation *cum* transitional justice process. The result is the constant undermining of the state’s monopoly on the use of violence by pariah criminals willing to confront the state violently, and the *de facto* rule of force of third parties rather than the rule of law of the state.

How does one determine what constitutes an armed group under international humanitarian law, and what

constitutes a criminal band, in the context of Colombia? Defense Ministry directive 14 of 2011 stipulated that the fight against *bacrim* is in the realm of law-enforcement, that the *bacrim* are not armed groups and that international humanitarian law shall not be applicable. In this view, the only armed actors to which international humanitarian law is applicable are the FARC until the peace accord of 2016, and the ELN. Colombian minister of Defense Juan Carlos Pinzón proposed in 2015 to apply international humanitarian law “to any group that meets certain objective criteria, irrespective of whether the group calls itself guerrilla or not.” For the Colombian government, what is crucial is the military force of a group: camps, heavy weaponry, uniformed fighters, territorial control, and centralized command, as well as the intensity of the violence. These objective criteria are in conformity with international law.

Another, related, question, is how to distinguish political armed actors from criminal ones. Although international law does not require that an armed group have a political motivation in order for it to be potentially considered party to an armed conflict, in the political debate in Colombia the two questions are often presented as intimately linked. The recognition of a political nature to violence has frequently been a matter of

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409 *La Silla Vacía*, ‘¿Bombardearon o no bombardearon? Ésa es la cuestión’, 3 November 2015: “a cualquier grupo cuando cumpliera ciertos criterios objetivos, sin importar si se autodenominaba guerrilla o no.”
411 See also Chapter 2.
412 Claudia Lopez claims that there is no difference what so ever. Claudia López (ed.), *Y refundaron la patria*, Penguin Random House 2010, p. 58: “Solo hubo cambio de nombre: de cartel de Medellín a los Pepes, de los Pepes a ACCU, de ACCU a Convivir, de Convivir a AUC, de AUC a Bandas Criminales.”
opportunism. Sometimes political motives are denied officially, although there appears to be a reasonable ground to assume political motives, for example in the case of calling the FARC ‘narco-terrorists’ or ‘mere drug-traffickers’. Sometimes political motives are officially recognized where there appears very little ground to do so, for example in the case of the paraportes.

Denying any political nature to the bacrim risks obscuring their capacity to influence politicians and state institutions, especially on the municipal and regional level. A study by Colombian think tank Fundación Ideas para la Paz looked into the reproduction and expansion capacity of the bacrim. It found that economic circumstances, i.e. where the prospects for coca growing, processing and trafficking are greatest, do not suffice to explain the patterns of bacrim activity. Rather, to understand ‘contexts of illegality’ and explain patterns of bacrim activity, also circumstances of a more institutional and sociological nature must be considered, including where the state is weakest and most corruptible and where legal alternatives for the civilian population are scarcest.

The label bacrim, as opposed to paramilitarism, does several things. For one thing, it downplays the extent to which paramilitarism during the days of the AUC was at the service of narco-trafficking and other criminal interests. Second, it overplays the extent to which the paramilitary project of the AUC has effectively demobilized. Moreover, it obscures the state policy behind the rise of paramilitarism.

3 State criminalization

Part of the story of the Colombian civil war is that of state weakness: an impotent state, incapable of enforcing its

413 See Juan Carlos Garzón, ‘Las bandas criminales ¿Qué son y cómo debe responder el Estado?’, Razón Pública, 16 March 2015.
415 Id.
monopoly on the use of violence, that gets caught between guerrillas and paramilitaries. Private violent actors gain immense income from the cocaine trade. The distinction between organized crime and armed conflict gets blurred as the state tries to suppress various forms of armed actors, with varying degrees of political motivation. From the bottom up, pariah criminals undermine the rule of law.

That is the story that some within the Colombian state would want the world to believe, and that inspired Plan Colombia: the poor and innocent Colombian state, in dire need of assistance as outside private violent actors are undermining it. But there is a further side to the story: that of the state being pivotal in the creation and expansion of paramilitarism. We see not merely a weak state threatened from the outside, but rather a criminalized state captured from within.

3.1 Corruption and Proceso 8.000

With drug trafficking came not only the use of force by drug traffickers, but also their attempts to buy influence over the state. Drug traffickers were particularly interested in making sure to avoid arrest and extradition. Pablo Escobar managed to get elected to Congress in 1982, thus gaining immunity, but his term in Congress was short-lived. Fellow Medellín cartel founder Carlos Lehder had created his own political party, which he called Movimiento Cívico Nacional. In reaction to the murder of Justice Minister Rodrigo Lara Bonilla in 1984, president Betancur (1982-1986) revived the extradition treaty with the United States, and Carlos Lehder was extradited to the United States in 1987. A violent conflict ensued between the state and the cartel bosses who united as Los Extraditables and who professed to prefer a tomb in Colombia to a prison in the United States. In 1991, narco-trafficking gained a victory by ensuring a constitutional ban on the extradition of nationals. With extradition off the table, Escobar was willing to ‘turn himself in’ to the authorities. He negotiated that he would serve time in what became known as ‘The Cathedral’, a prison that Escobar had built for himself and that was as luxurious a residence as any. Escobar
could continue his criminal activities from within The Cathedral. In 1992, when he received early warning of a government plan to move him to an actual prison on a military base, Escobar decided to escape from The Cathedral.

Pablo Escobar by then had made too many enemies. He had managed to amass considerable influence over many within the Colombian state, by his ruthless and consistent application of ‘plata o plomo’ (silver or lead), but he had remained a pariah. President Gaviria (1990-1994) was determined to punish Escobar for the murder of his mentor, presidential candidate Luis Carlos Galán, in 1989. The United States government blamed Escobar for the cocaine epidemic and associated violence in the United States, as well as the death of two U.S. citizens aboard the Avianca flight that Escobar had bombed in 1989. Joining the U.S. and Colombian governments in the hunt for Escobar were Los Pepes, underworld figures that were persecuted by Pablo Escobar. Against such a powerful coalition, even a man like Pablo Escobar eventually stood no chance, and he was killed in a gunfight with Colombian police officers in 1993.

As Pablo Escobar had become public enemy number one, it seemed as if the Colombian government and also the U.S. government were willing to do anything it took to take him down, even cooperating with criminals. Although Escobar was indeed taken down, the alliance with Los Pepes turned out to bring severe consequences of its own.

Corruption is a universal phenomenon. Cocaine represented a multi-billion-dollar illegal economy, in a poor country like Colombia; of course law-enforcement officers were going to be bribed. Escobar reportedly had hundreds of police and army officers and politicians on his payroll. They were on his payroll primarily to guarantee an omission: not being arrested and/or extradited.

The cooperation with Los Pepes was of a different nature. Here, it was not organized crime that bribed state officials, but state officials who collaborated with certain organized crime actors towards a common objective.416 Los Pepes were an alliance

of various organized crime actors with a grudge against Pablo Escobar, primarily from the Cali cartel. Their cooperation was crucial in the manhunt on Pablo Escobar, but the cooperation with these criminals did not end with the death of Escobar.

There were suspicions of Ernesto Samper’s successful 1994 presidential campaign having been co-financed by the Cali cartel. What ensued was an investigation that became known as Proceso 8.000, for the number of the case file. The case had an incredibly high political profile, featuring defeated presidential candidate Andrés Pastrana (who would become president in 1998) presenting ‘narco-cassettes’, containing evidence of conversations between representatives of Samper’s Liberal party and of the Cali cartel. Prosecutions were started against various ministers, members of Congress and other high state officials. Public outrage over the extent of the corruption was enormous. President Samper survived what would have come down to an impeachment vote in Congress by 111 to 43 in June 1996, whilst vice-president Humberto de la Calle resigned in September 1996. In between, in an unusually severe move, the Clinton administration had denied president Samper a visa to enter the United States.

The result was a governability crisis, with the Samper government severely discredited both domestically and internationally. The lack of legitimacy and power of the Samper administration allowed for the strengthening of both guerrillas and of the paramilitaries throughout the country. Although the Proceso 8.000 investigations reached various ministers and members of Congress, they eventually lost political impulse and came to a standstill.

With the extradition of Carlos Lehder to the United States, the death of Pablo Escobar, and the Proceso 8.000 investigations harming the Cali cartel, the model of the famous narco who could openly engage in politics seemed to have lost some of its predominance. The security chiefs of the former capos became independent, and started for themselves. This marked a profound change in the relationship between narco-traffickers

and paramilitaries. Narco-traffickers used to employ violence to further their business interests, and would support and hire paramilitary groups to fulfill their violence demands; violence was instrumental to narco-trafficking. With the demise of the Cali cartel and the rise of narco-paramilitarism, narco-trafficking became instrumental to a violent expansionist project of reconfiguring Colombia’s power relations. Previously, those who were engaged in narco-trafficking, who were powerful and willing to use violence, were content with their private armies and a weak state. A corruptible state, one that would leave narco-traffickers alone, was for them ideal. With paramilitarism, criminal interests were no longer limited to ensuring non-interference of the state. They became interested in taking over the state.

3.2 Paramilitarism and parapolítica

The state had officially used paramilitary groups for decades, especially from 1968 until 1989, when Law 48 was in force, creating civil patrols integrated within the Colombian military system. This ‘legal paramilitarism’ had many advantages: it was cheaper than enhanced regular military capacity; it enabled the state to reach hitherto un(der)reached regions; it allowed for confronting guerrillas with their own methods of irregular warfare; it allowed for wide intelligence gathering; and it allowed for the reduction of image damage, providing the army with a way of plausibly denying any involvement in human rights violations.

The growth of paramilitarism was further aided by decentralization. Electoral reforms carried out during the Turbay administration (1978-1982) provided for the direct election of mayors and governors, rather than national appointments. The

1991 Constitution provided even further opening up of the political system that had been so formidable closed during the National Front. A space emerged for new political parties and new movements. Paramilitarism, with the support of traditional regional elites, closed off that space. Moreover, administrative decentralization made municipal capture ever more lucrative. The 1991 Constitution did not provide enough guarantees to avoid state capture in the volatile, criminal and violent environment of Colombia. Whilst Colombia’s government rode the waves of neoliberalism – deregulating trade, cutting down social expenditure, and privatizing state-owned activities – the spoils for paramilitarism got bigger and bigger.

With cocaine and corruption income consistently very high, and the Colombian state weakened by the governability crisis during the Samper administration (1994-1998), the paramilitary squadrons prospered. Whilst president Pastrana (1998-2002) engaged in a failed attempt at negotiating peace with the guerrillas, the Colombian state continued to allow the paramilitary organizations to operate. Law 48 had allowed private militias to operate between 1968 and 1989. Law 356 of 1994 had made the CONVIVIR legal, but had been declared unconstitutional in 1997. However, the state did little to effectively dismantle the groups. When former governor Uribe of Antioquia announced that he would run for president in the 2002 election, the paramilitary leaders decided to support him.

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421 See Daniel Pécaut, ‘Un conflicto armado al servicio del statu quo social y político’. Pécaut’s contribution to the report of the Truth Commission created by agreement between the FARC and the Colombian state: Comisión Histórica del Conflicto y sus Víctimas, Contribución al entendimiento del conflicto armado en Colombia, February 2015.

422 See Verdad Abierta ‘¿Uribe llegó a la Presidencia con el apoyo de los ‘paras’?, 18 September 2014; see also Verdad Abierta, ‘Las Auc
By then, paramilitary leaders had incredible ties to the state apparatus. Local politicians had gotten into agreements with the AUC: they would leave the AUC alone and pass favorable legislation and enact favorable policies for them, in return for campaign financing and high voter turnouts in territories terrorized and controlled by the AUC. Dozens of Congress members turned out to have ties to the paramilitaries.

Whereas the guerrillas had challenged and fought the state, killing government agents and boycotting elections, the AUC was bent on taking over the state. The guerrillas wanted to overthrow Colombia’s constitutional order from without; the paramilitaries wanted to control it from within. 70% of politicians who were victims of violence were the victim of guerrilla violence, and only 7% of paramilitary violence. But 96% of the investigations relating to electoral ‘assistance’ were related to the paramilitaries.\(^{423}\) The FARC had resorted more to a bottom-up process of ‘social capture’, whereas the AUC engaged in a more top-down process of ‘state capture’. During the demobilization process of the AUC, paramilitary leaders Salvatore Mancuso, Ramón Isaza and Ernesto Báez were even allowed to expose their views in person in Colombia’s Congress.\(^{424}\)

The relationship between paramilitarism and the state was so ambivalent, and so far-reaching, that commentators started to wonder who was instrumentalizing whom. At first sight, taking organized crime as a virus-like external threat to public order and the state, one tends to see paramilitarism as the


\(^{424}\) On 28 July 2004, the three paramilitary leaders saw their arrest warrants temporarily suspended, and they were escorted by the military to go from the demobilization zone to Bogotá in order to address Congress. It is one of the most blatant displays of paramilitary infiltration of Colombian politics in the history of the country. See Gina Parody, ‘El día en que los paras se tomaron el Congreso’, *Kienyke*, 22 May 2011.
actor who is instrumentalizing and corrupting the state. But it may also seem at times as if the relationship were inverse: the elites who already controlled the state instrumentalizing violence and *narco*-trafficking for their own purposes. Who is using whom? Is the state using paramilitaries for its dirty work, or are paramilitaries using the state for revenues and impunity?

Inverted capture, in which the state is instrumentalizing criminal groups, can already be seen in the late 1980s and early 1990s, when the state engaged *narco*-paramilitarism to carry out the elimination of the *Unión Patriótica* and other acts of dirty war. Whereas in Argentina and Chile the state committed its acts of dirty warfare more directly, in Colombia the state relied in large measure on paramilitary groups for this purpose. Claudia López explicitly claims, in an influential book, that Uribe used paramilitarism for his political project, not the other way around.\(^\text{425}\) Although the state could not regulate the cocaine trade, through the instrumentalization of *narco*-paramilitarism the state could still profit from it.

Paramilitarism predates the cocaine trade. In the times of Law 48, many paramilitary organizations were led by local strongmen and looked like peasant armies. With the creation of *MAS* (Death to Kidnappers), *narco*-paramilitarism was born: an armed actor directly answering to *narco* interests. The CONVIVIR and the model of the MAS merged to form a state-condoned *narco*-paramilitarism, united under the AUC umbrella. The AUC was led by the Castaño brothers. Their father had been killed by the FARC, just like Uribe’s father, which explains the ferocious anti-subversive nature of their political agenda. The Castaño brothers were supportive of MAS but later fell at odds with Pablo Escobar and, according to their own account, created *Los Pepes*.\(^\text{426}\) *Los Pepes* would morph into various *narco*-paramilitary organizations, which subsequently would unite under the AUC umbrella.


\(^{426}\) See an interview with Fidel Castaño in *Semana*, ‘Yo fui el creador de los Pepes’, 27 June 1994.
The AUC developed strong interests, in the *narco*-trade, in landownership and in other ventures. To protect those interests, the AUC forged an alliance with state actors. In the short term, the AUC used coercion and violent pressure towards both politicians and voters. This basically pariah rule of law undermining crime is the most effective in the short term, but carries a high penal exposure. In the middle term, with much less penal exposure, state capture occurs through campaign financing. In the long term, the ultimate capture occurs by creating movements or parties that come into being already captured.\(^{427}\)

The modus of cooperation between paramilitarism and the political class turned into a self-perpetuating system. Politicians would cooperate with paramilitaries, in return for the guarantee of no electoral competition and high voter turnout in their district. In a perfect harmony of interests, paramilitaries and the politicians could then distribute the spoils of office to the detriment of everybody else. It is not so dissimilar to how traditional elites, National Front politicians, the Colombian armed forces and the legalized self-defense groups distributed Colombia’s wealth for decades. What was new to the paramilitary project that emerged in the 1990s was the role of the new elites from the *narco*-bourgeoisie, who were ever more powerful and had achieved high levels of state capture, whilst their willingness to resort to violence to settle disputes internally as well as externally did not diminish.

Whereas the FARC’s social base consisted of poor, barely educated peasants, the social base and especially the political support system of the paramilitaries consisted of influential, wealthy people. That is how paramilitarism developed from a bottom-up essentially pariah activity into elite rule of law undermining crime. The impunity was caused by the absorption of state institutions by *narco*-paramilitary forces, beyond mere corruption. Jasmin Hristov describes the impunity as “the

paramilitarization of the justice system.” The extent to which the electoral process had been paramilitarized came to light in the so-called parapolítica scandal.

It was something of a public secret that many politicians had extensive ties with paramilitaries. Paramilitary leader Mancuso bragged about one third of Colombia’s Congress members being controlled by the AUC. It was not mere bragging: eventually 30% of Colombia’s Congress members were convicted for having ties to paramilitarism. The parapolítica investigations were carried out by Colombia’s Supreme Court, which according to the Constitution of 1991 has jurisdiction over crimes committed by members of Congress. Some members, frightened by the effectiveness of investigations by the Supreme Court and more confident of their power to influence regular legal proceedings, resigned from Congress and claimed that by doing so jurisdiction would befall on the regular justice system. The Supreme Court denied this course of action and asserted jurisdiction over crimes committed by Congress members while in office irrespective of subsequent resignation from office. The investigations led to immense tension between the Supreme Court and the Executive, and even the harassment and wiretapping of Supreme Court magistrates by presidential secret service DAS.

The scandals exposed during the parapolítica investigations are a prime example of elite rule of law undermining crime up to the point of state capture. Some networks of parapolítica were led by a paramilitary man, other more locally organized networks were led by politicians like Jasmin Hristov, Blood and Capital – The Paramilitarization of Colombia, Ohio University Press 2009, p. 134.

See Comisión Colombiana de Juristas, ‘¿La ‘parapolítica’ al desnudo?’, 22 October 2009.

See for example an interesting reconstruction of efforts to discredit Iván Velásquez, the Supreme Court magistrate in charge of the parapolítica who in 2013 would become Commissioner of CICIG: Verdad Abierta, ‘El gran complot’, 24 May 2015.
The legal figure used in the parapolítica cases was that of ‘concierto para delinquir’, the Colombian equivalent of conspiracy crimes, taking in the politicians for their role in crimes against humanity as well as drug trafficking. President Uribe tried to bring concierto para delinquir into the realm of political crimes. In Colombia, a political crime, to which potentially an amnesty can be applied, is a crime against the constitutional order. Colombia’s Supreme Court considered paramilitarism or parapolítica not to be a political crime.

The evidence and testimony presented in the Justice and Peace proceedings and in various parapolítica cases showed a shocking level of cooperation between state actors and narco-paramilitaries. What had happened during the 1990s and the first decade of the 21st century was not a paramilitarism that was fighting and trying to replace the state, akin to the guerrilla; nor was it an effort to infiltrate the state, like general corruption. Rather, paramilitarism had to a considerable degree ‘become’ or fused with the state. As Hristov puts it, “the more the paramilitary and the state fuse into one whole, the more it would appear that paramilitarism, as such, has ceased to exist.” The result is the legalization of illegality. Paramilitarism becomes the state. The illegal becomes legal. War becomes peace.

The Colombian state had been under existential pressure. As a result of the war with the drug traffickers, hundreds of state agents had been murdered. Drug traffickers and paramilitaries

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had killed four presidential candidates for the 1990 election.\textsuperscript{435} In 1991, Medellín was the homicide capital of the world with a staggering 381 murders per 100,000 inhabitants per year.\textsuperscript{436} The communist insurgency controlled vast areas of the territory. In these circumstances, the Colombian state and narco-paramilitarism made a lethal pact. By the early to mid-2000s, it was ‘mission accomplished’: territorial control over much of the formerly guerrilla-controlled territory was in the hands of the elites again. The increasing paramilitary violence and both national and international scrutiny were obstacles for the Colombian state to move from a state on the brink of failure to a successful state.\textsuperscript{437}

There had emerged an insupportable inconsistency in Colombian sovereignty: to control the national territory, the state cooperated \textit{de facto} with narco-paramilitaries, but for international legitimacy the state needed to \textit{de jure} disassociate itself from them. The narco-paramilitaries were happy to negotiate the legalization of their illegally acquired wealth, hence the Justice and Peace process was convenient for both state and paramilitaries. The dismantling of the paramilitary structures was, as mentioned above, far from fully effective. Some of those who did not demobilize continued as pariah criminals. The dismantling of the elite \textit{parapolítica} structures was not fully effective either, as many Congress members accused of \textit{parapolítica} remain in office.\textsuperscript{438}


\textsuperscript{436} World Bank, ‘Urban Violence: A Challenge of Epidemic Proportions’, 6 September 2016. The highest murder rates shown in the twenty-first century by cities like San Pedro Sula, San Salvador or Caracas, tend generally not to go over 120 per 100,000 inhabitants per year.

\textsuperscript{437} See Hubert Gehring and Maria Christina Koch, ‘On the Path from Failed State to OECD Member? Colombia’s Way towards a Brighter Future’, \textit{International Reports} 1, 2016, 96-110.

\textsuperscript{438} See for example \textit{Semana}, ‘El informe que indica que la parapolítica no es cosa del pasado’, 17 April 2016; \textit{Verdad Abierta}, ‘Reeligen a 26 congresistas investigados por la Corte por parapolítica’, 10 March 2014
When Andrés Pastrana stepped in the footsteps of his father to become Colombia’s president in 1998, the Colombian state was not only weakened by guerrillas, paramilitaries and drug traffickers, but also criminalized by narco-paramilitarism. Pastrana negotiated a plan with the United States that would reinforce the Colombian state’s monopoly on the use of force, without however properly considering the degree of state criminalization: Plan Colombia.

4 Plan Colombia

The United States has a long history of involvement in Colombia. In 1903, the United States decided the fate of the Colombian province of Panama in favor of Panamanian separatists. During the Cold War, the United States assisted the Colombian state’s fight against the communist insurgency, and Colombia was the only Latin American nation to send troops to support the United States in the Korean War. With the advent of the War on Drugs, the United States became increasingly active in assisting the fight against narco-traffickers in Colombia. In the so-called kingpin strategy, the United States participated in efforts to track down Pablo Escobar and subsequent cartel leaders. In the 1980s, under the so-called ‘Andean Initiative’, 2.2 billion USD were invested in counter-narcotics efforts in Colombia, Peru and Bolivia. The level of United States involvement in Colombia would increase dramatically with the negotiation and adoption of Plan Colombia starting in 1998. U.S. aid to Colombia, which stood at 55 million USD in 1996, would rise to close to a billion USD in 2000.

Misael Pastrana Borrero was president of Colombia from 1970 to 1974.
The United States of course subsequently invaded Panama in 1989, deposing Panamanian leader Manuel Noriega.
4.1 Design: from socio-economic development to counter-narcotics

In the late 1990s, the Colombian state was on the brink of failure. U.S.-Colombian relations had reached probably an all-time low when the United States denied president Samper a visa to enter the country. When Andrés Pastrana assumed office in 1998, he hoped to negotiate a ‘Marshall Plan for Colombia’ with the U.S., aimed at socio-economic development of the country. Given the central role of U.S. demand for cocaine in fueling Colombia’s violence, a contribution from the U.S. towards improving conditions in Colombia did not seem unwarranted.

Colombia was of concern to U.S. interests for a variety of reasons. First of all, in the War on Drugs, Colombia was of course one of the primary battlefields as far as the supply-side is concerned. Moreover, Colombia, a United States ally, is typically perceived to be the oldest democracy on the continent. The severe pressure on Colombia’s democratic institutions worried the United States: if even Colombia, with relatively well-established democratic and rule of law institutions, would fall to narco-terrorists, that would bode ill for other countries in the region. Colombia is of prime regional geo-strategic importance, bordering the continent’s biggest economy Brazil, major oil exporting country Venezuela, as well as Panama with its Canal.

The original vision, formulated by Colombian president Andrés Pastrana, embodied a socio-economic approach to the conflict, focusing on peace first, development second, and drug-trafficking third. The version of the plan would not be adopted however.

In 2000, U.S. Congress debated Plan Colombia. The United States first of all did not want to get sucked militarily into the internal armed conflict of Colombia. Efforts of the U.S. in trying to influence the course of the internal armed conflicts in Nicaragua and El Salvador were clearly not examples to be repeated. As the U.S. Ambassador in Bogotá at the time, Myles Frechette, stated in a cable to Washington in January 1997: “There will be no U.S. government assistance for fighting the

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guerrillas. The issue raises too many human rights concerns and has been a searing experience for us in Central America." Nor did Washington merely want to subsidize poverty alleviation in Colombia with U.S. taxpayers’ money. Many in Washington however felt the urge to do something in Colombia. They found a justification by transforming the leading rationale behind Plan Colombia, from a socio-economic approach into a counter-narcotics one.

Retired General Barry McCaffrey, then drugs czar of the U.S. administration, played a crucial role in this first transformation of Plan Colombia. General McCaffrey had commanded the United States Southern Command until 1996, when he became director of the Office of National Drug Control Policy under Bill Clinton. The fact that the U.S. administration appointed an army general in charge of drug control policy serves as an explicit reminder of the fact that Washington intends to fight an actual War on Drugs. The official idea in this stage was to avoid getting involved in the decades-old armed conflict of Colombia, and stage just a lean and orderly counter-narcotics operational involvement of the U.S.

In turning Plan Colombia into a counter-narcotics operation, there were also domestic political dynamics at play in the United States. President Bill Clinton as well as vice-president and presidential candidate Al Gore were afraid to appear ‘soft on crime’. Bill Clinton was portrayed as too lenient on drugs by the Republicans ever since in 1992 he admitted to having tried marijuana, without however having inhaled.

The whole ‘Plan for Colombia’s Peace and Prosperity’ as Pastrana had envisioned it was rewritten, in English, under American terms and signed into law by Bill Clinton on 13 July 2000. A hardline version was created, relying intensely on military and police assistance in the fight against drugs. One of the proponents of the hardline strategy was then-Senator Joe

Eventually, Plan Colombia came to rely overwhelmingly on military assistance, especially delivery of a fleet of helicopters.

The original proposal had envisioned a total cost of 7.5 billion USD, of which 4 billion would be paid for by the U.S., and the remainder by other donors. When the original socio-economic holistic plan was re-written into a narrow counter-narcotics plan, the rest of the world lost interest. When George W. Bush pursued a rather radical unilateral policy with regard to the war in Iraq, willingness of other countries to participate in Plan Colombia declined even further. What was envisioned as a multilateral socio-economic peace plan for Colombia had effectively turned into a bilateral militarized counter-narcotics plan between the United States and Colombia.

The militarization of the counter-narcotics policy in Plan Colombia represents a missed opportunity. After all, the reason that Colombian peasants grow coca can be explained in economic terms: it is a perfectly rational choice at the individual level. Alternative crops are difficult to bring to market, especially given the bumpy roads and otherwise inadequate infrastructure in great parts of Colombia. Alternative crops have volatile prices and Colombian peasants have to compete on a liberalizing international market. If a peasant grows coca, buyers will come to his or her place to buy it. There is virtually guaranteed demand and a guaranteed good price. Coca moreover is a very strong plant, highly resistant to diseases. At the individual peasant level, simple economics tells you that growing coca is entirely rational. FARC leader ‘Timochenko’ even quoted Milton Friedman, the champion of the neoliberal order that he and his organization oppose, to bring home the point of the basic economic logical flaws behind the U.S. War on Drugs.445

Aerial fumigation of coca crops, a strategy actively pursued by the United States under Plan Colombia, actually

fortifies this logic. By fumigating coca fields, the supply of coca will decrease, or at least that is the aim. If demand for cocaine in the United States does not change in the meantime, all that will happen is that prices for coca leaf will rise. Estimates vary, but to cite just one, the costs of the coca leaf required to produce one kilogram of cocaine are around $700, whereas the retail price of that kilogram of cocaine on the streets of New York can be as high as $100,000. In other words, producers and processors of cocaine can easily afford to pay higher prices for the coca leaf, as long as on the streets of New York the money keeps being spent. The more successful fumigation efforts, the higher the price that peasants receive for coca leaf becomes, and hence the more attractive it becomes for individual farmers to start or continue growing coca, easily offsetting the risk of being fumigated.

The operational counter-narcotics goals of Plan Colombia were defined in large measure in terms of acres of coca fumigated and tons of cocaine intercepted. These are severely problematic operationalizations of counter-narcotics goals, because development on these metrics can be explained either way. If interdictions are high, the U.S. and Colombian governments can claim that the army and the police are getting increasingly effective. If interdictions are low, they can claim that they have been effective and that fewer drugs are being shipped. Regardless of developments on the ground, in this way the U.S. and Colombian governments can claim success and bring to the public the message that they are winning the war on drugs. As early as 1991, a Foreign Policy article noted that “Washington’s measures of efficiency are as misleading in assessing genuine progress in the Andean drug war as ‘body counts’ were in measuring U.S. success in the Vietnam war.”

446 The estimate is taken from figures from the UN Office on Drugs and Crime. See Stratfor, ‘Mexico’s Cartels and the Economics of Cocaine’, 3 January 2013. Doubling the price paid to Colombian peasants for coca leaf represents the equivalent of a 0.7% price increase at the New York retail level according to this estimate.

If also imperfect, a better way to measure success in the War on Drugs, at least as far as the United States is concerned, would be the development of price, purity and availability of narcotics on U.S. markets. On these indicators, there has been virtually no effect of Plan Colombia. As the Congressional Research Service put it in 2005: “Despite increased eradication of drug crops and interdiction efforts under Plan Colombia, U.S. government agencies responsible for tracking drug trends report that the availability, price, and purity of cocaine and heroin in the United States have remained stable.”

This should have come as no surprise. Under one of Plan Colombia’s predecessors, the Andean Initiative, significant U.S. resources were devoted to targeting the supply of coca. In March 1989, the State Department Office of the Inspector General had noted that these efforts “have had little impact on the availability of illicit narcotics in the United States.”

Plan Colombia was proposed as a socio-economic development plan by Colombian president Pastrana in 1999. It was turned into a counter-narcotics military cooperation plan and signed into law by Bill Clinton on 13 July 2000. During its implementation, it would undergo a second fundamental transformation.

4.2 Implementation: from War on Drugs to War on Terror

Although conceived by presidents Andrés Pastrana and Bill Clinton, the implementation of Plan Colombia was carried out largely in perfect tandem between two other presidents: Alvaro Uribe and George W. Bush. Plan Colombia had just taken off when the threats of communist insurgencies and of narcotics ceded priority to the threat of terrorism in the wake of 9/11.

Counter-terrorism rhetoric was inserted into Plan Colombia immediately after 9/11. In fact, counter-narcotics in

general was brought into the counter-terrorism framework by the Bush administration. Colin Powell explicitly compared the FARC to Bin Laden in October 2001. In December 2001, Bush declared that “if you quit drugs, you join the fight against terror in America.”

In the eyes of the Bush administration, counter-insurgency, counter-narcotics and counter-terrorism formed one indivisible mission. In this mission, the United States should side unquestioningly with the Colombian government. Telling in this respect are the words of John McCain, then-Senator who would later become presidential candidate for the Republican Party, when discussing the financing of Plan Colombia in 2002:

“To the President’s credit, American policy has dispensed with the illusion that the Colombian government is fighting two separate wars, one against drug trafficking and another against domestic terrorists. The democratic government of Colombia has long insisted that it is the nexus of terrorists involved in the drug trade that threatens Colombian society. American policy now recognizes that reality, and abandons any fictional distinctions between counter-narcotic and counter-insurgency operations. (...) President-elect Uribe has been given a clear mandate by his people to give them back their country. Our values and our interests require us to support our ally.”

In this statement, Senator McCain explicitly declared counter-insurgency, counter-narcotics and counter-terrorism to be the same thing. This goes against the Clinton-idea of Plan Colombia, which was narrow counter-narcotics. General Charles Wilhelm of

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the Southern Command was quoted in a Colombian magazine in 1999 saying: “It is easy to distinguish between a counter-narcotics and a counter-insurgency operation. If it is counter-narcotics, it is aimed to destroy a lab, crops, a landing strip and any armed personnel that defends them. If it is whatever else, it is counterinsurgency and is forbidden.”\textsuperscript{453} Retired General McCaffrey, the drug czar, agreed, stating in November 2000: “The primary focus of this supplemental effort is to provide support for Colombia’s intensifying counter drug effort. As a matter of Administration policy, the United States will not support Colombian counterinsurgency efforts.”\textsuperscript{454} The easy distinction between counter-narcotics and counter-insurgency, according to General Wilhelm in 1999, was a fictional distinction according to Senator McCain in 2002.

