

A new type of hybrid actor in global governance: anti-impunity commissions, shared sovereignty, and the rule of law

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Abstract: This article investigates the contribution of a new type of hybrid actor to fostering the rule of law in weak states. In a number of issue-areas in global governance, hybrid solutions have been experimented with, and the latest manifestation of this global trend towards hybridity are hybrid anti-impunity commissions that have begun to proliferate in Latin America in the past decade or so and that are likely to produce ripple-effects beyond the continent. These commissions do not supplant the justice system of the target state but fight impunity from within it. They do so by assuming some of the sovereign prerogatives traditionally assumed to be falling within the *domaine réservé* of the host state. The prototype of this new hybrid actor was deployed in Guatemala, where the Comisión Internacional Contra la Impunidad en Guatemala had to terminate its mandate after more than a decade of successful work. It remains unclear, however, to what extent such hybrid commissions can effect a lasting transformation of the justice systems of their host states and what scope conditions are required for them to operate successfully. What remains poorly understood, for instance, is how the depth of delegation affects the provision of public goods. In this article I shall argue that hybrid arrangements in which tasks are shared relatively evenly among externals and locals and that thus involve only a partial delegation of authority tend to be more successful and produce more sustainable results than arrangements providing for deeper forms of delegation.

A. Introduction

How can a culture of the rule of law¹ be established where there is none? This article investigates the contribution of a new type of hybrid actor to fostering the rule of law in weak

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1 The United Nations (UN) defines the rule of law 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. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty,

states, seeking to identify those institutional-design aspects that enable the new hybrids to have a positive impact upon the justice systems of their host states. In a number of issue-areas in global governance, hybrid solutions – which involve both international and domestic actors in the exercise of governance functions – have been experimented with in order to address the dilemma created by the export of Western/Northern templates of good governance, democracy, the rule of law, etc. to non-Western contexts. The latest manifestation of this global trend towards hybridity – which will be the subject of this article – are hybrid anti-impunity commissions that have begun to proliferate in Latin America in the past decade or so, and that are likely to produce ripple-effects beyond the continent.

The trend towards hybridity has inspired a burgeoning scholarly literature.² Conceptualizations of hybridity abound. Levi-Faur, for instance, distinguishes four forms of hybridity, of which the fourth, multi-level regulation, is relevant for the purposes of this article.³ Multi-level regulation means that actors from different layers of governance are involved in the exercise of governance tasks. In a similar vein, Bargués-Pedreny and Randazzo understand hybridity as a state of affairs describing the interaction of external and domestic actors in peacebuilding: “The nature of this interaction ranges from cases of compliance or submission – in which international actors enforce their will or, on the contrary, in which local agents resist and reject external mechanisms of governance – to more cooperative encounters”.⁴ Hybridity is often viewed as an emancipatory tool in that it implies receptiveness to domestic norms and traditions and opens space for the involvement of local actors in governance tasks. At the same time, however, those who highlight the emancipatory potential of hybridity also caution against romanticizing the local.⁵

A much-studied manifestation of hybridity in global governance – which is also a cognate of the anti-impunity commissions investigated in this article – are hybrid criminal tribunals which have proliferated globally in the past couple of decades.⁶ Hybrid tribunals

avoidance of arbitrariness, and procedural and legal transparency”. <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last accessed on 25 March 2020).

- 2 See, e.g., *N. Lemay-Hebert and R. Freedman* (eds.), *Hybridity: law, culture and development*, New York 2017; *G. Millar*, Disaggregating hybridity: why hybrid institutions do not produce predictable experiences of peace, *Journal of Peace Research* 51, Issue 4 (2014); *J. Peterson*, A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces, *Journal of Peacebuilding and Development* 7, Issue 2 (2012).
- 3 *D. Levi-Faur*, Regulation and regulatory governance, in *Ibid.* (ed.), *Handbook on the politics of regulation*, Cheltenham 2011, p. 10-11.
- 4 *P. Bargués-Pedreny and E. Randazzo*, Hybrid peace revisited: an opportunity for considering self-governance?, *Third World Quarterly* 39, Issue 8 (2018), p. 1546.
- 5 *Ibid.*, p. 1546.
- 6 See, e.g., *T. Cruvellier*, From the Taylor trial to a lasting legacy: putting the special court model to the test, *International Centre for Transitional Justice and Sierra Leone Court Monitoring Programme* (2009); *L. Dickinson*, The promise of hybrid courts, *The American Journal of International Law* 97, Issue 2 (2003); *E. Higonet*, Restructuring hybrid courts: local empowerment and national criminal justice reform, *Arizona Journal of International and Comparative Law* 23 (2005/2006).

were born partly out of the realization that “a purely international process that largely bypasses the local population does little to help build local capacity. An international court staffed by foreigners, or even a local justice system operated exclusively by the UN transitional administration, cannot hope to train local actors in necessary skills”.⁷ Purely international criminal tribunals are often perceived as quick fixes that temporarily replace local mechanisms yet fail to empower local actors to handle future prosecutions themselves. Hybrid criminal tribunals, by contrast, seek to leave a more lasting imprint upon the justice systems of their host states.

These different arrangements – international, hybrid, national – can be located on a continuum, with purely international mechanisms (using international law, international staff, and enjoying supranational powers) occupying one end of the spectrum and domestic mechanisms (employing national law, local staff and ceding no sovereign privileges to external actors) occupying the other end. Hybrid tribunals and hybrid anti-impunity commissions in turn are situated somewhere in the middle of the continuum, with hybrid tribunals entailing higher sovereignty costs than hybrid anti-impunity commissions. Sovereignty costs can be defined as costs that arise when states surrender discretion over national policies to external actors.⁸ The magnitude of these costs depends upon a variety of factors, including the level of delegation, in that arrangements involving an extensive delegation of national competencies to external actors extract significant sovereignty costs, whereas arrangements involving only a partial delegation of prerogatives entail consequently lower sovereignty costs.⁹

The new hybrids, which entail comparatively low sovereignty costs, have mainly proliferated in Latin America, especially in the Northern Triangle, which seems to be an ideal laboratory for examining their effects, because the problem of state capture by organized crime and/or corrupt actors is pervasive in the region and impunity is rampant¹⁰, as local judicial systems are weak and often themselves corrupted. The international community has experimented with a variety of tools that seek to promote the rule of law in weak states, ranging from traditional capacity-building programs to highly intrusive measures such as international criminal tribunals. A relatively recent tool – which is as innovative as it is under-researched – are hybrid commissions not supplanting the justice system of the target state but fighting impunity from within the system. They do so by assuming some of the sovereign prerogatives traditionally assumed to be falling within the *domaine réservé* of the host state. The prototype of this new hybrid actor was deployed in Guatemala, where the Comisión Internacional Contra la Impunidad en Guatemala (CICIG) recently had to termi-

7 Dickinson, note 6, p. 304.

8 E. Hafner-Burton, E. Mansfield and J. Pevehouse, Human rights institutions, sovereignty costs, and democratization, *British Journal of Political Science* 45, Issue 1 (2015), p. 3.

9 *Ibid.*, p. 7.

