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Militarized Criminal Organizations and Human Rights Court Review of State Protection Efforts: Evidence from Colombia

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MILITARIZED CRIMINAL ORGANIZATIONS
AND HUMAN RIGHTS COURT REVIEW
OF STATE PROTECTION EFFORTS:
EVIDENCE FROM COLOMBIA

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MILITARIZED CRIMINAL ORGANIZATIONS AND HUMAN RIGHTS COURT REVIEW OF STATE PROTECTION EFFORTS: EVIDENCE FROM COLOMBIA

DAVID L. ATTANASIO*

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I. INTRODUCTION

Since 2007, new threats to the physical security of ordinary citizens have materialized in Mexico and Colombia. A long history of drug trafficking in Mexico has entered into a new phase, as cartels violently contest territorial control with each other and with the government. Meanwhile, Colombian paramilitary groups, which were supposedly eliminated through the 2003–2006 demobilization pro-

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cess, have reemerged in an altered form, without clear anti-insurgent goals and a greater focus on gains from illegal businesses.¹ By 2012, they had become the leading cause of human rights and humanitarian law abuses in Colombia, responsible for between thirty and fifty percent of all abuses.² While these phenomena are dissimilar in some ways, the two countries share a serious problem of militarized criminal organizations that are devoted to the production and transportation of drugs and willing to unleash violence against the civilian population to do so. In fact, some commentators have argued that violence in Colombia and Mexico has converged, in the sense that in both countries the violence is now primarily driven by the logic of illegal business that requires territorial control.³

In Colombia, the sixty-year-old armed conflict has changed character since 2006. Out of the flawed demobilization of right-wing paramilitary groups between 2003 and 2006, new violent groups have emerged: the so-called Bacrim (from the Spanish for “criminal bands”) or neoparamilitaries. While the choice of terminology to describe these groups has become politicized based on the connection it implies with the old paramilitaries,⁴ I will use the term “neoparamilitaries,” as it reflects the origins of the new groups while admitting the possibility that they are not identical in all respects to earlier paramilitaries. These neoparamilitaries have continued to commit the sort of widespread acts of violence, including targeted assassina-

1. See Alonso Tobón García, *Dinámicas y usos de la violencia neoparamilitar en el Valle del Cauca* 12 (CENTRO DE RECURSOS PARA EL ANÁLISIS DE CONFLICTOS [CERAC], Working Paper No. 18, 2012) (Colom.), available at http://www.cerac.org.co/assets/pdf/CERAC_WP18.pdf.

2. See CENTRO DE INVESTIGACIÓN Y EDUCACIÓN POPULAR [CINEP] & PROGRAMA POR LA PAZ [PPP], INFORME ESPECIAL: SOBRE LA SITUACIÓN DE DERECHOS HUMANOS Y DERECHO INTERNACIONAL HUMANITARIO EN COLOMBIA DURANTE 2012 3, 10-11 (2013) (Colom.), available at http://www.cinep.org.co/images/stories/Documentos/Informe_Especial_mayo2013_final.pdf (the CINEP database registered 565 human rights abuses neoparamilitaries, 268 by the national police and 187 by the national army, as well as 493 humanitarian law violations by the neoparamilitaries, 347 by FARC, 118 by the national army, 98 by combatants, 72 by the national police, and 48 by ELN); Marguerite Cawley, *BACRIM Responsible for 30% of Human Rights Violations in Colombia*, INSIGHTCRIME (Apr. 16, 2013) (Colom.), <http://www.insightcrime.org/news-briefs/bacrim-perpetrators-of-30-crimes-reported-in-colombia-govt>.

3. Mauricio García Villegas & José Rafael Espinosa Restrepo, *Crimen, conflicto armado y Estado en Colombia, México y Guatemala* 3 (DeJuSticia, Working Paper No. 7, 2012); cf. Richard Snyder & Angélica Durán Martínez, *Drugs, Violence, and State-Sponsored Protection Rackets in Mexico and Colombia*, 70 COLOM. INTERNACIONAL 61 (2009) (analyzing the levels of violence in Mexico and Colombia in terms of state regulation of illegal markets, but not focusing specifically on neoparamilitaries).

4. The government de-emphasizes the paramilitary origins of the groups by calling them “criminal bands” (*bandas criminales*, or Bacrim), while some NGOs, including Corporación Nuevo Arco Iris and the Comisión Colombiana de Juristas, emphasize this connection with the name “neoparamilitaries.”

tions and massacres,⁵ which were common prior to the paramilitary demobilization. They are massive organizations that extend over entire regions—both rural and urban zones—and violently contest control over illegal industries, such as the production and trafficking of drugs. They pose a serious threat to the physical security of many Colombians that extends well beyond the danger posed by many other sorts of criminal organizations. Different from other forms of organized crime, the groups are militarized, having adopted military-grade weapons, military-type organization, and military methods to protect and expand their economic activities. The International Committee for the Red Cross (“ICRC”), for instance, has found that some of these groups have sufficient organization and capacity for violence to make them parties to the internal armed conflict.⁶

One role that has been assumed by international human rights courts—namely the European Court of Human Rights and the Inter-American Court of Human Rights—is that of reviewing state efforts to protect against threats to human rights that come from such non-state sources. Both of these courts have found states responsible for their failure to take reasonable protective measures against threats posed by groups that in some important respects resemble the neo-paramilitaries in Colombia. Examples include finding Turkey responsible for assassinations carried out by shadowy state-aligned militant groups⁷ and finding Colombia responsible for a massacre by paramilitary forces.⁸ According to the common rule that the courts have adopted, the threshold requirement for any such review is that the state knew or should have known of a specific risk either to the victim or to a limited group to which the victim belonged. Such a threshold requirement determines the circumstances in which a court may review the actions that a state has undertaken to prevent serious human rights violations. The current threshold requirement is narrow: it technically excludes from review all claims of inadequate state protection in which it cannot be claimed that the state knew or should have known of a specific risks to the victim (or the victim’s group).

5. In this Article, I will use the term “massacre” to refer to a single event in which the perpetrating person or group kills three or more people.

6. Int’l Comm. of the Red Cross, Documento sobre la participación de ciertos grupos armados emergentes en el conflicto armado no internacional en Colombia 3 (2011) (unpublished report), *available at* <http://otramiradadelconflicto.wikispaces.com/file/view/Calificaci%C3%B3n+GAE+de+CICR.pdf>.

7. *Akkoç v. Turkey*, 2000-X Eur. Ct. H.R. 389, ¶¶ 85-92; *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶¶ 69-71, 75; *Koku v. Turkey*, App. No. 27305/95, Eur. Ct. H.R. 1, ¶¶ 137-41 (2005); *Mahmut Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, ¶¶ 91-99.

8. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 124, 126 (Jan. 31, 2006).

This Article will argue that such a threshold requirement is overly narrow given the violence from these militarized criminal organizations, in that it unnecessarily and inappropriately excludes many of their actions from court review in light of general principles that the courts already accept. Careful consideration of these principles indicates (as this Article will argue) that the human rights courts should adopt a rule that extends review to situations in which state officials knew (or should have known) that a militarized criminal organization posed a threat to the local population. The state should then be held responsible if: (i) its officials failed to take reasonable measures to reduce or eliminate this threat, (ii) the organization committed acts of violence against a person, and (iii) the measures not taken would have had a reasonable chance of preventing the acts of violence. Such an expanded threshold requirement would allow review of the failure, for example, of local public security forces to confront a locally active group and to detain its members or prevent them from acting, even when those forces lack knowledge of specific acts of violence that the group was likely to commit.⁹

The expansion of the review threshold requirement is appropriate because the groups constitute what I will call Militarized Criminal Organizations, a status that renders them particularly severe threats to the physical security of individuals.¹⁰ Broadly speaking, a Militarized Criminal Organization (“MCO”) is an organization whose purpose is “to obtain, directly or indirectly, a financial or other material benefit”¹¹ and whose nature nearly or actually renders it capable of

9. Expanded court oversight of state protection efforts via broadened responsibility rules is one way to address the problem of human rights violations committed by non-state actors. For other human rights approaches to the problem, see generally Office of the High Comm’r for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, at 72, U.N. Doc. HR/PUB/11/01 (2011); INT’L COUNCIL ON HUMAN RIGHTS POLICY, ENDS & MEANS: HUMAN RIGHTS APPROACHES TO ARMED GROUPS 33-37 (2000); Pablo Policzer, *Human Rights Violations Beyond the State*, 5 J. HUM. RTS. 215, 216-18 (2006); August Reinisch, *The Changing International Legal Framework, in NON-STATE ACTORS AND HUMAN RIGHTS* 37, 38-41 (Philip Alston ed., 2005). Ian Brownlie offered an instructive but somewhat outdated legal analysis of “armed bands” in Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT’L & COMP. L.Q. 712 (1958).

10. The definition of a Militarized Criminal Organization offered here is somewhat tangential to the ongoing debate over the nature of paramilitary and neoparamilitary groups in Colombia, as it is primarily intended as a legal category and not a deep understanding of the groups. For examples of the debate over the groups, see GUSTAVO DUNCAN, *LOS SEÑORES DE LA GUERRA: DE PARAMILITARES, MAFIOSOS Y AUTODEFENSAS EN COLOMBIA* (2006); Jasmin Hristov, *Self-Defense Forces, Warlords, or Criminal Gangs? Towards a New Conceptualization of Paramilitarism in Colombia*, 43 LAB., CAPITAL & SOC’Y 13 (2010).

11. U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, art. 2(a), U.N. Doc. A/RES/55/25 (Nov. 15, 2000) (“‘Organized criminal group’ shall mean 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 offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”).

being party to an internal armed conflict under International Humanitarian Law.¹² In this sense, it has three features beyond its purpose. First, it has a sufficient degree of internal organization, including a responsible command structure, to plan armed operations.¹³ Second, it has the capacity for and exercises military-style force that rises above mere “isolated and sporadic acts of violence.”¹⁴ Third, it exercises at least quasi-territorial control. In contrast to the territorial control necessary to render an organized armed group a party to the conflict under Additional Protocol II,¹⁵ an MCO may have quasi-territorial control without excluding the state from a territory so long as it excludes some other MCO, armed group, or quasi-armed group. Because they meet these criteria, MCOs pose a serious threat to citizen security in the areas where they operate. By also constituting a criminal organization, they are likely to provoke less government reaction than a rebel group, in part because they tend to corrupt state officials at least in the local levels of government.

In the face of such organizations, the current threshold requirement for review of state protection efforts does not allow review of and responsibility for many acts of preventable MCO violence. Under current rules, a state is responsible for inadequate protection only when state officials knew (or should have known) that the victim of the violence was at risk and failed to take reasonable action to prevent the risk from materializing. Violence by MCOs often fails to satisfy the knowledge of risk requirement. The organizations often commit acts of violence that are not conducted on behalf of state forces, with their assistance, or under circumstances in which state officials know the violence will occur. Instead, by and large, state officials know only that MCOs are present in an area and have the propensity and capacity to commit severe acts of violence. They do not know who will be a victim or when particular acts of violence will be committed. As a result, the current threshold requirement does not allow the review of a large number of the preventable acts of violence that MCOs commit. The requirement demands some form of knowledge of the specific act that the non-state actor commits, an element that is often absent with MCO violence.

12. A group could meet this requirement absent an armed conflict if it would or nearly would be capable of constituting a party should an armed conflict exist.

13. See Geneva Convention Relative to the Protection of Victims of Non-International Armed Conflicts, Additional Protocol II art. 1(1), Dec. 12, 1977, 1125 U.N.T.S. 611.

14. *Id.* at art. 1(2).

15. *Id.* at art. 1(1). According to the International Committee for the Red Cross, Additional Protocol II requires hostilities between the non-state armed group and state forces, while the Geneva Convention IV, Common Article 3 requires only hostilities between two or more non-state armed groups. Int'l Comm. of the Red Cross, Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Mar. 2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

The proposed modification of the traditional threshold requirement is based on the application of principles governing review of inadequate protection cases in the context of the violence surrounding MCOs, using the situation with neoparamilitaries in Colombia as a case study. Current jurisprudence generally recognizes a broad state obligation to protect those in its territory against violence from non-state actors,¹⁶ but the conditions in which the courts will review a state's allegedly inadequate protection efforts are narrower. However, the courts have been willing to allow additional review of state protection efforts in light of systemic risks that states will fail to protect adequately, permitting the courts to apply their limited institutional competence when it is most likely to be needed. At the same time, courts have been particularly attentive to the need to respect their institutional position by avoiding unnecessary interference with state policy-making by overly scrutinizing the balance of priorities that states adopt.