In Senator McCain’s statement, the support for ‘our ally’ Alvaro Uribe is also explicit, even before Uribe was installed.\textsuperscript{455} Bringing in the counter-terrorism discourse was very warmly supported by Uribe. It helped convincing the U.S. public that his political project was of central concern to U.S. interests. A weak state that could fall prey to international terrorists creating a haven from which to attack the United States is a scary prospect at only a two-hour flight from Miami. Uribe presented himself as a strong president, democratically elected, sympathetic to U.S. interests, and willing to use force to bring back order, and hence as an ally in the War on Terror worthy of U.S. support.

As a result of invoking counter-terrorism, the original limitations that Plan Colombia aid only be used in the context of counter-narcotics operations and not in the context of counter-insurgency, were removed. In August 2002, H.R. 4775, an ‘emergency’ counter-terrorism budget, was signed into law. With the stroke of a pen, all ‘drug-war aid’ suddenly became ‘counter-

\textsuperscript{453} Taken from Jonathan Rosen, \textit{The Losing War – Plan Colombia and Beyond}, State University of New York Press 2014, p. 117.

\textsuperscript{454} Ingrid Vaicius and Adam Isacson, “The “War on Drugs” meets the “War on Terror””, \textit{International Policy Report} February 2003, p. 11.

\textsuperscript{455} Senator McCain’s statement is of 6 June 2002; Alvaro Uribe was elected on 26 May 2002 and took office on 7 August 2002.
US counter-narcotics aid to Colombia became ever more militarized. During most of the 1990s, the efforts to dismantle the Medellín and Cali cartels had centered on cooperating with Colombian police forces rather than with the military. Plan Colombia increasingly shifted its focus towards the Colombian military. Moreover, also on the U.S. side, focus was shifted towards the Ministry of Defense. An increasing share of military training was no longer funded through the State Department, governed by the Foreign Assistance Act of 1961, but rather through the Department of Defense. This has led to less Congressional oversight and less consideration of human rights.

In the process of militarizing counter-narcotics aid under the guise of counter-terrorism, ironically the civil war discourse was suppressed. The idea that the FARC had some legitimacy in a civil war against the government, and that they could be negotiated with, ceded to the discourse that the FARC were terrorists. If the FARC are basically akin to Al Qaeda, then a legitimate government has no business negotiating with them; the only option is fighting. Uribe was keen on stressing this, arguing: “There is no armed conflict here. There was armed conflict in other countries when insurgents fought against dictatorships. Here there is no dictatorship; here there is a profound, complete democracy. What we have here is the challenge of a few terrorists.” The whole idea of international


Id., p. 3.


BBC interview with Alvaro Uribe, November 2004: “Queremos libertades efectivas.” Quoted in Heather Hanson and Rogers Romero
terrorism was laid over the situation in Colombia, denying the decades-old roots of the armed conflict.

Accordingly, Alvaro Uribe redesigned the Colombian state’s role. Whereas president Pastrana had negotiated with the FARC, Uribe decided on all-out warfare against the insurgency, whilst negotiating with the paramilitaries. Moreover, Uribe’s policies of ‘Democratic Security’ entailed the widening of the state’s powers in the fight against ‘narco-terrorism’. Akin to the U.S. Patriot Act, Democratic Security employed a discourse emphasizing freedom from terrorist threats over the protection of civil and political rights for all. One of the most controversial examples of this was the constitutional reform approved by Colombian Congress in December 2003, allowing the military to detain people for up to 36 hours, search homes and intercept communications without warrants or other judicial orders.460

Operationally, Plan Colombia underwent far-reaching militarization. Around 80% of the available funds were spent on the military.461 As far as the counter-narcotics component was concerned, massive aerial spraying was preferred over voluntary manual eradication and crop substitution. Socioeconomic development and strengthening the democratic and rule of law institutions were pushed to the background.

In the end, militarizing the perception of a conflict has a high self-fulfilling character: the more a problem is treated as a military one, the more it becomes one. It can also lead to severely counter-productive and perverse incentives. The militarization of the perception of the conflict led to thinking in terms of eliminating enemy combatants. A successful military commander was not one who kept an area safe, who protected a population effectively; but rather one who killed the most enemy combatants. The internal promotion policies within the army

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were designed to this effect: the more enemies killed, the faster an officer’s career development. The internal promotion policies in Colombia’s army were the prime driver behind one of the worst episodes of state-committed human rights abuses in Latin America in the 21st century: falsos positivos.

4.3 Excesses

The implementation of Plan Colombia coincided with gross human rights violations committed by the Colombian military and their paramilitary associates. The best-known human rights tragedy that occurred in the context of Plan Colombia and Democratic Security were the falsos positivos. The Colombian and the United States governments had decided that a war had to be fought. Colombian military commanders were rewarded for the number of enemy combatants they neutralized. This resulted in paramilitaries handing over community leaders, activists, as well as desechables to the military, who would subsequently dress them up as rebels and present them as enemy casualties. An estimated 3,000 persons were murdered in the course of the falsos positivos practice.462

Although the best-known, and providing for the most direct and systematic participation of the Colombian state forces, the falsos positivos episode is far from the only human rights tragedy committed or allowed by the Colombian military during the course of Plan Colombia. The AUC committed various massacres and selective killings, unhindered by Colombian state security forces. Paradigmatic in this regard is the massacre in the

village of El Salado in February 2000. The Public Prosecutor’s Office estimates that more than 100 civilians were murdered in a bloodbath that may have lasted for two weeks.\textsuperscript{463} The military did nothing to stop the massacre, and some sources even say that army helicopters were seen in the area.\textsuperscript{464} The village was left abandoned after the massacre. The US government signed Plan Colombia into law four months later.

Aerial spraying in the meantime, using Monsanto’s famous Roundup Ultra, left a devastating mark on Colombia. Along with coca, legal crops were destroyed too. Land became unusable and damage to the environment was enormous.\textsuperscript{465} Upon the instigation of another country, Colombia accepted to massively spray its own soil and people with toxics, aggravating the problem of internally displaced persons. In fact, aerial spraying in the department of Putumayo, a traditional FARC-stronghold and focal point for Plan Colombia, seemed to be aimed at displacing the population. Senator Charles Grassley (R-Iowa), a key architect of U.S. drug policy, observed in September 2002 that “many of the people who are working in the coca fields of Colombia are not native – ruralists to that area. They are, in fact, urban people who, because of economic circumstances were attracted to go into the rural areas and work the coca fields. And for them, alternative development is not developing agriculture, but rather developing jobs back in the urban areas.”\textsuperscript{466}

In a context of widespread violence, massacres, and aerial spraying, during Plan Colombia and Democratic Security, the concentration of land ownership increased. In 2005, the

\textsuperscript{463} See \textit{El Tiempo}, ‘Más de 100 fueron las personas asesinadas por ‘paras’ en masacre del Salado, revela la Fiscalía’, 22 June 2008.

\textsuperscript{464} See Centro Nacional de Memoria Histórica, ‘La Masacre de El Salado - Esa Guerra no era Nuestra,’ \textit{Informe} 2009.


\textsuperscript{466} Ingrid Vaicius and Adam Isacson, “The “War on Drugs” meets the “War on Terror'”, \textit{International Policy Report} February 2003, p. 8.
Colombian Comptroller Office (Contraloría) reported that, in part due to forced displacement, drug traffickers and paramilitaries had come to control 48% of the most productive land in the country. Land ownership facilitates money laundering as well as legal moneymaking. As the Representative of the UN Secretary General put it already in January 2000: “displacement is often a tool for acquiring land for the benefit of large landowners, narco-traffickers, as well as private enterprises planning large-scale projects for the exploitation of natural resources. The fact that most peasants do not possess legal title to the land makes them easy targets for this process (…)”

Whilst Plan Colombia was in force, the number of internally displaced persons increased dramatically. The estimates vary widely, especially between Colombian government provided numbers and those provided by NGOs or international organizations. According to the Colombian NGO CODHES, there were around two million internally displaced persons in 2000, when Plan Colombia was signed into law. By 2010, this number had reached five million.

When Uribe encountered resistance to his Democratic Security policies, he struck back. The parapolítica investigation was seriously discrediting Uribe’s political project. Virtually all Congress members under investigation belonged to Uribe’s coalition. Secret service DAS was ordered to spy on Senator Gustavo Petro and on the Supreme Court magistrates involved in the politically sensitive investigations. What ensued was a severe conflict between president Uribe and the Supreme Court magistrates, who qualified the illegal spying and the defamation

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469 CODHES (Consultoría para los Derechos Humanos y el Desplazamiento), Boletín Número 79, March 2012, p. 9.
efforts as a “criminal enterprise directed from the Presidential Palace.”  

The President denied the accusations, but a scandal developed that came to be known as the *chuzadas*, in this context meaning a combination of illegal spying and defamation efforts. Jorge Noguera Cortes, director of the DAS in Uribe’s first term from 2002 to 2005, was sentenced to 25 years for *concierto para delinquir* and homicide. Another former DAS Director, María del Pilar Hurtado, was convicted to 14 years for her role in the *chuzadas*, whilst former presidential secretary Bernardo Moreno was convicted to 8 years. Uribe’s successor, Juan Manuel Santos, decided to dissolve the DAS in 2011.

Whilst the DAS operated illegally, Uribe also sought to expand his legal possibilities. Patriot Act style executive powers were granted, civil liberties were curtailed, wide use of emergency measures was made, and the role of the military in the state and in society was expanded. Right after his installation as president, Uribe created a civilian informants’ network of up to one million members, stating: “Everyone must collaborate. If we all get involved, we will defeat the violent ones.”

The distinction between combatants and civilians in Colombia has always been complicated, with counter-insurgency ideas like ‘the internal enemy’ and ‘guerrilla-sympathizer’ frequently invoked in a fashion familiar from Guatemala in the 1980s. The FARC were also complicit in blurring the distinction between combatants and civilians when attacking civilian state representatives or landowners as enemies. Uribe made abolishing the distinction into official policy. Borrowing Bush jr.’s

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470 See *Público* (Spain), ‘El Supremo acusa a Uribe de espiar a jueces y políticos’, 14 April 2010, speaking of “una empresa criminal dirigida desde la Casa de Nariño”.


“you’re either with us or against us” he refused to accept neutrality of the population in the face of ‘terrorism’.

When the villagers of San José de Apartadó declared a ‘Peace Community’, in which no armed actor whether guerrilla, paramilitary, military or police is allowed, Uribe did not accept. He accused the inhabitants of having ties with the FARC. In February 2005, eight villagers were massacred by paramilitaries. President Santos, ordered to do so by the Constitutional Court, offered apologies on behalf of the state for falsely accusing the Peace Community of having ties with the guerrillas in 2013.473 What happened already before, especially in Antioquia and now even more evidently and on a more national scale through the legislative support for the state’s coercive apparatus, was “the legalization of invasive forms of social control and the simultaneous repression and criminalization of dissent.”474

Uribe encountered resistance to the way he wanted to dismantle the AUC. He had negotiated a lenient accord with the AUC, providing for virtual impunity. Before turning the accord into what became the Justice and Peace Law, Congress introduced several changes, such as requiring full confessions to be eligible to the benefits of the law and economic reparations to the victims. The Constitutional Court made further changes, including the requirement that demobilized paramilitaries who are convicted under the Justice and Peace regime serve their entire alternative sentence in a penitentiary establishment, with time spent by demobilized fighters in ‘concentration zones’ during the negotiations not counting towards the final prison sentence.475 The Justice and Peace magistrates subsequently took the truth-telling process in the context of Justice and Peace much more seriously than expected.

473 See Verdad Abierta, ‘Por qué Santos pide perdón a la Comunidad de Paz’, 10 December 2013.
Some of the paramilitary leaders appeared to be willing to disclose information not only about their crimes but also about military complicity and political corruption. Salvatore Mancuso, for example, used an 87-slide PowerPoint presentation to detail his confessions. Afraid of what they might say, Uribe decided to extradite the most important paramilitary leaders to the United States on drugs charges.

The announcement that the paramilitary leaders would be extradited to the United States came as a big surprise. Among the extraditees were the very highest paramilitary commanders, including Salvatore Mancuso, Don Berna, and Jorge 40. The United States considered these men, not without reason, as among the most prominent narco-traffickers. Accordingly, the United States was happy to get these men before American courts, and they went to great lengths in order to accept the extraditees that Uribe was granting them, at one point having six aircraft ‘in play’ to ferry the men through Bogotá and Guantanamo, Cuba, to courthouses in Florida, New York, Texas, and Washington, D.C.

The U.S. had promised that they would allow the defendants to continue their participation in the Justice and Peace process, but in fact obstructed such participation. Moreover, with some exceptions, the extradited paramilitary leaders got relatively lenient sentences. As Deborah Sontag notes, “[t]he [paramilitary] leaders extradited en masse will have served an average of 10 years, at most, for drug conspiracies that involved tons of cocaine. By comparison, federal inmates convicted of crack cocaine trafficking – mostly street-level

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dealers who sold less than an ounce – serve on average just over 12 years in prison.”

The truth-telling process as well as access to remedies for Colombian victims have suffered from the extraditions. *Parapolítica* cases were also adversely affected by the unavailability of the paramilitary leaders in the country to testify. After the massive extradition of paramilitary leaders, further extradition requests were blocked by Colombia’s Supreme Court, enumerating the following reasons: it would infringe upon the spirit of the Justice and Peace Law; it would not be in accordance with the rights of the victims; it would affect profoundly the functioning of Colombia’s justice system; and the crimes for which the citizen is wanted for extradition are less grave than the crimes of which he is accused in Colombia. The massive extradition in May 2008 of the paramilitary leaders to the United States on drugs charges was an action by the Uribe and Bush administrations severely undermining of the Justice and Peace transitional justice process.

**4.4 Evaluation**

The U.S. government seems to consider Plan Colombia a blatant success. George W. Bush awarded the Presidential Medal of Freedom to Alvaro Uribe, to express U.S. gratitude for his partnership. Then-Vice President Joe Biden even called for its

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repetition in Central America.\textsuperscript{481} This stands in stark contrast with how many civil society organizations evaluate Plan Colombia. The Beckley Foundation Drug Policy Programme for example concludes that “the case of Plan Colombia should be used as a learning experience about ‘what not to do’ when addressing complex social and political situations involving the illicit drug trade and internal conflicts in some producer countries.”\textsuperscript{482}

Plan Colombia succeeded in achieving some of its objectives, most notably changing the balance of force between the FARC and the Colombian military in the favor of the latter. Whereas Colombia was considered to be on the brink of failure at the onset, by the end of Plan Colombia, when around ten billion USD had been spent, the military had re-established state control over large parts of the territory.

Plan Colombia and Democratic Security were based on violent repression. Their goals were defined in terms of intercepted metric tons of drugs, acres of coca fumigated, and number of high-profile arrests and of enemy-combatants killed. But those are misguided goals. Homicides, disappearances and human rights violations continued, while paramilitarism and parapolítica prospered.

As a counter-insurgency operation, Plan Colombia succeeded partially, in that the FARC were severely debilitated, although this was exactly what the Clinton administration and Congress did not establish as the objective back in 2000. However, the FARC were debilitated, not defeated. The peace process that was under way under president Pastrana was undermined. Proponents of Plan Colombia in Washington claimed that increasing Colombia’s military capabilities would reinforce the government’s negotiating position and would force the guerrillas to negotiate in good faith. The opposite in fact

happened: militarization emboldened the hardliners on both sides, further polarizing the parties.\textsuperscript{483} It would take prolonged peace negotiations between the FARC and Uribe’s successor, Santos, the latter winning the Nobel Peace Prize, to end the conflict with the FARC. As a counter-insurgency operation, Plan Colombia did not fully meet its objective.

Counter-insurgency warfare, moreover, is not just a military strategy. It is as much about winning the ‘hearts and minds’ of the population, a message brought home from missions from Vietnam to Iraq, and a message explicitly recognized by U.S. Army Field Manuals.\textsuperscript{484} This was blatantly disregarded, as for many peasants, the first and sometimes only encounter with Plan Colombia was when airplanes flew over their land and sprayed herbicides. Alternative development funding was wholly inadequate. By spraying coca crops, whilst not offering any alternative livelihood, Plan Colombia actually drove many poor peasants into the arms of guerrillas and paramilitaries. The idea that security, through military enforcement, comes first, and economic aid comes sequentially second, is misguided.

As a counter-narcotics operation, Plan Colombia was an utter failure. The number of acres under coca cultivation fluctuated over the course of Plan Colombia, but did not diminish structurally. Production of coca was easily moved, to other parts of Colombia, as well as to Bolivia and Peru. The supply and prices of cocaine on American streets were not affected. In as far as Colombian traffickers lost their direct influence over U.S. markets, Mexican traffickers replaced them. Drug violence in Mexico has skyrocketed since.

Plan Colombia has been effective to a degree in curbing pariah rule of law undermining crime. The army has become substantially stronger over the course of the implementation of Plan Colombia. Thousands of FARC combatants were ‘neutralized’, as were small time crooks. By the end of Plan Colombia, after billions of dollars had been spent, the state was no longer on the brink of failure. Plan Colombia was effective in

\textsuperscript{483} Ingrid Vaicius and Adam Isacson, “The “War on Drugs” meets the “War on Terror””, \textit{International Policy Report} February 2003, p. 11.
\textsuperscript{484} Id., p. 6.
increasing the effectiveness of the state’s monopoly on the use of violence.

It was so interested however in the effectiveness of the state’s violence monopoly that it lost sight of its legitimacy. The Bush Administration considered Uribe an ally; by the end of the Bush Administration, Uribe indeed was one of its very few allies in Latin America. Plan Colombia was largely blind to elite rule of law undermining crime. Judicial independence was under severe pressure during Plan Colombia, as is evidenced by the chuzadas of Supreme Court magistrates by the DAS. That judicial independence was maintained to a considerable degree was more despite of than thanks to the military aid the Uribe government received from the United States. The functionality of the legislative process was abysmal: of the 2002 Congress, around 40% of members were investigated for ties to paramilitaries. Civilian control over the military was also under duress, as soldiers and officers accused of human rights violations were repeatedly directed to military courts instead of to the ordinary criminal justice system. 485

5 International Criminal Court

The International Criminal Court (ICC) officially opened a preliminary examination into the situation in Colombia in 2004. The Colombia examination is the longest-running preliminary examination of the Court. The preliminary examination serves for the Office of the Prosecutor (OTP) to determine whether there is enough information about crimes of sufficient gravity, providing a reasonable basis to open an investigation. Before an actual investigation against suspected criminals can commence before the ICC, The OTP has to analyze whether or not the ICC has jurisdiction; whether or not an investigation would be

admissible; and whether or not an investigation would be in the interests of justice and of the victims.

With regard to the situation in Colombia, the matter of jurisdiction is relatively straightforward. Colombia ratified the Rome Statute on 5 August 2002, just two days before president Andrés Pastrana would hand over power to Alvaro Uribe. It did so issuing an Article 124 declaration, to the effect of excluding war crimes from the jurisdiction of the ICC for a seven-year period. The ICC has jurisdiction over crimes against humanity committed in Colombia since 1 November 2002, and over war crimes committed in Colombia since 1 November 2009.

The bigger questions are those of admissibility and the interests of justice. That the situation in Colombia, seen from a general perspective, meets the gravity threshold of the ICC seems beyond doubt. The crucial requirement for admissibility in this context relates to Colombian national criminal proceedings. When faced with people suspected of having committed war crimes or crimes against humanity in Colombia, the Colombian state has primacy to exercise jurisdiction. If a case has been investigated or prosecuted by Colombia’s national justice system, the case is inadmissible before the ICC. If national proceedings however are absent, or if they were conducted in bad faith, with the purpose of shielding the suspect from justice,

486 The decision to exclude ICC jurisdiction over war crimes for a seven-year period was met with fierce criticism. See Alejandro Chehtman, ‘The ICC and Its Normative Impact on Colombia’s Legal System’, DOMAC, October 2011, fn. 47 and accompanying text.
487 See Rome Statute Article 126, providing that the State shall enter into force for a ratifying state on the first day of the month after the 60th day following the deposit by that State of its instrument of ratification.
then the case may be admissible before the ICC.\textsuperscript{489} The OTP hence has to determine whether domestic proceedings have been carried out against those who appear to bear the greatest responsibility for the most serious crimes and, if so, whether they are a faithful attempt at doing justice. Moreover, the OTP has to consider whether there might be other substantial reasons to believe that an investigation would not serve the interests of justice.\textsuperscript{490}

When Luis Moreno Ocampo started as the first Prosecutor of the ICC, he considered the two most serious situations within the jurisdiction of the Court in terms of gravity to be those in the DRC and in Colombia.\textsuperscript{491} The official opening of the preliminary examination of the situation in Colombia occurred when the paramilitary demobilization negotiations were in full course. Hence, naturally the OTP dedicated considerable attention to the Justice and Peace transitional justice process that accompanied the official demobilization of paramilitarism. Was it a faithful attempt to do justice? Or was it insufficient in that respect, and did it in fact serve to shield perpetrators from justice? In the latter case, the OTP might decide to step in.

Over the course of fifteen years of preliminary examination, the OTP has not decided to open an investigation; not with regard to paramilitaries, nor to state forces or to guerrillas. Neither has the OTP decided to close the preliminary examination. For fifteen years, the option of opening an ICC investigation has hovered like a sword of Damocles over the heads of Colombian decision makers – or so the ICC hopes. The main rationale behind the exceptionally long period of continuous preliminary examination is that of ‘positive complementarity’: that by the continuous threat of opening an investigation, as well as by offering cooperation and advice, the ICC stimulates the national justice institutions in Colombia to perform better.

\textsuperscript{489} See Rome Statute, Article 17.
\textsuperscript{490} See Rome Statute, Article 53(c).
\textsuperscript{491} See for example OTP ICC, ‘Council on Foreign Relations – Mr. Luis Moreno-Ocampo Keynote Address’, 4 February 2010, p. 5.
Fifteen years of preliminary examination is an extraordinarily long period of time. What does it mean for Colombia to be under preliminary examination by the OTP? What can and does the ICC actually do?

5.1 The preliminary examination from the viewpoint of the OTP

The OTP informed the government of Colombia on 2 March 2005 that it had received information on alleged crimes committed in Colombia that could fall within the jurisdiction of the Court. It was clear from the outset that Colombia would be fundamentally different from for example the DRC, since Colombian justice institutions are much more developed. Since the opening of the preliminary examination, the OTP has focused on determining “whether national proceedings encompass persons who appear to bear the greatest responsibility for the most serious crimes and are genuine.”

The OTP publishes yearly reports on its preliminary activities. These reports are not very detailed: typically, in around ten pages an entire country situation is covered. In November 2012, the OTP presented a more detailed Interim Report on the situation in Colombia, “exceptional in nature, in recognition of the high level of public interest generated by this examination.” The Interim Report was published in English on 14 November 2012 and became available in Spanish on 4 December 2012. It concluded that there is a reasonable basis to believe that crimes under the jurisdiction of the ICC have been committed, and that preliminary examination of the situation should continue.

The 2012 interim report on the preliminary examination of the situation in Colombia was an exceptional report, for which reason a summary of its content is warranted. Although relying heavily on state-provided quantitative information, the report

493 Id.
494 Id., p. 2.
covers broad ground, going into the situation of Afro-descendants, the role of ‘megaprojects’ and forced displacement, and the role of sexual violence. It also covers the falsos positivos as possibly a crime against humanity committed by State actors, stating: “There is a reasonable basis to believe that [the falsos positivos] were committed pursuant to a policy adopted at least at the level of certain brigades within the armed forces, constituting the existence of a State or organizational policy to commit such crimes.” It also goes into the question of whether inaction and impunity at even higher levels may lead to responsibility for crimes against humanity: “[a]lthough the information currently available does not enable the identification of responsibility beyond the brigade level, the Office continues to analyze reported attempts of masking or tolerating, and allegations against higher officials of having indirectly encouraged the commission of such crimes.”

When discussing the possible commission of war crimes, the OTP also goes into the matter of bacrim, and their potential qualification as organized armed groups: “the issue of whether new illegal armed groups would qualify as organized armed groups that are parties to the armed conflict, remains the subject of further analysis. This is a required contextual element for their commission of war crimes within the Court’s subject-matter jurisdiction.” It also discusses the use of child soldiers by the various parties to the armed conflict as a potential war crime.

After discussing the alleged crimes in Colombia in light of the Court’s subject-matter jurisdiction, the OTP discusses admissibility. With regard to the FARC and the ELN, back in 2012 the OTP concluded: “Subject to the appropriate execution of sentences of those convicted, the information available indicates that those who appear to bear the greatest responsibility within FARC and ELN for the most serious crimes within the situation have already been the subject of genuine national proceedings.” This analysis of the OTP predates the peace

495 Id., p. 29.  
496 Id., p. 33-34.  
497 Id., p. 41.  
498 Id., p. 50.
accords reached between the FARC and the Santos government in 2016.

The OTP then discusses the Justice and Peace proceedings. With regard to the temporal jurisdiction of the Justice and Peace tribunals, which is broader than that of the ICC, the OTP notes that “since some of the worst crimes allegedly committed by paramilitaries were during the 1990s (and earlier), and since the paramilitaries demobilized, bloc by bloc, between 2003-2006, it does not appear unreasonable for the national authorities with broader temporal jurisdiction than the ICC to prioritise incidents occurring prior to November 2002.” 499

The OTP then discusses the controversy surrounding the extradition of paramilitary leaders to the United States 500 before concluding that cases relating to paramilitaries that have been before the ordinary criminal justice system or before the Justice and Peace tribunals would not be admissible before the ICC. 501

It goes on to discuss cases against state officials, starting with the parapolítica cases, referring to the case against former congressman Jorge de Jesus Castro Pacheco and seven other former congressmen, in which the Supreme Court found that “the congressmen’s involvement with the armed group went beyond a mere agreement to support and promote the group, but rather was so integral to the group’s operations that the parties were effectively part of the same criminal hierarchy and organizational structure.” 502 With regard to army officials, the OTP uses particularly strong language. It concludes that “while numerous members of the armed forces have been investigated and disciplinary measures, criminal convictions and prison sentences issued, the proceedings have not focused on the responsibility of those at senior levels for the occurrence of such crimes.” 503

Finally, the OTP discusses prioritization and complementarity, noting that focusing on those who bear the

499 Id., p. 52.
500 Id., p. 53-54.
501 Id., p. 54.
502 Id., p. 57.
503 Id., p. 60.
greatest responsibility must not lead to impunity for other crimes. “Consistent with positive complementarity, the Office supports national investigations of alleged crimes that do not meet the criteria for ICC prosecution.” The OTP encourages the Colombian authorities to conduct broad investigations aimed at uncovering the context and structure of criminal groups, and warns against the risk of scattered investigations in various jurisdictions, such as the Justice and Peace tribunals, the Supreme Court when it comes to members of Congress, and the ordinary criminal justice system. It suggests that the crime of forced displacement should remain a prosecutorial priority, as well as rape and other forms of sexual violence, and falsos positivos.

How did the OTP reach its conclusions? In other words, what did the OTP actually do after opening the preliminary examination into the situation in Colombia? The OTP describes its own activities as follows:

“Numerous meetings have been held in this regard with the Colombian authorities, with the national prosecution service and members of the judiciary, as well as with members of civil society and academia. In October 2007 and August 2008, the Prosecutor led missions to Colombia to obtain further information on the status of national proceedings, while further missions have been undertaken by senior staff members of the Office. The Office has also maintained ongoing channels of communication with the Colombian authorities for the purpose of receiving updated information on national proceedings from the judicial authorities, including copies of judgments as well as information on ongoing and completed proceedings under the ordinary and Justice and Peace Law frameworks. The Office has also encouraged and engaged in public discourse on the principle of complementarity in Colombia, including in the context of its bi-annual roundtable with local and national authorities.”

5.2 Relation to Justice and Peace

The most important question regarding the ICC’s preliminary examination into Colombia in light of positive complementarity, especially during its first couple of years, was the Court’s reaction to the Justice and Peace process. The legislation that would accommodate the paramilitary demobilization was debated in Colombia’s Congress for two years. President Uribe had to concede on the inclusion of alternative sentences of five to eight years in the eventual Justice and Peace Law. Colombia’s Constitutional Court subsequently also put in its share, deciding inter alia that time spent in concentration zones during the demobilization process may not count as time served in relation to the prison sentence.

The OTP had to analyze the Justice and Peace proceedings in light of the Rome Statute’s provisions on complementarity and interests of justice. The Colombian state institutions were capable of providing justice. In essence, the question the OTP had to answer was whether the particularities of the Justice and Peace proceedings would show unwillingness on the part of the Colombian authorities to provide justice.

Article 17(2) of the Rome Statute exhaustively lists three criteria that may show unwillingness: proceedings were undertaken with the purpose of shielding the person concerned from criminal responsibility; there were unjustified delays inconsistent with an intent to bring the person concerned to justice; or the proceedings were not conducted independently or impartially. To determine whether the Justice and Peace Law process, in its entirety or with regard to a specific individual, is reflective of unwillingness of the Colombian state to bring the perpetrator to justice, the ICC must undertake “a comprehensive assessment of the multiple efforts of the national authorities, 

505 Id., p. 9.
taking into account the real and concrete context of the Colombian situation.”

As far as a possible intent to shield individuals from justice is concerned, Kai Ambos notes, with regard to the alternative sentences of five to eight years provided for in the Justice and Peace Law: “The Colombian Constitutional Court, while admitting that the sentence may appear disproportionately low for the serious crimes in question, does not see a disproportionality with regard to the right to justice, given that the ordinary sentence is not replaced, but only suspended under certain conditions to be fulfilled by the beneficiary.” The combination of an effective conditioned alternative sentence of five to eight years in detention, and the ordinary sentence of up to thirty or forty years that takes effect in case the conditions are not met, seems to be a genuine intent to do justice according to the Colombian Constitutional Court. The OTP agrees. The fact that the OTP accepts the alternative sentences of five to eight years, coupled with higher ordinary sentences in case conditions are not met, may provide a precedent in other situations where alternative sentences are considered as part of a peace process.

The question of whether excessive delays are inconsistent with an intent to bring perpetrators to justice is, just like the possible intent to shield individuals from justice, one of interpretation. The Rome Statute leaves interpretation of this provision to the OTP. The OTP does not find unjustified delays in any particular case grave enough to warrant opening of an investigation.

As far as judicial independence is concerned, the Colombian judiciary has shown remarkable independence vis-à-vis the Executive, as is evidenced by the parapolítica cases, as well as by its interpretation and application of the Justice and Peace Law. As Kai Ambos notes, the Supreme Court “explicitly

recognized the ICC’s jurisdiction over the Statute crimes committed on Colombian territory and even reserved its right to inform the ICC if Colombian institutions obstruct the efficient administration of justice.”\textsuperscript{508} The Executive has certainly attempted to obstruct judicial independence, particularly during the \textit{chuzadas} of Supreme Court magistrates. However, the independence of the Supreme Court and the Justice and Peace magistrates and the ordinary criminal justice system seems to have been sufficient to prevent the opening of an ICC investigation on the ground of lack of independence or impartiality.

The question of ‘the interests of justice’ of Article 53(c) is a further matter. When a state reaches a peace accord with an armed group, whether paramilitary or guerrilla, and that accord includes reduced prison sentences, then it may be in the interests of justice for the ICC not to intervene. Since the OTP did not move beyond the Article 17 criteria for admissibility it did not have to assess the Article 53(c) test.