10 WOLA, The International Commission Against Impunity in Guatemala. A WOLA report on the CICIG experience, Report 6/2015 (2015), pp. 2, 8.

nate its mandate after more than a decade of successful work. On CICIG's website it is emphasized that the commission is "unprecedented among UN or other international efforts to promote accountability and strengthen the rule of law. It has many of the attributes of an international prosecutor, but it operates under Guatemalan law, in the Guatemalan courts, and it follows Guatemalan criminal procedure".¹¹ Unlike international and hybrid criminal tribunals CICIG entails much lower sovereignty costs and does not use international law and international judges to fight impunity, but seeks to build a culture of the rule of law from within the Guatemalan legal system. In light of CICIG's success, citizens in neighboring Honduras, El Salvador, and Ecuador called upon their governments to replicate the CICIG experience in their respective countries, and each of these countries has put a different spin on "their" version of CICIG. Worldwide, about a dozen countries have contemplated setting up a similar mechanism.¹² This reflects a global trend towards hybridity (also evidenced by the spread of hybrid criminal tribunals in post-conflict states). However, in contrast to hybrid criminal tribunals, the hybrid commissions that are the subject of this contribution are barely known outside specialist circles, despite the fact that they have been considered successful and "particularly innovative" models deemed worth replicating.¹³

It remains unclear, however, to what extent such hybrid commissions can effect a lasting transformation of the justice systems of their host states and what scope conditions are required for them to operate successfully. While a number of useful policy briefs have been written about hybrid commissions¹⁴, hardly any theory-building work has been carried out. The handful of existing scholarly publications are usually single-case studies on CICIG¹⁵ which, however, tend not to address the broader theoretical literature on shared-sovereignty

11 The International Commission Against Impunity in Guatemala, About CICIG, <https://www.cicig.org/history/index.php?page=about> (last accessed on 25 March 2020).

12 WOLA, note 10, p. 29.

13 A. Hudson and A. Taylor, The International Commission Against Impunity in Guatemala. A new model for international criminal justice mechanism, *Journal of International Criminal Justice* 8, Issue 1 (2010), p. 54.

14 See, e.g., C. Call, International anti-impunity missions in Guatemala and Honduras: what lessons for El Salvador?, CLALS Working Paper Series No. 21 (2019); C. Call, From steady progress to severely wounded: a two-year report on the performance of the OAS mission in support of the fight against corruption and impunity in Honduras, CLALS Working Paper Series No. 18 (2018); Call and J. Hallock, Too much success? The legacy and lessons of the International Commission Against Impunity in Guatemala, CLALS Working Paper Series No. 24 (2020); International Crisis Group, Crutch to catalyst? The International Commission Against Impunity in Guatemala, Latin America Report No. 56 (2016); Open Society Justice Initiative, Against the odds. CICIG in Guatemala (2016), <https://www.justiceinitiative.org/uploads/88ffa0-09bf-4998-8ef3-e2a175e3f455/against-odds-cicig-guatemala-20160321.pdf> (last accessed on 25 March 2020).

15 See, e.g., M. Donovan, The International Commission Against Impunity in Guatemala: will accountability prevail?, *Arizona Journal of International & Comparative Law* 25, Issue 3 (2008); Hudson and Taylor, note 13, pp. 1-2; T. Nyberg, International Commission Against Impunity in Guatemala: a non-transitional justice effort, *Revue Québécoise de Droit International* 28, Issue 1 (2015), pp. 157-184; Y. Krylova, Outsourcing the fight against corruption: lessons from the International Commission Against Impunity in Guatemala, *Global Policy* 9, Issue 1 (2018), pp. 95-101;

arrangements, of which these hybrid commissions are the most recent manifestation. Shared sovereignty arrangements “involve the engagement of external actors in some of the domestic authority structures of the target state”¹⁶, yet unfortunately these mechanisms remain largely “underanalyzed and undertheorized”.¹⁷ What remains poorly understood, for instance, is how the depth of delegation affects the provision of public goods. Whereas international and hybrid criminal tribunals involve deep delegation, anti-impunity commissions involve only partial delegation.

Does that make them less successful in promoting the rule of law than more intrusive arrangements? In this article I will refute the intuitive assumption articulated in the literature on shared sovereignty arrangements that “the depth of delegation ... determines effectiveness with respect to more complex tasks, even including the restoration of the rule of law”.¹⁸ On this view, the “external actor is most effective when reestablishing the rules through its own structures, rather than having to work within the state’s structure”.¹⁹ This contribution, by contrast, defends the counter-intuitive finding that partial delegation will have a greater impact upon the rule of law than full delegation, as “a purely international process that largely bypasses the local population does little to help build local capacity”.²⁰ This raises the question of “legacy” which has been debated in the literature on hybrid criminal tribunals²¹ and which is equally relevant for the type of hybrid actor discussed in this article. Apart from strengthening human resources and physical infrastructure, initiating legal reform, etc., legacy should “encompass a shift in terms of trust in the legal system as a viable avenue for dealing with future conflicts and ongoing violations of human rights”.²² Unfortunately, however, even though the importance of legacy is widely recog-

M. Zamora, Institutional inoculation: the International Commission Against Impunity in Guatemala (CICIG), international rule of law mechanisms, and creating institutional legitimacy in post-conflict societies, *Columbia Journal of Transnational Law* 57 (2019), pp. 535-597.

- 16 *S. Krashner*, Sharing sovereignty. New institutions for collapsed and failing states, *International Security* 29, Issue 2 (2004), p. 108.
- 17 *A. Matanock*, Governance delegation agreements: shared sovereignty as a substitute for limited statehood, *Governance* 27, Issue 4 (2014), p. 2.
- 18 *Ibid.*, p. 3.
- 19 *Ibid.*, p. 6.
- 20 *L. Dickinson*, The promise of hybrid courts, *The American Journal of International Law* 97, Issue 2 (2003), p. 304.
- 21 Legacy can be defined as “a hybrid court’s lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity”; Office of the United Nations High-Commissioner for Human Rights, Rule-of-law tools for post-conflict states. Maximizing the legacy of hybrid courts, New York and Geneva 2008, <https://www.un.org/ruleoflaw/files/HybridCourts.pdf> (last accessed on 25 March 2020), pp. 4-5.
- 22 *Ibid.*, p. 6.

nized, its actual successes, “although not entirely absent, have been few”.²³ The bottom line is: we do not really know what works and why. In the following, I will seek to fill this gap by identifying some of the factors that have enabled certain hybrid commissions to have a positive impact upon the local justice system while others have failed. In this article, impact will be gauged based on a range of indicators, ranging from quantifiable criteria to softer measures. Quantifiable indicators include case statistics and impunity rates; note, however, that what matters is not only the sheer *quantity* of cases being investigated and convictions achieved. It is equally important to look at *who* is being investigated, prosecuted, and convicted. Do the new hybrids merely go after small fry – lower-level policy officials, petty criminals, etc.; or are the big fish – those normally considered untouchable – equally targeted? Another relevant indicator for measuring impact is the new hybrids’ legacy in terms of building local capacity, i.e. the creation of what Ciorciari and Krasner have called islands of excellence – “entities that provide public services much more effectively and transparently than most surrounding domestic institutions. The creation of islands of excellence is a crucial mechanism by which sovereignty-sharing arrangements can have a lasting positive impact on host-state governance”.²⁴ Whether or not domestic structures will be strengthened and islands of excellence will be created seems to depend on political will, careful planning, and proper incentives to engage in close collaboration between externals and locals.²⁵ A related proxy for measuring impact will be the new hybrids’ contribution to legislative reform aimed at strengthening the local justice system – have relevant initiatives (for instance those related to the creation of specialized anti-corruption infrastructure) been successfully adopted or are important reform measures stalled by political opposition? Finally, impact will be gauged based on surveys measuring public trust in the hybrid commissions as well as the justice system in general.