The main principle, implicit in the jurisprudence, calls on courts to allow review of cases when there is a systemic risk that the state will fail to protect its citizens adequately from violence, such as that arising from MCOs. Such a principle allows the courts to control the number of cases on already overcrowded dockets and avoid inappropriately interfering with state policy-making while also flexibly expanding review in order to fulfill the court purpose of safeguarding human rights. By expanding the scope of review in response to serious and systemic risks of inadequate protection, the courts can economize judicial resources while also using them in those cases where they are most needed. Expanding review can motivate states to comply with their human rights obligation to protect by holding them accountable for failures to fulfill the obligation and by changing the way policy makers, judges, activists, and the public view the problem.¹⁷ State protection efforts against MCOs particularly merit such loosened review requirements. Several characteristics of MCOs create a substantial systemic risk that the state will fail to act sufficiently: MCOs do not directly oppose the state, they systematically corrupt state officials, and they primarily affect groups of less concern to the central government.

At the same time, the human rights courts have been reluctant to excessively interfere with state policy-making. In fact, the courts have explicitly adopted a principle that requires them to limit the

16. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006) (citing *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶¶ 62-63; *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶¶ 115-16 (1998)).

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

review of state protective measures in order to avoid such excessive interference. Such unreasonable interference would occur if the state could be held responsible for every act of violence within its territory or under its jurisdiction, even if the violence could only be prevented by adopting new, general criminal justice policies. However, when faced with MCOs, such as the neoparamilitaries in Colombia, there is less of a concern that expanding state responsibility will unreasonably interfere with the state, because the MCOs themselves provide a clear target for specific protective actions.

It is important to be clear about how adopting the proposed rule would affect ordinary human rights protections against state actions. First, the fact that more inadequate protection cases would be subject to court scrutiny—effectively requiring that the state take additional protective measures—would not excuse any state human rights violations committed while protecting its citizens. These are unacceptable under all circumstances, including when a state is fulfilling its obligation to ensure citizen security in the face of MCOs.¹⁸ In this sense, review under a broader range of circumstances is no different from that under more restrictive circumstances: neither would excuse any state human rights violations. Second, the call for a loosened threshold requirement applies only to those circumstances in which the state is unlikely to be overzealous in its protective obligations, as these circumstances in part motivate the appropriateness of the relaxed requirement. For example, in the context of Colombian neoparamilitaries, there are a number of reasons to expect the state to react inadequately to the threat these groups pose. The groups may have connections through shared interests to elements of the state security forces or to economic elites, as did the paramilitary groups from which they emerged. They have corrupted many members of the state security forces, especially those operating at the local level. Finally, as the violence primarily affects disfavored segments of society, the state may fail to react out of apathy. For all of these reasons, the most likely problem is not state overzealousness but a lack of motivation to ensure citizen security.

This Article is divided into seven parts, including this introduction. The second part will provide an overview of the situation in Colombia, characterizing the main neoparamilitary groups, their structure and methods, and the human rights violations that they commit. It will also describe the Colombian state response to the emergence of these neoparamilitary groups. The third part will describe the current responsibility rule for state failure to protect, as developed by

18. Of course, under many international human rights treaties, some human rights are derogable in appropriate emergency circumstances. However, the rights to life and physical integrity, which are the rights generally at issue with MCO violence, are non-derogable.

the Inter-American and European human rights courts, and it will discuss its limited application to neoparamilitaries in Colombia. The fourth part will identify and diagnose how the courts have flexibly applied the announced threshold requirement to expand the scope of court review—particularly in situations of near-armed conflict. The fifth part argues that a significant consideration relevant for decisions to broaden review—the systemic risk of state failure to fulfill its broad obligation of protection—is highly relevant to MCOs, such as those in contemporary Colombia. The sixth part argues that the primary consideration that has led the courts to limit the scope of responsibility—specifically, the avoidance of unreasonable interference with state policy-making—has limited application in the circumstances presented by MCOs. Finally, the seventh part concludes the Article by briefly recapping the argument and explaining the principal effects of the proposed modified rule.

II. NEOPARAMILITARY GROUPS IN COLOMBIA

This part will present the current situation of neoparamilitary activity in Colombia. It will begin by describing how the neoparamilitary groups emerged from the paramilitary demobilization, the current panorama of active groups, and their general structures. Following this background, it will characterize the businesses of the groups as well as the human rights violations that they commit. Having explained the nature of the challenge that the groups pose, it will turn to the general state response to the neoparamilitaries and to the particular problem of corruption.

A. *Emergence of the Neoparamilitaries*

This so-called third generation of paramilitarism¹⁹ is largely a continuation of the last, as the neoparamilitaries emerged from the flawed demobilization of the Autodefensas Unidas de Colombia (“AUC”).²⁰ The AUC was a national organization or network of paramilitary forces devoted to combating guerrilla groups and protecting various economic interests, both legal and illegal.²¹ In 1997 various regional paramilitary groups formed a tenuous alliance under the banner of the AUC at the instigation of one regional organization.²²

19. Conflict Dynamics and Peace Negotiations Area, *Siguiendo el conflicto: hechos y análisis: Where is Paramilitarism Heading in Colombia*, FUNDACIÓN IDEAS PARA LA PAZ 1 (Jan. 2010), http://www.ideaspaz.org/images/Siguiendo_58_19-01-10_en.pdf.

20. CENTRO NACIONAL DE MEMORIA HISTÓRICA, ¡BASTA YA! COLOMBIA: MEMORIAS DE GUERRA Y DIGNIDAD 186-89 (2013).

21. See MAURICIO ROMERO, PARAMILITARES Y AUTODEFENSAS 1982–2003, at 18-23 (2003).

22. The Castaño brothers, then leaders of the ACCU, were the primary force behind the formation of the AUC.

Between 1997 and 2003, the peak of the AUC's activity, it was responsible for massive attacks on the civil population, including large-scale massacres and mass displacements. For example, an attack by 450 paramilitaries of the Northern Block of the AUC on the town of El Salado in February 2000 left 60 people dead and 4000 displaced.²³ Between 2002 and 2005, the Uribe administration passed several laws, most notably the Justice and Peace Law,²⁴ to demobilize the paramilitary organizations by granting their members special criminal law benefits.²⁵

However, many mid-level—and some top-level—paramilitary commanders chose not to go through the Justice and Peace process or went through it disingenuously.²⁶ The effect of the transfer of power to mid-level commanders was a splintering of whatever unity had existed in the AUC. Immediately following the demobilization, a substantial number of neoparamilitary groups emerged, with approximately half of the commanders being former paramilitaries but with many lower ranking members being new recruits.²⁷ According to one NGO, approximately 43 groups were active in 2006,²⁸ while another reported 101 in 2007,²⁹ with 3000 people allegedly belong to these groups following the end of the paramilitary demobilization process in 2007.³⁰ More recently, the National Police claimed that in 2010 there were 3749 members,³¹ while Indepaz asserted that there were

23. GONZALO SÁNCHEZ G. ET AL., GRUPO DE MEMORIA HISTÓRICA, LA MASACRE DE EL SALADO: ESA GUERRA NO ERA NUESTRA 24-28, 48 (2009), available at http://www.centrodememoriahistorica.gov.co/descargas/informes2009/informe_la_masacre_de_el_salado.pdf.

24. L. 782, diciembre 23, 2002, DIARIO OFICIAL [D.O.] (Colom.); L. 975, julio 25, 2005, DIARIO OFICIAL [D.O.] (Colom.).

25. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, POLÍTICA INTEGRAL DE LUCHA CONTRA LAS BANDAS CRIMINALES (BACRIM) 1 (2011) (Colom.) (reporting the demobilization of 31,671 paramilitaries).

26. See HUMAN RIGHTS WATCH, PARAMILITARIES' HEIRS: THE NEW FACE OF VIOLENCE IN COLOMBIA 5-6, 19-20, 28 (2010) (Colom.); OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 2 (reporting that the groups have armed wings to protect themselves from other groups and the state); Int'l Crisis Grp., *Colombia's New Armed Groups*, LATIN AM. REP. NO. 20, May 2007, at 6, available at [http://www.crisisgroup.org/~media/files/latin-america/colombia/20_colombia_s_new_armed_groups.ashx](http://www.crisisgroup.org/~/media/files/latin-america/colombia/20_colombia_s_new_armed_groups.ashx).

27. Interview with Juanita Goebertus Estrada, Asesora, Oficina del Alto Asesor para la Seguridad Nacional, in Bogotá, Colom. (Jan. 11, 2012).

28. CAMILO GONZÁLEZ POSSO, INDEPAZ, V INFORME SOBRE NARCOPARAMILITARES EN 2010, at 3 (2011) (Colom.), available at http://www.indepaz.org.co/wp-content/uploads/2011/03/586_V-Informe-2010-INDEPAZ-15-03-2011.pdf.

29. Interview with Ariel Fernando Ávila Martínez, Coordinador, Observatorio del Conflicto Armado, Corporación Nuevo Arco Iris, in Bogotá, Colom. (Jan. 16, 2012).

30. Permanent Council, *Eighth Quarterly Report of the Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia*, at 6, CP/doc. 4176/07 (Feb. 14, 2007).

31. GONZÁLEZ POSSO, *supra* note 28, at 3. *But see* Int'l Crisis Grp., *Policy Briefing:*

approximately 7100 members that year (between 8200 and 14,500 if support networks were included).³²

By 2013, these groups had consolidated, by agreement and by forcible takeover,³³ into four or five principal groups, with the Urabeños³⁴ and the Rastrojos³⁵ clearly the most important.³⁶ By 2009, the combined military capacity of these groups exceeded that of Colom-

Improving Security Policy in Colombia, LATIN AM. REP. NO. 23, June 2010, at 9, available at <http://www.crisisgroup.org/~media/Files/latin-america/colombia/B23%20Improving%20Security%20Policy%20in%20Colombia.pdf> (asserting that the National Police reported 2580 members in 159 municipalities and 18 departments, presumably in late 2009 or early 2010); Mauricio Romero Vidal & Angélica Arias Ortiz, *A diez años del inicio del Plan Colombia: Los herederos de las AUC, la geografía del narcotráfico y la amenaza de nuevos carteles*, 16 ARCANOS 4, 13 (2011) (Colom.) (asserting that the National Police reported neoparamilitary presence in 152 municipalities across 20 departments for 2010) (citing Intervención de General Naranjo, Director de la Policía Nacional, Conversatorio, *Desafíos criminales y acción del Estado* (Jan. 25, 2011)).

32. GONZÁLEZ POSSO, *supra* note 28, at 3. However, DAS claimed there were only 2162 members. Vidal & Ortiz, *supra* note 31 (citing *Yamid Amat entrevista a Director del DAS*, EL TIEMPO (July 3, 2010) (Colom.), <http://www.eltiempo.com/archivo/documento/CMS-7787693>).

33. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 2; Interview with Carlos Andrés Prieto, Coordinador, Área de Dinámicas del Conflicto y Negociaciones de Paz, Fundación Ideas para la Paz, in Bogotá, Colom. (Jan. 11, 2012).

34. This group formed directly from the forces of the demobilized Elmer Cardenas Bloc of the AUC in the Urabá, Antioquia region of Colombia. Daniel Rendón (“Don Mario”)—who did not demobilize and is the brother of former Elmer Cárdenas Bloc Commander Freddy Rendón—founded the group. HUMAN RIGHTS WATCH, *supra* note 26, at 33, 69. In 2012, they had some presence in as many as 23 different departments and 218 municipalities, primarily in northern Colombia. INSTITUTO DE ESTUDIOS PARA EL DESSARROLLO Y LA PAZ (INDEPAZ), VIII INFORME SOBRE GRUPOS NARCOPARAMILITARES 4 (2013) (Colom.) [hereinafter INDEPAZ, VIII INFORME], available at <http://www.indepaz.org.co/wp-content/uploads/2013/08/Informe-VIII-Indepaz-final.pdf>.

35. The Rastrajos emerged from the military division of the North of the Valley drug cartel, but it includes a large number of former AUC fighters. Originally led by Wilber Varela of the North of the Valley cartel, the Rastrojos was not permitted to participate in the AUC demobilization because the government considered it to be a criminal organization. Instead, it used the demobilization as a chance to expand, such as when it moved into Nariño in 2005 after the local paramilitary bloc demobilized. HUMAN RIGHTS WATCH, *supra* note 26, at 33-34; Int’l Crisis Grp., *supra* note 26, at 7, 12-13; Vidal & Ortiz, *supra* note 31, at 23. In 2012, they had some presence in as many as 24 departments and 236 municipalities. INDEPAZ, VIII INFORME, *supra* note 34, at 4.