5.3 Positive complementarity at work

During the first couple of years of the preliminary examination, the ICC played the role of supervising the transitional justice process that accompanied the paramilitary demobilization. The ICC’s intention was to be “encouraging genuine national proceedings”\textsuperscript{509} in Colombia through exercising pressure on Colombia and maintaining the preliminary examination. One of the OTP’s stated preliminary examination policy objectives was “[e]nding impunity through positive complementarity.”\textsuperscript{510}

The ICC was a new and prestigious institution in the Colombian context. Moreover, the ICC was unfamiliar and unpredictable for the Uribe government. In this early stage, the positive complementarity dynamic was at its most effective. It

\textsuperscript{508} Id., p. 15, footnotes omitted.
\textsuperscript{510} Id., p. 23.
may be argued that the toughening of the Justice and Peace framework in the Congressional debate and in the Constitutional Court rulings was caused at least in part by the sword of Damocles of the possibility of the opening of an ICC investigation. Colombian judicial institutions show considerable independence, even when under duress. The ICC preliminary examination may indeed have been a source of support for the independence of Colombia’s national judicial institutions, particularly of the Penal Cassation Chamber and the Justice and Peace Chambers.511

There are two further lines of jurisprudence of the Supreme Court in which the influence of the ICC might be asserted. First, the series of decisions that deny extradition of paramilitaries to the United States were influenced by the ICC, with the Supreme Court even making explicit reference to the ICC: “Giving prevalence to national justice in these matters shields the Colombian state confronted with the possibility of intervention by the International Criminal Court. Or, in other words: authorizing the extradition of a Colombian national wanted for the crime of narco-trafficking abroad whilst knowing that the same person must also respond for graver crimes against humanity, constitutes a form of impunity that discards said International Tribunal which authorizes it to intervene in those states that sponsor such practices.”512 Second, the ICC’s influence

511 See Hector Olásolo, “El Principio de Complementariedad y las Estrategias de Actuación de la Corte Penal Internacional en la Fase de Examen Preliminar: ¿Por qué la Corte Penal Internacional mantiene su Examen preliminar, pero no abre una Investigación, sobre la Situación en Colombia?,” lección inaugural, Facultad de Derecho de la Universidad Santo Tomás de Aquino (USTA), Bogotá, Colombia, 1 July 2012.

512 Corte Suprema de Justicia, Sala de Casación Penal, M.P. Dr. José Leonidas Bustos Martínez, Acta No. 048, Extradición Rad. 32568, 17 February 2010, p. 36. Own translation; Spanish original: “Dar prevalencia a la justicia nacional en estos asuntos blinda al Estado colombiano frente a la posibilidad de intervención de la Corte Penal Internacional. O, dicho de otra manera: autorizar la extradición de un nacional colombiano requerido en el extranjero por delito de narcotráfico, conociéndose que esa misma persona también debe
can be discerned in the concurrent opinions in some *parapolítica* cases, in which some of the magistrates declared that some politicians should be held accountable for crimes against humanity, since they would form an integral part of the paramilitary structure.\(^{513}\)

With regard to modes of liability applied in recent Colombian case law inspired by international law, Alejandro Chehtman notes that “it is clear that the Colombian judiciary has experienced a drive towards the incorporation of modes of liability that are foreign to its civil law tradition."\(^{514}\) If a criminal investigation wants to target the complex criminality behind the political support networks of paramilitarism, it is crucial to move beyond material authorship of crimes. The most prominent way in which this played out in the *parapolítica* cases as well as in Justice and Peace cases is the figure of *concierto para delinquir agravado* ('aggravated conspiracy to commit a crime'). Curiously, although international criminal law treats conspiracy as a mode of liability, Colombian law treats the figure as a distinct crime, provided for in Article 340-2 of the Colombian Criminal Code. In cases involving superior responsibility, the implementing legislation for the Rome Statute and the ongoing preliminary examination contributed to a general atmosphere of receptiveness for international law, but the direct influence of Rome Statute law is limited. As Chehtman notes: “The doctrinal development adopted by the Colombian judiciary seems (...) to have been taken from other Latin American countries. That is, the concrete tools utilized by the Prosecutors and, subsequently, by the tribunals themselves were explicitly taken from the *Fujimori* decision in Peru, and the references utilized there were to

\[^{514}\text{Alejandro Chehtman, ‘The ICC and Its Normative Impact on Colombia’s Legal System’, DOMAC, October 2011, p. 30}\]
German Professor Claus Roxin, the Eichmann decision in Israel, the Wall shootings decision in Germany, and the Juntas decision in Argentina.”515

With regard to prosecutorial strategies, some commentators also perceive ICC influence. Chehtman for example claims that the ICC has been “influential in slowly driving prosecutors into focusing on the systematic and widespread character of mass criminality in Colombia, and changing their institutional division of labour from the traditional distribution by cases, to the more rational allocation of fronts within the conflict.”516 He argues in this respect that the ICC’s main influence was not through training and capacity development programs, but rather through more indirect pressure.517

All these potential influences of the ICC – the eventual provisions of the Justice and Peace Law and their application, denial of extraditions, reception of new forms of holding superiors to account, prosecutorial efficiency and effectiveness – are somewhat speculative. Another international court – the Inter-American Court of Human Rights – might have been at least as instrumental in these developments. Chehtman recognizes this: “Indeed, many observers suggest that all in all the Inter-American Court has been much more influential on the Colombian case than the ICC.”518 However, it does not seem unreasonable to credit the ICC with having been one among the sources of support and pressure in favor of justice and accountability.

5.4 Positive complementarity overstretched

Monitoring Justice and Peace was a relatively clear ‘positive complementarity’ mission. When the OTP provisionally considered Justice and Peace to provide sufficient justice in its

515 Id., p. 30, footnotes omitted.
516 Id., p. 5.
517 Id., p. 6.
518 Id., p. 36.
2012 Interim Report, it meant that Colombia’s domestic justice system had so far ‘passed the test’. If at that time the OTP had closed the examination, even if only provisionally, the preliminary examination would have been a clear intervention in the paramilitary demobilization process. Pointing to the amendments to the original Justice and Peace proposal introduced by Colombian Congress and the Supreme Court, and the frequent references by civil society organizations to the ICC, the OTP could have credibly claimed that it had concluded a successful intervention in the situation in Colombia: positive complementarity at work.

Instead, the ICC kept ‘the situation in Colombia’ under preliminary examination. This includes paramilitaries, FARC, ELN, bacrim, and state agents. If the ICC had closed the preliminary examination of the paramilitary demobilization, it could have opened a new examination of falsos positivos, or of the demobilization process of the guerrillas, or both. But the ICC steered itself into an unfocused and unclear position in Colombia.

Moreover, the situation in Colombia lost priority for the ICC, notwithstanding the decision not to close the examination. After the detailed 2012 interim report, no more detailed reports were published. In the 2014 general OTP Report on preliminary examination activities, the OTP dedicates barely seven pages to the activities relating to Colombia. It reported that the Office conducted a mission to Bogotá from 11 to 16 November 2013, during which it gathered additional information and had various meetings, and concluded that it will continue to monitor and analyze developments in Colombia. In May 2015, Deputy Prosecutor James Stewart addressed a conference in Bogotá on ‘Transitional Justice in Colombia and the Role of the International Criminal Court’. By then, the peace process with the FARC was on the forefront. The situation in which Colombia found itself compared to the moment of opening the examination, when the

AUC were not demobilized and Uribe was in power, had radically changed.

The situation in which the ICC found itself had also drastically changed. After the first couple of years of its existence the ICC got into rough waters for a variety of reasons. Since its creation on 1 June 2002, it took the Court almost ten years to deliver its first judgment. The Court was criticized for being too Africa-focused, for being ineffective, and for being too expensive, amongst other critiques.

It had in the meantime become apparent to the Colombian authorities that the OTP was fairly easily kept at bay. The positive complementarity idea behind the preliminary examination is based, ultimately, on the stick of the actual opening of an investigation. If that had happened, Colombia would have been the first non-African country to be the subject of an ICC investigation. The Colombian government had applied for OECD membership, and aspired to join the likes of Mexico and Chile as an OECD member state.521 Joining the likes of the Democratic Republic of the Congo and Sudan as a country under investigation by the ICC was certainly something the Colombian government was keen to avoid. But as the years passed by, the prospects of the actual opening of an investigation became ever smaller.

5.5 Evaluation

In general terms, the OTP is quite optimistic of the effects of preliminary examinations. It declared: “In the course of its preliminary examination activities, the Office 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. Preliminary examination activities

521 See Hubert Gehring and Maria Christina Koch, ‘On the Path from Failed State to OECD Member? Colombia’s Way towards a Brighter Future’, International Reports 1, 2016, 96-110.
therefore constitute one of the most cost-effective ways for the Office to fulfil the Court’s mission.”

There is however something of a paradox in the concept of positive complementarity. The idea rests on the logic of carrots-and-sticks. Once the preliminary examination is officially announced, there can only be a one-time use of the stick: opening an investigation. If the examination is dropped, the stick is gone. If an investigation is officially opened, there is also no further stick. But the use of the stick is problematic: once the OTP decides to open an investigation, it relies on the Colombian state for cooperation. So the state, of which the ICC had just determined that it is unwilling to bring perpetrators to justice, subsequently becomes a necessary partner again. If the state fails to be a reliable partner in the light of positive complementarity, the OTP moves to ‘negative complementarity’. But why would a state that is deemed unwilling to bring perpetrators to justice subsequently cooperate with the ICC to do for it exactly what it does not want to do itself? To execute eventual arrest warrants and to collect evidence, the OTP is highly dependent on the Colombian state. Once the Colombian national justice institutions are put aside by the OTP, and the ICC opens an investigation, the Colombian state holds the cards again. Seen in this light, the possibility of actually opening an investigation is a drastic one-time-use only stick. The possibility that the ICC decides to make use of it cannot be discarded entirely, and its use would definitely bring severe negative consequences to Colombia’s image on the international plane. The effectiveness of the positive complementary model depends in large measure on the credibility of the ‘stick’. After all those years, Colombian authorities have recognized that the chances that the OTP will make use of the stick are extremely small.

As far as the carrots in the positive complementarity strategy are concerned, there are also severe limitations. The

523 See for example Cesar Rodríguez Garavito, ‘¿Quién le teme a la Corte Penal Internacional?’ (‘Who is afraid of the International Criminal Court?’), El Espectador, 29 September 2016.
Court has never become a partner of the Colombians, but has rather remained a source of external scrutiny. The position of the ICC in this regard can be compared with that of the International Monetary Fund (IMF). The IMF judges whether government expenditure is according to the Fund’s rules, and if not, the state is punished by the withholding of any further loans. Similarly, the ICC judges if Colombia’s criminal justice application is according to the Court’s rules. If not, the ICC will punish Colombia by opening an investigation. But if the state complies with the conditions, the results are dissimilar. A state complying with IMF conditions may receive billions of dollars’ worth of loans, aid and debt relief. What may a state that complies with ICC conditions receive, other than that the stick is not used? The ICC is in no position to reward monetary or other benefits to state institutions. So not only is the stick only fit for one-time use, the carrots are largely absent.

Of course the ICC was up for a very complicated task in Colombia. Plan Colombia was a multi-billion-dollar operation. The only superpower on the planet put its full military and foreign policy weight behind it. The ICC on the other hand has a total budget of around 140 million USD, with which it has to finance all its investigations and cases. Less than 50 million USD of the budget goes to the OTP, of which only a portion can be spent on carrying out preliminary examinations, of which the examination of Colombia is only one. The Court’s relation to Colombia’s main international partner, the United States, is ambivalent to say the least.

The Court’s potential for action is very limited. In the first place of course materially the jurisdiction is limited, to crimes against humanity committed since 2002 and war crimes committed since 2009. Corruption, narco-trafficking, and crimes like homicide not amounting to war crimes or crimes against humanity are beyond the material scope of the jurisdiction of the ICC. This makes it impossible for the ICC to adopt a comprehensive approach towards the situation in Colombia.

Also in terms of the number of potential individual suspects, the Court is limited. Even before it became apparent that not a single arrest warrant would be issued, it was already clear that the Court would never indict more than a handful of suspects. The 2008 extradition of paramilitary leaders concerned fourteen senior leaders, all on drug charges. In total, between 2002 and 2010 Uribe extradited well over a thousand people to the United States on drug charges. The ICC has never indicted more than ten suspects in any single situation.

What was left for the ICC was a normative influence. Arguably, the ICC preliminary examination was one source, among many, of international pressure on Colombia not to apply a blanket amnesty in the paramilitary demobilization. The Legal Framework for Peace was a 2012 constitutional amendment that applies to all parties to Colombia’s armed conflict, and that would pave the way for a negotiated settlement and transitional justice process to end the armed conflict with the FARC. Although it was criticized for allowing too much impunity, it did not allow for blanket amnesties. In the negotiations between Colombia and the FARC – the first peace negotiations involving a Rome Statute party – amnesty was clearly not on the table. One could say that the ICC pressure was key, but one could equally convincingly say that the Inter-American Court had at least as important an influence.

The ICC also figured in other settings in Colombian politics. In 2008, as tensions between president Uribe and his Venezuelan homologue Hugo Chávez were rising, Uribe announced that he would denounce Chávez before the ICC for financing of genocide, a line of action he seems not to have pursued. In 2012, a Bogotá court confirmed the conviction of Colonel Plazas Vega for his role in the Palace of Justice siege in 1985. Curiously, the Court included in its ruling a request

addressed to Moreno Ocampo to investigate the role of then-

president Belisario Betancur in the events, seemingly unaware of the fact that the Rome Statute does not provide for jurisdiction for events having occurred prior to its entry into force, for Colombia in November 2002. In 2015, as tensions between Colombia and Venezuela were again rising, this time in particular with regard to the treatment of Colombians residing at the Venezuelan side of the border, the Colombian Attorney General threatened to denounce president Maduro before the ICC.

These instances show limited concern for the possibility of actually opening investigations, and all the more for using the figure of the International Criminal Court in political disputes.

For the ICC, the Colombian situation was important. Whereas counter-terrorism activity in Colombia served the U.S. in pointing out that that the War on Terror was not exclusively

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528 The Court ruled: “Ante la inexistencia de pronunciamientos por parte de autoridades judiciales que determinen la posible responsabilidad que en estos delitos pueda tener el ciudadano Belisario Betancur, Presidente de la República para la época de los hechos (...) se dispone exhortar a don Luis Moreno Ocampo o quien haga las veces de Fiscal Principal ante la Corte Penal Internacional, para que considere presentar el caso ante dicho organismo e impida la consolidación de la impunidad que brinda el fuero que protege al expresidente de la República en el ámbito interno”. See El Tiempo, ‘Ejército tendrá que pedir perdón por el caso del Palacio de Justicia’, 31 January 2012.

529 In theory, the crime of forced disappearance as a continuous crime could imply its commission as a crime against humanity by former president Betancur after 1 November 2002, allowing for ICC jurisdiction. However, footnote 24 of the Elements of Crimes says of the crime of forced disappearance: “[t]his crime falls under the jurisdiction of the Court only if the [widespread and systematic] attack [directed against a civilian population] occurs after the entry into force of the Statute.” It is not likely that former president Betancur’s alleged continuous refusal to provide information on the whereabouts of the disappeared victims of the 1985 Palace of Justice siege could be considered to form part of a widespread and systematic attack directed against a civilian population occurring after 2002.

targeted at Islam, the Colombia investigation was for a long time the Court’s strongest card for showing that it does not focus exclusively on Africa. Moreover, the Colombian situation became a showcase for the nascent idea of positive complementarity.\footnote{See for example William Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, \textit{Harvard International Law Journal} 49(1), 2008, 53-108, p. 89-90.}

In Colombia, there are relatively well-established institutions. The Public Prosecutor’s Office had shown its teeth in \textit{Proceso 8.000}, the Supreme Court in \textit{parapolítica}, and the Constitutional Court in toughening the Justice and Peace process. Inability to prosecute grave crimes is not the primary problem in Colombia. Rather, it is unwillingness that results in impunity. The most interesting thing the OTP could have done would have been to target Colombian generals or high-ranking government officials for their role in the \textit{falsos positivos} as a crime against humanity. But if the ICC had decided to open an investigation into high-level individuals within the state apparatus, Colombian authorities would simply have refused any further cooperation with the Court. Moreover, at least in the person of Prosecutor Luis Moreno Ocampo, the OTP seems to have held a rather favorable opinion of the Colombian government. After the end of his term as ICC Prosecutor, Moreno Ocampo even suggested that the Nobel Peace Prize be awarded to presidents Pastrana, Uribe and Santos jointly.\footnote{See \textit{El Tiempo}, ‘El acuerdo cumple con criterios de Fiscal de la CPI’, 27 September 2015. Moreno Ocampo uses more superlatives to praise the Colombian government. In an interview with CNN, he likened the accord between the Colombian government and the FARC to a Van Gogh painting. See \textit{CNN Español}, ‘Luis Moreno Ocampo: Este acuerdo es una obra de arte’, 26 September 2016.}

Some people, hopeful of the ICC’s potential, suggest further modes of possible ICC involvement in Colombia. Chehtman for example notes the suggestion of the establishment of a special division within the OTP to liaise with local authorities on a permanent basis.\footnote{Alejandro Chehtman, ‘The Impact of the ICC in Colombia: Positive Complementarity on Trial’, \textit{DOMAC}, October 2011, p. 57.} But the ICC is not equipped to perform

\section*{References}

\begin{itemize}
\item \footnote{See \textit{El Tiempo}, ‘El acuerdo cumple con criterios de Fiscal de la CPI’, 27 September 2015. Moreno Ocampo uses more superlatives to praise the Colombian government. In an interview with CNN, he likened the accord between the Colombian government and the FARC to a Van Gogh painting. See \textit{CNN Español}, ‘Luis Moreno Ocampo: Este acuerdo es una obra de arte’, 26 September 2016.}
\item \footnote{Alejandro Chehtman, ‘The Impact of the ICC in Colombia: Positive Complementarity on Trial’, \textit{DOMAC}, October 2011, p. 57.}
\end{itemize}
such a role. It has very limited resources, and it is an international court, best equipped to bring people to justice in The Hague. Moreover, corruption, drug trafficking and countless other forms of crime other than Rome Statute crimes play a pivotal role in Colombia’s problems of violence and impunity. An institution that is limited to war crimes and crimes against humanity is not ideally placed in that regard.

At the current stage of the preliminary examination, the OTP has not formed a specific or final position regarding the Special Jurisdiction for Peace, which was established in the context of the peace agreement with the FARC. If the peace accord with the FARC holds, it seems extremely unlikely that the ICC shall be willing to act as a ‘spoiler’ and indict individuals contrary to the provisions of the peace accord. Some have suggested that the ongoing ICC preliminary examination gave the government leverage in the negotiations with the FARC. Moreno Ocampo even advised the FARC on the limits of what would be acceptable to the ICC. But to think that the FARC leadership, virtually universally wanted for extradition by the United States for drug charges, would be particularly impressed by the slim prospect of an ICC intervention would be naïve.

The appearance of the potential ICC threat was kept up. The Colombian Minister of Justice traveled to The Hague to explain to the ICC Prosecutor the modalities of the Special Jurisdiction for Peace. Prosecutor Fatou Bensouda issued a

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534 Human Rights Watch was very vocal in its critique on the agreement between the FARC and the Colombian government. Especially after the no-vote in the referendum, this led to severe criticism towards Human Rights Watch. See for example Greg Grandin, ‘Did Human Rights Watch Sabotage Colombia’s Peace Agreement?’, The Nation, 3 October 2016.


536 See El Tiempo, ‘Integrantes de las Farc se reunieron con exfiscal de la CPI’, 17 August 2015.

cautiously favorable statement on the peace accords.\textsuperscript{538} On 5 December 2018, the OTP duly declared again that it “will continue to engage with the Colombian authorities to receive information on concrete and progressive investigative steps and prosecutorial activities carried out with respect to the potential cases it has identified”, and that it “will continue assessing the genuineness of the proceedings carried out under the ordinary justice system, the JPL [Justice and Peace Law] tribunals and the SJP [Special Jurisdiction for Peace].”\textsuperscript{539} But after fifteen years of continuous preliminary examination, the ICC has become a bystander in Colombia, and the threat of opening an investigation has lost its credibility.

\section{6 Conclusion}

Colombia is a perfect example of how state weakness and pariah crime develop into state criminalization and elite crime; how the distinction between organized crime and civil war may get blurred; how counter-insurgency, counter-narcotics and counter-terrorism may fuse; and how reinforcing the state’s monopoly on the use of force militarily is not enough to diminish violence. Rule of force and enhancing the effectiveness of the state’s monopoly on violence alone will not get Colombia on track for a safer and more equitable future.

Plan Colombia treated the Colombian state rather uncritically as its ally in the fight against \textit{narco}-terrorism and \textit{narco}-insurgency. Although effective in reinforcing the state’s monopoly on the use of violence, it was blind to elite rule of law

\textsuperscript{538} OTP ICC, ‘Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army’, 1 September 2016.

\textsuperscript{539} OTP ICC, ‘Report on Preliminary Examination Activities 2018’, 5 December 2018, p. 44.
undermining crime, leading to insufficient attention for excesses such as falsos positivos and parapolítica.

The ICC is inherently limited, in its material jurisdiction, in its human and financial resources, and in its ambivalent relationship with the United States. It can do little to nothing against pariah rule of law undermining crime. In the context of a transitional justice process, it can be a potentially effective tailpiece, providing an ultimate stick that prevents blanket amnesties. However, since its jurisdiction is limited to crimes against humanity and war crimes, and hence excludes corruption and narco-trafficking, its potential is also in this regard limited. At least, in contrast to Plan Colombia, the ICC preliminary examination did no harm. At best, the ICC had a valuable normative influence in favor of accountability in Colombia.

In the 1980s, the Colombian state, in terms of its violence monopoly, had three principal challenges: the guerrilla, the paramilitaries, and the narco-traffickers. In 2019, the challenges are similar. A peace accord has been signed with the FARC, and peace talks with the ELN are ongoing. The effective demobilization of the FARC’s estimated 8,000 fighters is uncertain however. The neo-paramilitaries, or bacrim, are still active on the territory. Drug trafficking is still the fuel on which the bacrim, potentially rogue guerrilla units, and other criminal organizations run. Unless more profound reforms are undertaken, disbanding the FARC, just like disbanding the AUC, will not lead automatically to a reduction in violence, but only to a legal re-classification. Colombia’s new president, Ivan Duque, has announced policies rather eerily reminding of the days of Uribe’s Democratic Security.540

The fight against communist guerrillas has for a long time been instrumentalized by the Colombian state. The communist guerrillas were the perfect scapegoat for all of the country’s problems. They were also the perfect cover-up for acts of violence, social cleansing, attacks against unionists or environmentalists, and all measures directed at limiting personal

freedoms. In the case of assassinations carried out by the paramilitaries or the army, frequently the official claim would be either that those killed were guerrillas, or alternatively that the killing had been perpetrated by guerrillas, providing deniability of any state wrongdoing. The image, reinforced by the elite-owned mass media, is that of the guerrilla as the big pariah threat and the army as the savior. The use of (real or fabricated) military success against guerrillas plays a big role here. The \textit{falsos positivos} were mainly driven by the internal promotion policies of the army, which in turn were driven by the desire for a dual perception: that the guerrilla threat was real, and that the army was successfully fighting it. Elite rule of law undermining crime in the meantime retains its presence in Colombia.

In their very essence, Plan Colombia boiled down to assisting a militarized fight against pariah rule of law undermining crime, whereas the ICC preliminary examination boiled down to hovering over a domestic transitional justice process from The Hague. An alternative form of international intervention, with a more holistic mandate aiming at elite rule of law undermining crime from within, shall be discussed in the next chapter.
CHAPTER 6 GUATEMALA

1 Introduction

Guatemala has suffered an immensely violent history. Under Spanish rule, the colonial system in Central America was based on exclusion and exploitation of the indigenous population. After independence from Spain the Guatemalan elites maintained extractive political and economic institutions, and great parts of the indigenous population lived under *de facto* slavery. In October 1944 a revolution brought down the military regime. The ‘Democratic Spring’ that followed brought education, healthcare and land ownership to the formerly disenfranchised masses in rural areas. The *raison d’être* of the state transformed from a negative role as instrument of oppression, exploitation and status quo enforcer into a more positive role as development promoter. The Eisenhower administration perceived of these developments as a threat to US interests however and authorized the CIA to intervene. After an interlude of democratic rule lasting for almost a decade, the tradition of military authoritarian rule in Guatemala was restored in 1954.

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542 For an influential account of oligarchical rule and racism in Guatemala, see Marta Casaús Arzú, *Guatemala: Linaje y racismo*, F&G Editores 2007.
A group of young military officers tried to oust the authoritarian military leadership of Guatemala in 1960. They did not succeed. Those rebellious officers who were not killed or arrested fled into the mountains and, inspired by the success of the Cuban Revolution in 1959, they resorted to guerrilla tactics. The civil war that would follow lasted until 1996 and cost the lives of approximately 200,000 people, the great majority of whom indigenous Mayas. A UN-sponsored truth commission later attributed 93% of the human rights abuses that had occurred during the civil war to the state and concluded that the army campaign against the indigenous population constituted the crime of genocide.\textsuperscript{544}

After Peace Accords were signed in 1996 the hoped-for transition towards democracy, rule of law and peaceful capitalist economic development did not materialize. Although the army and the police were reformed, at least superficially, many of the reforms agreed upon during the peace negotiations were not carried out. Instead, the state retreated from the public domain. Important public infrastructural works and service providers were privatized, public healthcare and education were neglected, and ultimately public security crumbled.

With the civil war officially over, criminal violence in Guatemala started to rise. In 2000 Guatemala registered around 3000 homicides; by 2006 that figure had doubled, gaining the country a spot in the top-5 of countries with the highest per capita murder rate. Acknowledging that to regain control over the escalating vicious cycle of violence and impunity was beyond the capacity of the state, Guatemala requested assistance. In 2007 the United Nations and the state of Guatemala created CICIG, the International Commission Against Impunity in Guatemala. CICIG has a two-tiered mandate: to dismantle the clandestine security apparatuses that thrive on impunity and corruption, and to strengthen the Guatemalan state institutions in order to prevent the reappearance of those parallel structures. CICIG is an institutional innovation within the field of international criminal justice. Rather than creating an

\textsuperscript{544} CEH (Comisión para el Esclarecimiento Histórico), \textit{Guatemala: Memoria del Silencio}, 1999.
independent international jurisdiction, CICIG functions fully within the Guatemalan legal order. But within the Guatemalan legal order, CICIG has far-reaching powers, including the capacity to carry out investigations and act as a co-prosecutor.

In this chapter I shall first give a historic overview of violence and the state in Guatemala, analyzing how violent state repression turned into a seemingly anarchic escalation of privately organized violence. Then I shall explain CICIG’s creation and mandate, before turning to its performance over the twelve years of its existence. CICIG’s results have been significant. The model can serve as a source of inspiration towards the development of a coherent response to rule of law undermining crime.

2 Violence and the state in Guatemala

2.1 Guatemala’s civil war

When authoritarian military rule in Guatemala was restored after the 1944-1954 ‘Democratic Spring’, an initial period of instability set in. After a failed rebellion in 1960, dissident army officers retreated to the mountains and started a guerilla war against the military state. A classic Cold War era civil war ensued in which the various guerilla groups established ties with Cuba and the Soviet Union while the military regime received considerable economic and military assistance from the United States. In return for US assistance, the Guatemalan military regime allowed the 1961 Bay of Pigs invasion of newly communist Cuba to be launched from Guatemalan soil.545

The left-wing insurgency that started in 1960 provided a common ground around which the military and the economic elite could unite. The alliance between the military and the

economic elite, notwithstanding internal squabbles for power, proved to be fairly stable and held the country in a suffocating grip for decades. In the late 1960s the army had succeeded in practically annihilating the insurgent groups. What was left of them retreated to the inhospitable mountainous areas of Guatemala that were of least economic interest to the elites. Those mountainous areas had provided refuge to persecuted people before: indigenous Mayas, driven off the most fertile lands to make room for big ladino farms, had retreated there over the course of the preceding centuries and had been carving out a subsistence farming existence.

In the 1970s the various guerilla groups united under the single command structure of the URNG (Unidad Revolucionaria Nacional Guatemalteca). Motivated by the ongoing neglect for the development needs of the countryside, and inspired by the Sandinista success in taking over power in nearby Nicaragua in 1979, the guerilla regained force. The areas where the guerilla regained a forceful presence largely coincided with areas with an indigenous majority population.

The answer of the state was to further militarize and to unleash relentless repression onto anybody that could potentially be a threat to the dominance of the military and the elites. In 1978 the Guatemalan army began a selective campaign of political disappearances and assassinations in Guatemala City and other urban centers. The primitive anti-communism of the late 1970s was supplemented by a virulent anti-indigenous racism, turning this selective campaign in the cities into an unselective scorched earth campaign in the countryside. The army perceived the indigenous population in the countryside as a whole not only as an impediment to the progress of the country, but also as the guerilla’s support base. In consequence the indigenous population as a whole was considered an ‘internal enemy’. Starting in 1981 the army moved to massacre Maya

\[\text{546}\] For a compelling narrative of how this alliance worked out during 1982 and 1983, see Martín Rodríguez Pellecer, ‘Los militares y la élite, la alianza que ganó la guerra’, Plaza Pública, 21 August 2013.

villages. In order to ‘take the water away from the fish’ dozens of Maya villages in mountainous areas with guerilla presence were wiped off the map.

The army campaign against the indigenous population left thousands dead and displaced. Typically, the army would come to a village at dawn, surround it, and massacre a substantial part of its population, after which the village and its surrounding crops were set to fire. Survivors that fled into the mountains were targeted by hunger and aerial bombardments. Those who were captured or who surrendered to the army were placed in so-called model villages, where life was completely controlled by the military. Mayas were not allowed to speak their indigenous language or to wear their indigenous dress, and were forcibly ‘re-educated’ in order to eradicate their indigenous culture. Male villagers were forced to participate in Civil Self-Defense Patrols (PACs). PACs had existed since the 1960s, but immensely increased in enrollment after 1981. The army forced PACs to assist in the massacring of their fellow Maya villagers. In 1982, one out of every two Guatemalan adult men was a patroller.

During the presidency of Ríos Montt (1982-1983) that lasted for only 16 months alone approximately 75,000 Maya civilians were murdered and thousands more were raped and forcibly displaced by the army. The conclusion that the army campaign constituted the crime of genocide would later be confirmed by amongst others a UN-sponsored truth commission, a Roman Catholic Church truth commission, a

549 CEH, Guatemala: Memoria del Silencio, 1999, Capitulo II, Volumen 1, Las Patrullas de Autodefensa Civil, para. 607.
551 ODHAG, Guatemala: Nunca Más. Informe del Proyecto Interdiocesano de Recuperación de la Memoria Histórica, 4 vols., 1998
Spanish judge,\textsuperscript{552} and a Guatemalan judge.\textsuperscript{553} Underlying the genocide was a centuries-old tradition of racism of the \textit{ladino} part of the population vis-à-vis the indigenous part of the population. That racism formed the ideological basis under the colonial regime and, after independence, also under the \textit{de facto} conditions of slavery the indigenous people were forced to live by.\textsuperscript{554} That racism is still strongly present in the 21st century, but never had that racism been so viciously lethal as during the early 1980s.

In the meantime, the military had developed into a sort of supra-institution, absorbing all civilian institutions and exercising great influence over all economic activity in the country, from agriculture to electric power, tourism and telecommunications.\textsuperscript{555} After a Maya village had been massacred and the survivors relocated into model villages, the lands surrounding the village were appropriated to be used for large farming projects or for hydroelectric plants. Survivors were forced to provide labor. Military officers and the economic elites with whom they allied made fortunes. When the Jimmy Carter administration’s boycott of the Guatemalan army caused a shortage of spare parts for Guatemala’s air force, those among Guatemala’s economic elite that owned private airplanes enthusiastically organized themselves into a voluntary air force.\textsuperscript{556}


\textsuperscript{554} See Marta Casaús Arzú, \textit{Guatemala: Linaje y racismo}, F&G Editores 2007.


\textsuperscript{556} See Martín Rodríguez Pellecer, ‘Los militares y la élite, la alianza que ganó la guerra’, \textit{Plaza Pública}, 21 August 2013.
One of the most obvious, and most infamous, instances of economic and ethnic motives for violence coalescing is the case of the Río Negro massacre. The economic development program of the Guatemalan military government included the building of the Chixoy hydroelectric dam, today generating around 15% of Guatemala’s electricity production. Construction on the dam started in 1976 and was concluded in 1985. As a result of the construction of the dam, co-financed by the World Bank, the residents of the village of Río Negro were forced to relocate. In the 1970s Río Negro was inhabited by around 800 Maya Achi, one of the Maya peoples. The villagers who lived on agriculture and fishing were not content with the less fertile grounds assigned to them and protested. The military was quick to claim that the protesters were part of the guerilla. Between 1980 and 1983 around 440 of them were murdered. The stated political objective of eliminating the guerilla, the tacit racism towards the Maya Achi, and the evident economic gains to be made in the construction of the Chixoy dam, coalesced to create one of the deadliest episodes of Guatemala’s civil war.