A final word on the theoretical premises underlying this article. While the new hybrids certainly require a confluence of factors to operate successfully – ranging from intra-institutional factors relating to institutional design, mandate, resources, etc. to extra-institutional variables such as the level of donor support, civil society pressure, affiliation with interna-

- 23 *Ibid.*, p. 5; The Sierra Leonean hybrid, for instance, had established a Legacy Working Group but its overall impact on was negligible, as locals were insufficiently involved (*S. Horowitz*, How International Courts Shape Domestic Justice, *Israel Law Review* 46, Issue 3 (2013), p. 365). In the Bosnian War Crimes Chambers, by contrast, nationals played a much larger role and the issue of legacy was addressed more systematically. See, e.g. *A. Chehtman*, Developing local capacity for war crimes trials: insights from BiH, Sierra Leone, and Colombia, *Stanford Journal of International Law* 49 (2013), pp. 311-312. The legacy of the Cambodian hybrid in turn has been undermined by corruption and politicization. See, e.g., *T. Cruvellier*, From the Taylor trial to a lasting legacy: putting the special court model to the test, *International Centre for Transitional Justice and Sierra Leone Court Monitoring Programme*, pp. 31-32.
- 24 *J. Ciorciari and S. Krasner*, Contracting out, legitimacy, and statebuilding, *Journal of Intervention and Statebuilding* 12, Issue 4 (2018), p. 485.
- 25 *A. Chehtman*, Developing local capacity for war crimes trials: insights from BiH, Sierra Leone, and Colombia, *Stanford Journal of International Law* 49 (2013), p. 320.

tional organizations, and so on – for reasons of space and feasibility the present article will focus on institutional design aspects. I will argue rather counter-intuitively that partial delegation is preferable over full delegation, as the latter fails to empower local actors and to establish local infrastructure that will promote the rule of law even after the mission's departure. Future research should then address how these institutional design aspects interact with external factors in shaping the successes and failures of hybrid anti-impunity commissions, in order to complete the puzzle.

B. The prototype: CICIG

CICIG was established in 2006 pursuant to an agreement between the United Nations (UN) and the Guatemalan government. When the commission was forced to terminate its work thirteen years later, this was not because it was unsuccessful but because it was so successful: when it began investigating corruption charges against then-president Morales' inner circle and later Morales himself, the latter first sought to obstruct CICIG's work and subsequently decided not to renew its mandate. CICIG had thus become a victim of its own success. Its quantifiable achievements are impressive indeed: according to Transparency International, CICIG achieved a 25% reduction in impunity, investigated more than 200 cases that led to charges against more than 160 high-level government officials including former and incumbent presidents, a vice president, former ministers, former police chiefs, army representatives, politicians, businessmen, drug-traffickers, etc.²⁶ WOLA even speaks of "transcendental results" achieved by the commission.²⁷ Survey data indicate high rates of public approval of CICIG in particular, with CICIG becoming the most trusted institution in Guatemala²⁸; at the same time, public trust in the justice system in general increased by ten percent during CICIG's period of operation.²⁹ Consequently, CICIG's head Ivan Velasquez described the commission's greatest achievement as follows: "[E]n todo caso demostramos que si era posible luchar contra esa gran corrupción que es la que facilita la impunidad en el poder, esto indica que nadie está por encima de la ley."³⁰

CICIG's mandate has a unique focus on strengthening investigations and prosecutions *as well as* contributing to the reform of the judicial system. On the one hand, CICIG is

26 Transparency International Defence and Security, *Mission made possible. External oversight and anti-corruption in fragile states* (2017), <https://ti-defence.org/publications/mission-made-possible-external-oversight-anti-corruption-fragile-states/> (last accessed 12 August 2020), p. 8.

27 WOLA, note 10, p. 27.

28 Luisa Paredes, *Comision Internacional Contra la Impunidad, la mas confiable institucion en el 2017: Latinobarometro*, *El Periódico* (2018), <https://elperiodico.com.gt/nacion/2018/04/20/comision-internacional-contra-la-impunidad-la-mas-confiable-institucion-en-el-2017-latinobarometro/> (last accessed on 25 March 2020).

29 Zamora, note 15, p. 586.

30 *Comision Internacional Contra la Impunidad en Guatemala, Informe de cierre. El legado de justicia en Guatemala* (2019), https://www.cicig.org/cicig/informes_cicig/informe-de-labores/informe-final-de-labores/ (last accessed 25 March 2020), p. 76.

mandated to investigate and (co-)prosecute illegal security apparatuses and clandestine security organizations (CIACS) that have infiltrated all sectors of the Guatemalan state.³¹ It may initiate investigations on its own but needs the cooperation of Guatemalan authorities for prosecutions, which it may join as a private prosecutor.³² This combination of prerogatives is unusual and was a concession to sovereignty concerns voiced by the Guatemalan Constitutional Court, which stripped away the independent prosecutorial powers CICIG was originally intended to enjoy. Even with this more limited mandate, the establishment of CICIG entailed certain sovereignty costs for Guatemala. The exercise of both investigatory and prosecutorial powers under national law by a hybrid commission was a first in the history of anti-corruption initiatives: “For the first time, a UN Member State conceded to an international entity through delegating a significant part of its investigative and prosecutorial powers.”³³ CICIG moreover has the authority to identify civil servants who have committed administrative offences and participate in disciplinary proceedings against them. Crucially, in terms of longer-term structural reform, CICIG is empowered to initiate legislative proposals for combating impunity.³⁴

While CICIG produced solid results in the first years of its existence, its task seemed Sisyphean: “As late as 2014, it did not seem to matter how many cases CICIG and the Office of the Public Prosecutor mounted against corrupt presidents, ministers, military officers, government employees, mayors, members of Congress, police, judges, or lawyers ... the temporary vacuums would be filled by new actors eager to bend the country’s deeply ingrained clientelistic structures and practices to their benefit ... it seemed set to leave Guatemala fundamentally unchanged, with the culture and structures of impunity intact”.³⁵ This changed in 2015, when CICIG’s investigations triggered a political earthquake which offered “Guatemala its best hope for change in 20 years”.³⁶ CICIG and the *Ministerio Público* (MP) had exposed two massive corruption scandals (called *La Linea* and the IGSS – Guatemalan Institute of Social Security – scandal) which implicated high-level officials from president Molina’s inner circle, including vice president Baldetti – and later Molina himself. The revelations triggered large-scale street protests which became known as the “Guatemalan Spring.”³⁷ Baldetti eventually resigned and was later arrested. Further investigations produced incriminating evidence that Baldetti and Molina themselves were the

31 Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission Against Impunity in Guatemala (“CICIG”), https://www.cicig.org/uploads/documents/mandato/cicig_acuerdo_en.pdf (last accessed on 25 March 2020).