36. INSTITUTO DE ESTUDIOS PARA EL DESSARROLLO Y LA PAZ (INDEPAZ), VII INFORME SOBRE PRESENCIA DE GRUPOS NARCOPARAMILITARES EN EL 2011, at 1, 4 (2012) (Colom.) [hereinafter INDEPAZ, VII INFORME], available at http://www.indepaz.org.co/wp-content/uploads/2012/03/722_VII-Informe-presencia-narcoparamilitarismo-2011-INDEPAZ.pdf; Sofía León Oñate, *Se Acabó la Primera Generación de los Neoparamilitares, ¿Qué Sigue?*, 18 ARCANOS 2, 2-3 (2013) (Colom.); *En Colombia quedan cinco bandas criminales: general León Riaño*, EL PAÍS (Sept. 25, 2012) (Colom.), <http://www.elpais.com.co/elpais/judicial/noticias/general-riano-afirma-capturado-jefe-paisas-sera-reemplazado> (reporting a statement by the National Police Director); Pacho Escobar, *El Estado no ha podido con las Bacrim y ganan “Los Urabeños,”* ARCO IRIS (Mar. 7, 2013) (Colom.), <http://www.arcoiris.com.co/2013/03/el-estado-no-ha-podido-con-las-bacrim-y-ganan-los-urabenos>; Interview with Juanita Goebertus Estrada, Asesora, Oficina del Alto Asesor para la Seguridad Nacional, in Bogotá, Colom. (Dec. 23, 2011).

bia's FARC rebels, executing double the total number of militant actions.³⁷ During the period from 2006 to 2008, 55 percent of reported neoparamilitary group activities were offensive actions, 26 percent were threats, and only 12 percent were combat with public forces.³⁸ Indepaz indicated that the groups were present in 409 municipalities in 31 departments during 2012,³⁹ while Nuevo Arco Iris found neoparamilitaries to be present in 337 municipalities.⁴⁰ The national police, in turn, claimed the groups were active in only 118 municipalities in 2012, down from 159 in 2010, while also asserting that the number of members had increased to 4170 members from 3749 members.⁴¹

While local units of the groups are more structured and hierarchical than the national-level groups, the neoparamilitary groups generally share a moderate degree of organization.⁴² In rural regions, they are hierarchically structured to permit "direct combat and coordinated military actions," while in urban regions they use local gangs to exercise violence on their behalf.⁴³ Beyond local organizational patterns, neoparamilitary groups have substantial regional and national organization, with the Urabeños currently more centralized than the Rastrojos.⁴⁴ As the early 2012 armed or enforced strike (*paro armado*) indicates, the Urabeños have the capacity to take substantial coordinated actions at least at the regional level, but possibly more broadly.⁴⁵ They effectively forced all the businesses in the affected areas, including the major coastal city of Santa Marta, to shut

37. Mauricio Romero & Angélica Arias, *Sobre paramilitares, neoparamilitares y afines: Crecen sus acciones, ¿qué dice el gobierno?*, 15 ARCANOS 34, 34-36 (2010) (Colom.).

38. *Id.* at 38.

39. INDEPAZ, VIII INFORME, *supra* note 34, at 2. According to Indepaz, the Defensora del Pueblo (Public Defender) reported successor group presence in 188 municipalities and 23 departments for 2010, while DAS reported their presence in only 54 municipalities and claimed there were only 2162 members. GONZÁLEZ POSSO, *supra* note 28, at 3; Vidal & Ortiz, *supra* note 31, at 4, 13. The Observatorio del Conflicto Armado de la Corporación Nuevo Arco Iris reported that in 2010 neoparamilitaries were present in 226 municipalities across 28 departments. *Id.*

40. Oñate, *supra* note 36, at 13; Pacho Escobar, *Los carteles neoparamilitares que mandan en Colombia*, ARCO IRIS (July 3, 2013) (Colom.), <http://www.arcoiris.com.co/2013/03/los-carteles-neoparamilitares-que-mandan-en-colombia/>.

41. INDEPAZ, VIII INFORME, *supra* note 34, at 3.

42. Interview with Ariel Fernando Ávila Martínez, *supra* note 29. According to Ávila, the neoparamilitaries have considered branding important in order to facilitate negotiations with the government and to open the possibility of a future demobilization. Despite the need to establish a brand, the groups generally do not wear uniforms or any sort of distinctive emblem, although they occasionally wear uniforms in highly contested regions, such as in Córdoba and Antioquia. Some neoparamilitary groups have even published and distributed operational manuals of sorts, including guidelines on compliance with International Humanitarian Law. *Id.*; Interview with Juanita Goebertus Estrada, *supra* note 36.

43. *See, e.g.*, Oñate, *supra* note 36, at 5; García, *supra* note 1, at 11, 16.

44. Interview with Ariel Fernando Ávila Martínez, *supra* note 29.

45. *Los 'Urabeños' muestran su poder regional*, SEMANA (Jan. 6, 2012) (Colom.), <http://www.semana.com/nacion/urabenos-muestran-su-poder-regional/169971-3.aspx>.

down without firing a single shot.⁴⁶ The ICRC determined that the organization of the Urabeños and the Rastrojos was sufficient to render them parties to Colombia's internal armed conflict.⁴⁷ At the end of 2012, the Defensor del Pueblo, a principal public official responsible for protecting human rights in Colombia, publicly declared that the neoparamilitary groups have sufficient command authority and structure to constitute illegal armed groups under humanitarian law.⁴⁸

B. *Business and Violence*

Either in pursuit of their illegal businesses, or to promote other interests, the groups have committed wide-ranging acts of violence against the civilian populace of Colombia, in both rural and urban regions.⁴⁹ The primary economic focus of neoparamilitaries is on controlling the drug trade—primarily the manufacturing and distribution of cocaine, but also control of coca farming—and the illegal mining sector, with territorial presence and control emphasizing the areas important for these activities.⁵⁰ In their territories, they engage in widespread extortion, in what government officials have referred to as “administering the territory,”⁵¹ a form of unofficial taxation of the local population.⁵² Importantly, they have also violently protected

46. *Id.*

47. Int'l Comm. of the Red Cross, *supra* note 6, at 3. Other organizations had indicated that the ERPAC also had sufficient structure to be a party to the armed conflict. HUMAN RIGHTS WATCH, *supra* note 26, at 9; Int'l Crisis Grp., *Dismantling Colombia's New Illegal Armed Groups: Lessons from a Surrender*, LATIN AM. REP. NO. 41, June 2012, at 2 (strongly implying that ERPAC and other groups should be considered parties to the armed conflict). Even ex-president Uribe has supported the determination that the neoparamilitary groups are parties to the conflict. See Int'l Crisis Grp., *supra*, at 2.

48. 'Bandas criminales deben ser catalogadas como grupos armados ilegales,' EL TIEMPO (Nov. 13, 2012) (Colom.), http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12376523.html; Diana C. Durán, *Bacrim, más que delincuentes*, EL ESPECTADOR (Nov. 14, 2012) (Colom.), <http://www.elespectador.com/noticias/judicial/articulo-387073-bacrim-mas-delincuentes>.

49. HUMAN RIGHTS WATCH, *supra* note 26, at 6; Codhes, *Incremento en vulneraciones a los derechos humanos: El desplazamiento Masivo y la Situación Indígena*, BOLETÍN DE LA CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO, no. 80, Dec. 2012, at 6-7 (Ecuador).

50. HUMAN RIGHTS WATCH, *supra* note 26, at 28; Int'l Crisis Grp., *supra* note 31, at 9-10; Oñate, *supra* note 36, at 12; Angélica Arias Ortiz, *Las Bacrim retan a Santos*, 17 ARCANOS 4, 24-27 (2012) (Colom.); Pacho Escobar, *El Estado no tiene una política seria frente a las Bacrim*, ARCO IRIS (Mar. 7, 2013) (Colom.), <http://www.arcoiris.com.co/2013/03/el-estado-no-tiene-una-politica-seria-frente-a-las-bacrim>; Interview with Ariel Fernando Ávila Martínez, *supra* note 29 (mentioning extortion, illegal mining, narcotrafficking both internal and external, and contraband gasoline).

51. Interview with Juanita Goebertus Estrada, *supra* note 36.

52. *Id.*; HUMAN RIGHTS WATCH, *supra* note 26, at 87.

possession of property illicitly seized during the AUC era by intimidating or murdering those who would seek to reclaim it.⁵³

The acts of violence committed to further these businesses include murder, torture, massacres, disappearances, child recruitment, other forced recruitment, and sexual violence, as well as threats and extortion.⁵⁴ These acts take place in at least two distinct contexts. The first occurs in the process of securing territory for the purposes of conducting illegal activities, where the groups fight for control of prime terrain with other groups.⁵⁵ These conflicts can leave non-members caught in the crossfire, mistakenly targeted, or intentionally targeted for cooperating with rival neoparamilitary groups. The second occurs in the administration of a territory under the group's control, as part of an effort to generate a social order conducive to their illegal activities.⁵⁶ This administration involves both maintaining power over the residents through threats or attacks as well as subjecting them to extortion and other crimes in order to economically benefit from control of the territory.⁵⁷ Common targets for violence include unionists, human rights defenders, and AUC victims asserting their rights.⁵⁸

53. See *Los están matando*, SEMANA (Mar. 14, 2009) (Colom.), <http://www.semana.com/nacion/articulo/los-estan-matando/101043-3> (reporting that four leaders of victims groups were allegedly murdered by neoparamilitaries); *Ya son 45 los líderes de víctimas asesinados por reclamar sus tierras; en 15 días murieron tres*, EL TIEMPO (June 2, 2010) (Colom.), <http://www.eltiempo.com/archivo/documento/CMS-7737280> (noting that at least 45 victims of land dispossession seeking to assert their rights had been murdered between 2005 and June 2010).

54. U.N. High Comm'r for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, ¶¶ 32, 35, U.N. Doc. A/HRC/16/22 (Feb. 3, 2011); HUMAN RIGHTS WATCH, *supra* note 26, at 6-7; Int'l Crisis Grp., *supra* note 36, at 11; Oñate, *supra* note 36, at 11; Ortiz, *supra* note 50, at 8-9, 11-13, 17; Escobar, *supra* note 50; Interview with Juanita Goebertus Estrada, *supra* note 36 (mentioning homicide, collective homicide, and extortion).

55. Fundación Ideas para la Paz, *Dinámicas del conflicto armado en la guajira y su impacto humanitario*, ÁREA DE DINÁMICAS DEL CONFLICTO Y NEGOCIACIONES DE PAZ UNIDAD DE ANÁLISIS 'SIGUIENDO EL CONFLICTO', no. 61, June 2013, at 2, 13-14 (Colom.); Ortiz, *supra* note 50, at 27-28. For example, the Rastrojos used violence to take control of large swaths of Nariño, a department on the pacific coast in the southwest corner of Colombia, which, along with its capital Tumaco, has become a strategic location for the international drug trade. *Little Progress in Troubled Tumaco, Colombia*, WASH. OFF. ON LATIN AM. (May 24, 2011), http://www.wola.org/commentary/in_troubled_tumaco_little_progress. By 2011, the Rastrojos had consolidated control of this region, where both coca and poppy grow, which was reflected in much lower degree of violence. Interview with Juanita Goebertus Estrada, *supra* note 27.

56. See, e.g., García, *supra* note 1, at 10.

57. For example, the Urabeños have established militarized control of various areas, mostly near the Caribbean coast, through forces that resemble "private armies," particularly in the departments near the Atlantic coast. See HUMAN RIGHTS WATCH, *supra* note 26, at 69-70.

58. U.N. High Comm'r for Human Rights, *supra* note 54, ¶ 34; HUMAN RIGHTS WATCH, *supra* note 26, at 40. For example, the National Labor School found that 47 unionists were killed in 2009 and 52 in 2010. ESCUELA NACIONAL SINDICAL, INFORME NACIONAL DE COYUNTURA ECONÓMICA, LABORAL Y SINDICAL EN 2010-2011: PESE AL CRECIMIENTO

However, the groups also target ordinary citizens, such as those involved in contraband, security guards, and neighborhood councils, as well as those who are apparently collaborating with rival groups or who simply happen to be in a conflict zone.⁵⁹

The consequences of these actions are grave. Neoparamilitary groups are now the leading cause of human rights and humanitarian law violations in Colombia, committing between 30 and 50 percent of all abuses,⁶⁰ and almost all victims of their unilateral actions are civilians.⁶¹ Between 2009 and 2010, there was approximately a 40 percent increase in the number of massacres—from around 27 to around 38—which the groups used to secure territory and purge their organizations.⁶² The number of massacres per year remained roughly constant in 2011⁶³ and was complemented by a steady stream of murders.⁶⁴ During 2011, the violence from the neoparamilitaries was particularly notable in Córdoba, where fighting among the groups produced a substantial number of homicides, massacres, and forced displacements.⁶⁵ The groups also caused a large part of new internal displacement, reportedly responsible for 45 percent⁶⁶ of the 280,041 persons displaced in 2010 from the armed conflict or political and social violence.⁶⁷

ECONÓMICO, NO MEJORA LA SITUACIÓN LABORAL DEL PAÍS 8 (2011) (Colom.), available at <http://www.ddhh-colombia.org/html/noticias%20sindicales/coyunturalaboral09052011.pdf>. Additionally, between January 2007 and March 2009, the neoparamilitaries assassinated 59 leaders of social organizations. Romero & Arias, *supra* note 37, at 39.