By 1983 Guatemala’s international isolation as a result of the relentless violence against the indigenous civilian population had come to harm Guatemala’s economic interests as well as the prestige of its military. Moreover, the army had decisively won the political conflict with the guerillas on the battlefield. General Efraín Ríos Montt had come to power by military coup in 1982, but was replaced by his Minister of Defense, General Oscar Mejía Víctores, in yet another coup in 1983. The military campaign had succeeded in annihilating not only the armed insurgency but also every form of non-violent resistance. Community leaders, unionists, environmentalists and student leaders were among those killed or disappeared for alleged guerilla sympathies.


Practically all leadership and social capital that could potentially be mobilized against discrimination, neglect of the interests of indigenous people and of workers, or environmental harm, had successfully been eliminated. With the military’s and the economic elites’ shared control over the state firmly established, democratization was allowed to set in.

A National Constituent Assembly (ANC) was elected in 1984 to draft a new constitution. The ANC was elected in a climate of oppression and military rule, with little press freedom and widespread fear for being associated with the left. The agenda of the ANC was limited by the military, and abolishing military tribunals or having a civilian Minister of Defense were not on the table. Civil society at the time barely existed as the result of the relentless violence of the preceding years. Consequently, the 1985 constitution reflects the political dominance of the military and the economic elites and the absence of political pluralism at the time.559

The first democratically elected president since 1954, Vinicio Cerezo, assumed the presidency in 1985. His presidency was marked by a constant battle for power between the civilian state leadership and elements within the armed forces, the latter orchestrating at least two failed coup attempts. In 1990 populist candidate Jorge Serrano Elias was elected. He caused the first serious constitutional crisis since 1985 when he dissolved Congress and the Supreme Court in 1993 in an attempt to assume absolute control over the state. His auto-coup backfired however, and upon a ruling of unconstitutionality of his actions by the Constitutional Court Serrano was forced to flee to Panama. Interim–president Ramiro De León Carpio (1993-1996) intensified the peace process with the guerillas and signed the Comprehensive Agreement on Human Rights in 1994. The newly elected president Alvaro Arzú (1996-2000), who had campaigned with a promise to promptly reach a peace agreement, signed the final Accord for a Firm and Lasting Peace on 29 December 1996.

559 See for example CEH, Guatemala: Memoria del Silencio, 1999, p. 205-209.
2.2 Guatemala’s violent peace

The peace between the guerillas and the army materialized, aided by the deployment of UN peacekeeping force MINUGUA. Corruption, inequality and privately organized violence however proliferated. Today, in formal peacetime, on average more people die of violence per year than during the civil war. Inequality between the indigenous population and ladinos is still similar to the situation at the outbreak of the civil war. Behind a façade of democracy and rule of law institutions lies a seriously dysfunctional state incapable of projecting any credible effort at enforcing its monopoly on the use of force in the territory.

The Peace Accords included an ambitious agenda of state reform. The military’s role in internal security was to be limited only to exceptional circumstances under Congressional oversight, tax collection was to be increased, and the multiethnic nature of the nation was to be recognized. In 1998, Bishop Gerardi published a truth report, detailing the role of the army in the atrocities of the civil war. Gerardi was murdered two days after the presentation of the report, reminding everybody in Guatemala of the resistance any effort at fundamental change would face.\textsuperscript{560} To implement the measures agreed upon in the 1996 Peace Accords a constitutional referendum was envisioned. The referendum, which was held only in 1999, fell prey to political machinations. To the twelve constitutional amendments that were required for the implementation of the Accords, Congress added another 38 for the electorate to approve. Guatemala’s political parties barely campaigned either in favor or against the referendum. No radio ads were broadcast to reach the illiterate part of the electorate. Notwithstanding efforts of MINUGUA and other international actors in Guatemala to raise awareness of what was at stake in the referendum the voter turnout was a mere 18.5%, with the no-vote in the majority by a small margin.\textsuperscript{561}


\textsuperscript{561} See Cynthia Arnson (ed.), \textit{The Popular Referendum (Consulta Popular) and the Future of the Peace Process in Guatemala}, Latin
The no-vote and the high level of abstention in the 1999 referendum signified a major defeat for the reform process that, with the aid of the international community, was underway in Guatemala. The result is that in effect, the constitution in place today in Guatemala is the one designed in 1985, modified in 1993 upon the constitutional crisis provoked by Serrano’s auto-golpe, an event that had encouraged Guatemala’s elites to further tighten their control over the state. Although the constitution provides formally for a democratically elected Congress and President and an independent judiciary, the institutions are set up in such a way as to ensure their weakness vis-à-vis the military and the economic elites.

The executive, in most Latin American states a bulwark of real power, is constitutionally debilitated in a number of ways. Significantly, not only are incumbent presidents prohibited from presenting themselves for reelection, the same goes for incumbent vice-presidents. Compared to for example the United States, where incumbent presidents are allowed to run for re-election once and where incumbent vice-presidents of re-elected presidents frequently run for president, this leads to a weakened executive. In reaction to Serrano’s autogolpe, the 1993 constitutional reform provided for a 4-year presidential term instead of the 5-year term in the original 1985 Constitution, further weakening the executive. Between 1985 and 2015 eight presidential elections produced winners from eight different parties.

The weakness of political parties is not limited to the presidency but also affects Congress. Only 25% of Congress members are elected from national party lists, with the remaining 75% elected from departments. The three-quarters of departmentally elected deputies owe more loyalty to their local


563 Constitución Política de la República de Guatemala de 1985, reformada por Acuerdo legislativo No. 18-93 del 17 de Noviembre de 1993, Article 186(b).
political and financial backers than to the party under whose nominal banner they run.\textsuperscript{564} Transfuguismo is rampant: the phenomenon of politicians switching parties while in office. Of the 158 Congress members who assumed office in January 2012, 117 had switched parties by the end of their term;\textsuperscript{565} of those who assumed office in January 2016, 70 had switched sides within their first three months in office.\textsuperscript{566} With all eight successful presidential candidates since 1985 coming from different parties, and members of Congress switching political parties so frequently, the democratic political choice expressed by the population through elections is of rather limited consequence.\textsuperscript{567}

The dysfunctionality of the democratic system in Guatemala is intimately related to the lack of a comprehensive and inclusive state project. Privatization, particularly under the presidency of self-declared neo-liberal Alvaro Arzú (1996-2000), defied any social ambitions the state had. Encouraged by the World Bank and the IMF, many formerly state-controlled companies in the fields of telecommunications, electricity, water, and roads were privatized, in effect coming down to the ownership of those companies passing from the military elite that controlled the state to the business elite with which Arzú was closely allied.\textsuperscript{568} After privatization in the above-mentioned fields was virtually completed, political ambition towards public healthcare and public education dwarfed. Instead of allowing the state to develop public health and public education, fiscal reforms were consistently blocked and elites and the higher

\textsuperscript{564} See also Ivan Briscoe and Martín Rodríguez Pellecer, ‘A state under siege: elites, criminal networks and institutional reform in Guatemala’, Clingendael 2010.

\textsuperscript{565} \textit{PubliNews}, ‘Más de la mitad de diputados fueron tránsfugas’, 30 December 2015.

\textsuperscript{566} \textit{Prensa Libre}, ‘El 44% de los diputados son tránsfugas’, 13 April 2016.


\textsuperscript{568} See Benedicte Bull, ‘Arzú, un neoliberal?’, \textit{Plaza Pública} 1 May 2018.
middle-class simply turned to private healthcare and private education. Finally, with public security rapidly deteriorating, private security took a flight.

The lack of a comprehensive state project is strikingly exemplified by the national tax revenue. Guatemala stands out in Latin America for having the lowest tax revenue as ratio of GDP.\textsuperscript{569} The low tax collection reflects a low ambition on the part of the state: ask little, give little. The poor to non-existent service delivery of the state, whether in the field of security or in the fields of healthcare and education, leads to a low public legitimacy of the state. This negatively affects the willingness of the middle-classes to contribute to the state project. If you send your kids to private schools and to private hospitals and you have to pay a private security guard to maintain safety in your street, why pay taxes that are likely to end up in the pockets of corrupt government officials anyway? If the chance is less than 50\% that the Congress-member that you vote for still belongs to the same political party by the end of his or her term, what meaning does representation have?

‘Social conflictivity’ (\textit{conflictividad social}) in the meantime continues unabatedly. Social conflictivity is the name given to situations in which lower-class Guatemalans stand up and protest the denial of their rights to fair wages, environmental preservation, or access to electricity. The answer of the state consists frequently of criminalization and suppression of unionists, environmentalists and indigenous leaders. In the 1980s such social leaders were labeled communists and were often disappeared by the army. In the 21\textsuperscript{st} century they are labeled terrorists or inciters if they call on their supporters to protest and they are frequently indicted on spurious charges.\textsuperscript{570}


\textsuperscript{570} The Inter-American Commission on Human Rights expressed its preoccupation over the far-reaching criminalization of expression and dissent in a letter to the Guatemala government: Comisión Inter-Americana de Derechos Humanos, Relatoría Especial para la libertad de expresión, Solicitud de informacion Ref: Iniciativa que dispone
Without a common threat against which to protect the people, whether an external enemy or the perceived internal enemy of communism, the state must rely on a comprehensive and inclusive state project that includes service provision in order to gain legitimacy. As Fareed Zakaria puts it, the “reciprocal bargain between taxation and representation is what gives governments legitimacy in the modern world.”\textsuperscript{571} Moreover, this reciprocal bargain gives the state an incentive to work towards more prosperity for its citizens, who can subsequently be taxed more. With taxation and representation so ineffectual as in Guatemala, the social contract crumbles and gives way to a predominant ‘every man for himself’-thinking. Ambitious and bright young people are less likely to dedicate themselves to public service, for the perception prevails that the state is so corrupt that there is little opportunity for righteous people to achieve improvement. The state becomes a mere venue for acquiring power and wealth, not a place where the direction of collective action is agreed. The rule of law is no longer forcefully demanded nor provided.

In Guatemala the vicious cycle of state inaction and citizen self-reliance has evolved into an extremely violent situation. In part this stems from the violent legacy of Guatemala’s civil war, and incomplete post-war reforms.\textsuperscript{572} On top of that, in the 21st century two imported criminal phenomena rose to unprecedented heights in terms of lethal violence: the War on Drugs and violent transnational street gangs. The War on Drugs, fueled by US demand for drugs, US supply of firearms, and the involvement of Mexican drug lords, takes a great toll on Guatemala. Especially after Mexico unleashed the army on the Mexican cartels, many Mexican cartels took refuge in

\textit{aprobar ley contra actos terroristas (Iniciativa 5239) Guatemala, CIDH/RELE/Art.41/03-2018/14, 15 March 2018.}


neighboring Guatemala. Notorious in this respect is the Zetas cartel, responsible for many violent incidents in Guatemala, such as the paradigmatic *Los Cocos* massacre killing 27 farm workers in 2011.\(^{573}\) Also domestic Guatemalan crime families extend their power through the profitable drugs trade. The economic power of the *narcos* is enormous, and *narco* money has become an important source of political campaign financing in Guatemala.\(^{574}\) The capacity and willingness to use brutal violence of the *narcos* is certainly unrivaled. Another imported criminal phenomenon, the violent youth street gangs or *maras*, wreak similar havoc upon Guatemala’s security situation. Originated in the streets of Los Angeles, violent street gang culture was exported to Central America as illegal or convicted immigrants were deported from the United States. They exert brutal violence on a large scale particularly in Guatemala, El Salvador and Honduras.\(^{575}\)

Today Guatemala is suffering an escalation of deadly violence on a scale that resembles a state of war. During the civil war the violence was to a considerable degree politically and ethnically motivated and rather centralized, with the state accounting for the lion’s share of the violence employed in the country and striving for a monopoly on violence through eradication of the guerilla. In the 21st century the state only has a small minority share in the overall use of violence, which is now predominantly economically motivated. The state’s failure to enforce its monopoly on the use of force is exemplified by


Guatemala’s extremely high rate of lynchings: groups of citizens executing suspected criminals on the spot.\textsuperscript{576}

Faced with the proliferation of such a diverse range of violent actors on its territory, the Guatemalan state has proven incapable of providing a minimum degree of security to its citizens. The state is severely under-present or even virtually absent in large parts of the territory, both rural and urban. But although Guatemala’s state is weak, it has not completely failed the way for example the state of Somalia has failed. The Guatemalan state is able to build and minimally maintain roads and airports for example, crucial for trafficking purposes. And the Guatemalan state institutions exert sufficient influence to be worth co-opting for corruption purposes. Hence, organized crime groups buy their way into the state, through political campaign financing, influence trafficking, bribes, and if need be through intimidation and killing.

3 Rule of law in Guatemala

The rule of law has never achieved maturity in Guatemala. During colonial times, there was royal rule rather than rule of law. During independence the rule of law has consistently been compromised. In the time of the civil war, there was military rule, in which judges were an integral part of the state’s repressive project.\textsuperscript{577} The Peace Accords were signed in 1996, and Guatemala became one of the test cases for the ‘Rule of Law Revival’ of the 1990s. Rather than a process of post-war reconstruction of the rule of law, the task at hand was the construction, for the first time in Guatemalan history, of the rule of law.

There was no lack of international efforts. The UN deployed a peacekeeping mission, MINUGUA, with an extensive


\textsuperscript{577} See CEH, \textit{Guatemala: Memoria del Silencio}, 1999, p. 113-151.
rule of law and human rights agenda, as well as an official truth commission to investigate the crimes of the civil war. Moreover, there were countless bilateral rule of law projects. The IMF and the World Bank stressed the importance of the protection of property rights and supported various institution-centered rule of law projects. The United States reinvented their cooperation with Guatemala’s security institutions in the context of the War on Drugs, whilst various European countries were involved in rule of law projects aiming for increased respect of human rights and democratization.

As Guatemala was working through the structural adjustment prescriptions of privatization, deregulation and trade liberalization, there was also a decentralization effort. More autonomous powers and budgets were given to departments and municipalities, which in turn became preys for organized crime and corruption. In the meantime the criminal justice sector was busy switching to a more adversarial system. All the while the monopoly on the use of violence was gradually slipping away from the hands of the state. Violence continued to rise steadily, and the rule of law institutions watched by powerlessly. When crime levels in Guatemala began to rise, mano dura proponents dressed up their call for tough

579 See for example The World Bank, Guatemala: the role of judicial modernization in post conflict reconstruction and social reconciliation, Social Development Notes No. 21, 2005.
repression of crime in terms of law-enforcement and the rule of law.\textsuperscript{583}

Several of the bare minimal requirements for the rule of law as formulated by Raz were not met in Guatemala at the beginning of the 21\textsuperscript{st} century. Laws in Guatemala are oftentimes not clear, they are not stable, the making of laws is not guided by open, stable, clear, and general rules, the independence of the judiciary is compromised, courts are not easily or equally accessible, and discretion of the crime-preventing agencies is not adequately limited to prevent perversion of the law. From a tyrannical state to be reined in by the rule of law in the 1980s, Guatemala was evolving into a weak and criminalized state in need of reinforcing.

3.1 Judicial independence

The judiciary is perhaps endemically the weakest institution of the Guatemalan state by design. Two institutional design features in particular stand out for their contribution to the undermining of judicial independence in Guatemala: the overlapping jurisdictions of the Constitutional Court and the Supreme Court of Justice, and the lack of a proper judicial career.

The jurisdiction of the Constitutional Court is naturally restricted, at least formally, to constitutional matters. All other matters of law are to be decided upon by the \textit{Organismo Judicial}, consisting of regular courts, appellate courts, and as its highest authority the Supreme Court of Justice. The Constitutional Court (CC, also to its Spanish acronym) has been expanding its jurisdiction however over the last three decades. Every citizen has the right to file an \textit{amparo} to the CC when he or she believes that a violation of the Constitution has occurred, irrespective of whether that violation has personally affected the petitioner or

Whereas for twenty years the number of *amparos* filed per year hovered around one thousand, that number has grown to seven thousand in 2017, causing an enormous backlog at the Constitutional Court. Moreover, Congress and the President frequently ask consultative opinions of the CC in politically sensitive matters. Some matters clearly belong to the jurisdiction of the CC. For example, the CC was asked in 2007 whether the creation of CICIG would be constitutionally allowed. In 2012, First Lady Sandra Torres de Colom divorced president Colom, with the apparent purpose of circumventing the constitutional ban on first-degree relatives of the incumbent president to run for the presidency. When Sandra Torres officially registered her candidacy, the Supreme Electoral Tribunal asked the CC whether her recent divorce effectively paved the way constitutionally for Sandra Torres to be allowed to run for president.

But the CC has gone much further than that. A clear illustration of the central role of the CC as the final arbiter in Guatemala’s politically most sensitive legal matters is its series of rulings on the position of former *de facto* president Efraín Ríos Montt, who had come to power by coup in 1982, to be ousted in yet another coup in 1983. The Constitution prohibits those who have ever been involved in a coup d’état from occupying the presidency. Accordingly, he was barred from running for president in the 1999 presidential election. Surprisingly, the CC reversed this bar in 2003. The CC reasoned that Ríos Montt’s involvement in the 1982 coup could not lead to him being barred from the presidency under the terms of the 1985 Constitution because that would amount to retroactive application of the law. The fate of Ríos Montt was in the hands of the CC again in

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586 MINUGUA would say of this controversial decision: “The need for judicial appointments based on merit and not political criteria was demonstrated in the 2003 crisis over the inscription of Ríos Montt: the widely criticized political behaviour of the Constitutional Court, whose members are appointed by political sectors, contrasted sharply with...
2007 when Spain requested Guatemala to extradite Ríos Montt on genocide charges. The CC determined that he could not be extradited because the crimes for which he was charged were ‘political crimes’, and the Constitution prohibits the extradition of nationals for political crimes. The 2007 decision to refuse extradition of Ríos Montt to Spain was legally incorrect, as the Genocide Convention explicitly states that “genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition”, while the Guatemalan Constitution explicitly grants precedence to international human rights treaties over domestic legislation.

In 2013 Ríos Montt and the CC crossed yet again, when Ríos Montt was convicted to 80 years imprisonment for his involvement in genocide and war crimes. The conviction, rendered by a first instance Guatemalan trial court, was open to regular appeal with an appeals court, residing under the authority of the Supreme Court of Justice. The defendant filed an amparo with the Constitutional Court however, claiming that his right to a fair trial had been violated. Notwithstanding the fact that the verdict was open to a regular appeal, and notwithstanding the fact that the alleged violation of the right to a fair trial was a matter of interpretation of the criminal procedure code rather than a constitutional matter, the adherence to legal procedures and precedents by a Supreme Court selected openly on the basis of qualifications.” MINUGUA, 14th Report on Human Rights, 10 November 2003, General Assembly A/58/566. In 2006, the Constitutional Court would declare the 2003 decision allowing Ríos Montt to run for president to have been erroneous and denied it future application.


Constitutional Court decided to annul the verdict only ten days after it was rendered and ordered a re-trial before another first instance trial court.

The idea of a strong Constitutional Court responsive to citizens filing *amparos* to redress violations of constitutional rights is to be understood within the context of 1985. Back then the state was practically omnipotent and the military had recently murdered and driven off their lands thousands of Maya indigenous civilians. A strong Constitutional Court with low threshold accessibility to individuals seemed attractive in that context. The Constitutional Court however was designed in such a way as to ensure the continuing control of the elites over the state when in 1985 formal democracy was allowed to set in. The Constitutional Court consists of five magistrates, one appointed each by the Supreme Court of Justice, Congress, the President, the dean of the San Carlos University and the Bar Association. Elites typically manage to control at least three of the five bodies appointing CC magistrates. With leverage over the Constitutional Court, powerful actors can get criminal convictions undone, they can prevent extraditions, and they can get Attorney Generals ousted. The Constitutional Court basically has acted as a trump card for powerful actors that see their interests affected.

Another trump card for Guatemala’s powerful actors lies within the odd nomination procedure within the Guatemalan judiciary. The *Carrera Judicial*, or Judicial Career, starts at the lowest jurisdiction, that of the *juzgados de paz*, and goes up one level, to the first instance trial courts (*juzgados de primera instancia*). The way up the ladder, to appeals courts (*salas de apelaciones*) and the Supreme Court of Justice, is not governed by the *Carrera Judicial*, but rather by a political nomination procedure. The result is that any lawyer, also those without any previous experience as a trial judge, can enter the appeals courts

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1067-1094. In the 3-2-majority decision, two strongly formulated dissenting opinions stressed vehemently the fact that the alleged violation of due process was a matter of criminal procedure and not a matter of constitutional law.
or the Supreme Court; and that no lawyer can get appointed without a political ‘godfather’ (padrino).\(^{590}\)

The politicized nomination procedure for the highest branches of the judiciary, instituted in the 1985 Constitution and adjusted in the 1993 constitutional reform following the failed auto-coup d’état by Serrano, consists of a structure of comisiones de postulación or ‘nomination commissions’. The commissions propose a list of suitable candidates from which Congress appoints the judges for renewable 5-year terms.\(^ {591}\) The comisiones de postulación are a corporatist mechanism, placing the appointment of judges partially outside the realm of the state. In the commissions, the deans of the law faculties of the country’s universities have a place, as well as representatives of the Colegio de Abogados (the Bar Association) and the acting president of the judiciary. Since 1678 there has been one public university in Guatemala, Universidad de San Carlos. In 1993 there were three private universities. In the 1993 constitutional reform the deans of law faculties of private universities were given a seat each in the comisiones de postulación. Seven new private universities have been created between 1993 and 2001, all with a law faculty, some without a single student.\(^ {592}\) Moreover, in the 1993 constitutional reform the nomination of appeals court judges and of the Attorney General was brought within the direct realm of the comisiones de postulación.


\(^{591}\) The original 1985 Constitution provided for 6-year terms. After Serrano’s autogolpe, the 1993 constitutional reform provided for 5-year terms, a further weakening of the judiciary. Moreover, the number of Supreme Court magistrates was increased from 9 to 13, and the presidency of the Supreme Court was no longer to be held by one magistrate appointed president of the court by Congress for the entire term, but rather on a 1-year rotating basis decided inter pares. Voting between the 13 magistrates on who is to hold the presidency of the Court frequently paralyzes the Court for prolonged periods.

\(^{592}\) See Nómada, ‘Las 5 claves para entender la disputa por la justicia’, 22 April 2014.
The apparent idea of the *comisiones de postulación* was to de-politicize the nomination of judges and to create a counterbalance in society for the power of the state. The result however has been the politicization of the universities and the Bar Association. Elections for dean of the San Carlos University are accompanied by proper political campaigns, so political rather than academic has the position become. The politicization of the Bar Association was exacerbated by the 2001 *Ley de Colegiación Obligatoria*, which provides inter alia for what resemble political parties (*planillas*) of admitted lawyers for electing the representatives in the *comisiones de postulación*. Organizing *planillas* in the Bar Association has become a central political activity. Through the *comisiones de postulación*, various interest groups find a forceful avenue for gaining influence over the functioning of the judiciary. The process is not transparent and extremely vulnerable to undue outside influences. A clear example of how the politicized nomination procedure paralyzes the judiciary is again provided by the Ríos Montt case. In 2014, a judicial election year, the Constitutional Court ordered the Supreme Court to find an appeals court to rule upon Ríos Montt’s claim that a 1985 amnesty law applied in his favor. Over 60 appeals judges recused themselves and simply refused to rule upon the issue.

Another striking illustration of the vulnerability of the *comisiones de postulación* is provided by Roberto López Villatoro, popularly known as the Rey del Tenis (the king of sneakers) for having made fortunes importing sneakers from China. López Villatoro, who was married to Ríos Montt’s daughter Zury Ríos, was a key figure in the organization of *planillas* in the Bar Association. He allegedly played a central role in the *comisiones*

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593 See *Nómada*, ‘En la USAC habrá elecciones (al estilo de la vieja política)’, 27 April 2018.
595 *Prensa Libre*, ‘Sala rechaza conocer solicitud de amnistía de Ríos Montt’, 26 February 2014.
de postulación for Supreme Court and appeals courts magistrates in 2009 and in 2014, as well as in coordinating the efforts that led to the Constitutional Court allowing Ríos Montt, at the time his father-in-law, to run for president in 2003. One of the central elements in López Villatoro’s scheme of exercising control over the judiciary was offering study trips to Spain of up to various months free of any charge to acting magistrates and to jurists aspiring to become magistrates. In that way he fomented a network of loyalties. But is paying for a half-year stay in Spain of a Guatemalan jurist, who turns out to become Supreme Court magistrate at a later stage, in itself a crime?

The process of judicial nominations leads to a judiciary that is very vulnerable to corruption. A perfect example of the degree to which laws are circumvented by the very institutions charged with upholding them is ‘child-laundering’, or lavado de niños. Guatemala is one of the largest sources of internationally adopted children in the world, and child adoption from Guatemala has been rife with irregularities. ‘Child-laundering’ is a form of illegal adoption of children, in which criminals do not circumvent border controls and try to traffic children illegally to the United States, as a more pariah criminal would do, nor do they deceive child protection authorities and juvenile judges with regard to the background of children to be offered for adoption. Rather, juvenile judges form an integral part of a criminal network in which children are forcibly or irregularly taken from their biological parents, legally registered as orphans, and legally offered for adoption. Adoptive parents in the United States pay large sums of money for the right to adopt a child,

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597 López Villatoro was arrested on bribing charges following an investigation by CICIG and the Public Prosecutor’s Office in February 2018. See Prensa Libre, ‘Caso Comisiones Paralelas – El Rey de Tenis influyó en la elección de cortes en el 2014’, 27 February 2018.
whose abduction has been laundered off willfully by Guatemalan judges.

As a result of the system of comisiones de postulación and the anomalous position of the Constitutional Court, judicial independence is severely compromised in Guatemala. Control over the Supreme Court of Justice and the Constitutional Court lies within a complicated interconnected network in which the Bar Association, the universities and Congress play central roles. With the lack of a legal professional ethic, an academic ethic, or a political ethic and established political parties, the process is ruled by Guatemala’s economic elites who have the resources to organize planillas in the Bar Association, to found and fund private universities, and to fund political campaigns. Underlying the idea of the rule of law is a separation and balance of powers. There is indeed a balance of powers in Guatemala. Not between an independent legislative, judiciary and executive however, but between interdependent operadores, economic elites and the military.

### 3.2 Militarization, privatization and mano dura

The Guatemalan armed forces continue to play a bigger role in domestic security than was agreed in the 1996 Peace Accords. The Accords called for a one-third reduction in size of the armed forces. Just prior to signing the Accords, the military beefed up its size to partially neutralize this reduction. Military intelligence remains strongly active in Guatemala, and the military can regularly be seen patrolling the streets.

In part, deployment of the military in domestic security matters fits within a regional pattern. States that are confronted with increasingly powerful drug trafficking organizations willing and capable to use force on the highest end of the violence spectrum call upon their armies to suppress the violent criminal threat. However, in Guatemala militarization of public security

goes much further than only the fight against the narcos. *Fuerzas de Tarea* operate in both the city and in the countryside. *Fuerzas de Tarea* are combined patrols of soldiers and police officers, officially fully under the command of the police. The relative size of military personnel to the joint patrols vis-à-vis police personnel has consistently increased. The joint patrols are paid entirely from the Interior Ministry Budget, thus channeling funds destined for the police towards the payment of soldiers.\textsuperscript{600}

The military also manages to exercise influence in other sectors. For example, the National Health Institute, at the time headed by a former military man, bought the old Military Hospital in 2014 whilst constructing a new military hospital with civilian healthcare funds.\textsuperscript{601} The Ministry of Culture and Sports bought four million footballs at a highly inflated price from *Industria Militar*, an agency of the Ministry of Defense. *Industria Militar* also produces uniforms and equipment for the National Civilian Police.\textsuperscript{602} Thus, not only is the official Ministry of Defense budget well in excess of what was agreed in the Peace Accords, civilian funds from various ministries serve to increase the military’s role outside the Ministry of Defense budget even further.

As violent crime rose and the army budget, at least officially, declined since 1996, former military personnel responded by entering the lucrative private security business. Private security personnel soon outnumbered police and army combined by a factor of three. Former military officers own many

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\textsuperscript{600} See *Prensa Libre*, ‘Crece presupuesto militar’, 7 July 2016.

\textsuperscript{601} See *Prensa Libre*, ‘IGSS quiere usar hospital de militares’, 30 April 2014. The head of the National Health Institute was prosecuted for corruption by CICIG and the Public Prosecutor’s Office, see Nic Wirtz, ‘Corruption Network in Guatemalan Health System Exposed’, *Americas Quarterly*, 22 May 2015.

\textsuperscript{602} See *Prensa Libre*, ‘Capturan a tres coroneles y un mayor por fraude en la Industria Militar’, 4 May 2018.
of the private security businesses, employing former soldiers as private security guards.  

Government control over the private security industry is remarkably weak. In effect, it appears as if the state has lost the ambition to enforce a credible monopoly on the use of force, apparently comfortable with officially sharing the prerogative of using force with private actors. As private security rose to be one of the Guatemalan economy’s main sectors, Congress enacted a new Private Security Companies Regulation Act in 2010.  

The new law, in conjunction with a new Arms and Ammunitions Law, prohibited guards under the age of 25 to carry a firearm. As around 30% of private security personnel are under the age of 25, this regulation harmed the commercial interests of the companies. Contrary to private security personnel, police and army personnel under the age of 25 are allowed to carry a firearm. The Constitutional Court stepped in to declare private security personnel akin to public security forces, hence allowing private guards between 18 and 24 years of age to carry a firearm. “The expression ‘security forces’ includes both state institutions charged with establishing citizen security as well as private entities dedicated to delivering that service,” the Constitutional Court reasoned.

By officially putting private security guards on par with public security forces, the Guatemalan state has gone remarkably far. Guatemalan private security companies are frequently


604 Ley que Regula Los Servicios de Seguridad Privada, Decreto 52-2010.

605 Ley de Armas y Municiones, Decreto 15-2009.

606 Corte de Constitucionalidad de Guatemala, expediente 1608-2009, Sentence of 2 December 2010, my own translation. Spanish original: “… la expresión fuerzas de seguridad comprende, tanto a las instituciones estatales que tienen por fin establecer el valor seguridad ciudadana, como las entidades privadas que se dedican a la prestación de ese servicio...”
involved in human rights violations.\textsuperscript{607} They have become a formidable force in Guatemala, sanctioned by the Guatemalan state to share in the exercise of the legal use of violence. The state has officially accepted the privatization of security provision.