32 *Ibid.*

33 Krylova, note 15, p. 96.

34 Agreement between the United Nations and the State of Guatemala, note 31.

35 Open Society Justice Initiative, note 14.

36 *Ibid.*

37 N. Lakhani, People-power and the “Guatemalan Spring”, Al Jazeera (3 September 2015), <https://www.aljazeera.com/indepth/features/2015/09/people-power-guatemalan-spring-150903075327898.html> (last accessed on 25 March 2020).

ringleaders of *La Linea*. Molina was ultimately forced to step down as well and was stripped of his immunity. He was subsequently arrested and is still awaiting trial.³⁸ The democratic awakening triggered by CICIG's investigations is widely seen as one of the commission's most important achievements: "Its signal legacy is demonstrating to a jaded Guatemalan citizenry that the most powerful people in the country can be held to account for criminal behavior. Interview after interview, including of legislative and civil society opponents of CICIG, highlighted this achievement by the international mission. The mission also demonstrated that, given the political space, national judicial institutions could work."³⁹

Apart from triggering Guatemala's democratic awakening, the legacy of the commission can also be gauged based on a number of more mundane indicators such as its contribution to capacity-building, human resource development as well as to the reform of the legal system.⁴⁰ In terms of institutional legacy, CICIG contributed significantly to strengthening the MP's prosecutorial capacities and the independence of the courts. Its reform proposals led to the establishment of specialized high-risk tribunals (Tribunals de Mayor Riesgo) as well as of a special unit within the MP (the Fiscalía Especial Contra la Impunidad, FECI), which were "central to its judicial successes and represented a strategic foothold in the judicial system where citizens could have confidence that corruption had not penetrated".⁴¹ FECI staff were selected and vetted by CICIG and the attorney general and enjoyed a privileged position inside the MP in that they worked on a confidential basis and separately from the rest of the ministry.⁴² The collaboration between CICIG and FECI staff has been considered the commission's "most effective capacity-building work"⁴³ in that new staff were trained-on-the-job rather than through seminars and workshops, and knowledge was thus effectively transferred. CICIG also contributed to the establishment of the Criminal Analysis Division as well as the creation of new group-oriented methods of investigation, which enabled the prosecution of entire criminal networks rather than individual suspects. This, together with other reform initiatives launched by CICIG such as the introduction of wiretapping, witness protection programs, plea bargaining provisions, etc. significantly strengthened local investigatory and prosecutorial capacities.⁴⁴

Yet weak local capacities were not the only problem CICIG faced when taking up its work. Equally – if not more – worrisome was the corruption of the local judiciary. One indicator of the rule of law is the effective separation of powers; yet in Guatemala, the pro-

38 *Ibid.*

39 *Call and Hallock*, note 14, p. 65.

40 CICIG, note 30, p. 93.

41 *Call and Hallock*, note 14, p. 66.

42 Open Society Justice Initiative, note 14, p. 100.

43 *Ibid.*, p.102.

44 Open Society Justice Initiative, note 14, p. 102. For an overview of all reform initiatives launched by CICIG, see CICIG, note 30, pp. 99-104.

cess of judicial selection is deeply politicized. CICIG recognized the magnitude of the problem early on when first opening cases but not winning convictions: “Even if the commission could successfully prosecute a case and win a conviction, appellate courts would overturn it. In order to get results, the commission decided it had to change the judges. For that, the CICIG turned its attention to the little known – and often ignored – process of selecting Guatemala’s high court judges.”⁴⁵ CICIG and the MP had revealed a vast corruption scheme aimed at controlling the judiciary that involved political and organized crime networks trading seats on Guatemalan courts in return for political favors.⁴⁶ Cognizant of the difficulty of promoting the rule of law in the absence of an independent judiciary, CICIG not only successfully lobbied for the establishment of specialized high-risk courts untarnished by corruption allegations, but also sought to shape the judicial selection process more generally. The most ambitious reform effort occurred in the aftermath of the Guatemalan Spring, when CICIG perceived a window of opportunity to initiate a fundamental transformation of the entire legal system, including with regard to the process of judicial selection.⁴⁷ Yet there was no support from the highest political levels, and influential segments of society quickly mobilized against the initiative, ultimately killing it.⁴⁸

While CICIG was thus unable to completely transform the legal system, and while in the absence of major reform Guatemalan justice operators are still at risk of being corrupted and/or harassed, overall CICIG’s presence has nonetheless contributed to a change for the better, as it has helped fortify core judicial structures such as the MP. Several episodes involving the frustration of attacks on the independence of the judiciary bear this assumption out: “[T]wo pieces of information indicate that today, the concrete work of the CICIG would likely continue without it through the MP ... it appears that the MP considers itself sufficiently strong that, in an interesting role reversal in 2017, the Attorney General and chief prosecutors used their own influence to impede the removal of CICIG Commissioner Velásquez. Similarly, in September 2018 and January 2019, the Constitutional Court firmly upheld the CICIG’s mandate in the face of Executive Branch pressure to defy the Court and acts of intimidation against independent national institutions. Similarly, despite the increased presence of hard-line military officials in the government, the special Tribunals de Mayor Riesgo (High-Risk Tribunals), ruled on September 26, 2018, in the midst of the political crisis, that the Guatemalan government and army committed genocide against the Maya-Ixil ethnic group in 1982–1983. This suggests that the MP and the courts have

45 InSight Crime, Guatemala elites and organized crime (2016), https://www.insightcrime.org/wp-content/uploads/2018/02/Guatemala_Elites_Organized_Crime.pdf (last accessed on 25 March 2020), p.40.

46 Comisión Internacional Contra la Impunidad en Guatemala, 11th annual work report of CICIG (2018), <https://www.cicig.org/press-release-2018/11th-annual-work-report-of-cicig/?lang=en> (last accessed on 25 March 2020).

47 *Call and Hallock*, note 14, p. 37.

48 *Ibid.*, p. 38.

reestablished themselves as strong, independent institutions.”⁴⁹ The hope is that because CICIG created islands of trained and committed personnel within each institution it cooperated with, this will have a spillover effect onto the legal system as a whole.⁵⁰ And indeed, thanks to CICIG’s interventions, Guatemalan justice operators have begun to prosecute and convict powerful figures previously considered untouchable – including former President Efraín Ríos Montt who was convicted of genocide (the verdict was later overturned however, and Montt died during his retrial) – which suggests that a gradual transformation of the culture of impunity into one of accountability and the rule of law may be occurring.

It is too early, however, to assess the long-term effects of CICIG’s work. Upon leaving Guatemala last fall, the commission recognized that its efforts had not been sufficient to transform the state. CICIG had almost gotten to the nucleus of the CIACS that had captured the state yet also stressed that lasting change was inhibited by the vested interests of powerful segments of society – a “mafia coalition” of politicians, business leaders, and private individuals “willing to sacrifice Guatemala’s present and future to guarantee impunity” (quoted in *The Guardian* 2019).⁵¹ With a new president – who is said to be involved with those criminal networks that CICIG was hired to dismantle in the first place (and who was once himself under investigation by CICIG) – the current political climate has become rather hostile.⁵²

C. The replicas: MACCIH, CICIÉS, and CEICCE

Just like in Guatemala, the Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH)⁵³ was created as a result of civil society pressure. In 2014, the discovery of a massive corruption scheme involving the Honduran Social Security Institute caused popular outrage, with tens of thousands of protesters demanding the resignation of president Hernández and the establishment of a Honduran variant of CICIG. While CICIG

49 *Zamora*, note 15, pp. 589–590.

50 *Hudson and Taylor*, note 13, pp. 70–71.

51 Associated Press in Guatemala City, Guatemala in grip of “mafia coalition”, says UN body in scathing corruption report, *The Guardian* (28 August 2019), <https://www.theguardian.com/world/2019/aug/28/guatemala-corruption-mafia-coalition-jimmy-morales> (last accessed on 25 March 2020).