59. U.N. High Comm'r for Human Rights, *supra* note 54, ¶ 34; HUMAN RIGHTS WATCH, *supra* note 26, at 45.

60. CINEP, *supra* note 2, at 3, 10-11; Cawley, *supra* note 2.

61. See, e.g., García, *supra* note 1, at 10.

62. U.N. High Comm'r for Human Rights, *supra* note 54, ¶ 32 (“Of particular concern is the drastic increase in massacres (40 per cent), in the context of violent disputes among and within these groups.”) “By November, the Presidential Programme for Human Rights had recorded 38 massacres with 179 victims. In 2009, it recorded 27 massacres with 139 victims.” *Id.* at n.12.

63. OBSERVATORIO DERECHOS HUMANOS (DDHH) Y DERECHO INTERNACIONAL HUMANITARIO (DIH), CIFRAS SITUACIÓN DE DERECHOS HUMANOS Y RESULTADOS OPERACIONALES DE LA FUERZA PÚBLICA: COMPARATIVO ENERO – OCTUBRE 2010 Y 2011, available at <http://quederechos.wordpress.com/2012/05/23/cifras-situacion-de-derechos-humanos-y-resultados-operacionales-de-la-fuerza-publica/> (for the period between January and October, there were 32 massacres in both 2010 and 2011, which annualized, predicts about 38 massacres).

64. Ortiz, *supra* note 50, at 17.

65. *Id.* at 31-35. For earlier episodes of violence in Córdoba related to neoparamilitaries, see Victor Negrete Barrera, *La situación de Córdoba requiere con urgencia un manejo integral* (2010), http://www.justf.org/files/primarydocs/Negrete_Cordoba.pdf.

66. GONZÁLEZ POSSO, *supra* note 28, at 9 (citing a figure from the Comisión de Seguimiento a la Situación de Desplazamiento).

67. Codhes, *¿Consolidación de qué?: Informe sobre desplazamiento, conflicto armado y derechos humanos en Colombia en 2010*, BOLETÍN INFORMATIVO DE LA CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO, no. 77, Feb. 15, 2011 (Colom.). *But see Reportes, Desplazamiento – Personas*, RED NACIONAL DE INFORMACIÓN: INFORMACIÓN AL

One of the most infamous events of 2011 in Colombia was the murder of two university biology students from Bogotá on vacation that January.⁶⁸ The crime sparked a manhunt for the members of the Urabeños thought responsible, with several detained for the crime over the succeeding days.⁶⁹ A particularly severe example during 2012 was the massacre of ten *campesinos* on a farm in Santa Rosa de Osos, Antioquia, possibly because the owner refused to make an extortion payment to the Rastrojos.⁷⁰ The attack was sufficiently severe to draw a rare direct comment from the U.N. Office of the High Commissioner for Human Rights in Colombia condemning the massacre.⁷¹

To take a few other concrete examples, in 2011 there were a series of massacres in southern Córdoba and northern Antioquia—an area known as the Nudo de Paramillo.⁷² Violence during March 2011 left ten or twelve bodies scattered across a property in rural Antioquia in the town of Cuturú, near the border with Córdoba, with authorities attributing responsibility to the Rastrojos.⁷³ In July 2011, five indigenous people of the Embera Zenú were murdered in Zaragoza, An-

SERVICIO DE LAS VICTIMAS (Colom.), http://rni.unidadvictimas.gov.co/?page_id=1629 (last updated Dec. 1, 2013) (reporting only 163,111 new displacements for the same year). However, the exact numbers are difficult to determine and those from official sources likely underestimate substantially the total displacement caused by neoparamilitaries. Ortiz, *supra* note 50, at 11-13.

68. Interview with Carlos Andrés Prieto, *supra* note 33 (noting that this event served as an alarm bell for the national government).

69. *Cae autor intelectual de crimen de estudiantes*, EL TIEMPO (Feb. 17, 2011) (Colom.), <http://www.eltiempo.com/archive/document/CMS-8869316>; *Capturan tercer implicado en asesinato de estudiantes de universidad Los Andes*, EL ESPECTADOR (Feb. 16, 2011) (Colom.), <http://www.elespectador.com/noticias/judicial/articulo-251273-capturan-tercer-implicado-asesinato-de-estudiantes-de-universidad>; *Mandos bajos de bandas criminales serían los asesinos de los dos biólogos bogotanos*, EL HERALDO (Feb. 15, 2011) (Colom.), <http://www.elheraldo.co/region/mandos-bajos-de-bandas-criminales-serian-los-asesinos-de-los-dos-biologos-bogotanos>.

70. *Aumenta a \$150 millones recompensa por masacre de Santa Rosa de Osos*, EL TIEMPO (Nov. 9, 2012) (Colom.), http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12369611.html; *Masacre en Santa Rosa de Osos*, EL ESPECTADOR (Nov. 8, 2012) (Colom.), <http://www.elespectador.com/noticias/judicial/masacre-santa-rosa-de-osos-imagen-385976>.

71. *Oficina de la ONU para los Derechos Humanos condena masacre de 10 personas en Santa Rosa de Osos, Antioquia*, LA AGENCIA DE LA ONU PARA LOS REFUGIADOS (Nov. 8, 2012) (Colom.), available at <http://www.acnur.org/t3/noticias/noticia/oficina-de-la-onu-para-los-derechos-humanos-condena-masacre-de-10-personas-en-santa-rosa-de-osos-antioquia/>.

72. In prior years, the Rastrojos had also committed severe violations of human rights as part of the consolidation, protection, and administration of its territory. The group regularly committed murder and forced displacement, as well as threats and extortion to preserve social control and to generate income. HUMAN RIGHTS WATCH, *supra* note 26, at 80.

73. *Investigan masacre de 10 personas en el Bajo Cauca antioqueño*, EL ESPECTADOR (Mar. 14, 2011) (Colom.), <http://www.elespectador.com/print/256761>; Gudilfredo Avendaño Méndez, *Guerra de bandas, tras asesinato de 12 personas*, EL TIEMPO (Mar. 15, 2011) (Colom.), <http://www.eltiempo.com/archivo/documento/MAM-4447248>.

tioquia—near the border with the Córdoba department—also presumably by the Rastrojos.⁷⁴ The August 2011 massacre in Las Pailas—attributed to the Rastrojos and the Paisas—left four peasants, apparently uninvolved in criminal activity, dead, and two others disappeared in a small rural town in the south of Córdoba.⁷⁵ Over one hundred families were temporarily displaced when they fled the violence.⁷⁶

This pattern continued in 2012. A group of five men, the youngest of which was seventeen years old, were supposedly murdered by the Gaitanistas subgroup of the Urabeños in Remedios, Antioquia in the middle of a June night, to be found the next morning by people going to work.⁷⁷ Also in June, the Urabeños allegedly massacred four family members in Arroyón Arriba, Córdoba, apparently because of one son's involvement in illegal activities.⁷⁸ Another family was massacred in Campo Bello, Nariño, with the parents and a child of three years dead and the other child of five years wounded.⁷⁹ In October, a group of ten members of the Urabeños allegedly massacred a father and three sons in Roldanillo, Valle del Cauca, all of whom were apparently day laborers.⁸⁰ Later the same month, the Urabeños mur-

74. *Cinco indígenas fueron asesinados en Antioquia presuntamente por exparamilitares*, VANGUARDIA (July 1, 2011) (Colom.), [http://www.vanguardia.com/historico/110956-cinco-indigenas-fueron-asesinados-en-antioquia-presuntamente-por-exparami](http://www.vanguardia.com/historico/110956-cinco-indigenas-fueron-asesinados-en-antioquia-presuntamente-por-exparami; Defensor del Pueblo denunció homicidios de 5 indígenas embera-zenú); *Defensor del Pueblo denunció homicidios de 5 indígenas embera-zenú*, EL TIEMPO (July 1, 2011) (Colom.), http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-9778965.html.

75. *Bandas criminales, autoras de la masacre en Tierralta*, EL UNIVERSAL (Aug. 9, 2011) (Colom.), <http://www.eluniversal.com.co/print/117004>.

76. *Después de la masacre, habitantes regresan a Las Pailas, Córdoba*, EL HERALDO (Aug. 23, 2011) (Colom.), <http://www.elheraldo.co/c-rdoba/despu-s-de-la-masacre-habitantes-regresan-a-las-pailas-34714>.

77. Rodrigo Martínez Arango, *Atribuyen a "Urabeños" masacre de Remedios*, EL COLOMBIANO (June 4, 2012) (Colom.), [http://www.elcolombiano.com/BancoConocimiento/A/atribuyen_a_urabenos_masacre_de_remedios/atribuyen_a_urabenos_masacre_de_remedios.asp](http://www.elcolombiano.com/BancoConocimiento/A/atribuyen_a_urabenos_masacre_de_remedios/atribuyen_a_urabenos_masacre_de_remedios.asp; Masacre de cinco personas en Antioquia sería obra de 'Los Urabeños'); *Masacre de cinco personas en Antioquia sería obra de 'Los Urabeños'*, EL TIEMPO (June 4, 2012) (Colom.), <http://www.eltiempo.com/archivo/documento/CMS-11919988>.

78. *Identifican víctimas de masacre en Córdoba*, EL HERALDO (June 12, 2012) (Colom.), [http://www.elheraldo.co/region/identifican-victimas-de-masacre-en-cordoba-70831](http://www.elheraldo.co/region/identifican-victimas-de-masacre-en-cordoba-70831; Masacre de Arroyón Arriba no quedará impune: autoridades); *Masacre de Arroyón Arriba no quedará impune: autoridades*, EL MERIDIANO DE CÓRDOBA (June 15, 2012) (Colom.), [http://www.elmeridianodecordoba.com.co/index.php?option=com_k2&view=item&id=5405:masacre-de-arroy%C3%B3n-arriba-no-quedar%C3%A1-impune-autoridades&Itemid=120](http://www.elmeridianodecordoba.com.co/index.php?option=com_k2&view=item&id=5405:masacre-de-arroy%C3%B3n-arriba-no-quedar%C3%A1-impune-autoridades&Itemid=120; Masacre fue retaliación entre Urabeños: Policía); *Masacre fue retaliación entre Urabeños: Policía*, EL UNIVERSAL (June 15, 2012) (Colom.), <http://www.eluniversal.com.co/print/163712>.

79. *Bacrim masacra a una familia*, HSB NOTICIAS (July 30, 2012) (Colom.), <http://www.hsbnoticias.com/vernoticia.asp?wplaca=5626>.

80. *Asesinados cuatro miembros de una familia en el Valle*, EL TIEMPO (Oct. 18, 2012) (Colom.), [http://www.eltiempo.com/archivo/documento/CMS-12314531](http://www.eltiempo.com/archivo/documento/CMS-12314531; Atribuyen a 'Los Urabeños' masacre de cuatro personas en Roldanillo); *Atribuyen a 'Los Urabeños' masacre de cuatro personas en Roldanillo*, EL PAÍS (Oct. 18, 2012) (Colom.), [http://www.elpais.com.co/elpais/judicial/noticias/asesinados-hombre-y-sus-tres-hijos-roldanillo](http://www.elpais.com.co/elpais/judicial/noticias/asesinados-hombre-y-sus-tres-hijos-roldanillo; Mueren 4 por guerra entre 'Rastrojos' y 'Urabeños'); *Mueren 4 por guerra entre 'Rastrojos' y 'Urabeños'*, EL NUEVO SIGLO (Oct. 18, 2012) (Colom.), <http://www.elnuevosiglo.com.co/articulos/10-2012-mueren-4-por-guerra-entre-rastrojos-y-urabe%C3%B1os.html>.

dered three miners in Segovia, Antioquia, where they were apparently seeking employment.⁸¹

Beyond the sheer number of mass murders, the particular methods used have often been quite disturbing. In late July 2011, the police attributed the murder of three cousins in San Bernardo del Viento, Córdoba to specific members of the Urabeños⁸² and later accused an Urabeños commander of responsibility.⁸³ Armed men took the three cousins from their beds at dawn, bound them, and severely beat them while the rest of the people in the town remained in their homes.⁸⁴ When the townspeople later emerged from their homes to see what had happened, they discovered their bodies on a local bridge, with one having been decapitated.⁸⁵ The Urabeños committed similarly grisly acts in September 2012, when the tortured bodies of three men, two of which had been decapitated, initially appeared in Montería, Córdoba.⁸⁶

C. State Response to the Neoparamilitaries

The Colombian National Security Council in 2011 assigned responsibility for addressing the neoparamilitary (calling them Bacrim) problem to both the military and to the police, in a shift from the prior policy that gave primary responsibility only to the police.⁸⁷ Ad-

81. *Asesinaron a tres mineros que buscaban trabajo en Segovia*, EL COLOMBIANO (Oct. 28, 2012) (Colom.), http://www.elcolombiano.com/BancoConocimiento/A/asesinaron_a_tres_mineros_que_buscaban_trabajo_en_segovia/asesinaron_a_tres_mineros_que_buscaban_trabajo_en_segovia.asp.