In the meantime, to confront rising crime rates the Guatemalan state has relied on \textit{mano dura}. President Portillo (2000-2004) officially enacted Plan Broom (\textit{Plan Escoba}), appealing to the image of wiping the streets clean. Under the Berger government, extrajudicial executions of pariah criminals rose, and President Colom increased joint military-police patrols. Pérez Molina’s successful presidential campaign carried the slogan \textit{Urge mano dura} (\textit{mano dura} is urgently needed), beating in the second round Manuel Baldizón who campaigned in favor of reinstating the death penalty. The prison population in Guatemala has risen from around 6,000 in 1996 to 10,000 in 2010,\textsuperscript{608} all the way to over 20,000 in 2016.\textsuperscript{609} This rise in prison population may at first sight seem to signal that crimes are being solved and criminals are being punished. However, around half of Guatemala’s inmates are in pre-trial detention.\textsuperscript{610} Whilst the military and to a lesser degree the police get assigned more resources for repression, the Public Defender, the Forensic Sciences Agency and the judiciary face budget cuts.\textsuperscript{611}

The prison system is itself moreover a hotbed of crime. An extraordinary example of the coalescing of militarization, privatization and \textit{mano dura} is provided by Byron Lima. A former army captain, Byron Lima was convicted for the murder of Bishop Gerardi. In prison, he developed into the most powerful person in Guatemala’s penitentiary system. He organized a

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system in which inmates had to pay him for privileges, such as receiving visits or being transferred. He was free to enter and leave the prison, and received high-ranking officials as visitors. He even organized prisoners into a working squad that produced t-shirts and other materials for the Pérez Molina presidential campaign. The former military man was allowed to exercise private control over the prison system, his supporters arguing that it was necessary to exercise a tough hand over prisoners. His rule over the prison system came to an end only in July 2016, when he was killed along with twelve others, including his armed bodyguards and an Argentine model, in a massive in-prison shootout.612

3.3 Impunity

With the public security and justice sectors underfunded and corrupted, it needs barely surprise us that Guatemala suffered from staggering impunity. In 2008 Guatemala’s courts reported 114 murder convictions,613 whereas the police reported over 6000 murders. General impunity was estimated to be 99.75%.614 It made the UN Special Rapporteur on Extrajudicial Executions exclaim that “Guatemala is a good place to commit a murder, because you will almost certainly get away with it.”615

Impunity is not merely the result of incapacity and omission, but rather requires the continuous deliberate commission of acts to undermine and obstruct the state. Such obstructive acts include blocking any fiscal reform, keeping the Constitutional Court and the Supreme Court of Justice in check to

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614 See CICIG, Tercer Año de Labores, September 2010, p.4.

avoid actual judicial independence, and fomenting quarrels in Congress to prevent fundamental political debate. The dysfunctionality of Guatemala’s state institutions is no accident, it is of great benefit to a small group of powerful people.

The criminal law framework in place in Guatemala is furthermore tainted by hipergarantismo, a tendency to provide very strong procedural guarantees to suspects. A clear example of hipergarantismo is the requirement that suspects can only be arrested in their homes between 06:00 and 18:00. If an arrest warrant against someone suspected of very serious crimes gets confirmed by a competent judge at 20:00, the best police and prosecutors can do is surround the house of the suspect and wait until 06:00 the next day. Another expression of hipergarantismo is the almost unlimited right of defendants to file amparos to the Constitutional Court, claiming a violation of a constitutionally protected right. In cases against mareros or other pariahs, very few amparos are filed. But in cases against powerful elite suspects, defense lawyers exploit the amparo right to paralyze criminal proceedings. The tendency to build very strong safeguards in favor of suspects into the criminal justice system is explicable as a response to the state-terror of the early 1980s, but the way it worked out in practice ultimately hindered the rule of law in the context of Guatemala’s weak and criminalized state.616

Another fundamental flaw in Guatemalan criminal procedure is that trials are not concentrated in one court. Various judges have overlapping jurisdiction in entertaining amparos, appeals or other procedural motions. Thus it can happen, as occurred in the genocide trial against former president Ríos Montt, that up to six judges pertaining to different jurisdictions entertain matters belonging to the very same trial in the period between the opening of the trial and the sentencing.617 Key tenets of the accusatorial system, such as oral, public proceedings,

celerity, and equality of arms, suffer from this lack of process-concentration.

With rates of impunity for serious crimes as high as 98%, “the deterrent effect of the law is minimal,” as the UN Office on Drugs and Crime put it.\textsuperscript{618} Impunity on such a scale creates a vicious circle in which the ineffectiveness of the justice sector creates a lack of confidence and a lack of willingness to declare crimes and participate in trials, which leads to further ineffectiveness of the justice system. When laws are not enforced at such a general level, in the end the law loses its deterrent effect and even its societal relevance as guidance of behavior.

A prime bottleneck in Guatemala’s criminal justice system for a long time used to be the Public Prosecutor’s Office. Cases, if investigated at all, were investigated wholly inadequately. Investigators committed themselves to minimal efforts: to identify the body, to take fingerprints, to collect bullets on the crime scene and bring them to the office. But investigators did not commit themselves to the result of formulating hypotheses and bringing cases to court. In cases involving powerful suspects the Public Prosecutor’s Office leadership would frequently intervene to make sure that in the unlikely event of progress being made in the investigations, such progress would not implicate any powerful suspects. If progress in criminal investigations was not stalled at the Public Prosecutor’s Office, powerful suspects could block further progress through their control over the judiciary. The system was totally paralyzed.

In February 2007 a series of events brought the paralyzing status-quo to a tipping point. Three Salvadoran members of the Central American parliament and their driver were found dead by the side of the road in Guatemala, their bodies burnt and showing traces of torture. With Salvadoran authorities involved in the investigation in Guatemala, it soon turned out that Guatemalan police officers were responsible for the fourfold murder. Four police officers were arrested for their alleged involvement and brought to a maximum-security prison, where they were subsequently killed. No prison doors were

forced, no prison guard had seen anything.\textsuperscript{619} The Guatemalan authorities were quick in blaming the murder of the police officers on fellow inmates, but the international community was not content. Police officers killing Salvadoran parliamentarians only to subsequently be killed themselves in a maximum-security prison, and not a single suspect being brought to trial: Guatemala was becoming a serious threat to regional security.\textsuperscript{620}

The Guatemalan state was forced to accept help from the international community. Deployment of a peacekeeping force was unthinkable, not only for high costs, but also because even deploying a peacekeeping force of 10,000 blue helmets would be utterly ineffective in stopping the vicious cycle of rule of law undermining crime and counterproductive state policies of privatization, militarization and \textit{mano dura}. A new rule of law intervention not built on the premise of reining in state power from without, but rather on increasing state capacity from within, was devised.

4 CICIG

The International Commission Against Impunity in Guatemala (CICIG to its Spanish acronym) started operations in 2007. The Commission represents a true innovation in the field of international justice and international cooperation. Functioning fully within the Guatemalan legal order, no independent jurisdiction in the style of an international or hybrid tribunal is created. However, within the Guatemalan national legal order, the Commission has unprecedented powers: it can carry out criminal investigations, act as a co-prosecutor in court, propose legislative reform directly to Congress, and vet the judicial nomination process. The ultimate aim of the Commission is to strengthen Guatemala’s national rule of law institutions and to


dismantle the parallel criminal power structures active in the country.

Although initially endowed with only a two-year mandate, the Commission’s mandate has been renewed with two-year periods in 2009, 2011, 2013, 2015, and 2017. The results have been significant. Since its creation in 2007 CICIG has participated in the indictment of five former or acting presidents for corruption. The Public Prosecutor’s Office, strengthened by CICIG’s work, moreover indicted two former presidents for genocide. CICIG and the Public Prosecutor’s Office have also targeted ministers, members of Congress, military officers and wealthy businessmen. The elites of Guatemala seem to have let in a Trojan Horse when they agreed to the creation of CICIG, as corrupt acting and former government officials are brought to justice in large numbers.

In this paragraph, I shall first analyze the situation leading to the creation of CICIG. Then I shall analyze CICIG’s institutional design and mandate before turning to an evaluation of CICIG’s performance in the twelve years of its existence (2007-2019).

4.1 Creation

As we saw, following the 1996 Peace Accords Guatemala soon witnessed the escalation of privately organized violence coupled with near-universal impunity. The impunity was the result not merely of a lack of technical capacity but also of the hold that parallel structures, dominated by former and active-duty military men, had over the criminal justice system. In the Peace Accords, the Guatemalan government had acknowledged the existence of ‘illegal bodies and clandestine security apparatuses’ (CIACS) in Guatemala, and had committed itself to their dissolution.621

621 See in particular the Acuerdo Global sobre Derechos Humanos, signed in Mexico on 29 March 1994 and part of the Peace Accords between the Guatemalan government and the URNG, paragraph IV. See also: Swisspeace and Centro de Estudios de Guatemala, Proceso de paz en
CIACS is a denomination given to structures that are capable of guaranteeing their impunity through the exercise of substantial control over the state, for example through their influence over the *comisiones de postulación* and through the financing of political parties. The origins of these structures can be traced back to the military dictatorships. Back in the 1970s and the 1980s, the military had evolved into a sort of state-within-the-state, controlling many civilian agencies. Notably, the military exercised control over customs at the airports, the seaports and the land border crossings. After the signing of the Peace Accords, some institutional reforms were carried through. The National Police was reformed into a National Civilian Police, diminishing military control over the police. But the military networks never let go of their control over customs. In the civil war era, this control had served the military purpose of preventing weapons and supply deliveries to the guerilla. In the post-war era, the control over customs served an economic interest by allowing befriended importers and exporters to circumvent taxes in exchange for favors or bribes. When control over customs turned out to be a crucial and lucrative link in the narcotics trade the military elites came in collision with their erstwhile foremost ally, the United States.

The parallel clandestine security structures are by their nature extremely complicated to identify. They are not rigid hierarchical organizations but rather flexible networks with multiple crosscutting links of friendship, family or business relationships. To tackle such parallel structures, international

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personnel whose family does not reside in Guatemala and is hence less vulnerable to threats is of immense added value. That was one of the reasons the idea of creating an international commission was pushed forward. A precedent was provided by the ‘Joint Group for the Investigation of Illegal and Armed Groups with Political Motivation in El Salvador,’ an international investigative commission that operated in neighboring El Salvador in 1992 and 1993. The commission published a report detailing its findings on parallel security structures and issuing various recommendations to the El Salvadoran state in order to dismantle the illegal groups. Its recommendations received minimal follow-up. 625 For Guatemala a commission with a mandate beyond the mere publication of a report was envisioned. 626

With UN peace operation MINUGUA scheduled to close down in 2004 627 a follow-up international mission was crafted. An initial proposal went under the name of CICIACS: Investigative Commission on Illegal Bodies and Clandestine Security Apparatuses in Guatemala. In 2003 Guatemalan civil society, in this case represented by the Human Rights Ombudsman, and the Guatemalan ministry of Foreign Affairs agreed to request the United Nations to set up CICIACS. The Commission would be mandated to dissolve the parallel structures and would have independent prosecutorial powers to achieve its mandate. 628 In 2004 the Guatemalan government and the United Nations reached agreement and signed a treaty that

628 Acuerdo político entre el Ministro de Relaciones Exteriores de Guatemala y el Procurador de los Derechos Humanos sobre el establecimiento de una Comisión de Investigaciones de Cuerpos Ilegales y Aparatos Clandestinos de Seguridad en Guatemala (“CICIACS”), March 13, 2003.
would create CICIACS.\textsuperscript{629} Then-president Berger was not too sure whether CICIACS would be a good idea and requested the Constitutional Court to give a consultative opinion about the constitutionality of the international commission before sending the proposal to Congress for ratification. The Constitutional Court ruled that the Guatemalan Constitution bestows the power to prosecute exclusively upon the Public Prosecutor’s Office, that that power cannot be divided nor delegated, and that hence the creation of CICIACS would be a violation of the Constitution.\textsuperscript{630}

The unfavorable consultative opinion was a major setback for those in favor of international intervention in Guatemala’s crime problem. A new round of negotiations was entered into, this time directly between the Guatemalan state and the United Nations with a more limited role for civil society.\textsuperscript{631} The initiative was renamed International Commission Against Impunity in Guatemala (CICIG) and the independent prosecutorial powers were written out of the mandate. Instead, the new commission would only have the power to act as querellante adhesivo, or co-prosecutor, in cases that have already been started by the Public Prosecutor’s Office. The Guatemalan government and the United Nations signed the treaty establishing CICIG on 12 December 2006. President Berger sent it directly to Congress for ratification. This time it was Congress that asked the Constitutional Court for a consultative opinion. Since the powers of CICIG were less far-reaching than those of CICIACS in terms of initiating prosecutions and issuing

\textsuperscript{629} Acuerdo entre las Naciones Unidas y el Gobierno de Guatemala relativo al establecimiento de una Comisión de Investigación de Cuerpos Ilegales y Aparatos Clandestinos de Seguridad en Guatemala ("CICIACS"), January 7, 2004.

\textsuperscript{630} Corte de Constitucionalidad de Guatemala, ‘Opinión Consultativa sobre el texto del Acuerdo celebrado entre la Organización de las Naciones Unidas (ONU) y el Gobierno de Guatemala relativo al establecimiento de una Comisión de Investigación de Cuerpos Ilegales y Aparatos Clandestinos de Seguridad en Guatemala (‘CICIACS’), Expediente No. 1250-2004, August 5, 2004.

\textsuperscript{631} See Washington Office on Latin America, Activistas Contra la Impunidad – Un estudio de caso sobre la movilización por los derechos humanos en Guatemala, December 2008.
indictments, the Constitutional Court gave a favorable consultative opinion on the constitutionality of the CICIG treaty in May 2007.\textsuperscript{632}

After signing by the president and a confirmation of constitutionality by the Constitutional Court, the final hurdle to be taken was Congressional ratification. In July 2007 the International Relations Committee of Congress unexpectedly refuted the CICIG proposal. National as well as international pressure in favor of the creation of CICIG was enormous as a result of the murder of the Salvadoran parliamentarians and their driver and the subsequent in-prison murder of the four police officers allegedly involved therein. The ratification of the treaty establishing CICIG was considered as a matter of national urgency and as such subjected to a vote in favor by a two-thirds majority in Congress’ plenary session.\textsuperscript{633} Congress ratified the treaty creating CICIG on 1 August 2007, six months after the murder of the Salvadoran parliamentarians and one month prior to general elections. CICIG initiated operations in September 2007.

4.2 Mandate

CICIG has a unique, innovative institutional design. The Commission was created by a treaty between the United Nations, represented by the Secretary General, and the state of Guatemala, to which the president, the Constitutional Court and the Congress of Guatemala all consented. The creation of CICIG does not entail the creation of an international or hybrid jurisdiction. Rather, CICIG may act as an international co-prosecutor and investigator


\textsuperscript{633} See Open Society Justice Initiative, Against the Odds: CICIG in Guatemala, March 2016.
in criminal cases, concerning predominantly Guatemalan suspects to be tried by Guatemalan judges applying Guatemalan law.

CICIG has a dual mandate: identifying and dismantling the clandestine security structures that guarantee their impunity through their influence on state institutions; and strengthening the Guatemalan institutions to prevent the reappearance of such structures. As far as the dismantling of CIACS is concerned, CICIG has the power to investigate and to co-prosecute. Co-prosecuting in the mandate takes the form of acting as *querellante adhesivo*. A *querellante adhesivo* in Guatemalan criminal law can introduce evidence and cross-examine witnesses and has nearly all the process powers that the Public Prosecutor’s Office has in trial. The power to indict suspects and initiate a trial however is exclusively bestowed upon the Public Prosecutor’s Office. Only when the latter starts a trial can an aggravated party or a human rights group, or in this case CICIG, request the trial judge to be admitted to the proceedings as a *querellante adhesivo*.

One of the first things the first commissioner of CICIG did was to sign an agreement with the Public Prosecutor’s Office to create the Special Prosecutorial Unit Ascribed to CICIG, the UEFAC. The creation of the UEFAC served as a bypass to compensate for the suppression of independent prosecutorial powers from the commission’s mandate. Moreover, the creation of the UEFAC allowed the commission to create a vetted elite unit within the Public Prosecutor’s Office to work with, train, and prepare for tackling high-profile cases when CICIG’s mandate would come to an end. In 2011 the UEFAC was re-named Special Unit Against Impunity (*Fiscalía Especial Contra la Impunidad*, or FECI), stressing that the unit is part of the Public Prosecutor’s Office and not of CICIG. With the capacity to act as *querellante*

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634 See Código Procesal Penal de Guatemala, Decreto No. 51-92, articles 116-121.
635 See Convenio de cooperación bilateral entre el Ministerio Público y la Comisión Internacional Contra la Impunidad en Guatemala (CICIG), February 27, 2008, Article 3.
636 See CICIG, Informe de la Comisión Internacional Contra la Impunidad en Guatemala con Ocasión de su Cuarto Año de Labores, 2011, p. 21.
and with the creation of the UEFAC, the Commission had very powerful instruments at its disposal to fulfill its mandate of disarticulating parallel structures.

The second component of CICIG’s mandate is to strengthen the institutions of Guatemala’s criminal justice system. Beyond its direct cooperation with the Public Prosecutor’s Office, the Commission is also mandated to vet the judicial nomination process and to directly propose legislative reform to Congress. Those powers are significant infringements on Guatemala’s sovereignty. Although the Guatemalan state of course consented to the creation of CICIG, it is important to underline that very few, if any, United Nations operations are allowed to directly engage in national processes of judicial nominations and legislation.

To address situations of escalating privately organized violence and rule of law undermining state policies and crime, the design of CICIG is a promising innovation. Contrary to mechanisms that focus on genocide, crimes against humanity, and war crimes, CICIG is mandated to confront also non-political violence and even non-violent crime like corruption. Rather than being limited to address past atrocities, as is the case with pure transitional justice instruments, the Commission is open-endedly mandated to address crimes that were committed after the date of its creation. The explicit goal is to improve present-day law-enforcement capacity, acting as a co-prosecutor in order to disarticulate parallel structures whilst simultaneously launching efforts to improve the performance of the judiciary and the legislative framework in place. In order to fulfill its mandate, the Commission is bestowed with powerful capabilities within the Guatemalan legal order. This provides an adequate starting point for addressing the problems of a weak and severely criminalized state.

Within the UN system CICIG is an odd creature. Its founding document is not a Security Council resolution, as is the

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637 See Acuerdo entre la Organización de Naciones Unidas y el Gobierno de Guatemala relativo al establecimiento de una Comisión Internacional Contra la Impunidad en Guatemala (CICIG), 12 December 2006, Article 3.
case for peacekeeping operations as well as the international tribunals for the former Yugoslavia and Rwanda, nor a General Assembly resolution, as was the case for MINUGUA. In contrast, CICIG was created by a bilateral treaty between the state of Guatemala and the United Nations, the latter represented by the Secretary General. In the treaty that created CICIG, the Commission is established as a non-UN body, without further specifying what that means.\footnote{638} CICIG is not part of the UN Country Team under the leadership of the UN Resident Coordinator, under which organizations such as UNDP, UNICEF, UN-WOMEN, and WHO reside. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has a rather high-profile mission in Guatemala that also falls outside of the formal UN Country Team structure, but the local OHCHR representative owes direct accountability to the High Commissioner in Geneva.

To whom CICIG owes accountability is rather unclear. Within the UN system, CICIG is labeled an investigative and fact-finding mission under the Department of Political Affairs. This category is a collection of experimental international justice mechanisms, including besides CICIG three other UN missions: the United Nations Commission of Inquiry into the assassination of Benazir Bhutto, the former Prime Minister of Pakistan; the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea; and the United Nations International Investigation Commission into the assassination of former Lebanese Prime Minister Rafik Hariri.\footnote{639} The treaty establishing CICIG stipulates merely that the Commissioner shall periodically inform the Secretary General of the UN of the Commission’s activities.\footnote{640} In

\footnote{638} Id., Preamble. See also Open Society Justice Initiative, \textit{Against the Odds: CICIG in Guatemala}, March 2016, p. 33.  
\footnote{639} The latter would eventually evolve into the Special Tribunal for Lebanon, with a UN Security Council Resolution creating an independent jurisdiction.  
\footnote{640} See \textit{Acuerdo entre la Organización de Naciones Unidas y el Gobierno de Guatemala relativo al establecimiento de una Comisión Internacional}
effect the Commission turned out to operate in relative isolation from New York’s UN bureaucracy.\textsuperscript{641}

The decision to bestow CICIG with an initial two-year mandate was convenient both to the Guatemalan government and to the international community: CICIG was an experiment, infringing upon Guatemalan sovereignty and costing the international community money. Both parties wanted to test the instrument before committing themselves to it for more than two years. CICIG is funded through voluntary contributions, unlike for example the ICTY and ICTR, which were part of the general UN budget. CICIG’s design obliges the Commission to enter in a yearly struggle for funding\textsuperscript{642} and a bi-annual quest for mandate renewal, compromising the Commission’s effectiveness and independence.

Moreover, the designation of CICIG as a \textit{sui generis} non-UN body complicates recruitment of personnel. If UN staff-members want to work for CICIG they have to resign from their long-term contracts with the UN to be able to enter CICIG. The latter, subject to bi-annual mandate renewals, can only offer short-term contracts and CICIG-staff does not enjoy benefits like the UN Pension Fund. This makes it difficult for CICIG to attract law enforcement professionals from the UN system.\textsuperscript{643} Also in terms of immunity CICIG’s status causes ambivalence. In the establishing treaty the Guatemalan state grants immunity to

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\textit{Contra la Impunidad en Guatemala (CICIG), 12 December 2006, Article 5(a).}
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\textsuperscript{641} See also Open Society Justice Initiative, \textit{Against the Odds: CICIG in Guatemala}, March 2016.

\textsuperscript{642} The initial budget was estimated at 10 million USD per year, but quickly grew to 20 million USD per year by 2009. Funding levels would vary between 11 and 15 million USD per year from 2012 to 2015. See Open Society Justice Initiative, \textit{Against the Odds: CICIG in Guatemala}, March 2016, p. 40.

\textsuperscript{643} For a report of a conversation in which CICIG Commissioner Castresana complained of these difficulties to the United States Embassy, see: http://www.wikileaks.org/plusd/cables/08GUATEMALA796_a.html (last accessed 17 May 2018).
CICIG’s international personnel and premises, but not to any Guatemalan personnel working at CICIG.644

The impact of CICIG on all aspects of the Guatemalan rule of law merits special emphasis here. From the point of view of the United Nations, the direct involvement in domestic prosecutions, judicial nominations and legislation made diplomats uncomfortable. But from the point of view of Guatemala, the approach of CICIG is even more discomforting. In states with a functional rule of law, the criminal justice system consists schematically of a legislative that gives penal laws, a prosecutor that collects evidence and brings cases to court, a judiciary that independently applies the law to individual defendants, and an executive that carries out prison sentences. CICIG is a strange presence in this familiar scheme. The Commission proposes legislation, acts as a co-prosecutor, gives input on the nomination of high judges, and trains and advises the executive; and in all of these tasks CICIG enjoys immunity. In any domestic legal order that functions to a reasonable degree such concentration of powers in one, immune, body would be unthinkable. Only by acknowledging the near-total failure of the Guatemalan legal order does the mandate of CICIG become understandable.

4.3 Performance

Institutional strengthening

CICIG started operations in September 2007 and is expected to finalize in 2019. The first to lead CICIG was Carlos Castresana, a prosecutor from Spain known in Latin America for his involvement in the Spanish exercise of universal jurisdiction vis-à-vis former dictator of Chile Augusto Pinochet. When Castresana arrived in Guatemala he had to start from scratch.

644 See Acuerdo entre la Organización de Naciones Unidas y el Gobierno de Guatemala relativo al establecimiento de una Comisión Internacional Contra la Impunidad en Guatemala (CICIG), 12 December 2006, Article 10(2).
Never before had there been a commission similar to his, from which experience to draw lessons. He found a domestic justice system that was notoriously weak. Criminal investigations relied predominantly on witness testimony, which was particularly problematic given that Guatemala had one of the highest murder rates of the world and at the time no serious witness protection program.

The first thing CICIG had to do was to establish working relations with its Guatemalan counterparts within the government, the Public Prosecutor’s Office, the police and the judiciary. This was by no means an easy task. In the first two-and-a-half years of CICIG’s operations alone, the crucial Interior Ministry, under which the police resides, was led by no less than six different ministers, many of whom would later be convicted for corruption. At the time of CICIG’s arrival in Guatemala, the Public Prosecutor’s Office was led by an Attorney General allegedly involved in the deaths of the Salvadoran parliamentarians and the suspected police officers. Upon Castresana’s insistence he was replaced.

One of the main causes for the weakness of Guatemala’s justice institutions lies in the highly politicized comisiones de postulación mechanism for the appointment of Attorney General and appeals court and Supreme Court magistrates. As far as the appointment of high judges is concerned, CICIG sought to expand the reach of the Judicial Career Law, so that the professional judicial nomination process that applied to the juzgados de paz and the juzgados de primera instancia – the lowest two levels of Guatemala’s judicial system – would also come to apply to the appointment of appeals courts and Supreme Court magistrates. This would significantly reduce the leverage the


comisiones de postulación and Congress have over the judiciary. Congress has not adopted the proposed amendments.647

In the absence of a comprehensive judicial career, CICIG has tried to influence the process of the comisiones de postulación. A new law adapted the process, creating a set of minimal requirements for judicial posts and making the process more transparent to the public.648 When appeals courts and Supreme Court magistrates were selected in 2009, CICIG as well as Guatemalan civil society organizations made use of the newly more transparent procedure and got involved strongly. The Commission presented formal objections against various candidates, and when Congress ignored some of those objections CICIG filed an amparo with the Constitutional Court. Eventually most, although not all, of the candidates whom CICIG had formally objected were excluded.649 In 2010, in the process to select a new Attorney General, in spite of CICIG’s protests the highly criticized Conrado Reyes was appointed. Outraged, Commissioner Castresana resigned. The president was forced to undo the appointment of Reyes and called a new comisión de postulación process. Under the intense scrutiny of civil society and the international community, this time the esteemed human rights scholar and activist Claudia Paz y Paz was appointed.

CICIG’s proposal to create special High-Risk Tribunals within the Organismo Judicial prospered.650 Somewhat akin to the role of the UEFAC within the Public Prosecutor’s Office, the High-Risk Tribunals were designed as an elite unit within the judiciary. Those elite units are meant to deal with high-profile cases that serve to disarticulate CIACS and can subsequently

647 See CICIG, Aspectos Clave sobre la Iniciativa 4983 Reformas a la Ley de la Carrera Judicial Decreto 41-99 del Congreso de la República, 2015.
648 Ley de Comisiones de Postulación, Decreto 19-2009 del Congreso de la República.
650 Ley de Competencia Penal en Procesos de Mayor Riesgo, Decreto 21-2009; and Reformas a la Ley de Competencia Penal en Procesos de Mayor Riesgo Decreto 35-2009.
function as the source of an oil-spot of incorruptibility and effectiveness spreading out over the rest of the institution concerned. The High-Risk Tribunals have better security for judges, witnesses and other trial participants and, sitting in the capital, can exercise jurisdiction over serious crimes committed in the countryside. The High-Risk Tribunals have a broad material jurisdiction, ranging from genocide and war crimes, to grand corruption, extortion, homicide and drug trafficking.651

When CICIG started operations, the Public Prosecutor’s Office had neither equipment nor the expertise to adequately use investigative techniques like telephone wiretapping, ballistic analysis, or DNA identification. The criminal procedure was moreover severely outdated. CICIG is mandated to propose legislative reform directly to Congress and did so on a number of occasions. Much of the legislative reform brought about by CICIG was in the realm of criminal procedure. An amendment to the penal procedure code, introduced to Congress by CICIG, allowed witnesses to testify through videoconference.652 Another crucial improvement in investigation and prosecution was brought about by the introduction of crown witnesses in the Law Against Organized Crime.653 The new law allowed the Public Prosecutor’s Office under judicial oversight to suspend prosecution or lower the sentence and grant other advantages like a change of identity in return for cooperation with the authorities.

Dall’Anese, seasoned as Attorney General of Costa Rica from 2003 to 2010, took over from Castresana as CICIG’s second commissioner. He worked together with the newly appointed Claudia Paz y Paz to further strengthen the investigative capacity of the Public Prosecutor’s Office. New human resource management techniques and investigative strategies were

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651 See Ley de Competencia Penal en Procesos de Mayor Riesgo, Decreto 21-2009, Article 3.
652 Articles 365 and 379 were modified and articles 218bis and 218ter were added to the Penal Procedure Code by the Ley del Fortelacimiento de la Persecución Penal, Decreto 17-2009.
653 Principally articles 92, 93 and 94 of the Ley contra la Delincuencia Organizada were modified by the Ley del Fortelacimiento de la Persecución Penal, Decreto 17-2009.
implemented. Crucially, rather than tackling crimes on a case-by-case basis prosecuting the material authors, investigators and prosecutors were tasked with identifying the criminal organizations behind those crimes and with prosecuting their leaders. Moreover, with the help of CICIG the Unit of Special Investigative Methods within the Public Prosecutor’s Office was strengthened. The capacity to use modern investigative techniques like telephone tapping, DNA identification, and ballistic analysis, improved drastically under the watch of Paz y Paz and Dall’Anese.

Dall’Anese also continued CICIG’s legislative reform agenda. Although Congress did not fully adopt all of CICIG’s proposals, crucial legislation was adopted in the field of asset forfeiture and anti-corruption. A new Law Against Corruption, proposed to Congress by CICIG and eventually adopted on 30 October 2012, provides inter alia for the crime of ‘influence trafficking.’ The newly introduced criminal offense of influence trafficking is potentially a very valuable legal tool in the fight against parallel structures. Moreover, it serves a normative and communicative purpose. In Guatemala, corruption was more or less accepted, or at least expected. Nobody would be surprised

654 See for example CICIG, Informe de la Comisión Internacional Contra la Impunidad en Guatemala con Ocasión de su Quinto Año de Labores, 2012, p. 38.
655 Ley de Extinción de Dominio, Decreto 55-2010, allowing authorities to seize illegally acquired property and use it in support of state security and judicial institutions.
656 Ley Contra la Corrupción, Decreto 31-2012, article 35, establishing the new crime of ‘influence trafficking’ as Article 449bis of the Criminal Code. Guilty of the crime of influence trafficking is the person who ‘himself or through another person, or acting as an intermediary, influences a public functionary or employee, prevailing over him by virtue of his hierarchy, position, friendship or any other personal relationship, in order to obtain an undue benefit, for himself or for another person, in a matter that that particular public functionary or employee is entertaining or is due to resolve, irrespective of whether any detriment occurs to the state or to a third party.’ The wording mirrors that of Article 18 of the United Nations Convention Against Corruption.
if a judge or a member of Congress would traffic influences. After the adoption of the new anti-corruption legislation, posters were placed in courthouses detailing the new offense, signaling publicly that things were to change.

Cases
Besides institutional strengthening, CICIG also got involved directly in criminal cases. One of the first cases CICIG brought to court concerned four police officers nicknamed the *Mariachi Locos*, accused of stealing drugs shipments and robbing moneychangers. The case appeared to be relatively minor, but served the purpose of producing a first visible result in court for CICIG, somewhat akin to the purpose the *Tadic*-case served for the ICTY. Case selection by CICIG under Castresana appeared somewhat opportunistic, with the Commission also taking up cases like the *narco* related massacre of fifteen Nicaraguans and a Dutchman in a bus in Zacapa. Such violent incidents were of course severe cases that were brought to the attention of CICIG and served to gain CICIG credibility, but they were not essentially at the core of the mandate. An important early case for CICIG started under Castresana was the corruption case against former president Alfonso Portillo. Portillo would eventually be absolved by a Guatemalan court, to the great outrage of Commissioner Dall’Anese, but his extradition to the United States was granted and upon a guilty plea Portillo eventually served seven years in a US prison.

The case with the greatest impact on CICIG in its early phase was the Rosenberg case. In May 2009, with CICIG in its second year of operations, prominent Guatemalan lawyer Rodrigo Rosenberg was murdered on the streets of one of

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657 See also Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, March 2016, p. 44.
Guatemala City’s wealthiest neighborhoods. At the day of his funeral a dramatic post-mortem video was published, in which Rosenberg says: “if you are watching this video, it is because I have been murdered on the orders of president Colom.”\footnote{The video is available on YouTube: https://www.youtube.com/watch?v=VxZptUp9a44 (last accessed 18 May 2018).} A profound political crisis followed, placing the Colom administration under immense pressure. Castresana publicly took charge over the investigation, and subsequently stunned Guatemala, and the world, by revealing that Rosenberg had hired his own assassins in a bizarre combination of political intrigue and heartbreak.\footnote{For an elaborate account of the events in English, see David Grann, ‘A Murder Foretold – Unravelling the ultimate political conspiracy’, The New Yorker 4 April 2011. See also Roberto Oliva, Caso Rosenberg – Una conspiración en Guatemala donde la realidad supera la ficción, Leitzaran Grafikak 2012.} The theory may at first sight have appeared to be too wild to be true. But Castresana convinced the public in a press conference in which he presented the results of CICIG’s use of telephone wiretapping, GPS car tracking, phone call triangulation, surveillance cameras, and plea-bargaining. The quality and presentation of the evidence were unlike anything ever seen before in Guatemala.