52 *J.M. Burt and P. Estrada*, The future of accountability efforts in Guatemala in the balance as new hard-line government takes office, *International Justice Monitor* (15 January 2020), <https://www.ijmonitor.org/2020/01/the-future-of-accountability-efforts-in-guatemala-in-the-balance-as-new-hard-line-government-takes-office/> (last accessed on 25 March 2020).

53 The MACCIH website describes the mission’s objectives as follows: “The Mission to Support the Fight against Corruption and Impunity in Honduras works to support the country in combating corruption and impunity with an integral vision. Not only do we investigate cases involving relevant networks of public and private corruption, our effort is also focused on reforming and strengthening institutions that would prevent this scourge undermining the credibility of the authorities and the political system.”; Organization of American States, About the Mission, <https://www.oas.org/en/spa/dsdsm/maccih/new/mision.asp> (last accessed on 25 March 2020).

was established pursuant to an agreement between the Guatemalan government and the UN, MACCIH came into existence through an accord between Honduras and the secretary general of the Organization of American States (OAS).⁵⁴ It began operations in 2016 and terminated its work four years later, after president Hernandez refused to extend its mandate.⁵⁵ And just like CICIG, MACCIH had become a victim of its own success, because its anti-corruption investigations had gotten in the way of the country's powerful, including Hernandez and members of the legislature, who were investigated by the attorney general with the support of MACCIH and who voted to shut down the commission in 2019.⁵⁶ Yet despite persistent attacks, MACCIH still produced solid results during its brief lifespan. It assisted in the prosecution of 133 people and 14 cases⁵⁷, notably in the high-profile investigations against former first lady Bonilla de Lobo, who was ultimately convicted of fraud and embezzlement and sentenced to 58 years in prison.⁵⁸ Just like CICIG, MACCIH thus demonstrated to the Honduran citizenry that even the most powerful were not above the law.⁵⁹

Whereas CICIG was mandated to investigate (yet not prosecute) independently, MACCIH depended for both investigations and prosecutions on the cooperation of its Honduran partners. Article 3 of the agreement establishing MACCIH provides for the Mission's "active collaboration" with Honduran authorities on corruption cases, authorizing it to "accompany, assist, supervise, and evaluate" state institutions investigating and prosecuting corruption.⁶⁰ Stripping MACCIH of its powers to co-prosecute cases was likely a concession to the Honduran government fearing a commission with teeth.⁶¹ Despite this limitation, MACCIH made a significant contribution to building local capacity, creating the Unidad Fiscal Especial Contra la Impunidad y la Corrupción within the MP to collaborate with MACCIH in the fight against corruption. MACCIH screened and trained UFECIC staff and selected

54 Convenio entre el Gobierno de la República de Honduras y la Secretaría General de la Organización de los Estados Americanos para el Establecimiento de la Misión de Apoyo contra la Corrupción y la Impunidad en Honduras (19 January 2016), <http://www.oas.org/documents/spa/press/convenio-MACCIH-1.19.16.pdf> (last accessed on 25 March 2020).

55 Organization of American States, Comunicado de la Secretaria General de la OEA sobre finalización de la MACCIH (17 January 2020), https://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-003/20 (last accessed on 25 March 2020).

56 *H.S. Avalos and S. Robbins*, A death foretold: MACCIH shuts down in Honduras, InSight Crime (22 January 2020), <https://www.insightcrime.org/news/analysis/a-death-foretold-maccih-shuts-down-in-honduras/> (last accessed on 25 March 2020).

57 Organization of American States, note 55.

58 Reuters, Former first lady of Honduras sentenced to 58 years in jail (5 September 2019), <https://www.reuters.com/article/us-honduras-corruption/former-first-lady-of-honduras-sentenced-to-58-years-in-jail-idUSKCN1VQ00Y> (last accessed on 25 March 2020).

59 *C.F. Chamorro*, Las lecciones de la CICIG y la MACCIH para Nicaragua, Confidencial (27 January 2020), <https://confidencial.com.ni/las-lecciones-de-cicig-y-maccih-para-la-nicaragua-pos-ortega/> (last accessed on 25 March 2020).

60 Convenio entre el Gobierno de la República de Honduras y la Secretaría General de la Organización de los Estados Americanos, note 54.

61 *Zamora*, note 15, pp. 593-594.

cases for investigation, thus seeking to create an island of committed staff untarnished by corruption within the MP.

It was just this island that became the main sticking point in negotiations over the extension of MACCIH's mandate: "MACCIH endured a troubled tenure, but nonetheless forged an increasingly promising alliance with UFECIC ... Accountability for high-level corruption, however incipient and fragile, was apparently not well received by some in Tegucigalpa. As MACCIH's mandate came up for renewal, negotiations between the Honduran government and the OAS centered on the mission's relationship with UFECIC and its ability to continue supporting criminal investigations, which the government sought to discontinue. The OAS apparently balked at this demand, and with negotiations at a stalemate, MACCIH'S mandate was allowed to expire".⁶² In comparison to its Guatemalan counterpart, MACCIH is generally – "perhaps unfairly" – seen as less successful.⁶³ However, one should also keep in mind that MACCIH was a rather short-lived institution and that CICIG was equally considered a disappointment in the first years of its existence: "Ultimately, MACCIH started off strong despite a somewhat weaker mandate. It took some months to get up and running, then helped draft important laws that won passage ... It worked with the Public Ministry to secure the convictions of twelve individuals, including two ex-vice ministers and a magistrate of the Judicial Council, in its first two years".⁶⁴ Overall, both CICIG and MACCIH have been much more successful than anticipated at first.⁶⁵ Apart from contributing to successful prosecutions both CICIG and MACCIH can be credited with having strengthened institutional capacity in their host countries.⁶⁶ Just like CICIG, MACCIH initiated the creation of specialized anti-corruption infrastructure within the local legal system such as specialized court chambers – which were much more effective than regular courts – and special prosecutorial units within the MP, which were key to the mission's success.⁶⁷ However, similar to CICIG, MACCIH also suffered from persistent attacks launched by powerful actors from the executive and legislature, who saw their vested interests at stake. In sum, MACCIH's overall legacy is two-fold: first, it demonstrated to ordinary Honduran citizens that in principle no one is above the law, and that local institutions – with appropriate backing and insulation from political interference – can and do deliver in the fight against impunity. Its second main contribution was to build local capacity. Whether or not this will become a lasting legacy is unclear, as it remains to be seen if UFECIC can stand

62 M. Camilleri and C. Christie, How the "art of the deal" hurt Latin America's corruption fight, *Americas Quarterly* (30 January 2020), <https://www.americasquarterly.org/content/how-trumps-art-deal-hurt-latin-americas-corruption-fight> (last accessed on 25 March 2020).