82. *Masacrados tres primos en San Bernardo del Viento*, EL HERALDO (July 29, 2011) (Colom.), <http://www.elheraldo.co/judicial/masacrados-tres-primos-en-san-bernardo-del-viento-31380>.

83. *Cayó autor de masacre e San Bernardo, uno de los más buscados en Córdoba*, EL HERALDO (Aug. 11, 2011) (Colom.), <http://www.elheraldo.co/judicial/cay-autor-de-masacre-e-san-bernardo-uno-de-los-m-s-buscados-en-c-rdoba-33117>.

84. *Torturan y asesinan a tres campesinos en San Bernardo*, EL UNIVERSAL (July 29, 2011) (Colom.), <http://www.eluniversal.com.co/monteria-y-sincelejo/sucesos/torturan-y-asesinan-tres-campesinos-en-san-bernardo-35961>.

85. *Id.*

86. *Caso de decapitados de Montería: tres hipótesis rondan el horror*, EL UNIVERSAL (Sept. 18, 2012) (Colom.), <http://www.eluniversal.com.co/monteria-y-sincelejo/sucesos/caso-de-decapitados-de-monteria-tres-hipotesis-rondan-el-horror-91278>; *Surge nueva hipótesis del crimen*, EL MERIDIANO DE SUCRE (Sept. 19, 2012) (Colom.), <http://www.elmeridianodesucure.com.co/judicial/item/5584-surge-nueva-hipotesis-del-crimen>.

87. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 3. Prior to the February 2011 National Security Council decision, the National Police had the primary responsibility for combating the neoparamilitaries, with the Dirección de Carabineros y Seguridad Rural in charge of the issue. However, the Carabiniro had a limited territorial presence in many of the rural areas with the greatest amount of neoparamilitary activity, and some areas without any presence. Moreover, urban police had highly limited mandates, not requiring them to confront neoparamilitaries active in neighboring rural areas even though there was no police presence in those areas. HUMAN RIGHTS WATCH, *supra* note 26, at 94-95.

ditionally, it decided that it was the constitutional responsibility of not just the police, but also the military, to protect citizens against the neoparamilitaries.⁸⁸ However, the Council determined that, absent the need for self-defense or defense of others, neoparamilitaries should be dealt with using non-lethal force as a matter both of national policy and of humanitarian law.⁸⁹ The Council took the position that, as a matter of law, the neoparamilitaries are not parties to the Colombian non-international armed conflict, although it recognized that there was space for disagreement on this assessment, as the ICRC had determined that the Rastrojos and the Urabeños were parties.⁹⁰

The resulting strategy combined an emphasis on capturing and prosecuting neoparamilitary leaders while also engaging in a series of targeted security operations, called Troya.⁹¹ The original Plan Troya for Córdoba was announced in February 2012, just after the murders of the two university students. The official goal was to cut off funding to the neoparamilitaries by closing the main drug trafficking corridor through Córdoba, using a combination of the army, navy, air force, and police.⁹² This plan was quickly complemented with oth-

During this period, the military was permitted to assist the police in confronting the neoparamilitaries, but only on request to a military Advisory Group under the armed forces commander. Ministerio de Defensa Nacional, Directiva Permanente No. 208, §§ 3(b)(1)(b), 3(b)(6)(f) (2008). The Advisory Group, which became known as the Comité Ejecutivo, had the responsibility to decide which groups would be the objectives of military operations and what level of force would be used against those targets. *Id.* In 2009, it determined that the military could use lethal force against at least three of the neoparamilitary groups, as they constituted parties to the armed conflict. Interview with Juanita Goebertus Estrada, *supra* note 36. However, these policies underwent substantial change following current President Santos' exit from his then-position as Minister of Defense in May 2009. *Id.*

88. Interview with Juanita Goebertus Estrada, *supra* note 27.

89. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 3; *see also* Interview with Juanita Goebertus Estrada, *supra* note 36. For an interesting discussion of the applicable legal regime in moderately ambiguous circumstances and an analysis of a former Colombian approach, see Constantín von Groeben, *The Conflict in Colombia and the Relationship Between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces*, 16 J. CONFLICT & SECURITY L. 141 (2011).

90. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 4 (claiming the groups are not properly hierarchical, since the national commanders are unable to give orders to local units, with limited territorial control and capacity for sustained military operations). In addition, the National Security Council decided that the neoparamilitaries would not be eligible for demobilization. *Id.* at 3. However, victims of the groups would not be treated as victims of ordinary crime, but instead would be entitled to government humanitarian programs normally reserved for victims of armed conflict. Interview with Juanita Goebertus Estrada, *supra* note 36.

91. Oñate, *supra* note 36, at 3, 6-7.

92. *Así será 'Troya' contra las Bacrim*, EL TIEMPO (Feb. 7, 2011) (Colom.), <http://www.eltiempo.com/archivo/documento/MAM-4383001>; *Cuatro mil hombres ejection la 'Operación Troya,'* EL ESPECTADOR (Feb. 7, 2011) (Colom.), <http://www.elespectador.com/noticias/judicial/articulo-249375-cuatro-mil-hombres-ejection-operacion-troya>.

ers for similarly problematic regions: Troya Pacífico in May 2011⁹³ and Troya Chocó in July 2011.⁹⁴ A second round of Troya operations began with Operation Troya II in Córdoba in July 2012, with a new focus on illegal mining and extortion and increased use of criminal investigation and intelligence gathering.⁹⁵ To this was added a comparable operation for Northeastern Antioquia in October 2012⁹⁶ and Plan Troya Tayrona for the Magdalena department in November 2012.⁹⁷

The use of the Troya security operations has been complemented with a criminal justice approach focused on group leaders, but also frequently applied to other members. The Bacrim Unit of the Prosecutor's Office⁹⁸ has lead the effort to implement this criminal justice approach to combating the neoparamilitaries by closely coordinating with police and military actions. Through involvement in the planning stages of these operations, the Bacrim Unit has tried to assure that they strategically target those persons whose capture will be most helpful in dismantling the organizations. In many cases this has meant a focus on high value targets, often leaders of the various neoparamilitary groups, but sometimes including lower-level members who help the Unit develop intelligence and cases against superiors.⁹⁹ The Bacrim Unit has received increasing levels of resources to carry out this role: Law 1453 nearly tripled the number of prosecutors from the twenty-five in place in late 2011, to a total of seventy-three, and added approximately 100 judicial police investigators.¹⁰⁰

Following the decision to coordinate prosecution with security force actions, there was a substantial shift in the patterns of charging

93. *Presidente Santos lanzó Plan Troya en el Pacífico*, EL TIEMPO (May 5, 2011) (Colom.), <http://www.eltiempo.com/archivo/documento/MAM-4537557>.

94. *Crean nueva zona para combatir a las bacrim*, EL TIEMPO (July 26, 2011) (Colom.), <http://www.eltiempo.com/archivo/documento/MAM-4708579>.

95. *'Me ha faltado apersonarme de la seguridad en las regiones': Santos*, EL TIEMPO (July 7, 2012) (Colom.), http://www.eltiempo.com/politica/ARTICULO-WEB-NEW_NOTA_INTERIOR-12009572.html; *'Personalmente me ha faltado meterme más en la seguridad de cada región': Santos*, SEMANA (July 7, 2012) (Colom.), <http://www.semana.com/nacion/articulo/personalmente-ha-faltado-meterme-mas-seguridad-cada-region-santos/260807-3>.

96. *Mindefensa activa grupo especial para luchar contra la minería ilegal*, EL ESPECTADOR (Oct. 13, 2012) (Colom.), <http://www.elespectador.com/noticias/nacional/articulo-381089-mindefensa-activa-grupo-especial-luchar-contra-mineria-ilegal>; *Se combatirá la minería ilegal con 386 soldados y policías*, SEMANA (Oct. 15, 2012) (Colom.), <http://m.semana.com/nacion/articulo/se-combatira-mineria-ilegal-386-soldados-policias/266379-3>.

97. *'Plan Troya Tayrona' va contra las bacrim*, EL TIEMPO (Nov. 26, 2012) (Colom.), <http://www.eltiempo.com/archivo/documento/MAM-5845856>.

98. Officially entitled "Unidad Nacional de Decongestión y Apoyo Contra las Bandas Criminales."

99. Interview with Juanita Goebertus Estrada, *supra* note 27.

100. L. 1453, junio 24, 2011, DIARIO OFICIAL [D.O.] (Colom.); Interview with Juanita Goebertus Estrada, *supra* note 36; Interview with Government Official, in Bogotá, Colom. (Jan. 2012).

and convicting those alleged members of neoparamilitary groups captured by the public security forces.¹⁰¹ While between January and October 2010 only 53 percent of those captured as members of neoparamilitary groups were charged with conspiracy and only 12 percent were convicted, between January and October 2011 100 percent were charged with conspiracy and 47 percent were convicted.¹⁰² Although the Bacrim Unit increased the percentage of detained neoparamilitary group members who were charged and convicted during the first half of 2011, only 36 percent of all captures of alleged neoparamilitary group members were in cooperation with this unit.¹⁰³ However, while more than 13,000 neoparamilitary group members have reportedly been arrested since 2006, these arrests do not appear to have had a substantial effect on the security situation.¹⁰⁴ Instead, the approach has fragmented the national unity of the groups to some degree, while leaving them with much the same level of military capacity.¹⁰⁵

Despite official initiatives to combat neoparamilitaries, there are reasons to doubt whether all parts of the state security forces are actively and effectively opposing the neoparamilitaries. During the Uribe government, the military frequently failed to take actions against the neoparamilitaries despite having the opportunity, the capacity, and the general legal authority to do so. Although the military had not been authorized to use lethal force against a particular group unless it received explicit authorization or self-defense required such force, it had authorization to protect the civilian population in accordance with its constitutional duty.¹⁰⁶ Despite this, Human Rights Watch found that local military commanders at times asserted that the responsibility for combating the neoparamilitaries lay solely with the police.¹⁰⁷ Even though the military might have had

101. See Interview with Juanita Goebertus Estrada, *supra* note 36.

102. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 9; OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, ANÁLISIS DE LOS AVANCES: CIFRAS (2011) (the 2010 numbers are from PONAL – Seguridad Rural, while the 2011 numbers are from the Fiscalía).

103. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 102. While the national government does not closely oversee them, local prosecutors also commonly prosecute various crimes committed by members of the neoparamilitary groups. As of early 2012, there was no consolidated data about nationwide prosecutions that includes these local efforts nor has there been any specific effort to expand the local prosecutions. However, the government has tried to ensure that the expanded national Bacrim Unit will prosecute cases involving neoparamilitary group members. Interview with Juanita Goebertus Estrada, *supra* note 27.

104. Ortiz, *supra* note 50, at 8-9, 18-19 (citing General Oscar Naranjo, director of the national police, for the number of arrests).

105. Oñate, *supra* note 36, at 6-9.

106. HUMAN RIGHTS WATCH, *supra* note 26, at 94.

107. *Id.* at 96.

a significant presence in an area substantially exceeding that of the police, it would not necessarily have felt the need to take action to protect civilians.¹⁰⁸

Although both the police and the military now have official responsibility, elements of the military have resisted participating in the fight against the neoparamilitaries. In Córdoba, for example, despite the neoparamilitaries' extensive presence and violent actions, some parts of the military have allegedly been infiltrated by the groups and are reluctant to confront them.¹⁰⁹ But beyond allegations of infiltration, since February 2011 the military has resisted assuming responsibility for attending to the problem of neoparamilitaries. Some officers say that the military should not be involved in what is fundamentally a crime-control issue appropriately left to the police, particularly since the neoparamilitaries are not parties to the conflict and cannot be demobilized. Other officers claim they would like to fight the neoparamilitaries but that they must be allowed to use lethal force, particularly since the ICRC determined that some neoparamilitary groups are parties to the conflict.¹¹⁰

D. Corruption of State Officials

Efforts at combating the neoparamilitaries are hindered by extensive toleration of or collaboration with the groups by state officials at the local level, including police and military officers up to the rank of colonel.¹¹¹ There is widespread agreement among government officials and civil society representatives that the neoparamilitaries have succeeded in extensively corrupting members of many different state security forces, including the police, the military, the former Administrative Security Department (DAS), and the Prosecutor's Office, as well as political leaders at local and regional levels.¹¹²

The involvement has ranged from simply ignoring activities of a neoparamilitary group in a particular area to assisting in protecting and moving drug shipments.¹¹³ For example, police in Urabá (north-

108. *See id.*

109. Interview with Ariel Fernando Ávila Martínez, *supra* note 29.

110. Interview with Juanita Goebertus Estrada, *supra* note 27.

111. *Id.*; Interview with Juanita Goebertus Estrada, *supra* note 36.

112. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 10; Oñate, *supra* note 36, at 9-10; María del Rosario Arrázola, *Se abre capítulo bacrimpolítica*, EL ESPECTADOR (June 2, 2013) (Colom.), <http://www.elespectador.com/noticias/judicial/articulo-425485-se-abre-capitulo-bacrimpolitica>; Marguerite Cawley, *Accused Colombia Governor Highlights BACRIM Connections*, INSIGHT CRIME (May 26, 2013) (Colom.), <http://www.insightcrime.org/news-analysis/colombia-governor-bacrim-politics-guajira>; Escobar, *supra* note 36.

113. Elyssa Pachico, *Colombia's New Generation Drug Gangs: The Power to Corrupt*, INSIGHT CRIME (Aug. 15, 2011) (Colom.), <http://insightcrime.org/insight-latest-news/item/1401-colombias-new-generation-drug-gangs-the-power-to-corrupt>.

western Antioquia) have at times ignored the presence of the neoparamilitaries, letting them pass through towns or hold community meetings unmolested.¹¹⁴ In fact, the Inter-American Commission on Human Rights concluded that these groups were operating freely in parts of Chocó (near the border with Antioquia) with significant military presence.¹¹⁵

At the other extreme, the public security forces have also been found to collaborate more actively with the neoparamilitaries. In Urabá, the military, police, and prosecutors were reported to leave an area regularly in advance of operations by the Urabeños.¹¹⁶ There were similar accusations about the relation between public officials and the ERPAC in Meta, as well as other neoparamilitary groups in Nariño.¹¹⁷ In several recent events, active members of the military have been caught transporting drugs on behalf of neoparamilitary groups.¹¹⁸ Despite the range of corruption, perhaps the most serious example is the provision of information to the neoparamilitaries.¹¹⁹ For example, in 2008 the leader of ERPAC, alias Cuchillo, repeatedly evaded attempts at capture in Meta despite an extensive effort to locate him, including strong intelligence networks. The commonly accepted explanation is that he had links within the security forces that provided him with the information necessary to escape.¹²⁰

In recent years, the obvious extent of the links between members of security forces and the neoparamilitaries has become sufficiently severe as to provoke large-scale investigations and arrests. Following the murder of Rastrojos commander Angel de Jesus Pacheco in 2011, thought responsible for the previously-mentioned murders of ten or twelve individuals on a rural ranch in northern Antioquia, authorities received copies of his payroll records indicating massive payouts

114. HUMAN RIGHTS WATCH, *supra* note 26, at 101.

115. COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, INFORME SOBRE LA VISITA AL TERRENO EN RELACIÓN CON LAS MEDIDAS PROVISIONALES ORDENADAS A FAVOR DE LOS MIEMBROS DE LAS COMUNIDADES CONSTITUIDAS POR EL CONSEJO COMUNITARIO DEL JIGUAMANDÓ Y LAS FAMILIAS DEL CURBARADÓ, MUNICIPIO DE CARMEN DEL DARIÉN, DEPARTAMENTO DEL CHOCÓ, REPÚBLICA DE COLOMBIA ¶ 82 (Feb. 20, 2009), *available at* <http://www.cidh.org/countryrep/MPColombia2.20.09.sp.htm>.

116. HUMAN RIGHTS WATCH, *supra* note 26, at 99.

117. *Id.* at 102-03.

118. Oñate, *supra* note 36, at 9-10; Pacho Escobar, *El Estado no ha podido con las Bacrim y ganan "Los Urabeños,"* ARCO IRIS (Mar. 7, 2013) (Colom.), <http://www.arcoiris.com.co/2013/03/el-estado-no-ha-podido-con-las-bacrim-y-ganan-los-urabenos>; Interview with Juanita Goebertus Estrada, *supra* note 36.

119. Interview with Ariel Fernando Ávila Martínez, *supra* note 29.

120. Conflict Dynamics and Peace Negotiations Area, *supra* note 19, at 4 (reporting that alias Cuchillo escaped capture through official complicity); Interview with Carlos Andrés Prieto, *supra* note 33.

to state security officials.¹²¹ This event provoked a series of responses from national officials.¹²² That August the Minister of Defense, Rodrigo Rivera, confirmed that the Ministry was investigating members of the armed forces and the police for possible links to neoparamilitaries, with particular concern expressed about such links at the local level.¹²³ That same month the former National Police Director, General Oscar Naranjo, ordered an investigation into links between police in the Córdoba department and the Rastrojos,¹²⁴ having noted that 2011 was the worst year yet in terms of police corruption.¹²⁵

Currently, there is growing consensus that the neoparamilitaries pose a great risk of, and are likely in the process of, co-opting elected officials at different levels. To take a prominent recent example, the governor of Guajira, a Colombian department on the Atlantic coast, has been accused of working with neoparamilitaries.¹²⁶ The problem is likely more widespread: Nuevo Arco Iris reports that regional politicians frequently are attracted by the economic support the neoparamilitaries can provide for election campaigns.¹²⁷ In light of suspected links between neoparamilitaries and politicians, the Supreme Court of Colombia recently decided to expand its investigation of politicians with ties to the former paramilitaries to include those with ties to the neoparamilitaries.¹²⁸ The scrutiny has apparently already had some results—although the form of those results is not public—and has

121. *Los uniformados en la nómina del narco alias 'Sebastián': Integrantes de DAS, el Ejército y la Policía estarían al servicio del ex jefe de 'los Rastrojos,'* EL TIEMPO (Aug. 12, 2011) (Colom.), <http://www.eltiempo.com/archivo/documento/CMS-10141027>; Pachico, *supra* note 113. In January 2011 alone, the police Criminal Investigation Section (Sijín) in Bagre received 10 million pesos, the Army's Guala Atlantica 15 million, the local DAS 15 million, the city police in Cauca, Antioquia 30 million and the Cauca Sijín 35 million. *Id.*

122. *Mindefensa confirma que varios uniformados son investigados por posibles alianzas con bacrim,* EL COLOMBIANO (Aug. 2, 2011) (Colom.), http://www.elcolombiano.com/BancoConocimiento/P/por_posibles_alianzas_con_bacrim_varios_uniformados_son_investigados/por_posibles_alianzas_con_bacrim_varios_uniformados_son_investigados.asp.

123. *Id.*

124. *General Naranjo ordenó esclarecer supuestos vínculos de policías con Los Rastrojos,* EL HERALDO (Aug. 3, 2011) (Colom.), <http://www.elheraldo.co/regi-n/general-naranjo-orden-esclarecer-supuestos-v-nculos-de-polic-con-los-rastrajos-32037>. By early August, these new initiatives had resulted in the arrest of two or three soldiers and six police in northern Antioquia for alleged involvement with the Rastrojos. *Capturan siete policías y tres militares por nexos con Los Rastrojos,* EL ESPECTADOR (Aug. 4, 2011) (Colom.), <http://www.elespectador.com/noticias/judicial/capturan-siete-policias-y-tres-militares-nexos-los-rast-articulo-289355>; *Correos, vínculo de uniformados con las bacrim,* EL TIEMPO (Aug. 4, 2011) (Colom.), http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-10094909.html.

125. Interview with Juanita Goebertus Estrada, *supra* note 36.

126. Cawley, *supra* note 112.

127. Escobar, *supra* note 36; cf. Oñate, *supra* note 36.

128. Arrázola, *supra* note 112.

expanded to include a dedicated group of auxiliary magistrates as well as fifty to one hundred investigators from the national prosecutor's office.¹²⁹

III. RESPONSIBILITY FOR INADEQUATE PROTECTION

This part will present the current responsibility rule for state failure to protect that has emerged in the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights.¹³⁰ The exposition will focus on the explicit rule these courts have developed, despite the fact that they have often applied the rule flexibly, not following its literal terms. It will explain how the rule establishes a threshold requirement for court review as well as a substantive standard for state protection efforts. The rule will then be applied to the situation of neoparamilitaries in Colombia, arguing that under the literal terms of the rule, state responsibility for failure to protect against these groups is excluded under many circumstances. While the international jurisprudence allows for state responsibility for failure to protect in response to violations of various rights, including to personal integrity and freedom,¹³¹ this part will focus on the review requirement developed for the right to life in particular.

129. *Id.*

130. For an extensive overview of the international jurisprudence concerning state responsibility based on actions of non-state actors, see DAVID L. ATTANASIO, *MANUAL DE JURISPRUDENCIA INTERNACIONAL: RESPONSABILIDAD ESTATAL FRENTE A LOS ACTOS DE GRUPOS VIOLENTOS PRIVADOS* (forthcoming 2014). For a briefer introduction to the topic, not limited to failure to protect, see Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 *BUFF. HUM. RTS. L. REV.* 21 (2005). Felipe Medina discusses parts of the Inter-American Court jurisprudence in Felipe Medina Ardila, *La responsabilidad internacional del Estado por actos de particulares: análisis jurisprudencial interamericano*, in *DEBATE INTERAMERICANO*, VOL. 1, at 83 (Juana Inés Acosta López et al. eds., 2009). Also helpful are analyses of international state responsibility standards surrounding the International Court of Justice's *Genocide* decision. See Alberto Alvarez-Jimenez, *International State Responsibility for Acts of Non-State Actors: The Recent Standards Set by the International Court of Justice in Genocide and Why the WTO Appellate Body Should Not Embrace Them*, 35 *SYRACUSE J. INT'L L. & COM.* 1 (2007); Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 *EUR. J. INT'L L.* 649 (2007); Marko Milanović, *State Responsibility for Genocide*, 17 *EUR. J. INT'L L.* 553 (2006); see also Stephanie Fariior, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 *AM. SOC'Y INT'L L. PROC.* 299 (1998); Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 *EUR. J. INT'L L.* 989 (2008); Alexis P. Kontos, *"Private" Security Guards: Privatized Force and State Responsibility Under International Human Rights Law*, 4 *NON-ST. ACTORS & INT'L L.* 199 (2004).

131. See, e.g., *Storck v. Germany*, 2005-V Eur. Ct. H.R. 111, ¶ 102 (for the right to liberty); *Z and Others v. United Kingdom*, 2001-V Eur. Ct. H.R. 1, ¶ 73 (for the right to personal integrity).

A. Current Responsibility Rule for Failure to Protect

According to the responsibility rule that the European Court of Human Rights and the Inter-American Court of Human Rights apply, the state is responsible for a violation of the right to life as a result of acts of private persons or entities when: (i) the acts result in the victim's death, (ii) the authorities know or should know that there is a real and immediate risk to the life of the victim or members of a group to which the victim belongs, (iii) they do not take reasonable measures to prevent the risk from materializing, and (iv) the omitted measures would have had a reasonable possibility of preventing the victim's death.¹³² The two courts appear to differ over whether this rule merely establishes responsibility or whether it additionally renders the private person or entity's action attributable to the state.¹³³ However, they are in general agreement that the responsibility is founded in the state's general obligation to safeguard, ensure, or secure the substantive right to life of those within the state's jurisdiction.¹³⁴

132. See *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998) (“[W]here there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person . . . it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”) (but not finding a violation of the right to life); see also *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006); *Valle Jaramillo v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 90 (Nov. 27, 2008).

133. See, e.g., *Valle Jaramillo*, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 92.

134. The three major treaties establishing basic civil and political rights establish general state obligations requiring that everyone within either its jurisdiction or territory enjoys their treaty rights. See American Convention on Human Rights “Pact of San Jose, Costa Rica” art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention on Human Rights art. 1, Nov. 4, 1950, C.E.T.S. No. 5 (entered into force Sept. 3, 1953). The European Court of Human Rights has based responsibility for failure to protect, when life was at issue, on Article 2(1) of the European Convention, which requires states “to take appropriate steps to safeguard the lives of those within its jurisdiction.” See, e.g., *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 115. The Inter-American Court, in turn, has founded responsibility for failure to protect against violations of the right to life on the combination of American Convention Article 1(1), establishing the state duty to ensure the convention rights, and Article 4(1), establishing the right to life. See, e.g., *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 105-06. The United Nations Human Rights Committee has decided that the International Covenant on Civil and Political Rights requires that states take protective measures, at least with respect to life, via Article 6, defining the right to life, sometimes in conjunction with Article 2, establishing the state obligation to ensure the Covenant rights. See, e.g., *Herrera Rubio v. Colombia*, Comm. No. 161/1983 (Nov. 2, 1987), U.N. Doc. Supp. No. 40 (A/43/40) at 190, ¶ 10.3 (1988); *Barbato v. Uruguay*, Comm. No. 84/1981 (Oct. 21, 1982), U.N. Doc. Supp. No. 40 (A/38/40) at 124, ¶ 9.2 (1983).