Beyond the Rosenberg and Portillo cases, the joint work of CICIG and the Public Prosecutor’s Office was producing results. In the fight against pariah crime, under the watch of Attorney General Paz y Paz, five of the previously ‘untouchable’ organized crime bosses of Guatemala were captured and extradited to the United States, and dozens of members of the Mexican Zeta cartel, as well as dozens of Barrio 18 and Mara Salvatrucha members, were arrested.\footnote{See also Open Society Justice Initiative, Against the Odds: CICIG in Guatemala, March 2016, p. 57.} In the fight against elite crime, the case of the Pavón prison executions stands out. In an operation ostensibly aimed at regaining control over the prison back from the inmates, seven prisoners were executed in September 2006, one year before the creation of CICIG. Interior Minister at the time...
Vielman had been a symbol of the *mano dura* fight against organized crime and a prominent member of Guatemala’s traditional elites. He was prosecuted for his role in the *Pavón* executions in Spain, the country of his second nationality, upon a CICIG investigation. Police chief at the time Sperisen was likewise prosecuted in Switzerland. Director of Guatemala’s penitentiary system at the time Alejandro Giammattei was indicted in Guatemala, but his case was dropped.\(^663\)

CICIG’s third Commissioner, Iván Velásquez, had been the architect of the *parapolítica* cases in Colombia’s Supreme Court, and reassessed CICIG’s case selection strategy. Instead of going after a broad range of cases as they presented themselves to the Commission, Velásquez brought a single focus in the cases CICIG would pursue: high-level corruption. He redefined his target, moving away from the concept of CIACS – illegal bodies and clandestine security apparatuses – in favor of the concept of RPEI – illicit political-economic networks.\(^664\) The shift from CIACS to RPEI represents a twofold change of strategy. First, it implies the decision to follow the money, favoring a focus on economic motives over a focus on violence and security. Second, it implies moving from an implicit understanding of the foe as more or less coherent bodies or apparatuses, towards their understanding as informal networks. Velásquez also implemented tactical change. Instead of transferring capacity through workshops, he limited all capacity transfer to the method of joint work on investigations and prosecutions. Instead of exposing judges’ dubious past, filing official complaints against them or expressing concerns during the nomination procedures, Velásquez decided that he would rely solely on presenting irrefutable evidence in court.

CICIG’s new strategy produced a political and legal earthquake in Guatemala in April 2015, when Commissioner Velásquez and Attorney General Thelma Aldana revealed *La Línea*, a case that revolved around a phone line that was used by

\(^{663}\) Giammattei would move on to win Guatemala’s August 2019 presidential election.

an extensive corruption network in customs. The wiretaps of telephone calls ascribed to the corruption network implicated then-president Pérez Molina as well as vice-president Baldetti. Baldetti was the first to resign in May 2015, to be followed by Pérez Molina in September that same year. Both were detained and currently await trial in prison.665

The corruption schemes that CICIG and the Public Prosecutor’s Office kept on revealing turned out to be more encompassing than many would have deemed possible. The La Linea case revolved around the evasion of custom taxes. But there was also the case of Lago Amatitlan, where vice-president Baldetti positioned herself as an environmental activist, insisting on the purchase of a magic formula that would alleviate the pollution in the Amatitlan lake. Eventually, around 18 million USD was spent on the purchase of salt water.666 Another mind-blowing case that emerged was termed La Cooperacha. All government ministers had to buy presents for Baldetti and Pérez Molina on their respective birthdays, to be financed with the revenues from corruption within their ministries as they deemed fit. A yacht, a helicopter, an airplane, holiday residences and farms were donated to Baldetti and Pérez Molina in this scheme.667

CICIG and the Public Prosecutor’s Office aptly termed the most encompassing case Cooptación del Estado – cooptation of the state. From social service to healthcare to infrastructure to customs, every single corner of the state apparatus turned out to have been treated as a private looting domain by the Partido Patriota government. CICIG concluded that the Pérez Molina administration was “not an administration whose members

665 For a graphic reconstruction of events from 16 April 2015 to 5 October 2015 relating to the La Linea investigation and the downfall of Pérez Molina, see José Carlos Móvil Avendaño and Antonio Barrios Alvarado, El Patio Trasero, Ediciones Especializadas 2017.
committed isolated acts of corruption, but rather a mafioso criminal structure that had coopted power in Guatemala through the ballot box and whose principal leaders were Otto Pérez Molina and Roxana Baldetti.”668 On top of all the corruption, embezzlement and money laundering charges, the United States indicted former Vice-President Baldetti and former Interior Minister Mauricio López Bonilla on drug trafficking charges.669

Political impact
When CICIG started it had to acquire for itself a place in the Guatemalan legal and political order. A gifted public speaker, Carlos Castresana reached out to the public and the media very frequently, making him one of Guatemala’s very foremost public figures. When president Colom appointed Conrado Reyes as Attorney General, Castresana abruptly announced that he was stepping down as Commissioner, insisting that with a man like Reyes in charge of the Public Prosecutor’s Office he could not continue his work.670 Castresana’s resignation caused major public controversy and had the intended effect: Reyes’ appointment was annulled, paving the way for the appointment of Claudia Paz y Paz.

In succession of Castresana, the United Nations appointed Costa Rican Attorney General Francisco Dall’Anese, reputed for successfully prosecuting two former Costa Rican presidents for embezzlement. He inherited a controversial commission that had been at the center of Guatemala’s political life for the previous three years. Dall’Anese himself however was much less inclined to the spotlights. He got into political difficulties when he publicly collided with Guatemala’s judiciary. Outraged by what in his eyes were evident violations of the law by judges, he published a

668 See CICIG, Caso Cooptación del Estado de Guatemala, Comunicado de prensa 047, 2 June 2016.
report entitled ‘The Judges of Impunity’, naming and shaming eighteen judges as agents of impunity. In the report the Commission speaks of a sort of meta-impunity: impunity for those judges who favor impunity. There were no charges brought against the judges named in the report however.

In the meantime the most important case that made it to court in Guatemala whilst Dall’Anese was in office was the genocide case against Ríos Montt. CICIG was no direct party in this case, for the civil war was not within the mandate of the Commission. Indirectly however CICIG’s influence on the case has been crucial, since Claudia Paz y Paz, the Attorney General who pushed the case forward, would not have been appointed, and the High-Risk Court willing to hear the case would not have existed, if it had not been for CICIG’s interventions. On 10 May 2013, High-Risk tribunal A convicted Ríos Montt to 80 years imprisonment. On 20 May 2013, the Constitutional Court annulled the verdict. Dall’Anese had made public statements urging the government of former general Pérez Molina not to interfere with the due course of justice in the genocide trial, a trial in which CICIG was no formal party. He announced his resignation on 28 May 2013.

When Dall’Anese departed from Guatemala, he left CICIG discredited and weakened. President Pérez Molina had already announced publicly that CICIG should work towards its exit from Guatemala, focusing only on capacity transfer and not starting any new investigations. Favoring the Commission’s prospects were international political developments. Guatemala’s security situation had become of heightened importance to the United States after the arrival of some 40,000 unaccompanied minors, principally from Northern Triangle countries, at the Mexico-US border.

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671 CICIG, Los Jueces de la Impunidad, 28 November 2012, p. 8: ‘una impunidad sobre la impunidad misma’.


border. The US Administration had announced a new one-billion-dollar aid program under the name Alliance for the Prosperity of the Northern Triangle of Central America, and Vice-President Joe Biden traveled to Guatemala in March 2015 to deliver in person the message that receipt of its funds was conditional upon an extension of CICIG’s mandate. Pérez Molina seemed intent on defying the wishes of the United States however. In his speech at the Summit of the Americas on 11 April 2015, Pérez Molina declared that he would not subordinate the exercise of Guatemala’s sovereignty to the wishes of third parties.\footnote{Discurso del Señor Presidente de la República, Otto Pérez Molina, en ocasión de la VII Cumbre de las Américas, Ciudad de Panamá, 11 April 2015.}

Velásquez and Aldana revealed the first details of the \textit{La Linea} investigation on 14 April 2015, at a moment when few would have given much for CICIG’s chances of being prolonged. The pressure on Pérez Molina resulting from \textit{La Linea} gave him little choice however, and on 21 April 2015 he agreed to extend CICIG’s mandate. Six months later, the president himself, the vice-president and the majority of his cabinet were in jail.

The revelations turned Aldana and Velásquez into two of the most popular and most powerful persons of Guatemala.\footnote{Guatemalan online publication \textit{Nómada} published a ranking of Guatemala’s 30 most powerful persons in October 2015, with Velásquez and Aldana sharing the first place. Guatemalan magazine \textit{Crónica} published a list of Guatemala’s most influential persons in December 2015, with Velásquez first and Aldana in second place. Velásquez was also included in \textit{Foreign Policy’s} 100 Global Thinkers 2015, whereas Aldana entered \textit{The Time} 100 Most Influential People 2017.} CICIG now enjoyed the support of a very broad range of society, from human rights NGOs associated with the left to business sectors associated with the right, united by their rejection of corruption. Tens of thousands of Guatemalans mobilized to protest corruption and demand renewal of CICIG’s mandate.

The anti-corruption sentiment following the scandals of the Partido Patriota government dominated the campaign for the 2015 presidential elections. Guatemalan comedian Jimmy
Morales successfully campaigned on the slogan ‘neither corrupt nor a thief’. Positioning himself as an outsider to the political game, he insisted that he was untainted by corruption since he had never held public office before. Morales had run on the ticket of FCN, a political party founded by some of Guatemala’s most notorious former generals. Morales’ announcement that his intended Interior Minister appointee was Callejas y Callejas, an archetypical CIACS-leader, caused great worry amongst human rights NGOs. In an unexpected move, only a couple of days before the planned inauguration of the new government, Callejas was arrested along with fifteen other former military officers. It was clear that Velasquez and Aldana meant to continue their battle against corruption.

In the campaign, Morales had promised to support the immensely popular fight against corruption headed by Velásquez and Aldana. Prior to assuming office, President-Elect Morales publicly announced that the government of Guatemala would request the UN to extend CICIG’s mandate until 2021. But the relation between the president on the one hand and CICIG and the Public Prosecutor’s Office on the other, already tense after the arrest of Callejas, deteriorated further when CICIG had the president’s son and brother arrested. Mutual distrust developed into open animosity when Velásquez and Aldana announced that they were investigating president Jimmy Morales himself for alleged illegal campaign financing. Their request to lift Morales’ immunity so that he can be indicted was rejected by Congress. Morales on his turn declared Velásquez persona non grata – a decision that was overturned by the Constitutional Court – creating an institutional standoff.

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677 For an analysis of the impact of the arrest of Callejas by CICIG and the Public Prosecutor’s Office, see Nómada, ‘Cómo cambia el panorama este golpe del MP a Jimmy’, 7 January 2016.
In the meantime, Aldana and Velásquez continued their crusade against corruption. They charged Alvaro Arzú, president of Guatemala from 1996 to 2000 and long-time mayor of Guatemala City, with embezzlement in the municipality of Guatemala City. Subsequently center-left former president Alvaro Colom (2008-2012) was arrested along with various of his cabinet members on corruption and embezzlement charges, making him the fourth former or acting president of Guatemala to be charged with corruption in slightly over two years.

The actions of Velásquez and Aldana touched the very highest levels of Guatemala’s official and parallel power structures. These structures reverted to a familiar tactic: distract attention away from elite corruption by pointing to pariah violence. Indeed, Morales’ Interior Minister Enrique Degenhart, himself alleged to have been involved in corruption, called publicly on CICIG to investigate the maras.

Building on the increased capacity of the Public Prosecutor’s Office, Velásquez addressed the causes of the dysfunctionality of Guatemala’s rule of law at their core. Whereas in 2012 CICIG had indicted the mayor of the touristic town of Antigua for corruption, Velásquez indicted former president and mayor of the capital Arzú. Where CICIG investigated fuel smugglers within the customs office in 2012, Velásquez indicted acting president Pérez Molina for his leadership role in the corruption scheme within the customs office. After ten years of gaining an information position and strengthening the capacity of its domestic counterparts, CICIG seemed to come to the essence of its mandate.

However, CICIG was getting too close for comfort to dismantling Guatemala’s corrupt structures. The Jimmy Morales government unilaterally withdrew from the treaty creating CICIG.

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678 See Nómada, ‘Así se defendió el ministro Degenhart frente a la denuncia del sindicalista asesinado’, 12 April 2018.
680 CICIG, Informe de la Comisión Internacional Contra la Impunidad en Guatemala con Ocasión de su Quinto Año de Labores, 2012, p. 20.
681 Id., p. 25-26.
in January 2019. When Otto Pérez Molina was facing charges and announced that he would expel CICIG, Vice-President of the United States Joe Biden came to Guatemala personally to bring home the message that expulsion of CICIG would not be tolerated by the United States. Under the Trump administration, such support in favor of CICIG did not materialize.

5 Conclusion

Guatemala provides a perfect example of the changing nature of contemporary organized violence. Having been the scene of Latin America’s deadliest Cold War conflict in the 1980s, it is today the scene of one of the deadliest peacetimes of the continent. The military and the PACs have ceded, in terms of violence, to narcos, maras, and a whole range of violent actors. Instead of rather centralized political violence against guerillas and ethnic violence against the Maya indigenous population, today we see an almost anarchic escalation of primarily economically motivated violence. The rule of law in the meantime stood by powerlessly, paralyzed by judicial and political corruption.

The creation of CICIG in 2007 was a true innovation. CICIG’s institutional design is bold. Although no independent jurisdiction is created, the Commission has remarkably far-reaching powers within the Guatemalan legal order. Indeed, the degree to which CICIG infringes upon Guatemalan sovereignty – mandated to act as an investigator and co-prosecutor, to propose legislation, and to be involved in judicial nomination procedures – is unique for a UN mission, and can only be understood when considering the bankruptcy of Guatemala’s legal institutions.

CICIG has been a transformative actor in Guatemala’s fight against high-level corruption. Literally not a single administration since 1996 has been untouched by CICIG: former president Arzú (1996-2000) died whilst under investigation of CICIG, former president Portillo (2000-2004) was indicted by CICIG, as were the Interior Minister and various other top figures from the Berger administration (2004-2008). Former president Colom (2008-2012) finds himself in jail in the company of former
president Pérez Molina (2012-2016), both on CICIG indictments. At the time of this writing acting president Jimmy Morales (2016-present) is also under investigation, and president-elect Alejandro Giammattei (to assume office in 2020) spent ten months in prison in 2010-2011 for a case brought by CICIG. Moreover, indirectly, through the creation of the High-Risk Tribunals and the strengthening of the Public Prosecutor’s Office, CICIG has been pivotal in the genocide charges brought against former presidents Ríos Montt (1982-1983) and Mejía Victores (1983-1985).

CICIG addresses state capture. It is not focused on crimes against humanity, war crimes or genocide as international tribunals are. Neither is it focused on pariah crime, as militarized assistance programs are. It can target the kinds of crime central to state capture as it deems fit, directly prosecuting powerful suspects for corruption, embezzlement or influence trafficking.

Moreover, CICIG goes beyond the targeting of individual leaders. Rather than aiming at the completion of a limited number of paradigmatic cases, the Commission aims at integral reform. Whilst making use of the Guatemalan legal order, CICIG targets entire structures. As querellante adhesivo or through UEFAC/FECI, CICIG was involved in the prosecution of hundreds of suspects. In the process, as CICIG is embedded nationally, Guatemalan legal institutions are exposed to this prosecutorial rigor. Rather than one-off interventions with an incidental impact, CICIG’s impact purports to be structural. Legal reform, a modernized criminal and criminal procedure code, greatly increased capacity at the Public Prosecutor’s Office, High-Risk Tribunals, and witness protection programs are among the achievements of CICIG.

Castrasana had to build CICIG from scratch, without any international precedent and without any national predecessor. Dall’Anese continued the work of CICIG, focusing mainly on supporting Claudia Paz y Paz as Attorney General, but failed to craft a coherent strategy. The mandate is broad, and indeed may encompass not only purely elite expressions of organized crime

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but also pariah expressions. Going after shootouts between police officers and drug traffickers, or investigating the murder of sixteen people in a bus, may at first sight seem to fit in the mandate of addressing impunity. Moreover, such investigations into narco-related violence could count on the warm approval of the United States. But ultimately, investigations of such pariah expressions of crime distract from the underlying problem of state criminalization.

The ultimate strategic question for CICIG is whether the Commission would cooperate with the state in fighting pariah violence, or alternatively whether CICIG would delve into elite structures within the state. Particularly under Velásquez, the Commission focused at the latter. Underlying this strategic choice is an assessment of the reasons why Guatemala’s justice and security institutions are so weak. Is that so because they are challenged by outside pariah violence? Or is pariah violence prospering because something else is holding back the development of strong justice and security institutions? Increasingly, evidence points at the latter. Powerful political and economic elites have preferred weak state institutions, unable to challenge their interests. The social contract in place between Guatemala’s elites is not based on the rule of law, but on the exchange of favors in a dense web of clientelist relations, with corruption holding it all together.

What CICIG eventually aimed at was a profound transformation of Guatemala. In the context of the downfall of the Pérez Molina administration in 2015 and again during the protest against the ‘pact of impunity’ in Congress in 2017, Guatemala witnessed a renewed citizenship. Tens of thousands of Guatemalans protested in the streets, something unseen for decades. The repulsion of pervasive corruption united sectors from across the political spectrum. The mano dura approach to pariah crime was discredited, as the most explicit proponents of mano dura, former presidents Portillo and Pérez

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Molina, were both indicted for corruption. The excesses of mano dura were exposed in the investigations into the Pavón extrajudicial executions. Militarization of public security was similarly discredited by the countless revelations of corruption within the military.

CICIG represents a promising innovation in the myriad efforts aimed at strengthening and cleansing weak and criminalized states that suffer from rule of law undermining crime. The model, susceptible to improvements, can be a crucial step forward for the United Nations system in developing a coherent response to the changing nature of contemporary organized violence, rule of law undermining crime, and rule of law undermining state policies.
CHAPTER 7 CONCLUSION

This study was triggered by the observation that civil war and organized crime had become blurred concepts in Latin America. In Guatemala, more people die of violence during *la posguerra*, the state of formal post-conflict peace, than during the days of the civil war. In Colombia, where civil war ends and where organized crime starts was impossible to tell in the context of both guerrilla and paramilitary involvement in drug trafficking. During the course of this study, I noticed that not only the line between civil war and organized crime may be blurred, but that also the line separating organized crime from the state had become blurred. In this final concluding chapter, I shall summarize my main findings with regard to pariah and elite rule of law undermining crime, and with regard to international interventions.

1 The rule of law in Latin America and its undermining

In this study I have aimed for an account of the function of the rule of law in the context of efforts to strengthen weak or criminalized states, in order to understand how the rule of law is undermined and to identify potential interventions. It is essential to keep in mind the difference between the rule of law as a historical concept, and the rule of law in contemporary international relations. The rule of law concept developed primarily in strong-state contexts, with the purpose of curbing tyranny. This version of the concept is connected to traditional liberalism’s negative liberty. In contemporary international relations however, the concept is also used as an instrument to strengthen weak states.

In the thin versus thick debate with regard to the rule of law, Joseph Raz is typically credited with having formulated the thin extreme. He approaches the rule of law as essentially a negative value, minimizing “the harm to freedom and dignity which the law may cause in its pursuit of its goals however
laudable these may be." On the other side of the spectrum we saw the excessive overburdening of the rule of law concept, whereby democracy, human rights and liberal capitalism are considered integral components of the rule of law. External actors promoting the rule of law have tended to present it as a neutral value. Law in practice however shares with politics the central stake: the distribution and exercise of power. It is not neutral.

Given the concept’s origins in the curbing of strong government, Leviathan’s existence is presupposed by many rule of law theorists. The challenge to Leviathan by pariah crime is then oftentimes not given due consideration. But in the face of escalating criminal violence, a more positive understanding of the rule of law is warranted. This means that rule of law promotion efforts should aim not only at the rule of law’s capacity to restrain the use of force by the state, but also at strengthening the state’s capacity to suppress the use of force by private actors. This also implies strengthening the police and the penitentiary. Traditionally, for many rule of law practitioners and human rights activists, the police and the penitentiary were seen primarily as potential human rights violators to be restrained. But these institutions need a more positive approach from the rule of law in the face of escalating privately organized violence and state weakness.

This translates into a dual challenge for the rule of law: not only must it rein in the state in its use of force, it must also empower the state vis-à-vis external actors. When private use of force is so widespread and arbitrary as it is in countries like Guatemala and Colombia, the rule of law cannot limit itself to prevent the arbitrary exercise of public power, but rather must include focus on the reestablishing of the state’s monopoly on the use of force. The pariah threat is real enough in many Latin American states, and their populations would be better off if the state had the capacity to suppress privately organized violence more effectively. Indeed, populations are desperate for their

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states to develop that capacity, and are willing to vote *mano dura* and counter-insurgency minded politicians into office exactly for that reason.

However, there is a further step to be taken. The state may not merely be a rights-violating Leviathan to be reined in, and strengthening the state’s capacity to suppress private violence may be called for. But the state is not merely an impotent bystander overwhelmed by outside violence either. The state is also corrupted from within, by what I term elite rule of law undermining crime.

This makes the challenge for the rule of law actually threefold: prevent the arbitrary use of force by the state; facilitate the suppression of outside violent crime; and enable the justice institutions to cleanse the state apparatus from corrupt and criminal elements from within. The raison d’être for the rule of law is not only to protect citizens from the state, but it is not merely a situation of ‘the state versus the criminals’ either. When judges and legislators are coopted by crime from within to a large degree, efforts at strengthening the rule of law must include focus on the reestablishing of judicial independence and the functionality of the legislative process.

By looking at the undermining effects crime has on the rule of law, and by explicitly separating between elite and pariah crime, we gain a clearer vision of counter-crime strategies both domestic and international. We see then that governments resort to publicly magnifying and suppressing the pariah threat, whilst leaving the elite threat from within largely untouched. In particular *mano dura* has the effect of focusing on the suppression of pariah crime whilst ignoring elite crime, in the process explicitly discrediting the rule of law. Privatization of public security and military involvement in law-enforcement are similarly aimed at the forceful suppression of pariah criminals, not at the uncovering of corruption networks within the state or other expressions of elite crime.

By referring to ‘rule of law undermining crime’ I approach crime not from the point of view of the nature of the perpetrator or the crime, but from the point of view of the effect crime has on the rule of law. What characterizes rule of law undermining crime is either a structural willingness on the part of organized
crime actors to engage in confrontation with the state, or a durable collusion between the state and organized crime.

The concept of pariah crime relates to the changing nature of contemporary organized violence. Violence in Guatemala and Colombia has increasingly become decentralized and economically motivated, rather than centralized and politically, ethnically or racially motivated. The state’s monopoly on the use of force is ineffective. The widespread pariah crime resulting in war-like levels of violence in many countries is real and should by no means be downplayed. However, if one focuses on the external threat violent pariah actors may pose to the effectiveness of the state monopoly on the use of violence, one risks overlooking another aspect of the situation: state criminalization. When states speak of ‘narco-guerilla,’ or ‘narco-insurgency’ more generally, or of narco-terrorism or the ‘crime-terror-continuum,’ we get a discourse that portrays the state as the innocent victim of illegitimate violence from outside actors. It is crucial to recognize however the degree to which the state is not merely the victim of outside illegitimate violent actors, but is also criminalized from within.

The way that pariah crime facilitates elite crime can very clearly be seen in both Guatemala and Colombia. In Guatemala, former military intelligence chief Otto Pérez Molina won the presidency in 2011 running on a mano dura platform. The population was terrorized by the daily violence committed by street gangs and others, and was willing to elect a former general as a strongman. While publicly promising to crack down on crime and suggesting a reorientation of the war on drugs, Pérez Molina orchestrated the far-reaching criminalization of the state. If it weren’t for the desperation caused by pariah crime, Pérez Molina would not have been able to win the election on his mano dura campaign. It took the intervention of CICIG to uncover the corruption schemes in the Pérez Molina administration. One of the criminal investigations into the Pérez Molina government corruption was aptly called cooptación del estado, cooptation of the state. This was not a matter of widespread corruption as usual. Rather, the entire state had become criminalized. The majority of Pérez Molina’s cabinet members went to prison in 2015 and 2016.
Similarly, in Colombia, Alvaro Uribe was elected president in 2002 after a campaign centered on a promise of counter-insurgency: the military should be given the means to crush the guerilla and other pariah threats. The escalation of violence in Colombia created the possibility for Uribe to stand up as a strongman. While publicly promising to crack down on violence and narco-trafficking, Uribe masterminded the alliance between paramilitaries and the political establishment. If it weren't for the desperation caused by criminal violence, Uribe would not have been able to win the election on his counterinsurgency promises. Over a third of Colombia’s members of Congress at the time were accused of having ties to paramilitary organizations in the parapolítica investigations.

Looking at the impact crime has had on the rule of law in Guatemala and Colombia, three factors stand out. With regard to pariah crime, it is evident that the state’s monopoly on the use of force has been severely eroded in both countries. Private violent actors, from maras and narcos to guerrillas, paramilitaries and vigilantes, exercise deadly force on the respective territories at war-like levels and the state has no means to credibly react against them, resulting in widespread impunity. With regard to elite crime, in particular judicial independence and the functionality of the legislative process are undermined.

Any definition or conception of the rule of law, from the all-encompassing UN Secretary General’s 1994 definition685 to the thin conception of Joseph Raz, includes independent adjudication and application of the law. We saw judicial independence compromised in several ways. In Colombia we saw the chuzadas against Supreme Court magistrates following the parapolítica investigations, with special intelligence agency DAS wiretapping magistrates. In Guatemala, we saw the anomalous position of the Constitutional Court, and the vulnerable comisiones de postulación nomination procedures for magistrates.

685 UN Secretary-General, Strengthening the Rule of Law: Report of the Secretary-General, delivered to the General Assembly, UN Doc. A/49/512, 14 October 1994.
The legislative organ of the state does not necessarily have to be elected according to the world’s highest democratic standards. If the legislative organ however serves narrow criminal private interests, then the legislative process loses its public character, and hence its function. In Colombia, over 30% of Congress members were prosecuted for alleged ties with paramilitaries in the so-called parapolítica scandal. Guatemalan Congress suffers from widespread transfuguismo, the practice of Congress members changing political affiliation. What drives the legislative process are not coherent political projects but rather narrowly self-interested individuals. Especially in Guatemala, there is very limited ideology or public policy. Criminal capture of the electoral process is facilitated, or perhaps even reflected, by the weak party system. In such circumstances, the legislative process becomes dysfunctional. Although the rule of law does not equal democracy, rule of law does require that the making of laws “be guided by open, stable, clear, and general rules”, and that there is “adherence to principles of supremacy of law, [...], legal certainty, avoidance of arbitrariness and procedural and legal transparency.” In a Congress characterized by parapolítica, transfuguismo, and corruption, this is evidently not the case.

For international law, and the international community more generally, to restrict oneself to telling states what they are not allowed to do is insufficient in the face of a real enough pariah threat. For international law – and again for the international community more generally – to merely cooperate with captured state institutions in the suppression of pariahs is ineffective however. The frameworks of the crime suppression conventions and of rule of law development aid are based on cooperation between reasonably successful states and on the respect for

sovereignty. *Parapolítica* and *cooptación del estado* show that sovereignty may be captured by criminal interests, in which case the veil of sovereignty must be pierced through for international interventions to affect meaningful change.

What should be kept in mind moreover with regard to rule of law undermining crime is that the essence of the threat is national, not international. The widespread idea that organized crime is transnational and that law-enforcement should hence be too, is partially a misconception. Of course drug trafficking organizations by their nature engage in border crossing crime. Money laundering likewise is an international business. But the essence of the most menacing criminal phenomena is national. State criminalization projects like *cooptación del estado* in Guatemala and *parapolítica* in Colombia could prosper and remain unpunished for so long not because they crossed borders, but exactly because they exercised great control over their domestic justice institutions. The captured national sovereignty, rather than the ability to cross borders, is at the root of the profitability and sustainability of the most damaging criminal enterprises. The solution therefore can only be to break through the veil of that captured sovereignty and to improve the performance of national rule of law institutions from within.

**2 International interventions**

The international community has not been blind to non-political, criminal violence rising to war-like levels in many countries. Influencing thinking about war and crime has been the idea of ‘fragile’ states. In the UN’s 1992 *Agenda for Peace*, the discourse of peacemaking, peacekeeping and peacebuilding was based on the idea of parties to conflicts that had to be disarmed and reconciled. This vision of conflict was replaced, as far as the ‘new wars’ are concerned, by the framework of state-building rather than peacebuilding. The state, from being one party to the conflict, became the framework for the solution. If the violence can be brought down to a contest between coherent warring parties, then it might be solved by negotiation and conflict
resolution. But if the violence is seen as a result of the absence or weakness of state institutions, strengthening those institutions becomes the solution.

International interventions must indeed move beyond telling the state what it may not do, and should take a more positive approach towards states. Strengthening the state’s capacity to suppress private violence is called for. Such a more positive approach towards states is mirrored in the positive complementarity idea of the International Criminal Court, and in positive human rights obligations to investigate and prosecute. However, interventions must be wary not to merely assist the state in the forceful suppression of pariah crime. They should rather endeavor to enter into the state, in order to address elite crime.

I conducted case-studies into three international interventions. All three operated in a context of escalating criminal violence and weak, criminalized states. But the three have fundamentally different relations to the state. In as far as an international rule of law intervention faces an authoritarian state, the goal may be to prevent the arbitrary exercise of force by the state. This is the premise behind the Rome Statute and the International Criminal Court. In as far as an international rule of law intervention faces a ‘fragile’ state, the goal may be to facilitate the suppression of outside violent actors, which was the premise behind Plan Colombia. In as far as an international rule of law intervention faces a criminalized state, the goal is to enable the justice institutions to cleanse the state apparatus from within. This is the premise behind CICIG.

Plan Colombia was effective at strengthening the state’s monopoly on violence and capacity to suppress pariah crime. But this success came at the expense of egregious human rights violations, particularly falsos positivos, and unchecked growth of elite crime, particularly parapolítica. The ICC positive complementarity dynamic in the preliminary examination into the situation in Colombia had a normative influence, particularly in the early years. But as the preliminary examination entered its second decade, without a single suspect having been identified, the process lost its credibility.
In general, the ICC has a potentially valuable role to play in countering mano dura and counter-insurgency practices the moment they reach the level of crimes against humanity.\textsuperscript{688} But the ICC has a very limited material jurisdiction, typically excluding corruption. A case like \textit{La Línea} or \textit{Cooptación del estado} in Guatemala could not be brought before the ICC. Crimes against humanity moreover are hard to prove. For example, proving that prominent members of Uribe’s coalition were guilty of asociación ilícita in the context of parapolítica might be feasible in a Colombian court. Proving their command responsibility for crimes against humanity committed by Colombian armed forces, or complicity for crimes committed by paramilitaries, is much more complicated in court.

For more comprehensive approaches to prosper, domestic circumstances are crucial. The host state must meet some minimal conditions of presence and strength on the territory. ‘Failed’ states like Somalia or Haiti may need interventions along the lines of peacekeeping operations rather than along the lines of the CICIG-model. The same goes for states that suffer a conflict in which violence is aimed directly at control over the state, like in Syria, Iraq, Afghanistan, or Mali. Second, there must be a minimum of national political will in the host state. If such will is absent, not only will it be extremely unlikely for a CICIG-like intervention to be allowed by the host state, the mission would also find it to be utterly impossible to achieve change within the domestic institutions. But if the state is sufficiently strong and present, and if there is a minimum of political will, then progress a CICIG-like intervention may achieve can be substantial.

Circumstances in Guatemala were favorable at the time of CICIG’s creation. As a result of growing insecurity, evidenced by the murder of the Salvadoran parliamentarians and the subsequent in-prison murder of the police officers allegedly involved therein, the Guatemalan state had little choice but to

\textsuperscript{688} In this regard, the announcement that the ICC is looking into the situation in the Philippines and the wave of executions that has occurred there in the context of president Duterte’s war on drugs is worthwhile.
allow the creation of CICIG. Yet, Guatemala’s justice institutions were strong enough to provide a basis for CICIG to work with. International circumstances were also favorable, with the United Nations and the United States forcefully backing the Commission.