63 Call, note 14 (2019), p. 2.

64 Call, note 14 (2018), pp. 38-39.

65 Call, note 14 (2019), p. 8.

66 *Ibid.*

67 Chamorro, note 59.

on its own two feet after MACCIH's departure, or if the end of MACCIH also signals the end of UFECIC.⁶⁸

Further ripple effects of CICIG's work could be observed in El Salvador, which recently agreed to the establishment of a CICIG-offshoot⁶⁹ after Nayib Bukele was elected president and made good on its campaign promise to establish an anti-corruption mission inspired by the models of CICIG and MACCIH.⁷⁰ With three of his presidential predecessors investigated for corruption allegations, the issue of corruption featured prominently in Bukele's electoral campaign and apparently struck a nerve with many voters.⁷¹ The International Commission Against Impunity in El Salvador (CICIES) was therefore established in order to "support, strengthen and actively collaborate with the institutions of the Republic of El Salvador charged with preventing, investigating and punishing acts of corruption and other related crimes, including crimes related to public finances, illicit enrichment, money laundering, and national and transnational organized crime".⁷² The exact scope of its mandate, however, is yet to be defined. Observers believe that CICIES will entail insignificant sovereignty costs in that it is probably merely a technical advisory mission rather than a mission with investigatory or (co-)prosecutorial powers.⁷³ Like MACCIH and unlike CICIG, CICIES was created pursuant to an agreement (or rather a number of agreements) between the OAS and El Salvador. There is considerable confusion about CICIES' actual powers, owing to the fact that president Bukele is said to have rushed the creation of CICIES in order to make good on its campaign promise to establish a hybrid commission within the first 100 days of his tenure.⁷⁴ Yet, as observers point out, it will take quite some

68 *El Heraldo*, Sobrevivirá la UFECIC sin la MACCIH? (19 January 2020), <https://www.elheraldo.hn/pais/1350088-466/macchi-ufecic> (last accessed on 25 March 2020).

69 *N. Renteria*, El Salvador launches anti-corruption mission, inspired by Guatemala, Reuters (7 September 2019), <https://www.reuters.com/article/us-el-salvador-corruption/el-salvador-launches-anti-corruption-commission-inspired-by-guatemala-idUSKCN1VR2QP> (last accessed on 25 March 2020).

70 *Call*, note 14 (2019), p. 2.

71 *K. Foster*, From selfies to progress in El Salvador, Harvard Political Review (20 January 2020), <https://harvardpolitics.com/world/selfies-el-salvador/> (last accessed on 25 March 2020).

72 Organization of American States, Press Release, Government of El Salvador and the Organization of American States (OAS) Install CICIES (6 September 2019), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-063/19 (last accessed on 25 March 2020).

73 *Chamorro*, note 59.

74 *J. Quintanilla and G. Caceres*, If an international commission meant to fight corruption in El Salvador is not allowed to investigate, what is its purpose?, *El Faro* (7 February 2020), https://elfaroonet/en/202002/el_salvador/23991/If-an-International-Commission-Meant-to-Fight-Corruption-in-El-Salvador-Is-Not-Allowed-to-Investigate-What-is-its-Purpose.html. (last accessed on 25 March 2020).

time before CICIES will begin its actual work.⁷⁵ Regarding the scope of its mandate, a recent commentary concludes that CICIES, “as it currently stands, will act more as a technical advisor than as a commission dedicated to investigating corruption cases”.⁷⁶ Apparently, CICIES’ mandate is limited to identifying corruption offenses committed by the executive including the ministries, notifying the MP and offering technical advice to the MP and other institutions.⁷⁷ The main hurdle to giving CICIES investigatory powers similar to CICIG’s or MACCIH’s – as Bukele had promised during his campaign – is article 193 of the Salvadoran constitution, which confers exclusive investigatory and prosecutorial powers upon the attorney general’s office.⁷⁸ This, however, stands in contradiction to article 6.1.1 of CICIES’ agreement with the Salvadoran presidency, according to which CICIES will provide “technical assistance, accompaniment, and active collaboration in the investigation, criminal prosecution, and punishment of acts of corruption just as in the dismantling of networks of corruption”.⁷⁹ This, analysts have pointed out, is not only at odds with the agreement concluded between CICIES and the attorney general’s office, but, more importantly, is incompatible with the Salvadoran constitution.⁸⁰ If CICIES were thus to be given teeth, this would have to occur through a legislative process addressing these constitutional hurdles, yet none of the accords establishing CICIES contain measures aimed at overcoming this constitutional roadblock.⁸¹

A fourth hybrid commission is currently being established in Ecuador and to date, very little is known about this new body. Last year, president Moreno made good on one of his central campaign promises and announced the creation of the Comisión de los Expertos Internacionales Contra la Corrupción en Ecuador (CEICCE) via executive decree.⁸² Like CICIG (and unlike MACCIH and CICIES) CEICCE was established pursuant to an agreement between the UN and the host state. Compared to CICIG and MACCIH, CEICCE’s ambitions are more modest: just like CICIES, CEICCE will not have investigatory powers but is envisaged as an expert commission, which is tasked to provide advice to the judicial organs of the state of Ecuador. It shall conclude bilateral contracts with local institutions in charge of preventing, investigating and sanctioning acts of corruption in order to “assist and forti-

75 C. Call, Can El Salvador’s new anti-corruption mission deliver?, *Americas Quarterly* (12 September 2019), <https://www.americasquarterly.org/content/el-salvadors-new-international-anti-corruption-on-commission>. (last accessed on 25 March 2020).

76 *Quintanilla and Caceres*, note 74.

77 *Ibid.*

78 *Ibid.*

79 Quoted in *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 Presidencia de la Republica de Ecuador, Gobierno nacional crea comision de expertos internacionales para la lucha contra la corrupcion (2019), <https://www.presidencia.gob.ec/gobierno-nacional-crea-comision-de-expertos-internacionales-para-la-lucha-contra-la-corrupcion/> (last accessed on 25 March 2020).

fy” them.⁸³ CEICCE shall moreover receive complaints and propose public policies aimed at fighting corruption. Creating CEICCE via presidential decree certainly accelerated the process yet also cast doubt on the autonomy of the commission from the executive. Analysts moreover fear that the commission might be dissolved with the same ease it was created.⁸⁴ Compared to CICIG, the most complete model of the four anti-impunity commissions, CEICCE has only weak competencies and does not require a significant concession of sovereign privileges from its host state.⁸⁵

In sum, each of the replicas put its own spin on the CICIG prototype, which had the most far-reaching powers compared to the other hybrids. At the same time, CICIG was the most successful Latin American hybrid (so far). This suggests a positive causal connection between depth of delegation and impact. However, as the following discussion of another hybrid anti-impunity mechanism outside of Latin America shows, the correlation is not that straightforward in that deep delegation and thus higher sovereignty costs do not always correlate with significant advances in the consolidation of the rule of law. Compared to CICIG, the EU rule of law mission in Kosovo (EULEX) displayed a much higher degree of delegation and a significant concession of sovereign prerogatives, yet yielded only disappointing results. The following section will explain this puzzling observation.

D. The European hybrid: EULEX

EULEX (2008-2020) is the largest and most ambitious civilian mission under the EU’s Common Security and Defence Policy (CSDP), combining executive functions with a mandate for justice sector reform and capacity-building. It works within the general framework of UN Security Council resolution 1244 and is tasked with supporting Kosovo in creating “sustainable and independent rule of law institutions”.⁸⁶ EULEX is fully integrated into the Kosovar legal system and enjoys a broad set of prerogatives. Its powers are specified as follows: EULEX shall, *inter alia*, “monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law ... whilst retaining certain executive responsibilities”; promote the rule of law, public order and security – if necessary through overruling or reversing decisions taken by local authorities; ensure that local authorities operate in an unbiased manner; and ensure that cases of grave human rights violations, organized crime, corruption and other offenses are “properly investigated, prosecuted, adjudicated and enforced” – if necessary by international investigators, prosecutors and judges

83 *Ibid.*

84 M. Pozas, CICLES a la ecuatoriana?, *elsalvador.com* (27 September 2019), <https://www.elsalvador.com/opinion/editoriales/cicles-a-la-ecuatoriana/644134/2019/> (last accessed on 25 March 2020).