The first element of the responsibility rule constitutes a threshold requirement for court review of the efforts that the state took to protect. For the court to review protection efforts, there must have been a real and immediate risk, of which state officials knew or should have known, to the life of the individual.¹³⁵ The risk could be directed at some group, likely small, that included the victim and need not have singled out the victim in particular.¹³⁶

In contrast, the second element establishes substantive review standards for the particular efforts that the state took to protect the victims. In general terms, the efforts must be reasonable. Reasonable efforts to protect include implementing positive and specific operational measures in response to the particular risk and establishing a general system of protection for individuals' lives.¹³⁷ Operational measures are responsive to the particular risk facing a person and are not broad policies for addressing the risks in a society, so they could range from providing a bodyguard to investigating the threat.¹³⁸ In turn, the general system of protection will include an effective criminal justice system, capable of the "prevention, suppression, and sanctioning" of violations,¹³⁹ as well as other systems necessary for effective responses to risks.¹⁴⁰

B. Historical Development of the Responsibility Rule

State responsibility for failure to protect had something of a prehistory in the United Nations Human Rights Committee, which determined that a state could be responsible for failure to take measures to protect against violence from individuals or private entities, at least when the state is otherwise implicated in the violation. In an early decision, *Barbato v. Uruguay*, the Human Rights Committee determined that a state violates the Covenant when an inmate commits suicide or dies, at least if the authorities took no protective measures for an act or omission.¹⁴¹ Another early decision,

135. *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 116; *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124.

136. *Koku v. Turkey*, App. No. 27305/95, Eur. Ct. H.R. 1, ¶ 131 (2005); *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124.

137. See *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 116.

138. See *Barrios v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 124 (Nov. 24, 2011); *González v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 283 (Nov. 16, 2009); *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶ 76; *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 115; *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 139-40.

139. *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 115; cf. *González*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 285.

140. *González*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 285.

141. *Barbato v. Uruguay*, Comm. No. 84/1981 (Oct. 21, 1982), U.N. Doc. Supp. No. 40 (A/38/40) at 124, ¶ 9.2 (1983).

Herrera Rubio v. Colombia, stated that, under Article 6 in combination with Article 2, the State must “take specific and effective measures to prevent the disappearance of individuals” and, by implication, to prevent murder, in circumstances where soldiers were probably responsible.¹⁴²

However, responsibility for failure to protect blossomed in the international human rights courts in a line of cases that began with the Inter-American Court’s decision in *Velasquez Rodriguez*:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹⁴³

In this case, the Court was particularly concerned with preventing the state of Honduras from escaping responsibility for a practice of forced disappearance, where the practice itself concealed evidence of state responsibility. The European Court of Human Rights similarly adopted a state duty to protect and the possibility of responsibility for failures in *L.C.B. v. the United Kingdom*, which analyzed the scope of the right to life. Without finding the state responsible, it announced that these rights impose both positive and negative obligations, requiring the State “to take appropriate steps to safeguard the lives of those within its jurisdiction.”¹⁴⁴

The European Court of Human Rights refined the general principle—that states can be responsible for failure to protect—into the rule that both the European Court and the Inter-American Court currently apply, on the grounds that the enforceable obligation is not absolute but is limited to avoid excessive interference with the

142. *Herrera Rubio v. Colombia*, Comm. No. 161/1983 (Nov. 2 1987), U.N. Doc. Supp. No. 40 (A/43/40) at 190, ¶ 10.3 (1988) (but not clarifying whether the obligation is limited to actions of state authorities, given that it never takes a clear factual position).

143. *Velázquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988); see also *id.* ¶ 166 (“The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention . . .”).

144. *L.C.B. v. United Kingdom*, App. No. 23413/94, Eur. Ct. H.R. 1, ¶ 36 (1998) (establishing the positive obligation for the right to life but not finding a violation); see also *A. v. United Kingdom*, App. No. 25599/94, Eur. Ct. H.R. 1, ¶ 22 (1998) (establishing the positive obligation for the right to personal integrity); *Storck v. Germany*, 2005-V Eur. Ct. H.R. 111, ¶ 102 (“The State is therefore obliged to take measures providing effective protection of vulnerable persons . . .”) (establishing the positive obligation for the right to liberty).

state.¹⁴⁵ *Osman v. United Kingdom* established that the court-enforced state obligation to protect and any associated responsibility must take into account “the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.”¹⁴⁶ This judgment considered violence against a student’s family by a deranged teacher in the context of a generally law-abiding society where it was unreasonable to impose a broad state protective obligation. As a result, the Court limited the review of state protection efforts to circumstances in which there was a real and immediate risk to specific persons, and state officials knew or should have known of that risk.¹⁴⁷ The Inter-American Court adopted this rule and its underlying justification in the case of the *Pueblo Bello Massacre*, concerning the Colombian state’s failure to protect against a massacre by paramilitary groups.¹⁴⁸

C. Current Responsibility Rule and Protection Against MCOs

The current responsibility rule likely does not allow for court review of state protection efforts against much MCO violence, at least when it resembles that of the neoparamilitaries in Colombia. While state authorities in Colombia may sometimes have the knowledge required for review and responsibility, there is a significant range of situations in which they do not. Neoparamilitary groups have regularly co-opted officials at many levels of government through payments or other inducements, leaving a network of officials positively disposed toward these groups.¹⁴⁹ Some of these officials may have knowledge of or directly participate in illegal activities, including the

145. *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998) (“[S]uch an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”) (but not finding a violation of the right to life).

146. *Id.* In subsequent cases, the European Court required creation of a legislative and administrative framework that the State may not impose an impossible or disproportionate burden, reiterating an idea of *Osman*. *Budayeva v. Russia*, App. Nos. 11339/02, 21166/02, 11673/02, and 11343/02, Eur. Ct. H.R. 1, ¶ 135 (2008).

147. *See Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 116.

148. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006) (citing *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶¶ 62-63; *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶¶ 115-16); *see also* *Barrios v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶¶ 123-24 (Nov. 24, 2011); *González v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 280 (Nov. 16, 2009); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 155 (Mar. 29, 2006); *Valle Jaramillo v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 90 (Nov. 27, 2008); *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 188 (Aug. 24, 2010).

149. *See* OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 10.

commission of acts of violence. There are reports that in Urabá, Meta, and Nariño the public security forces have regularly left an area prior to actions by neoparamilitary groups, strongly indicating that state officials had knowledge of the impending actions.¹⁵⁰ If they did, their knowledge of the imminent acts of violence would likely be sufficient to fulfill this element for state responsibility.

However, even when neoparamilitaries have corrupted the government or security officials, the officials may not possess sufficient knowledge of impending violent acts to allow court review of state protection efforts to satisfy the current rule. Sometimes officials simply ignore neoparamilitary activity, letting them go about their business without any interference.¹⁵¹ Such tolerance does not by itself indicate that state officials have knowledge of particular future violent actions that the groups will commit. Other times, officials actively work with neoparamilitary groups to facilitate their illegal activities, such as by protecting and assisting with drug trafficking or by providing information that may enable them to avoid other law enforcement efforts.¹⁵² These forms of active involvement by themselves do not support the inference that the officials have access to information about impending violent actions, although providing neoparamilitaries with information to avoid law enforcement actions might constitute an independent violation of the state obligation to investigate and punish serious human rights violations.

Finally, security forces have reportedly failed to oppose or confront neoparamilitary groups who were active in the area of operations of the security forces. Even absent corruption, some elements of the military have taken the view that neoparamilitaries are a problem for the police to address, even when the military has a much more substantial presence in a region than the police.¹⁵³ At the same time, local police forces have on occasion failed to take measures to prevent neoparamilitary groups from operating in surrounding areas, sometimes advancing the explanation that they do not technically have responsibility for the area where the groups are operating. There is no indication that the security forces involved in these events have knowledge of impending violence.

Beyond the lack of specific knowledge of impending violence, the victims of neoparamilitaries often do not fall into any group with a particularly elevated risk to their lives. Certainly a person is more

150. HUMAN RIGHTS WATCH, *supra* note 26, at 99, 102.

151. *Id.*; COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *supra* note 115, ¶ 82.

152. Pachico, *supra* note 113; Interview with Ariel Fernando Ávila Martínez, *supra* note 29.

153. HUMAN RIGHTS WATCH, *supra* note 26, at 94-96; *see also* Interview with Juanita Goebertus Estrada, *supra* note 27; Interview with Ariel Fernando Ávila Martínez, *supra* note 29.

likely to be a victim if he or she falls into certain categories. In general, it is dangerous to be a leader of any sort of social movement or other group that appears to threaten the power of the neoparamilitaries or their allies. Labor leaders, human rights advocates, and victim's rights leaders have all been targeted by these organizations, making it dangerous to be at the head of any social movement in Colombia.¹⁵⁴ But the striking thing about the pattern of violence in contemporary Colombia is that it extends beyond these predictable and unfortunately normal targets. The violence has reached members of indigenous and afro-Colombian communities, even those not particularly active in promoting their rights, as well as ordinary *campesinos*.¹⁵⁵ It has even reached members of the Bogotá elite, such as the two university students murdered in Córdoba.¹⁵⁶

In general, there is no one group targeted for violence, the knowledge of which might fulfill this element of state responsibility. Given the ecumenical nature of the violence, unpredictable in its targets, many of the victims would find it hard to argue that they were part of a group at special risk of violence.¹⁵⁷ While other victims, such as leaders of social movements, are at elevated risk of violence, even they form a huge group, undermining satisfaction of the threshold requirement for review and responsibility that the victim be at a particularly elevated risk of violence.

IV. THE CURRENT RESPONSIBILITY RULE IN THE JURISPRUDENCE

This part will argue that, despite the rather narrow formulation of the official responsibility rule developed in the jurisprudence, the human rights courts have shown substantial flexibility in applying the threshold requirement for court review of protection efforts when called for by the circumstances. They have been particularly disposed to loosen the threshold for review in situations approximating internal armed conflict where the state failed to protect against actions by violent groups not acting in opposition to the state, and in some cases tacitly allied with it. The European Court made such moves in a series of cases that emerged from the PKK conflict between the Turkish government and Kurdish rebel groups, while the Inter-American Court has flexibly applied the standard in, among others, cases arising from the Colombian civil conflict. I will consider the jurisprudence of these two courts in turn and then conclude with a

154. U.N. High Comm'r for Human Rights, *supra* note 54, ¶ 34; ESCUELA NACIONAL SINDICAL, *supra* note 58, at 1, 8; Romero & Arias, *supra* note 37, at 39.

155. U.N. High Comm'r for Human Rights, *supra* note 54, ¶ 34; HUMAN RIGHTS WATCH, *supra* note 26, at 45.

156. See *supra* notes 69-70 and accompanying text.

157. See *González v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 282 (Nov. 16, 2009).

diagnosis of the reasons why the courts were willing to expand review in these circumstances.¹⁵⁸

A. *European Court Jurisprudence on PKK Conflict in Turkey*

Perhaps the most obvious example of a court expanding the scope of its review was when the European Court of Human Rights loosened the threshold requirement of the standard responsibility rule when considering the circumstances in Turkey. Evaluating a series of extrajudicial executions in the context of the Workers Party of Kurdistan (PKK) conflict, the European Court decided that it could review state protection efforts not only when the state had or should have had knowledge of a real and imminent danger to a specific individual, but also when it simply had knowledge of such a danger to a group of individuals.¹⁵⁹ Although *Osman* imposed a threshold requirement for responsibility that there be a risk to an identified person or persons,¹⁶⁰ the cases on the PKK conflict loosened the strictness of the requirement: the risk need not be a risk to the life of the victim in particular, but simply a risk to a group to which the victim belongs. This change allowed the Court to find Turkey responsible on the basis of the deaths of people who were members of groups known to be targeted by pro-state death squads, such as journalists or suspected PKK sympathizers.

However, even with the threshold requirement relaxed to include situations in which the state had knowledge of the risk to multiple individuals, the Court's application of the rule may still have stretched its literal terms.¹⁶¹ For example, the risk to a journalist in *Kılıç v. Turkey* was sufficient to allow court review because journalists, producers, and distributors for the victim's newspaper had been subject to attacks.¹⁶² Mere involvement in banned political activity, such as union membership, met the threshold requirement in *Akkoç v. Turkey*.¹⁶³ The *Mahmut Kaya v. Turkey* court reviewed protection efforts because the victim, a physician, was believed to have treated

158. For useful analyses of state responsibility in the context of international terrorist groups, see generally Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83 (2003), and Vincent-Joël Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005).

159. *See Koku v. Turkey*, App. No. 27305/95, Eur. Ct. H.R. 1, ¶ 131 (2005).

160. *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998).

161. The element of state knowledge of the risk was not important in this series of cases because Turkey had clear knowledge of the risk to these categories of persons who were the targets of attacks. *But see Koku*, App. No. 27305/95, Eur. Ct. H.R. ¶ 133 (in which the authorities had specific knowledge of the risk to the victim from a report of his disappearance).