CICIG derived its success from its innovative institutional design, aimed comprehensively at the Guatemalan rule of law. The CICIG mandate comprised a unique combination of actual case-work, and the power to investigate and prosecute; and a powerful institution-building mandate, including the power to propose legislation and provide input in judicial nomination procedures. CICIG had to invent the wheel. Subsequent similar interventions can build upon its experience. The model provides a potentially effective answer to the escalation of privately organized violence and the need to re-establish the state monopoly on the use of violence in many countries, whilst simultaneously addressing state criminalization. Sending a peacekeeping force to a country that is suffering widespread rule of law undermining crime makes no sense. Neither does indicting a handful of leaders of violent groups in an international jurisdiction. CICIG might be the most promising approach available to the international community to assist criminalized states struggling with privately organized violence on the scale of war beyond their control.

3 Final conclusions

This thesis started with the following question:

how can the international community most effectively promote the rule of law in countries that are facing high levels of privately organized violence and state criminalization?

The answer to this question is guided by two distinctions. First, that between the rule of law as it developed historically in strong-state contexts on the one hand, and the rule of law as a mechanism in contemporary international relations to
strengthen so-called fragile states on the other. Second, the explicit distinction between pariah and elite rule of law undermining crime. We see then that the international community must not merely restrain states, but must also positively strengthen their capacity to suppress pariah violence. At the same time, faced with elite rule of law undermining crime, the international community cannot limit itself to enhancing the repressive capacity of states, and should find pathways to pierce through the veil of captured sovereignty to affect change from within.

To curb anarchic violence and impunity, and to boost the state’s capacity for adherence to the rule of law, international interventions should aim at both elite and pariah rule of law undermining crime, whilst avoiding the pitfalls of privatization, militarization and mano dura. International interventions should not limit themselves to core crimes, nor to pariah drug trafficking. Rather, interventions should be endowed with a comprehensive material mandate that includes corruption and drug trafficking as well as violence.

Indeed, we have seen the relativity of distinctions between core crimes on the one hand and ordinary crimes on the other. In the 1980s, kaibiles, Guatemala’s military elite units, committed heinous crimes including torture and decapitation of Guatemalan peasants in the service of the Guatemalan state and in the context of the civil war. In the 21st century former kaibiles commit similar acts against similar victims, but now in the service of the Zetas and in the context of the War on Drugs. In Colombia, narco-traffickers were awarded belligerent status when they obtained so-called paraportes. For victims, the distinction is largely irrelevant. Beyond the classification of violence as civil war or as organized crime, human rights discourse has recently come to place more emphasis on the fight against corruption.\textsuperscript{689} Indeed, violence, corruption and drug trafficking are intimately linked both in Guatemala and Colombia.

\textsuperscript{689} See for example Anne Peters, ‘Corruption as a Violation of International Human Rights’, \textit{The European Journal of International Law} 29(4), 2018, 1251–1287.
Given the evolving nature of organized violence, international law should evolve too. International criminal law was designed to address centralized mass violence. In contexts of rule of law undermining crime, when *mano dura* reaches the level of crimes against humanity, international criminal law can be of relevance. But its material focus on core crimes, to the exclusion of corruption and drug trafficking, coupled with its focus on a limited number of individuals carrying the greatest responsibility, makes international criminal law ill-suited to strengthen states that are facing high levels of privately organized violence and state criminalization. Rule of law development aid and transnational criminal law are based on the premise of sovereign states cooperating with each other. If sovereignty is captured by criminal interests, both rule of law development aid and transnational criminal law typically fail to pierce through that sovereignty. Merely strengthening the capacity of the state to suppress pariah violence, as Plan Colombia did, or going after some of the most notorious individual organized crime leaders, as is the premise behind the kingpin strategy of the United States, cannot diminish state criminalization. The UNODC declared in 2010 that the “control of crime must be seen as part of the larger project of global governance.”\(^690\) This larger project of global governance must include the control of pariah crime, including drug trafficking, as well as the control of elite crime, including government corruption. The lessons of CICIG’s operations in Guatemala from 2007 to 2019 in that regard are worth learning.

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Crime and Peace - Summary

Introduction
This investigation departs from a threefold problem statement. First, I observe that the relation of the state vis-à-vis violence in many countries, including Guatemala and Colombia, is ambivalent. In 21\textsuperscript{st} century Guatemala, a country formally in peace, more people die of violence than did on average during the 36-year civil war. Colombia has been facing a civil war and a war on drugs for the past decades. Whether any given act of violence is considered part of the civil war or rather an expression of organized crime is oftentimes subject of controversy. Rather than a strong repressive state that is responsible for the majority of the violence being exercised on its territory, I see in both countries a weak state that is incapable of enforcing its monopoly on the use of violence, or is unwilling to do so. Private actors of various sorts are exercising violence on a scale that resembles civil war, in the absence however of a central conflict. If the state is not the main perpetrator of violence on its territory, merely telling the state what it may not do does not suffice.

Second, I observe that the state is not merely an impotent bystander overwhelmed by criminals besieging it from outside either. Of course there are violent outside actors, whom I term pariah criminals, who can make organized crime look like civil war if there are many of them. But there are also criminals who undermine the rule of law from within the state, whom I term elite criminals. Any effort at improving the performance of the rule of law must take into account that rule of law undermining crime comes not only from outside the state, but is also present within it.

Third, I observe that international efforts to promote the rule of law in crime-affected countries face serious shortcomings. Billions of dollars spent during decades of rule of law promotion abroad have failed to deliver strong justice institutions in many recipient countries. The legal instruments of the United Nations crime suppression conventions are useful to promote
cooperation between successful states, but face serious challenges in addressing elite rule of law undermining crime. Cooperation between law-enforcement authorities is problematic if those authorities are working at the service of criminal interests. International criminal law is materially limited to genocide, war crimes and crimes against humanity, to the exclusion typically of corruption or narcotics trafficking, and is therefore ill suited to comprehensively target pariah and elite rule of law undermining crime.

In Guatemala, an innovative United Nations intervention under the name International Commission Against Impunity in Guatemala (CICIG) has operated between 2007 and 2019. In Colombia, the United States provided a bilateral military aid program under the name Plan Colombia from 2000 to 2015. The International Criminal Court (ICC) has had the situation in Colombia under preliminary examination from 2004 until the time of writing. The central question I aim to provide an answer to in this thesis is the following:

how can the international community most effectively promote the rule of law in countries that are facing high levels of privately organized violence and state criminalization?

In order to do so, I intend to provide an analytical framework that moves beyond the distinction between organized crime and civil war, and examines the impact widespread crime has on the functioning of the rule of law. What concerns me in this investigation is how the international community can contribute to the rule of law’s threefold challenge in countries that face high levels of crime: prevent the arbitrary exercise of force by the state, enable the state to suppress pariah violence, and enable the justice institutions to cleanse the state from elite crime from within. I provide three in-depth case-studies in the light of that analytical framework: of CICIG, of Plan Colombia, and of the ICC’s preliminary examination into the situation in Colombia.
Rule of law
The canonical formulation of the meaning of rule of law is beyond what I pretend to develop in this thesis. What I do intend to provide is an account of the function of the rule of law in the context of efforts to strengthen weak or criminalized states, in order to understand how the rule of law is being undermined and to identify potential interventions. It is important that one keeps in mind the fundamental difference between the rule of law on the one hand as it was developed historically by political philosophers and constitutional lawyers looking for ways to curb the growing power of central government, and on the other hand as an instrument to turn contemporary weak states into states that effectively enhance the wellbeing of their citizens. Historically, political philosophers and constitutional lawyers, confronted with states that were increasing their powers, sought solutions to the potential pitfalls of excessive state power. This focus on what strong states may do links the rule of law to the negative liberty of traditional liberalism. The rule of law is portrayed as essentially a negative value, intended to minimize the harm that can be done by the law. The concept developed historically in a context in which the state had substantial control over its citizens, and in which control mechanisms over that state were the primary concern. Indeed, one of the most common starting points for discussing the rule of law is ‘government bound by law’. But what if there is no effective government to begin with?

In situations of state weakness and criminalization, what the rule of law can empower the state to do is at least as important. In such situations, there is a simultaneous dual challenge for the rule of law: not only to prevent tyranny and circumscribe the use of force by the state, but also to prevent anarchy and circumscribe the use of force by private actors. The dual challenge is particularly evident in the exercise of criminal justice. The exercise of criminal justice, when done arbitrarily, is potentially among the greatest threats to liberty. In the contemporary context of weak states with high levels of crime, the relation between rule of law and criminal justice is twofold. On the one hand, indeed the arbitrary exercise of criminal justice remains a threat, as is apparent in the application of mano dura.
policies. But of equivalent importance is the lack of exercise of criminal justice, or impunity, vis-à-vis crime perpetrated by citizens and state actors alike. This means that rule of law promotion efforts should aim not only at the rule of law’s capacity to restrain the use of force by the state, but also at strengthening the state’s capacity to restrain the use of force by private actors. This also means strengthening of the police and the penitentiary. Traditionally, for many rule of law practitioners and human rights activists, the police and the penitentiary were seen as potential human rights violators, to be addressed through human rights trainings. But these institutions need a more positive approach from the rule of law in the face of escalating privately organized violence and state weakness.

International rule of law promotion aims to ‘fix’ dysfunctional rule of law institutions. One cannot fail to ask: why are those institutions dysfunctional in the first place? Who is benefitting from that dysfunctionality? Ultimately, the rule of law is about the distribution of power. Rule of law developed as a check on the power of the monarch. Today, in weak states confronted with widespread undermining crime, promoting the rule of law means that those that are presently benefitting from impunity shall be adversely affected. Notwithstanding efforts to present the rule of law as a neutral and a-political good, law in practice shares with politics the central stake: distribution and exercise of power. Rule of law practitioners should acknowledge the intrinsically political nature of all their work rather than hide behind a facade of perceived neutrality just because they want to avoid accusations of neo-colonialism or because, in the case of the World Bank, their statutes do not allow them to get involved in political matters. Indeed, by hiding behind formal facades of neutrality, often interventions turn out to be merely status quo enforcing.

Efforts to strengthen the rule of law in weak-state crime-infested contexts should take as their starting point the rule of law’s thin essence. In the context of strengthening the rule of law in weak states in the 21st century, that thin essence, developed in the context of strong states in the 20th century, should be complemented. Preventing a Hobbesian state of anarchy and
providing security and law and order to citizens must take a central place in efforts to promote the rule of law.

State weakness and the blurring distinction between civil war and organized crime
The history of the state is to a large degree a history of the use and control of violence. States played a great role in the pacification of societies by monopolizing the use of violence on their territory. Indeed, it has become a matter of definition, with Max Weber asserting that the state is a human community that successfully claims the monopoly on the legitimate use of physical force within a given territory. Charles Tilly, one of the leading theorists of state formation and violence monopolization, famously observed that ‘the state made war, and war made the state’. He also wrote however about ‘state-making as organized crime’, signaling the fundamental intersection of organized crime and war.

An effective monopoly on the use of force in the hands of the state requires that the private use of force is limited in scale and sanctioned by the state. The most widely used measure for the lethal use of force in a country is number of violent deaths per 100,000 inhabitants per year. This rate may have been in the 100s in pre-state societies, prior to Leviathans’ monopolization efforts. Today, this rate is roughly 1 in the Netherlands. In the United States it is roughly 5, coming down from roughly 10 in the 1980s. In Central America, this rate can be as high as 50. Worldwide, more people die of violence in non-conflict settings than in the context of war.

Civil war, or internal armed conflict, presupposes a central conflict, with parties thereto. Particularly in the Cold War era, much of the violence in Guatemala and Colombia seemingly occurred in such a context. There was a central conflict between the state and its military on the one hand, and guerrilla forces on the other. In the 21st century however, most violence in both countries does not occur within that neatly defined central conflict. Rather, violence is much more decentralized. The state is not the violence monopolist fighting off contenders over its monopoly in a central political conflict. We rather see a
decentralized de facto challenge to the state’s violence monopoly, coming from various pariah actors. The state is only one among many violent actors, and its forces do not count for the majority of the violence committed on the territory. Maras, narcos, vigilante squads, paramilitary organizations and private security companies combined easily have the firing power to rival that of the state.

Not only has violence become more decentralized in the absence of monopolistic pressure, the motivation behind the violence has also changed. There is a blossoming literature on ‘greed versus grievance’ in civil wars. Greed and grievance however are ultimately intimately intertwined. For example, fighting over the control of natural resources can be cast as economically motivated violence, aimed at direct personal profit-making. However, it can just as well be aimed at political power and be motivated by discontent over unequal distribution of wealth between dominant and minority groups within a state. Similarly, the motivations of young men to join a rebel movement or a street gang that is perceived as more purely criminal, can be very similar.

Beyond asking oneself whether civil wars are motivated by greed or by grievance, one may ask whether any given situation of widespread violence should be characterized as civil war to begin with, or whether it should be characterized as high-intensity crime. This latter question is what sparked the ‘new wars’ literature. To speak of war, there must be a conflict, with parties thereto. Beyond the questions of central command and territorial control familiar from international humanitarian law, and beyond whether violence is economically or politically motivated, the most fundamental question to ask is whether the objective of the violence is to win the conflict and defeat the adversary. If parties gain an interest in the open-ended continuation of the violence, they become more of a violent organized crime group than a party to a civil war.

The idea of ‘fragile states’ fundamentally influences thinking about war and crime. In the UN’s 1992 Agenda for Peace, the discourse of peacemaking, peacekeeping and peacebuilding was based on the idea of parties to conflicts, both state and non-state, that had to be disarmed and reconciled. This vision of
conflict was replaced, as far as the ‘new wars’ are concerned, by the framework of state-building rather than peacebuilding. The state, from being one party to the conflict, became the framework for the solution. This makes sense to a degree. If the violence can be brought down to a contest between coherent warring parties, then it might be solved by negotiation and conflict resolution. But if the violence is seen as a result of the absence or weakness of state institutions, strengthening those institutions becomes the solution.

Ultimately however, the ‘fragile state’ lens carries the risk of favoring the strengthening of states’ capacity for repression, turning a blind eye to democracy, human rights, and the rule of law. Furthermore, states may exploit the blurring distinction between civil war and organized crime by employing terms like ‘narco-guerrilla’, or ‘narco-insurgency’ more generally, as well as ‘narco-terrorism’ or the ‘crime-terror-continuum’. Especially in combination with the ‘fragile state’ framework, these terms form part of a discourse that portrays the state as the innocent victim of illegitimate violence from outside actors.

When war decreased after the end of the Cold War and the end of its proxy civil wars, so did crime in many countries, particularly in the West. In Latin America however, many countries experienced a great crime rise – not only of violent pariah crime, but also of elite crime. The cycle of corruption, violence and impunity we see in Guatemala and in Colombia does not merely result in state fragility, but also in state criminalization. States are not only suffering from weakness caused by bottom-up violent challenges to their legitimate authority, but are also in many cases criminalized from within. Although the problem of state weakness may seem to have an obvious solution – state strengthening – there are many dangers. Whereas some states may be fragile due to external factors, many fragile states are criminalized from within. Simply strengthening the state shall then be of little avail.

**Organized crime and the state**
The way organized crime is organized has been evolving over the past decades. What can be discerned is that throughout the world
organized crime groups mirror the trends of international business. Whereas the likes of Henry Ford had become successful through the creation of large, vertically organized structures, run along Weberian bureaucratic lines, international business in the age of post-Cold War globalization has increasingly come to rely on flatter forms of organization, in a more horizontal network-like mode of operation. Similarly, organized crime changed. It has become less centralized, more open to new-comers, and more diffuse.

This created new challenges for law-enforcers. From the perspective of law-enforcement policy, the more traditional view is to approach organized crime as a set of criminal actors. Organized crime, in that view, is what full-time criminals engage in exclusively. Alternatively, one can approach organized crime as a set of illicit activities. What becomes visible then is that organized crime is not exclusively done by full-time criminals, but is actually an illicit activity that a wide range of actors engages in. Organized crime in this view is not a homogeneous actor, but rather a broad range of activities that may serve as a source of finance for both state and non-state groups. Organized crime may sustain armed conflict, and actors who start out as organized crime groups may even become militarized.

Indeed, perceiving of organized crime as a broad range of illicit activities performed by an equally broad range of loosely connected individuals and organizations requires a change of the perception of the problem from the side of law-enforcement. When trying to suppress the activities of a hierarchically organized opponent, it makes good sense to target individual leaders. However, when the activities that one wants to suppress stem not from hierarchical organizations but rather from a wide range of actors active in a network or a market, other strategies are warranted.

Some call for a reorientation of the fight against crime, from an exclusive focus on classic law-enforcement to also include a market-based approach. With regard to transactional crimes, this is a potentially valid concern. Transactional crimes are illicit deeds that fulfill a market demand, like narcotics production and trafficking, human smuggling, or illegal gambling. In particular in the case of narcotics, moving away
from the exclusive law-enforcement lens and adopting complementary lenses, such as public health but also market dynamics, is essential, albeit not uncontroversial. A large proportion of global organized crime is indeed driven by market demands and market logic. Countermeasures, to be effective, must disrupt those markets, and not just the criminal groups that exploit them, for the latter are easily replaced. The market-based approach however has much less to offer when it comes to so-called predatory crimes: illicit behavior that does not so much fulfill a demand, but rather preys upon societies; for example corruption, extortion, or sexual violence. In conceptualizing the threat posed by crime, I propose the concept of rule of law undermining crime.

Rule of law undermining crime

Every crime, by definition, is a transgression of the law. It may appear tautological to speak of ‘rule of law undermining crime’. However, the idea behind the concept ‘rule of law undermining crime’ is that certain levels and forms of crime, by eroding and defying the state monopoly on the legitimate use of violence, have particularly detrimental effects on the rule of law. What characterizes rule of law undermining crime is either a structural willingness on the part of organized crime actors to engage in confrontation with the state, or a durable collusion between the state and organized crime. When criminals are structurally willing to take on the authorities – when they bribe, intimidate, murder or even become state officials rather than hide from them – is when crime becomes rule of law undermining.

It is impossible to say that certain crimes *per se* are not mere transgressions of the law but rather rule of law undermining. The crime that undermines the rule of law in Latin America is fueled to a high degree by the proceeds from drug trafficking and human trafficking, as well as by administrative corruption. These offenses are committed across the globe, and need not always translate into the fundamental undermining of the rule of law. More than the type of offense, what is relevant is the effect on the state.
‘Undermining crime’ is a concept that has recently come to dominate Dutch debates on law enforcement. The essence of the concept is the consideration that crime be assessed by the undermining effect it may have on society, on the financial-economic system, and on the state. The idea to approach the threat posed by organized crime from the point of view of the undermining effects it has is worthwhile. However, in the Dutch debate the concept of ‘undermining crime’ still tends to present crime rather one-sidedly as a virus-like threat to society coming from the outside. The added value of the ‘undermining’ point of view towards crime is that it leads us to focus more on the effects of crime, and less on the activities of organized crime per se. It makes little sense then to limit the discussion, as is the current tendency in the Dutch debate, to classic organized crime actors like drug traffickers and outlaw motor gangs, who have always had the foremost attention of law enforcement. If applied consistently, the undermining frame could be likened to the harm-reduction point of view on drug policy. A focus on limiting the detrimental effects of certain behaviors, like organized crime or drug abuse, can guide policymaking more effectively than unwavering attempts at the suppression of such behavior per se.

In analyzing the undermining effects of crime, I distinguish two different kinds of undermining crime that I term ‘pariah’ and ‘elite’. Pariah crime is outsider crime, committed by violent individuals who are willing to confront the state. Pariah crime is undermining of the rule of law particularly in its direct defiance of the state’s monopoly on the use of violence. In Latin America, the violent street gangs known as maras provide the clearest instance of pariah crime. Elite crime on the other hand is insider crime, committed by wealthy and influential criminals who work within the state. To put it bluntly: whereas pariah criminals intimidate, kill or bribe police officers or judges, elite criminals appoint police chiefs and judges.

Pariah crime and elite crime mutually reinforce each other in many countries in Latin America, including Colombia and Guatemala. Elite crime thrives on the distraction of pariah crime. Pariah crime thrives on the lack of state response to their actions, which in turn is fomented by lack of state resources caused by corruption and tax evasion. The way that pariah crime
facilitates elite crime can very clearly be seen in both Guatemala and Colombia. In Guatemala, former military intelligence chief Otto Pérez Molina won the presidency in 2011 running on a *mano dura* platform. The population was terrorized by the daily violence committed by street gangs and others, and was willing to elect a former general as a strongman. While publicly promising to crack down on crime, Pérez Molina orchestrated the far-reaching criminalization of the state. The majority of his cabinet members went to prison in 2015 and 2016. If it weren’t for the desperation caused by pariah crime, Pérez Molina would not have been able to win the election on his *mano dura* campaign. Similarly, in Colombia, Alvaro Uribe was elected president in 2002 after a campaign centered on the counterinsurgency efforts against the FARC. The escalation of violence in Colombia created the possibility for Uribe to stand up as a strongman. While publicly promising to crack down on violence and narco-trafficking, Uribe masterminded the alliance between paramilitaries and the political establishment. Over 30% of Colombia’s Congress was indicted for ties with paramilitaries. If it weren’t for the desperation caused by criminal violence, Uribe would not have been able to win the election on his counterinsurgency promises. The ultimate result of the vicious cycle of violent crime, corruption and impunity can be a total fusion of criminal and government actors. Examples of this include the *parapolíticos* of Colombia, a contraction of ‘paramilitaries’ and ‘politicians’; or the clandestine parallel security structures of Guatemala known as CIACS.

It is hence not a matter of ‘the state versus the criminals’, with the state besieged from the outside by violent pariahs. The vicious cycle of violence, corruption and impunity oftentimes leads to state criminalization, with fundamental challenges coming from within the state. Pariah crime and elite crime are mutually reinforcing, and shall have to be addressed simultaneously.

The distinction between pariah and elite rule of law undermining crime has relevance for policy. Pariahs are sought after universally. They directly diminish the effectiveness of the state’s monopoly on the use of violence, and defy the state’s monopoly on the use of violence from the outside. Elite criminals
on the other hand are not so universally sought after. They have political connections and are not the stereotypical bloodthirsty criminals that everybody instinctively wants to see imprisoned. They threaten the legitimacy of the state from within.

**Mano dura, militarization and privatization**

A fragile state, confronted with an escalation of criminal violence, may deploy various strategies to counter crime. Some state policies that purport to react to pariah crime leave elite crime unaddressed. Particularly counterproductive in many countries in Latin America in this regard are militarization of policing, privatization of security, and *mano dura*.

*Mano dura* or penal populism stands, literally, for the ‘tough hand’ on crime. Typical measures include high prison sentences, long pre-trial detentions, and a suspension of constitutional rights. Penal populism is also familiar in the United States, with the policy of three-strikes-you’re-out as a prominent example. The essence of *mano dura* is to give state authorities a free hand in the suppression of pariah threats, particularly gang violence. Whilst all focus goes to repression, prevention and rehabilitation are left behind.

Policies of *mano dura* lead to human rights violations and exclusively target pariahs. Prison populations skyrocket, turnings prisons into hotbeds of gang activity, and the criminal justice system is unable to process the large volumes of pariahs entering it, leaving it paralyzed. Guatemala’s prison population rose from 6,000 in 1996 to 20,000 in 2016, with around half of the country’s inmates in pre-trial detention. Elite crime in the meantime is totally untouched.

*Mano dura* is popular at the polls, even though it has proven to be ineffective. As a response to the lack of success of *mano dura* policies in El Salvador, the government enacted a policy officially called *super mano dura*. *Super mano dura* also failed to improve the security situation in the country. As the recent experience with *mano dura* in Latin America seems to suggest, democracy does not inherently make crime-infested places less violent. Under *mano dura*, whilst citizens suspected of criminal behavior fall below many of the protective safeguards of
the law, the state, often through executive order or decreeing a state of emergency, grants itself the power to act above the law. In contexts of escalating criminal violence and lack of historically established rule of law institutions, at the polls, *mano dura* projects frequently win, pitting the democratic process against the rule of law.

Militarization of policing similarly leads to human rights violations whilst exclusively targeting pariahs. The blurring distinction of police and military roles occurs in the slipstream of the blurring distinction between war and organized crime. If organized crime groups become ever more violent and powerful, it may in certain circumstances be necessary to send the military in to counter their violence. For example, when a drug lab is guarded by *narco* hitmen carrying AK-47s, or when a slum neighborhood is under the violent control of a street gang and police officers who enter run the risk of being shot, it may make sense for the military to assist the police in re-establishing control. But beyond the direct reestablishment of control, there should be no role for the military.

Yet there oftentimes is. The military not only clears the armed hitmen guarding the drug lab, but also assumes subsequent control. Tons of cocaine are destroyed and the military calls it a victorious battle in the war on drugs. But the military was not trained in evidence gathering. Efforts to identify the criminal structure or to uncover the organization’s financial trappings are minimal.

Police tasks and military tasks were separated for a reason. In war, enemies are to be defeated through the use of overwhelming lethal force. In peace, societies are to be pacified not through maximum force but rather through the minimum force necessary. The military is trained to defeat enemies by overwhelming force, not to carry out sophisticated investigations and bring criminals to justice. Moreover, the institutional opportunity costs associated with the militarization of policing are tremendous. Criminal threats are presented as too big for the police and the justice institutions to handle. If every time criminal threats grow to certain levels the military is called in, the police and the justice institutions are starved of resources.
The privatization of public security carries risks similar to those of the militarization of policing. First, the risk of human rights abuse grows. Private security guards are often minimally trained, and private security companies have a poor track record of screening personnel and of keeping track of their firearms. Reports of abuse by private security personnel are frequent. Incidents of vigilantism escalating into serious human rights violations are similarly on the rise, and as long as the victims are social pariahs the state does little to counter vigilantism. Second, the massive use of private security companies represents tremendous institutional opportunity costs. All the funds that private individuals and companies spend on the services of private security companies cannot be invested in the police. Efforts at regulation of private security companies by fragile states are mostly futile. The reason private security companies prosper in Latin America in the first place is state weakness. It should be no surprise that the state is incapable of enforcing its regulatory framework upon the booming private security business.

Militarization and privatization thus lead to tremendous institutional opportunity costs. When confronted with major criminal problems, societies have systematically resorted to the military rather than the police, and have systematically hired private security companies rather than pay taxes for the police to provide public security. The police is thus starved of resources and is incapable of improving its performance. Militarization tends to place the state above the law, whilst *mano dura* tends to lead to marginalized citizens falling below the protection of the law. Privatization means that the state delegates its monopoly on the use of force, with the rule of law no longer ruling supreme. Whilst pariah violence is challenging the state and the security of its inhabitants bottom-up, corruption and elite crime erode the state top-down. How can the international community assist states in overcoming this dynamic?

**International responses**

Besides efforts of the international community to increase the capacity of domestic rule of law institutions through bilateral or
multilateral aid programs, for a long time the international community did little about organized crime. Indeed, organized crime was long perceived as a relatively minor threat to the international community, adequately dealt with on the domestic level. Awareness of the fundamental challenge posed by rule of law undermining crime grew after the end of the Cold War. However, the international legal and institutional response has been insufficient.

Rule of law development aid is made up of donor countries’ efforts to assist developing countries in the performance of their rule of law, somewhat akin to efforts aimed at agriculture or healthcare. Particularly after the end of the Cold War rule of law development aid flourished. There was a widespread belief that dual transitions towards democracy and capitalism were inevitable, and that the rule of law was the key delivery mechanism for both transitions. Authoritarian states in Eastern Europe were falling apart, Cold War civil wars in Central America were coming to an end, and various African countries were seeking to transition towards some status of ‘post-conflict’, creating a sense of urgency. Rule of law practitioners came to the fore, much like lawyers had done during the heyday of the Law and Development Movement of the 1960s.

There was however confusion as to what the rule of law is. Including the swift organization of elections and market reform under the rule of law rubric whilst oftentimes excluding security sector reform resulted in adverse effects. In order to avoid any impression of neocolonialism, the perceived neutrality of the rule of law was emphasized. Presuming that ‘better’ rule of law, like ‘better’ healthcare or agriculture, would be neutral, resulted in a failure to take into account local cultural and historical experience with the law, as well as to consider opposition by entrenched interests to rule of law efforts. Although supporting legal infrastructure and agents of change within local legal systems is useful, in the contexts of weak and criminalized states many rule of law development aid efforts fail to pierce through the veil of captured sovereignty, and accordingly fail to bring about fundamental change.

Transnational criminal law as epitomized in the United Nations crime suppression conventions suffers from somewhat
similar limitations. Of course the crime-suppression conventions have their merits in their call on nations to adopt legislation and prosecutorial policies, in particular in the fields of prohibiting the laundering of criminal profits and of asset forfeiture. Moreover, The Palermo Convention is the only comprehensive tool the world has, and serves to promote cooperation between minimally effective states.

However, the conventions are eventually the lowest common denominator. In diplomacy, political differences are often obscured by finding creatively ambiguous wording; exactly the opposite of what law-enforcement needs. Between strong and rule of law abiding states, cooperation can take place, with or without the conventions. But the conventions fail to pierce through the veil of sovereignty behind which elite criminals in weak or criminalized states manage to hide in order to bring about real change.

International criminal law as epitomized in the Rome Statute for the International Criminal Court does pierce through the veil of sovereignty. It can be of great relevance when mano dura or other state policies reach the level of crimes against humanity, as the policies of Duterte in the Philippines arguably do. However, the ICC is materially and institutionally limited. Corruption or drug-trafficking are not international crimes in the sense of the Rome Statute. Large-scale corruption cases against government members can thus not be brought before the ICC. The ICC is moreover institutionally limited, typically targeting not more than a handful of those most responsible in a certain situation. Targeting a limited number of leaders can defuse situations of centralized violence but is of limited effect vis-à-vis situations of widespread decentralized violence and state criminalization.

In the meantime, proposals to create an international response capacity to escalating problems of organized crime have surfaced from time to time. A truly international response capacity to the process of state criminalization, along the lines of a capacity to respond to natural disaster or to conventional warfare, has not moved forward however, nor is it likely to do so in the near future. The post-WWII international law paradigm is based on respect for state sovereignty on the one hand, and the
prevention of certain serious crimes that are of concern to the international community as a whole on the other. If states commit genocide, war crimes or crimes against humanity, their sovereignty no longer reigns supreme and may in fact cede to the concerns of mankind as a whole. If states fail to prevent genocide, war crimes or crimes against humanity a nascent ‘responsibility to protect’ even befalls upon the international community. But if rule of law undermining crime is eroding the state’s authority and legitimacy, the international legal framework does not pierce through the veil of state sovereignty, notwithstanding the fact that such crimes have a capacity similar to that of international crimes to create international crises.

In the absence of an effective international response capacity, a more successful fight against rule of law undermining crime depends on the performance of domestic justice systems. In order for international efforts aimed at increasing domestic capacity to succeed, they need to come with real powers. International efforts moreover must move beyond the law in the books, and insert themselves within the law in practice. There are plenty of laws that prohibit murder, rape, and corruption. The problem is in the enforcement of those laws. Broken rule of law institutions utterly fail to enforce the laws that are formally in force. The root of the lack of enforcement lies typically not in the transnational nature of crime. An oft-heard concern with regard to the activities of transnational organized crime is that they do not respect borders, whereas law-enforcement authorities have to. But the most menacing rule of law undermining crime projects are primarily national. They control their national law enforcement institutions, and are untouchable not because they move between jurisdictions but rather because they control their domestic jurisdiction.

What we witness, then, is the emergence of under-governed or criminally governed territories in which the international community cannot intervene because the captured sovereign state blocks intervention. Outside assistance is allowed in infrastructure and poverty alleviation but not in the core of the domestic rule of law institutions. If intervention is blocked, a dangerous status quo may emerge, in which the state remains ‘sovereign enough’ to prevent intervention or outright
collapse, yet its domestic rule of law is severely undermined by organized crime. Sometimes inroads in those sovereignties that shield criminal actors and under-governed territories are present. Colombia being a party to the Rome Statute and the Guatemalan government agreeing to the creation of CICIG are two examples. Under what kind of circumstances such inroads emerged shall be discussed in the case studies.