85 *Ibid.*

86 EULEX, About EULEX, <https://www.eulex-kosovo.eu/?page=2,60> (last accessed on 25 March 2020).

operating alongside or independently of their local counterparts.⁸⁷ EULEX staff may hear cases at all levels of the legal system and cooperate with their local counterparts – supervised by the Assembly of EULEX Judges. Pursuant to Law No. 03/L-053 on jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo⁸⁸, EULEX prosecutors have brought cases to court that were tried by panels with a majority of international judges, in order to prevent a politicization of the local judiciary along ethnic lines. EULEX is moreover tasked with mentoring, monitoring and advising (MMA) local authorities in order to guarantee that court and prosecutorial procedures are in line with international standards.⁸⁹

In terms of impact on the rule of law, EULEX's intervention has yielded disappointing results. The European Court of Auditors found EULEX's performance to be largely unsatisfactory, "particularly with regard to organised crime and corruption".⁹⁰ While certain achievements were noted in the area of customs and border control, the auditors criticized that since EULEX judges and prosecutors also carry out executive functions, they have less time left for capacity-building.⁹¹ Even though MMA measures had somewhat strengthened the capacities of local justice operators, the latter were still not capable of dealing with complex cases involving organized crime, corruption, or war crimes.⁹² Overall, the audit concludes, "EU assistance to Kosovo in the field of the rule of law has not been sufficiently effective. Assistance has made only a modest contribution to building the capacity of the Kosovo police and little progress has been made in the fight against organised crime".⁹³ A policy brief evaluating EULEX's track record equally concludes that the mission has not been very successful and that instead of empowering the local judiciary, "a certain dependence has paradoxically been generated, with the Kosovar judges submitting to their inter-

87 European Union, Council Joint Action 2008/124/CFSP 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (2008), https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf (last accessed on 25 March 2020).

88 Assembly of the Republic of Kosovo, Law No. 03/L-053 on jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo (2008), https://www.ecoi.net/en/file/local/1029038/1504_1220512024_law-on-jurisdiction-case-selection-and-case-allocation-of-eulex-judges-and-prosecutors-in-kosovo.pdf (last accessed on 25 March 2020).

89 EULEX, Programmatic MMA actions (2010), <https://eulex-kosovo.eu/docs/tracking/EULEX%20MMA%20ACTIONS%2020102904.pdf> (last accessed on 25 March 2020).

90 European Court of Auditors, European Union assistance to Kosovo related to the rule of law, Special Report No. 18 (2012), https://www.eca.europa.eu/Lists/ECADDocuments/SR12_18/SR12_18_EN.N.PDF (last accessed on 25 March 2020), p. 6.

91 *Ibid.*, pp. 16, 19.

92 *Ibid.*, p. 19.

93 *Ibid.*, p. 35.

national colleagues”.⁹⁴ Another report echoes this criticism regarding the lack of involvement of local jurists in complex criminal cases, which in turn has impeded the transfer of knowledge: “Instead, EULEX has overwhelmingly exercised its executive functions and has failed to sufficiently design local-majority panels in serious and complex criminal cases ... This is an unfortunate legacy given that local participation and ownership are necessary for developing an experienced and professional Kosovo judicial culture.”⁹⁵

E. Comparing the missions

In terms of building a culture of the rule of law and instilling confidence in the citizenry that the justice system works impartially and effectively, there are striking differences between the Latin American hybrids on the one hand, and the European hybrid on the other. Whereas survey results indicate high rates of public approval for the Latin American commissions and a concomitant rise in public trust in the justice system as a whole⁹⁶, no such effect could be observed in the case of EULEX, where recent polls show low levels of trust in EULEX specifically and the justice system more generally.⁹⁷ This casts doubt on the assumption that shared-sovereignty arrangements are more successful when they involve full rather than partial delegation.

In order to understand why some hybrids were more successful than others, this section will compare the impact of the different missions which exhibited different degrees of delegation and thus varied in terms of sovereignty costs – keeping in mind that since only CICIG and EULEX (and to a lesser extent MACCIH) have/had been in operation for a sufficient period of time, the discussion will inevitably focus on those missions at the expense of CEICCE and CICIÉS. Nonetheless, the discussion of the older hybrids has obviously important policy implications for the more recent mechanisms.

Now, the evidence reviewed in the preceding sections suggests that the simplistic assumption about a unilinear relationship between the depth of delegation and success of the mission does not hold. The hybrids discussed in this article range from deep delegation (EULEX) to moderate or partial delegation (CICIG) to shallow delegation (MACCIH) to

94 *S. Llaudes and F. Andrada*, EULEX: a mission in need of reform and with no end in sight, Real Instituto Elcano (2015), <http://www.realinstitutoelcano.org/wps/wcm/connect/5206e2804941a9b899b3bf253802dbc3/ARI41-2015-Llaudes-SanchezAndrada-EULEX-mission-need-reform-no-end-in-sight.pdf?MOD=AJPERES&CACHEID=5206e2804941a9b899b3bf253802dbc3> (last accessed on 25 March 2020), p. 10.

95 *D.M. Welski*, Hybrid court system in Kosovo: has EULEX proven to be the device to strengthen independence and effectiveness of the judiciary? Group for Legal and Political Studies, Policy Report 11/2014 (2014), <http://legalpoliticalstudies.org/wp-content/uploads/2014/11/Policy-Report-11-2014-eulex-Hybrid-Courts-ENG.pdf> (last accessed on 25 March 2020), p. 7.

96 *Paredes*, note 28; *Zamora*, note 15, p. 586.

97 Kosovo Centre for Security Studies, Kosovo security barometer, 8th edition (2018), http://www.kkss.org/repository/docs/barometri2018-eng2_477654.pdf (last accessed on 25 March 2020), pp. 14-15.

no delegation at all (CEICCE and CICIES, based on what is currently known about their mandate). While CEICCE and CICIES are nascent institutions whose effects cannot be assessed yet, a comparison of EULEX, CICIG, and MACCIH suggests that deep delegation does not produce a greater impact on the rule of law; on the contrary, sharing responsibilities and competencies more evenly among externals and locals actually contributes to peer-learning and thus capacity-building, which will likely make advances in the rule of law more sustainable in the medium-to-long term. Consider the starting conditions EULEX and CICIG faced: even though Kosovo and Guatemala differ in many ways, they actually confront quite similar governance problems, such as weak justice systems, ethnic cleavages, a legacy of armed conflict and mass atrocities, organized crime, and corrupt post-war political and economic elites not having the best interests of their citizens in mind.⁹⁸ Both hybrid missions were embedded in the legal system of their host state and both enjoyed significant powers in investigating and (co-)prosecuting cases of corruption and organized crime (as well as mass atrocities in the case of EULEX), with EULEX even being authorized to prosecute and adjudicate cases independently of local actors and overturn the latter's decisions. Yet a striking difference between CICIG and EULEX is that even though CICIG a) had significantly fewer powers and resources than EULEX; b) had to cover a much larger territory and faced considerably higher crime rates; and c) was much more dependent upon cooperation with its local partners than EULEX, it turned out to be more successful in promoting the rule of law than its European counterpart, "measured by case statistics, societal impact, public polling, scholarly opinion, or international acclaim".⁹⁹

While both CICIG and EULEX were in charge of investigating and (co-)prosecuting corruption and organized crime as well as offering technical assistance, peer-based learning worked better in Guatemala than in Kosovo, because CICIG depended for its success on long-term cooperation with its Guatemalan partners¹⁰⁰ and thus had a strong incentive to create uncorrupted and skilled domestic entities with whom it could work in the long run. The close relationship CICIG cultivated with the Guatemalan MP and the establishment of FECCI proved crucial in this regard. When CICIG first entered Guatemala, it had reason to fear that the MP had equally fallen prey to those corrupt networks the commission was tasked to investigate – the appointment of Conrado Arnulfo Reyes Sagastume as attorney general even led CICIG's head Carlos de Castresana to resign in protest. Reyes had ties to criminal networks and immediately moved to obstruct CICIG's work.¹⁰¹ Castresana's resignation caused an uproar in the media which "shamed the Constitutional Court into annulling the whole selection process".¹⁰² This in turn enabled the fortuitous appointment of

98 G. Kuris, Comparing peer-based anti-corruption missions in Kosovo and Guatemala, U4 issue 2019:6 (2019), <https://www.u4.no/publications/comparing-peer-based-anti-corruption-missions-in-kosovo-and-guatemala.pdf> (last accessed on 25 March 2020), p. 1.

99 *Ibid.*, p. 2.

100 *Ibid.*, p. 3.

101 Open Society Justice Initiative, note 14, p. 53.

102 Call and Hallock, note 14, p. 20.

human rights defender Claudia Paz y Paz – a lawyer with excellent credentials and no ties whatsoever to Guatemala’s traditional elites or criminal networks – as attorney general of Guatemala. CICIG’s close cooperation with Paz y Paz, FECI, and later Paz y Paz’s successor Thelma Aldana were vital to the commission’s success, especially in the face of wavering governmental support for the commission’s work. The collaboration between the MP and CICIG was a showcase of effective capacity-building and knowledge transfer. Similarly, in Honduras, MACCIH’s close collaboration with UFECIC strengthened this body to an extent that it became a threat to powerful domestic players and thus emerged as the main bone of contention in the negotiations over the prolongation of MACCIH’s mandate. The creation of local anti-impunity bodies such as FECI and UFECIC, as well as a specialized court infrastructure dealing with high-risk cases was at the heart of these hybrid commission’s legacy. CICIG and MACCIH therefore turned a seeming weakness into an asset: as they were highly dependent upon cooperation with their local counterparts, they carefully built alliances and ensured that their collaboration partners would be trustworthy, untarnished by corruption allegations, and possessed the necessary skills and resources for effective investigations and prosecutions. Ultimately, local Guatemalan and Honduran authorities were the ones that made the final decisions, and since neither CICIG nor MACCIH had the powers to overrule poorly made decisions, they had to pre-empt bad decision-making by putting in place staff and infrastructure that would ensure that sound decisions were made. EULEX, by contrast, because of its expansive mandate, had the privilege of simply circumventing or overruling corrupt or incompetent local partners. Consequently, EULEX did not make sufficient efforts at building local capacity because, from a short-term perspective, it was easier to bypass dysfunctional local mechanisms rather than try to substantially transform them. EULEX thus did not necessarily benefit from its broad mandate and powers. On a related note, the comparison of EULEX on the one hand, and CICIG/MACCIH on the other hand suggests that hybrids with less tasks are more likely to succeed than missions with a broader mandate, even if the latter have comparatively more resources at their disposal to discharge their more ambitious mandate. Ultimately, EULEX – with its “sprawling galaxy of functions, partners and work products”¹⁰³ – overburdened itself and ended up achieving little in each area, with the exception of customs.

Now, while the preceding analysis suggests that partial delegation will likely yield better results than complete delegation, this of course does not imply that by extension, the less teeth a hybrid commission has, the better. While CICIES and CEICCE – the two hybrids displaying the lowest levels of delegation – have not established a track record yet and thus their impact cannot be assessed at the moment, it seems unlikely that these actors will leave a major imprint upon the justice systems of El Salvador and Ecuador, respectively. Providing technical advice and receiving complaints about malfeasance will hardly be sufficient to change endemic practices of corruption and a deeply-ingrained culture of impunity. Rather, a mandate to investigate and (co-)prosecute cases of corruption and organized crime

103 *Kuris*, note 98, p. 10.

– and hence a medium-level of delegation – would have been desirable for these commissions.

F. CONCLUSION

The counter-intuitive finding that emerges at the end of this contribution is that in terms of rule of law promotion, hybrid arrangements in which tasks are shared relatively evenly among externals and locals and that thus involve only a partial delegation of authority tend to be more successful and produce more sustainable results than arrangements providing for deeper forms of delegation, because the latter simply bypass the structures of the host state and thus fail to build local capacity. Therefore, the deterministic assumption that hybrids are most successful in promoting the rule of law when they impose their own structures on the host state, rather than operating from within the latter's structures, does not hold.

However, in order to understand the successes and failures of this new type of hybrid actor in global governance, it is not sufficient to merely look at their institutional design – if they involve high or low levels of delegation, significant or insignificant sovereignty costs, or if they possess a narrow or broad mandate. Obviously, external variables equally factor into the equation as well. For instance, do these hybrids benefit from the backing of a broad coalition of domestic and international supporters? As the cases of CICIG and MACCIH demonstrate, success is a double-edged sword: both hybrids were killed off not because they failed but because they were so successful in holding the powerful to account. Is success thus suicidal? Well, it certainly heightens the risk of political backlash if anti-impunity commissions get in the way of those “mafia coalitions” that have captured the host state; yet that does not mean that these hybrids are condemned to being merely window-dressing. Future research should thus take a closer look at the *external* conditions required for hybrid anti-impunity commissions to work successfully. In the case of CICIG, for instance, concerted pressure – especially from the United States, but also from local civil society – not only helped to establish the commission in the first place but equally immunized the commission against attacks by domestic opponents. Only when the Trump administration took office and lost interest in supporting CICIG (and also MACCIH) did a window of opportunity open up for domestic proponents of impunity to rid themselves of the commissions. Trump, adopting a “transactional” approach to foreign policy – making short-term cost-benefit-calculations rather than adopting a longer-term principled approach – had decided to sacrifice the goal of anti-impunity in return for political favors by the Guatemalan and Honduran governments. In the case of Guatemala, Trump sacrificed CICIG in return for Morales’ promise to move Guatemala’s embassy in Israel to Jerusalem and cooperation on migration.¹⁰⁴ Honduras equally used the migration issue as a bargaining chip, negotiating a

104 Camilleri and Christie, note 62.

so-called safe third country agreement with Washington in exchange for US acquiescence in the dismantling of MACCIH.¹⁰⁵

In sum then, hybrid anti-impunity commissions, even if highly successful in discharging their mandate, cannot effect lasting change in their host countries in the absence of a broad reform coalition among domestic and international players. What these commissions can do, however, is planting the seed for a deeper transformation and demonstrate to the general public that no one is above the law, that there are no untouchables. As CICIG wrote in its final report, the true legacy of the commission was to raise awareness amongst Guatemalan citizens of the social contract, democracy, and the obligations of the state towards its citizens. This is the “seed of a process of change which, even though it will confront adversity, will not be slowed down. It is a point of no return”.¹⁰⁶

105 *Ibid.*

106 *Kuris*, note 98, p. 94.