**Colombia**

Colombia has a long history of privately organized self-defense. The fact that the fighting between Liberals and Conservatives that took the lives of approximately 200,000 people from 1948 to 1958 is referred to simply as *La Violencia* (‘The Violence’) shows the ambivalent character of war and political motives of that episode. The tri-partite civil war between guerrillas, paramilitaries and the state that followed could equally well be referred to as ‘The Violence’, so diffuse have criminal and political actors and the state been.

Drug production and trafficking created a unique dynamic in Colombia’s armed conflict. First of all, drug traffickers were extremely violent actors in their own right. Pablo Escobar and his fellow *extraditables* proclaimed war on the state, and various drug traffickers proclaimed war on the guerrilla too when they formed *MAS* – Death to Kidnappers to its Spanish acronym. The *extraditables* and *MAS* carried out war-like attacks, and tried to win public support, but they were first and foremost expressions of organized crime. They did not claim a political agenda beyond their own interests, namely avoiding extraditions and kidnappings.

Cocaine came to impact the civil war actors too. The FARC came to rely increasingly on cocaine; although narco money was not the cause for the start of the war, it sure played an important role in its continuation. Cocaine was most transformative for paramilitarism. The paramilitaries claimed to be a political-military movement, opposing the guerrilla and filling in the void left by the state. In practice they typically avoided direct combat with the guerrillas, the latter hardened by decades of fighting and surviving in the jungle, and preferred to terrorize civilian
populations and engage in drug trafficking and other criminal activities. Paramilitarism in Colombia, in contrast to Guatemala, thus developed autonomy vis-à-vis the state as a result of cocaine.

The story of the criminalization of the Colombian state is intimately linked to the rise of cocaine and paramilitarism. To begin with, as corruption is a universal problem, and as cocaine brought in billions of dollars into a developing country, of course law-enforcement in Colombia was going to be bribed. Pablo Escobar reportedly had hundreds of police and army officials and politicians on his payroll, primarily to guarantee an omission: not being arrested and/or extradited. Escobar had made many enemies who united under the acronym Los Pepes. The state cooperated with Los Pepes in the manhunt on Escobar. Instead of organized crime bribing state officials to guarantee an omission, here we see state officials actively seeking the collaboration of certain organized crime actors towards a common objective.

The cooperation did not end with the death of Escobar. It turned out that the Cali cartel had financed the campaign of president Samper. The investigation that followed implicated various ministers, members of Congress and other high state officials. The vice-president resigned in indignation. In an extraordinary measure in international relations, the Clinton administration denied Colombian president Samper a visa to enter the United States, pointing to the criminal infiltration of the Colombian state up to the highest level.

In the 1990s, various paramilitary and drug trafficking groups had united as the AUC – the United Self-Defense forces of Colombia. Projecting a ferocious anti-communist discourse, the AUC portrayed itself as ally of the state and as the third party in the civil war between the state and the guerrilla. On the other hand, the AUC blatantly challenged the state’s monopoly on the use of force and any laws prohibiting the production and export of cocaine. The guerrillas wanted to overthrow Colombia’s constitutional order from without, challenging and fighting the state, killing government agents and boycotting elections. The AUC and their allies on the other hand wanted to take over the state from within. The large majority of violent acts against politicians was blamed on guerrillas, but 96% of acts of irregular
‘electoral assistance’ were attributed to the paramilitaries. Whereas the FARC had resorted to a bottom-up process of social capture, the AUC engaged more in a top-down process of state capture. And whereas the FARC’s social base consisted of poor, barely educated peasants, the social base and especially the political support system of the paramilitaries consisted of influential and wealthy people.

The relationship between paramilitarism and the state was so ambivalent, and so far-reaching, that commentators wondered who was instrumentalizing whom. Taking the pariah lens, and seeing organized crime as a virus-like external threat to public order, one would think that paramilitarism and narco-trafficking were instrumentalizing and corrupting the state. But it seemed at times that the inverse was equally valid: that the elites who controlled the state were instrumentalizing violence and narco-trafficking for their own purposes. Is the state using paramilitaries for its dirty work, or are paramilitaries using the state for revenues and impunity?

The Supreme Court uncovered the links between politicians and paramilitaries in a series of investigations known as parapolítica. The extent of those links was shocking. Paramilitarism turned out not to be a pariah threat, like the guerrilla, fighting and trying to replace the state. Nor was paramilitarism an instance of mere grand-scale corruption, or an effort to infiltrate the state. Rather, the state and paramilitarism had increasingly become one. The more they had become one, the more it would appear that paramilitarism as such had ceased to exist.

Eventually the inconsistency in Colombian sovereignty became unsupportable. In order to control the territory, the state cooperated de facto with the paramilitaries, but in order to gain international legitimacy, it had to de jure disassociate itself from them, in particular from their drug-trafficking activities. Moreover, to a large extent it was mission accomplished: the FARC had been forced to retreat from major parts of the territory. The paramilitaries were happy to negotiate the legalization of their illegally acquired wealth, and agreed to demobilize. As part of the demobilization, the paramilitaries entered into a transitional justice process called ‘Justice and Peace’. Various
hitherto unconnected self-defense and organized crime groups were drawn into the AUC framework in order to benefit legally. Powerful drug lords bought the command of a paramilitary front to cleanse their criminal records in the transitional justice process – a practice referred to as *paraportes*, a contraction of paramilitary and passport. The distinction between civil war and organized crime was purposefully blurred.

After the dissolution of the AUC, the Colombian state referred to those paramilitary groups and narco trafficking groups who had refused to demobilize as ‘criminal bands’, or *bacrim*. The state thus emphasized that it considered them ordinary criminals, and not in any sense parties to an armed conflict. What were called *bacrim* by the government were referred to as neo-paramilitaries by others, and indeed many of the *bacrim* leaders and members are the same people as the erstwhile paramilitaries. In the times of the AUC, the political anti-subversive motive of the paramilitaries was more explicit and more consistent perhaps than with the *bacrim*. But the state had to reconsider the clear classification as mere criminal bands in a number of instances in reaction to their force, for example when the Colombian military carried out aerial bombardments on *bacrim* bases.

**Plan Colombia**

In the late 1990s Colombia the Colombian state was severely weakened by the continued presence of guerrillas and paramilitarism and the corruption scandals surrounding the Samper administration. Succeeding Samper in 1998, President Pastrana hoped to negotiate a ‘Marshall Plan’ for Colombia. Given the centrality of US demand for cocaine to Colombia’s violence, a contribution from the US towards improving living conditions in Colombia seemed justified. What was envisioned as a multilateral socio-economic peace plan for Colombia however turned into a bilateral militarized counter-narcotics plan between the United States and Colombia. Eventually a counter-terrorism layer was also laid over the plan.

In the early stages, the Plan had looked totally different from what it eventually became. Pastrana was interested in
peace, for which he was willing to negotiate with the guerrillas, and in socio-economic development. Counter-narcotics was third on his list. When Congress debated the plan, it was stressed that the United States did not want to get sucked into Colombia’s internal armed conflict militarily. However, Washington did not merely want to subsidize poverty alleviation in Colombia with US taxpayers’ money either. Counter-narcotics however was a hot topic. Accordingly, the objective of Plan Colombia in the negotiation phase switched. Instead of the multilateral socio-economic plan that Pastrana had hoped for, it became a militarized counter-narcotics plan.

The operational counter-narcotics goals of Plan Colombia were defined predominantly in terms of acres of coca fumigated and tons of cocaine intercepted. This operationalization of the goals is severely problematic, particularly since developments on those measures can be explained either way. Decreasing interception volumes can be explained as an indicator of less cocaine being trafficked, and thus as success. If interceptions go up, authorities can also claim success, arguing that increasing interception volumes are indicative of the effectiveness of the interception efforts. Alternative measures for success would be price, purity and availability of narcotics on US markets. Under Plan Colombia, nor under its predecessor the Andean Initiative, have effects on those measures been observed.

If the military counter-narcotics approach in Plan Colombia as opposed to the socio-economic development approach was not enough bad news for Colombians, a further transformation occurred during the plan’s implementation. Whereas the plan had been proposed by Pastrana and redesigned by the Clinton administration, its implementation occurred in tandem between presidents Bush jr. and Uribe. After 9/11, counter-narcotics was brought into the counter-terrorism framework. President Bush declared that if you quit drugs, you join the fight against terror in America. The terrorism framework appealed enormously to Uribe, who was eager to present the FARC as narco-terrorists and his state as innocent, besieged, and worthy of support. Moreover, framing Colombia’s armed conflict as an instance of international terrorism, at only a two-hour flight to Miami, further justified US interest in the country. Under
Clinton, the idea was to separate counter-narcotics from counter-insurgency. This distinction was easy to make according to high-ranking US military officers at the time, but after 9/11, through the terrorist lens, all distinctions got lost, and counter-insurgency, counter-narcotics and counter-terrorism increasingly came to be seen as the same thing in Colombia.

One of the consequences of this fusion is that counter-narcotics aid to Colombia became ever more militarized. Whereas during the 1990s, the kingpin strategy to eliminate top narcos was centered on cooperating with Colombian police, Plan Colombia switched its focus to Colombia’s military. Also on the side of the United States focus was shifted towards the Ministry of Defense. Military training was increasingly diverted away from the State Department, governed by the Foreign Assistance Act of 1961, towards the Pentagon, thus limiting Congressional oversight and consideration of human rights. For the execution of Plan Colombia, the United States government moreover frequently relied on private contractors. Ostensibly hired for cost reduction considerations, contracts with private military companies are not subject to Freedom of Information Act requests under the same conditions as normal government expenditure and policy are.

Ironically, the adoption of the terrorism lens and the increased role of the Pentagon and the Colombian military rather than the State Department and Colombian police in counter-narcotics efforts, led to a suppression of the civil war discourse. The idea that the FARC were a civil war actor that had a minimum of legitimacy and that could be negotiated with ceded to the view that the FARC were akin to Al Qaeda and that the legitimate, democratically elected government of Colombia had no business negotiating with them. The terrorism lens denied the decades-old roots of the armed conflict. The guerrillas and the AUC were arguably actors in an armed conflict as well as prominent players in the narco business. By further categorizing them as terrorists the nature of the threat they pose was misrepresented. The ‘terrorist’ groups in Colombia are real armies, comprising thousands of fighters and controlling territory and populations.

Another consequence of the militarization of counter-narcotics were perverse incentives. Law-enforcement prides
itself on low levels of crime, and focuses on prevention as much as on repression. In the militarized perception of counter-narcotics and counter-terrorism, focus went towards eliminating as many enemy combatants as possible. Internal promotion policies within Colombia’s armed forces indeed rewarded not those military commanders who kept the area under their command safe and who protected its population effectively, but rather those who killed the most enemy combatants. The militarization of counter-narcotics and its fusion with counter-insurgency and counter-terrorism made for a deadly combination. The army and its paramilitary associates killed thousands of *desechables*, ranging from homosexuals to petty thieves to unionists or environmentalists or simply poor folks in the wrong place at the wrong time, and dressed them up as guerrilla fighters. Presenting the bodies as guerrilla fighters killed in combat, or *falsos positivos*, the army signaled that the guerrilla threat was real and that the army was successfully doing something about it. The *falsos positivos* episode is one of the worst instances of human rights violations by any Latin American state in the 21st century.

Besides *falsos positivos* there were additional dramatic consequences of Plan Colombia and of Uribe’s Democratic Security policies accompanying it. Aerial fumigation of coca fields led to enormous ecological damage and, in the absence of available alternatives, drove many Colombians off their lands. The concentration of land ownership moreover increased in this period. There was an enormous increase in number of internally displaced persons, reaching five million by 2010. Plan Colombia moreover coincided with the *parapolítica* scandal and the wiretapping of Supreme Court magistrates by the presidential secret service. When the paramilitaries demobilized, they entered the Justice and Peace transitional justice process. The process was severely undermined when, in the crude counter-narcotics logic of Plan Colombia, the most important paramilitary leaders were extradited to the United States on drugs charges.

As a counter-narcotics operation Plan Colombia was an utter failure. Supply and prices of cocaine on American streets were unaffected, and production of coca was easily moved from
areas under military attack to other areas of Colombia or to Bolivia and Peru. In as far as the dominance of Colombian traffickers was broken, it was replaced by Mexican trafficking organizations, in turn spurring drug violence even closer to the United States. As a counter-insurgency operation, Plan Colombia succeeded partially, in that the FARC were severely debilitated. But success was far from complete in this regard. Proponents of Plan Colombia as a counter-insurgency operation had professed that increasing Colombia’s military capabilities would reinforce the government’s negotiation position and would force the guerrillas to negotiate in good faith. In fact the opposite happened: militarization emboldened hardliners on both sides of the conflict, fueling further polarization. It took Uribe’s successor Santos prolonged negotiations to reach a final accord with the FARC, whose decade-old guerrilla war could not be decided in the Colombian state’s favor on the battlefield even with the massive support of the United States. Moreover, the Colombian state still struggles with the bacrim. But most importantly, Plan Colombia ignored the legitimacy of the Colombian state’s violence monopoly. Falsos positivos and parapolítica serve as reminders that the state had not been decriminalized, and that through militarization, privatization and mano dura, pariah threats may be suppressed but elite crime remains untouched.

**ICC preliminary examination into the situation in Colombia**

The International Criminal Court (ICC) has jurisdiction over crimes against humanity committed in Colombia since 1 November 2002, and over war crimes committed in Colombia since 1 November 2009. The Office of the Prosecutor (OTP) of the ICC has had the situation in Colombia under preliminary examination since 2004. The justice institutions in Colombia are relatively well developed when compared to many of the African countries under scrutiny of the ICC. Rather than inability it would be unwillingness of the national justice institutions that would trigger the exercise of the ICC’s jurisdiction. The rationale underlying the very long period of preliminary examination is that of positive complementarity. By hovering over Colombia’s justice institutions as a stick, and by offering cooperation and
doctrinal development as a carrot, the ICC may encourage Colombia’s domestic justice institutions to perform better.

The official opening of the preliminary examination occurred in the context of the demobilization of the AUC. It was therefore natural for the OTP to invest much energy in scrutinizing whether the Justice and Peace transitional justice process was a faithful attempt to do justice. The original Justice and Peace proposal by Uribe may not have passed the test. But after Congress and the Constitutional Court intervened and provided for actual prison sentences, and when the Justice and Peace magistrates turned out to perform well, the ICC eventually concluded that the Justice and Peace process reflected a genuine intent to do justice.

The ICC was a new and prestigious institution to Colombia, a nation that was keen on joining the OECD and certainly wanted to avoid becoming the first non-African country to be investigated by the ICC. This gave the ICC considerable political weight and leverage, and in the early years some positive effects can be discerned. The extradition of the paramilitary leaders to the United States was a blow to the Justice and Peace process, but subsequent extraditions were denied by the Supreme Court, the latter explicitly invoking the ICC. The eventual provisions of the Justice and Peace law and their application brought more justice than some may have expected, new forms of holding superiors to account were received and applied in the Colombian legal order, and prosecutors became more effective and efficient as they increasingly focused on the systematic and widespread character of mass criminality rather than on isolated incidents. The Inter-American Court of Human Rights and developments in other Latin American jurisdictions also played a role in these advances, but it seems fair to credit the ICC for some of these positive developments, in particular the normative influence against anything approaching blanket amnesties.

Monitoring Justice and Peace was a clear mission. When the OTP provisionally concluded in its 2012 Interim Report that Justice and Peace provided sufficient justice, in effect declaring that Colombia had so far passed the test of complementarity, it could have closed the preliminary examination. It could then
have claimed that it had successfully intervened in the paramilitary demobilization *cum* transitional justice process, pointing to the amendments made by Congress and the Supreme Court relative to the original proposal for the Justice and Peace law by Uribe, and to the frequent references to the ICC by civil society organizations.

Instead, the ICC has kept the situation in Colombia under preliminary examination. This examination includes paramilitaries, FARC, ELN, *bacrim*, and state agents, without any prioritization or focus. If the ICC had closed the preliminary examination of the paramilitary demobilization, it could subsequently at any time have opened a new examination of *falsos positivos*, or of the demobilization process of the guerrillas, or both. But the ICC steered itself into an unfocused and unclear position in Colombia.

Moreover, the Court’s options are fundamentally limited in multiple respects. Materially, jurisdiction is limited to crimes against humanity since 2004 and war crimes since 2009. Corruption, narco-trafficking, and all crimes not amounting to war crimes or crimes against humanity are beyond the Court’s mandate, making it impossible for the ICC to adopt a comprehensive approach towards Colombia’s diffuse criminal panorama. Also in terms of number of suspects, the Court is limited, as it has never indicted more than ten persons in a single situation.

Of course the ICC was up for a very complicated task in Colombia. Plan Colombia was a multi-billion-dollar operation with the full support of the hemisphere’s only superpower. The relation of the ICC with the United States is ambivalent to say the least. The ICC has a total budget of around 150 million dollars, of which 50 million goes to the OTP, of which a portion goes to preliminary examinations, of which the examination of the situation in Colombia is only one. It would be unfair to expect miracles from such a small investment. The logic of carrots-and-sticks in the positive complementarity approach is problematic. Once a preliminary examination is opened, there is the further stick of opening an actual investigation. The stick is fit for one-time use only, and its use in effect means that the OTP considers that the Colombian state is unwilling to bring perpetrators to
justice. But then, upon the activation of the stick, the state holds the cards again. The OTP would rely on the Colombian state to allow it to carry out investigations and eventually to hand over suspects. But why would the Colombian state cooperate with the ICC to do for it exactly what it refuses to do itself? The possibility that the stick is used cannot certainly not be discarded entirely, and indeed it would do considerable damage to Colombia’s image on the international plane. But the chances that the OTP, engaging in a positive complementarity dynamic with the Colombian state and indeed showcasing the case of Colombia as an example of successful positive complementarity, would actually move towards negative complementarity and open an investigation, became slimmer with the years. And the Colombian authorities came to realize that. As far as the carrots are concerned, the ICC is in no position to offer much. The ICC is no IMF or donor country, and can offer little more than official visits and advice.

For the ICC, Colombia was important. Whereas supposed counter-terrorism activity under Plan Colombia served the US Administration to show that the War on Terror was not exclusively targeted at Islam, the examination of Colombia served to show that the ICC was not exclusively targeted at Africa. Moreover, the Colombia investigation served as a showcase for the nascent idea of positive complementarity.

For Colombia however the ICC became ever less important. The Court figured politically, for example when the Colombian government announced on multiple occasions that it would denounce president Chávez of Venezuela and his successor Maduro before the ICC on allegations that show little concern for the possibility of actually opening investigations, and all the more for using the figure of the ICC in political disputes. Appearances in the meantime were kept up. Colombian authorities paid visits to the ICC and received ICC officials with due protocol. But it has by long become evident that the ICC is extremely unlikely to actually open an investigation.
Guatemala
Between 1960 and 1996, the Guatemalan civil war would take the lives of an estimated 200,000 people. During the 16 months between the coup d’état that brought Efraín Ríos Montt to power in 1982 and the coup in which he was toppled in 1983 alone, an estimated 70,000 Maya civilians were murdered by the army in what is widely acknowledged to have been a genocide against the Maya people. The Guatemalan civil war was fueled by a political conflict between communist guerrillas and the military dictatorship, as well as by virulent anti-Maya racism. Economic motives were oftentimes also not far away. An exemplary episode of political, economic and ethnic motives coalescing is provided by the events surrounding the construction of the Chixoy hydroelectric dam. When Maya Achi villagers living in nearby Río Negro protested against the construction of the dam, the military was quick to claim that the protesting villagers were part of the guerrilla and killed 440 of them between 1980 and 1983. The stated political objective of eliminating the guerrilla, the racism towards the Maya Achi, and the economic gains to be made in the construction of the Chixoy dam, came together to produce one of the deadliest episodes of the Guatemalan civil war.

After the signing of the 1996 Peace Accords, there was little to no transitional justice. Moreover, the Guatemalan state retreated. Spurred to do so by the IMF and the World Bank and their structural readjustment prescriptions, public expenditure was brought back. Elites blocked any effort at fiscal reform, keeping Guatemala among the countries with the lowest tax revenue as ratio of GDP of the hemisphere. The result was a diminished state capacity for service delivery, not only in the fields of healthcare and education but also in the field of security. Public security subsequently deteriorated at immense speed. Violent crime soared, particularly under the influence of two imported criminal phenomena: the violent street gangs, or maras, and the War on Drugs. As a result, the annual homicide rate in Guatemala by 2010 had surpassed the average yearly casualty rate of the Guatemalan civil war, paradoxically making ‘post-conflict’ Guatemala more violent than Guatemala’s wartime.
Particularly in the 1980s, the Guatemalan military had developed into a state-within-the-state, controlling activities from customs to tourism and electricity. Upon the signing of the Peace Accords in 1996, the leaders of the parallel military state of the 1980s maintained much of their power. Their networks were known as CIACS, Illegal Bodies and Clandestine Security Apparatuses. In particular, the former military turned post-conflict-criminals controlled customs. During the civil war, control over customs served to prevent weapons deliveries to the guerrillas. After the end of the war, circumventing import and export taxes turned out extremely lucrative. Control over customs moreover turned out to be quite lucrative in the context of the narcotics trade. The CIACS of Guatemala are by their nature hard to identify. They do not rely on the open use of force the way paramilitarism or even the bacrim in Colombia do, and they are not territorially bound. Nor are the CIACS hierarchical organizations, but rather flexible networks with crosscutting links of friendship, family or business relationships.

With the security situation in Guatemala rapidly deteriorating and UN peace mission MINUGUA finalizing, pressure to create an international commission that would assist the Guatemalan state in dismantling the CIACS mounted. The first intent, under the name of CICIACS, was blocked by Guatemala’s Constitutional Court in 2004. After the murder of three Salvadoran parliamentarians in Guatemala, and the subsequent in-prison killing of the four police officers arrested for the death of the Salvadorans, Guatemala was in crisis. Soon after, the Guatemalan state allowed the creation of CICIG.

CICIG
The International Commission Against Impunity in Guatemala (CICIG) was established in 2007 by treaty between the government of Guatemala and the United Nations. It has a dual mandate: to investigate and dismantle the CIACS, and to strengthen Guatemala’s justice institutions so that the CIACS do not reappear. To that effect, rather than creating an international or hybrid jurisdiction, the Commission functions fully within the Guatemalan legal order. Within the domestic legal order the
international commission has far-reaching powers, including the power to act as co-prosecutor, to comment on judicial nominations, and to directly propose legislative reform to Congress. Initially endowed with only a two-year mandate, the Commission’s mandate has been renewed with two-year periods in 2009, 2011, 2013, 2015, and 2017.

The fact that CICIG may directly participate in criminal investigations and prosecutions gives the Commission the necessary teeth to achieve results. Either as querellante adherente (co-prosecutor) or through the special prosecutorial unit within the Public Prosecutor’s Office ascribed to CICIG, the Commission has participated in hundreds of investigations and trials. Moreover, CICIG set in motion modernization of criminal procedure and investigation techniques. The introduction of testimony through video-conferencing, the figure of the crown witness and the criminal offense of ‘influence trafficking’ were crucial steps forward in the fulfillment of CICIG’s mandate, as were the introduction of telephone tapping and witness protection schemes. Where disarticulation of parallel structures and institutional strengthening go hand in hand most visibly is in the creation of elite units within the justice institutions. In CICIG’s early years, the Special Prosecutorial Unit Ascribed to CICIG was created within the Public Prosecutor’s Office, and special High Risk Courts were created within the judiciary. These elite units with vetted personnel and extra resources proved very successful.

CICIG is not a transitional justice mechanism per se. Its mandate speaks of the disarticulation of CIACS and the prevention of their reappearance. Crimes against humanity, war crimes or genocide do not feature in the mandate. Yet, indirectly, CICIG has turned out to be one of the most effective international interventions in terms of domestic transitional justice. In order to counter present-day crime, the capacity and independence of the Public Prosecutor’s Office were strengthened. Similarly, with that same objective the High Risk Tribunals were created. It turned out that the strengthened Prosecutor’s Office also dared to indict former dictator Ríos Montt for genocide, and that a High Risk Tribunal dared to entertain the trial. On 10 May 2010, Ríos
Montt became the first former head of state in world history to be convicted for genocide by a court of his own country.

CICIG also provides an answer to militarization, privatization and *mano dura*. By prosecuting the perpetrators of extrajudicial executions of prisoners, CICIG targets the excesses of *mano dura*. By fighting corruption, the Commission increases the state budget and the trust of taxpayers in the way their state spends tax money. By dismantling the structures dominated by (former) military men, militarization is halted. In the meantime, CICIG has also contributed to the fight against pariah crime, by strengthening the Public Prosecutor’s Office and the latter’s capacity to go after *narcos* and *mareros*.

In terms of sovereignty, the impact of CICIG’s design on Guatemala is remarkable. The Commission was created by treaty between the United Nations, in this case represented by the Secretary General, and the state of Guatemala. Guatemala’s President, Congress, and Constitutional Court consented to the creation of CICIG. Yet, the impact on sovereignty, even though consented to, is fundamental. The treaty creating CICIG mandates foreigners in the service of a UN mission to act as *querellante adhesivo*, to directly propose legislative reform to Congress, and to comment on judicial nominations. Such direct interference in domestic prosecutions and legislative and judicial processes of a member state is unprecedented for any UN mission. CICIG’s creation becomes understandable only when taking into account the context of crisis of the Guatemalan state and the near bankruptcy of Guatemala’s rule of law.

When CICIG was created the Commission presented a risk, both to the Guatemalan government that ceded substantial parts of its sovereignty, and to the international community that was to finance the Commission. CICIG was considered an experiment. The result was that the Commission was only given a two-year mandate, a rather short time-span given the deep-rooted problems that CICIG was to address. CICIG’s mandate was eventually renewed on five occasions, in 2009, 2011, 2013, 2015, and 2017. The bi-annual mandate renewal and the annual struggle for funding needlessly hampered the Commission’s effectiveness.
However, CICIG turned out to have been remarkably effective, and at incredibly low cost. Contrary to international or hybrid tribunals who need to hire international judges, CICIG prosecutes before Guatemalan judges. In its twelve years’ existence, CICIG has prosecuted hundreds of suspects directly and contributed indirectly to the prosecution of many more, at an average cost of around 25 million USD per year. In contrast, the ICC had spent a billion USD by the time it emitted its first verdict. Plan Colombia has cost upwards of 10 billion USD.

When CICIG started its work, Guatemala had one of the highest murder rates of the world. The threat of maras and narcos loomed large and dominated headlines domestically and abroad. The ultimate strategic question for CICIG then was whether to go after pariah crime together with the state, or to go after elite crime structures within the state. In the early days of CICIG, the Commission investigated some pariah cases, like a shoot-out between police officers and drug traffickers, or the circumstances behind sixteen dead bodies found in a bus from Nicaragua. Such cases may at first sight seem to fit in the mandate of addressing impunity. Moreover, these narco related cases could count on the warm support of the United States. But ultimately they are pariah cases, distracting from the root problem: the grand corruption at the highest level of government and business. Particularly when CICIG shifted its official focus from CIACS to RPEIs (illegal political-economic networks) and grand corruption, the Commission gained an increasingly coherent approach towards elite crime, beyond violent crime.

The most paradigmatic case that CICIG brought to court together with the Public Prosecutor’s Office was called cooptación del estado, ‘cooptation of the state’. Exposing widespread corruption within the Pérez Molina administration, the case led to an intent by president Pérez Molina to terminate CICIG. Public support for the Commission and the Public Prosecutor’s Office, as well as support from the Obama administration, forced president Pérez Molina to resign however. Former president Pérez Molina, former vice-president Baldetti, as well as a majority of his cabinet members were imprisoned. When CICIG and the Public Prosecutor’s Office also went after Pérez Molina’s successor, Jimmy Morales, and many of
his cabinet members, the situation for the Commission deteriorated however. Absent support from the Trump administration, the Commission was terminated by president Morales in 2019.

CICIG’s design is innovative. The Commission is fully nationally embedded, and integrally aims at state criminalization and corruption rather than at crimes against humanity or violent pariah crime. Whilst directly disarticulating criminal structures, CICIG simultaneously strengthens Guatemala’s justice institutions. The powers the Commission has within the Guatemalan domestic legal order are substantial. The results of this approach have been beyond expectations. Guatemala’s justice institutions were considered on the brink of failure when CICIG was created in 2007. As a result of CICIG’s direct or indirect involvement, the justice system of Guatemala was able to indict seven acting of former presidents – five for corruption and two for genocide – making it one of the most prolific justice systems of the hemisphere. Beyond the indictment of seven former or acting presidents, the Guatemalan justice institutions were empowered to address many more criminal politicians and powerful businesspeople as well as pariah criminals. The CICIG-model, susceptible to improvements, can be a crucial step forward for the United Nations system in developing a coherent response to the changing nature of contemporary organized violence, rule of law undermining crime, and rule of law undermining state policies.

Conclusion
In Colombia and Guatemala, as well as in many other countries in Latin America and elsewhere, at the root of much violence is not a powerful state that must be reined in as it abuses its monopoly on the use of force, but rather a state that is incapable of enforcing its monopoly on the use of force as various private actors are engaging in violence on its territory. However, this does not merely amount to a situation of ‘the state versus the criminals’, in response to which strengthening the state’s capacity to suppress the private use of force would suffice. Rather, we see states that are criminalized from within.
Accordingly, the rule of law’s challenge in countries that face high levels of crime is threefold: prevent the arbitrary exercise of force by the state, enable the state to suppress pariah violence, and enable the justice institutions to cleanse the state from elite crime from within.

Two crucial factors with regard to the crime facing countries like Colombia and Guatemala merit special emphasis. First, the nature of the threat is national rather than international. The widespread idea that organized crime is transnational and that law-enforcement should hence be too, is largely a misconception. Of course drug trafficking organizations by their nature engage in border crossing crime. Money laundering likewise is an international business. But the essence of the most menacing criminal phenomena is national. State criminalization projects like cooptación del estado in Guatemala and parapolítica in Colombia could prosper and remain unpunished for so long not because they crossed borders, but exactly because they exercised great control over their domestic justice institutions. Likewise, the control pariahs exercise in Guatemala and Colombia is not a result of international activity but a primarily national phenomenon. The captured national sovereignty, rather than the ability to cross borders, is at the root of the profitability and sustainability of the most damaging criminal enterprises. The solution therefore can only be to break through the veil of that captured sovereignty and to improve the performance of national rule of law institutions from within.

Second, the distinction between pariah and elite crime and their mutual relationship are crucial. Pariah crime may easily distract from elite crime. Indeed, oftentimes pariah threats are instrumentalized by elite criminal projects in order to maintain state violence, corruption and impunity. Irrespective of whether the pariah threat is portrayed as communist, terrorist, or purely criminal, one must be aware of the risk of its instrumentalization. In Colombia in the times of falsos positivos, the ‘narco-guerrilla’ threat was used to kill thousands of innocent people; the killings were blamed on the guerrilla or those killed were said to be guerrillas. In Guatemala, the mara threat was invoked as justification for the extra-judicial execution of inmates. When CICIG was making progress in corruption cases against high-level
government officials, the Interior Minister of Guatemala called on CICIG to assist the state in the fight against maras. It is essential to move beyond the violent pariahs that are universally sought after, to include the targeting of illegal political-economic networks entrenched within the state.

In order to target elite crime, international interventions must thus pierce through the veil of sovereignty. Externally assisting the state in the suppression of pariah crime, what Plan Colombia essentially did, does not suffice. Approaches that exclude the targeting of corruption, like the Rome Statute of the ICC, cannot comprehensively address state criminalization. State capacity to confront both pariah and elite challenges must be integrally strengthened from within. That is what CICIG has purported to do, with remarkable success worthy of repetition.
In 21st century Latin America, many countries face criminal violence on the scale of civil war. Whilst street gangs and drug traffickers defy the state's monopoly on the use of force from below, high-level government corruption and human rights violations by state actors defy the legitimacy of the state from the inside. What the international community can do to assist states that face the simultaneous challenge of bottom-up and top-down rule of law undermining crime is the central question guiding this dissertation. This dissertation includes three in-depth case studies of Plan Colombia, the ICC preliminary investigation of Colombia, and the International Commission Against Impunity in Guatemala (CICIG).

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