162. *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶ 66.

163. *Akkoç v. Turkey*, 2000-X Eur. Ct. H.R. 389, ¶ 81.

PKK guerrillas.¹⁶⁴ Most recently, the court in *Koku v. Turkey* reviewed protection efforts for a victim whose political party had been targeted nationwide for kidnappings and murders, even though he was only the president of a local branch.¹⁶⁵ In none of these cases would it be fair to say that the risk to the particular victim was extraordinarily high or that the group of at-risk individuals was particularly limited. While it may well have been extremely likely that some individual in the at-risk groups would be murdered, it does not appear to have been particularly likely that the specific victim would be.

Instead, the Court appears to have focused more on the fact that Turkey was taking inadequate measures to distance itself from and to suppress the elements committing murders. This is most obvious in its explanation of the particular protective measures Turkey should have taken. Specifically, the Court emphasized that the criminal law and law enforcement measures implemented were inadequate under the circumstances to prevent attacks by groups aligned with the government.¹⁶⁶ The requirement that the government take preventative measures consisting of effective law and law enforcement targets the source of risk to individuals' lives—specifically, by deterring or detaining potential perpetrators—and not the particular risk itself. The Court's insistence that Turkey adequately distance itself from those committing the violations is also clear in its repeated reference to the connection between the perpetrators and the state. For instance, it repeatedly mentions the strong implication that members of the security forces acquiesced or assisted in the violations of the right to life.¹⁶⁷

B. *Inter-American Court Jurisprudence on Paramilitaries in Colombia*

The Inter-American Court has also applied the threshold requirement for review with some flexibility—specifically when considering Colombian paramilitary groups—explicitly going beyond the text of the responsibility rule to find responsibility for inadequate protection despite the lack of a known risk to an individual or group of individuals. In its *Pueblo Bello* decision, the Court noted that

it has not been proved that the State authorities had specific prior knowledge of the day and time of the attack on the population of

164. *Mahmut Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, ¶ 89.

165. *Koku*, App. No. 27305/95, Eur. Ct. H.R. ¶ 131.

166. *Mahmut Kaya*, 2000-III Eur. Ct. H.R. ¶¶ 100, 115-16; cf. *Akkoç*, 2000-X Eur. Ct. H.R. ¶¶ 85-92; *Kılıç*, 2000-III Eur. Ct. H.R. ¶¶ 69-71, 75; *Mahmut Kaya*, 2000-III Eur. Ct. H.R. ¶¶ 91-99.

167. *Akkoç*, 2000-X Eur. Ct. H.R. ¶ 84; *Kılıç*, 2000-III Eur. Ct. H.R. ¶ 68; *Mahmut Kaya*, 2000-III Eur. Ct. H.R. ¶ 91.

Pueblo Bello and the way it would be carried out. For example, no evidence has been provided to show that the inhabitants of this village had reported acts of intimidation or threats before this attack.¹⁶⁸

Despite the lack of state knowledge, the Court found Colombia responsible for failure to protect, thereby exceeding the strict requirements of the announced threshold requirement for review.¹⁶⁹

The Inter-American Court implicitly relaxed the threshold requirement that the state know of the specific risk against the backdrop of several potentially relevant factors. First, there was a clear implication that the state could and “would direct its control and security operations against [the illegal paramilitary groups].”¹⁷⁰ That is to say, the Court recognized that the state, under the circumstances, should target the source of the risk to human rights, even if it lacked knowledge of “real and imminent danger” to the rights of a particular individual or individuals. Second, it repeatedly referenced the fact that “by having encouraged the creation of these groups, the State objectively created a dangerous situation for its inhabitants” as well as that the state had been ineffective in “dismantling the paramilitary structures,” in part because of “connivance or collaboration with State agents.”¹⁷¹

C. *Diagnosis of the Flexible Application of the Current Responsibility Rule*

This jurisprudence of the regional human rights courts shows them struggling with how exactly to define the threshold requirement for reviewing inadequate state protection, given the fact that the courts probably cannot review and impose responsibility for every violation of the state obligation to protect. The courts have recognized that the fundamental state protection obligation is extremely broad. The European Court has recognized on multiple occasions that states have the broad duty “to take appropriate steps to safeguard the lives of those within its jurisdiction.”¹⁷² The Inter-American Court has established that the state has a duty to “ensure respect for—guarantee—the norms of protection and also to ensure the effectiveness of all the rights established in the Convention in all circumstances and with regard to all persons.”¹⁷³ However, the courts have

168. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 135 (Jan. 31, 2006).

169. *Id.* ¶ 140.

170. *Id.* ¶ 134.

171. *Id.* ¶¶ 126-27; see also *Valle Jaramillo v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶¶ 76, 80 (Nov. 27, 2008).

172. *Kılıç*, 2000-III Eur. Ct. H.R. ¶ 62; *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 15 (1998).

173. *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 111.

also recognized that they cannot provide for every violation of this broad obligation, leaving much of the compliance with the obligation to state discretion.

As a result, the state's obligation to protect can be distinguished from the conditions in which the human rights courts will review compliance and potentially impose responsibility. The human rights courts need not, and have chosen not to, review every potential deviation from the state's broad duty to protect, in part because the interference of the courts in such a policy-heavy area raises substantial questions of their appropriate role with respect to states and how to best use limited court resources. The specific formal responsibility rule that the courts apply arose in response to particular circumstances—namely, a relatively unpredictable murder in England—but became fixed in international jurisprudence as the formal threshold requirement for determining when the courts may review state protection efforts. The cases discussed above suggest that the courts have implicitly recognized that some situations not fitting within the narrow bounds of the threshold requirement may and should nonetheless be adjudicated internationally. However, the courts have not yet announced any alternative threshold requirement for review that may be applicable in other circumstances.

In the following parts, I will identify and clarify two major principles that guide the courts in determining the scope of their review and that can guide the development of appropriate situation-specific responsibility rules. These principles counsel explicitly relaxing the threshold requirement for review for cases of inadequate protection against acts of MCO violence. On the one hand, the courts have responded to the state's reluctance to protect with relaxed threshold requirements for review, as we have seen in this part's discussion. Because the MCOs, despite constituting quasi-armed groups, do not primarily direct violence against the state and in fact often try to subvert it or its officials, the state often lacks strong incentives to respond strongly to the threat they present. On the other hand, the courts have been unmistakably concerned with avoiding review of protection efforts, and imposing responsibility when doing so would unreasonably interfere with state policy-making. However, any such interference is substantially reduced in the face of MCOs, since the state is not asked to protect against unpredictable risks but against a focused risk. For these reasons, expanded human rights court review of state compliance with the duty to protect is appropriate.

V. RISK OF STATE FAILURE TO PROTECT AND REQUIREMENTS FOR REVIEW

In this part, I will argue that considerations applied by the human rights courts in the past to determine the scope of review for state failure to protect support an expanded responsibility rule in the face of MCO violence. First, I will argue that the courts have expressed through their jurisprudence a latent principle that the threshold requirement for review should be adjusted to allow for review of protection efforts when there is a systemic risk that the state will inadequately protect against violence. This principle allows the courts to use their limited judicial competence efficiently to promote compliance with the state human rights obligation to protect by focusing resources on those issues most in need of their intervention. Relaxing the threshold requirement allows courts to motivate states to fulfill the obligation to protect and will be particularly effective when the loosened review requirement is explicitly announced. Second, I will argue based on the example of neoparamilitaries in Colombia that a state may be particularly reluctant to protect against MCOs for a number of reasons.

A. *Risk of State Failure to Protect as an Expansionary Principle*

Regional human rights courts have regularly expanded state responsibility for failure to protect when structural conditions indicate a systemic risk that the state will inadequately protect the rights of individuals, reflecting a latent principle in the jurisprudence. Both the European Court and the Inter-American Court exceeded the narrow terms of the announced review requirement in cases where violent groups had the tacit support of some set of state officials. The European Court, in the cases addressing protection during the PKK conflict in Turkey, repeatedly noted that the murders at issue appeared to have been committed by groups acting in Turkey's interest and that some parts of the state security forces appeared to have acquiesced in the groups' activities.¹⁷⁴ Similarly, the Inter-American Court of Human Rights considered it relevant to state responsibility that Colombia had encouraged the formation of paramilitary groups and that parts of the security forces had connived or collaborated with the groups.¹⁷⁵ In both Turkey and Colombia, the links between the state and the violent groups indicate that at least some elements of the state lacked motivation to vigorously protect against their attacks. The courts found this fact relevant in generously construing the formal limits of the standard threshold requirement or in exceed-

174. *Akkoç v. Turkey*, 2000-X Eur. Ct. H.R. 389, ¶ 83; *Kılıç*, 2000-III Eur. Ct. H.R. ¶ 68; *Mahmut Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, ¶ 91.

175. *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 126-27.

ing them altogether. For these reasons, the principle according to which the courts should expand the scope of review in the face of risk of inadequate protection can be considered a sound way to make sense of the judgments in this area of jurisprudence.

Employing a principle according to which the courts vary the scope of review of state protection efforts in response to systemic risks makes sense given the structure of regional human rights court systems. The courts are a secondary mechanism for upholding human rights with limited institutional competence, practically if not legally. They are secondary mechanisms in the sense that the state is the primary agent responsible for upholding human rights, both by directly refraining from violating them and by ensuring that all state organs comply with human rights obligations.¹⁷⁶ And as a secondary mechanism, the courts have limited institutional competence. This shortcoming results both from the limited capacity that the courts and their systems have to resolve contentious cases and from a need the courts have recognized to avoid interfering inappropriately with state policy-making. But, despite their limited institutional competence, the courts are committed to upholding human rights in the states subject to their jurisdiction according to the courts' own interpretations of the applicable human rights treaty standards. Harmonizing its broad institutional commitment to interpreting human rights standards and upholding human rights by applying limited institutional competence requires care in the deployment of available resources.

While the courts have established that states have a very broad obligation to protect,¹⁷⁷ for reasons of institutional competence they must carefully allocate resources dedicated to overseeing and enforcing the obligation. The courts can apply different sorts of resources to enforce the obligation, such as by hearing individual cases, providing provisional measures, or issuing advisory opinions. The goal of such deployment in the context of protection is to eliminate certain failures of state compliance resulting from a lack of interest in protecting or a positive opposition to protecting, by creating new incentives for the state to protect. But because of limited institutional competence, the quantity of available resources is limited, making it impossible to respond to every failure to protect with an individual conten-

176. American Convention on Human Rights, *supra* note 134, at art. 46 (requiring exhaustion of domestic remedies for recourse in the Inter-American system); European Convention on Human Rights, *supra* note 134, at art. 35 (requiring exhaustion of domestic remedies for recourse in the European system); *see also* American Convention on Human Rights, *supra* note 134, at art. 1 (establishing state obligations to both respect and ensure the fulfillment of rights); European Convention on Human Rights, *supra* note 134, at art. 1 (establishing state obligations to respect and to secure the fulfillment of rights).

177. *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (citing *Kılıç*, 2000-III Eur. Ct. H.R. ¶¶ 62-63; *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶¶ 115-16).

tious case or provisional measures decision. Instead, the courts must ration these resources. Court resources get allocated in different ways, in part by the choices of advocates and lawyers who decide which cases get brought. But the courts also shape the distribution of judicial resources by imposing requirements that exclude certain failure to protect cases from court review, despite the fact that the courts have acknowledged a broad obligation to protect.

Both the European Court and the Inter-American Court have substantial capacity limitations—even if these take different forms in each—that limit the resources they can deploy to motivate state compliance. The Inter-American Court in 2012 issued only nineteen merits decisions in contentious cases. While the European Court in 2011 issued 1157 judgments in contentious cases, resolving 1511 applications, these numbers substantially decreased from the prior year, leaving 151,600 applications pending in the system.¹⁷⁸ Laurence Helfer described similar statistics in a prior year as constituting a docket crisis.¹⁷⁹ In such conditions, it may be best for the courts to leave cases to other protective mechanisms, unless human rights court review will be particularly useful in ensuring the fulfillment of human rights. But by expanding review in response to systemic risk of inadequate state protection, the courts are able to limit their caseload except when the court is most likely to be useful in promoting state compliance with its obligations.

At the same time, a principle according to which the courts should vary the scope of review of state protection efforts based on systemic risk makes sense given the general concern that the courts will leave insufficient policy discretion to states.¹⁸⁰ Although there is less risk of inappropriate interference when state officials knew or should have known of a particular human rights risk, much review of state protection efforts will put the courts in the position of second-guessing state policy. Against such a background concern, it makes sense for the courts not to involve themselves in the review of state protection efforts except when doing so is particularly important from a human rights perspective. Avoiding review except when important helps circumvent any unnecessary direct interference with state policymaking in the area of protection, leaving more discretion to the states. However, it remains important for the courts to review protection efforts when these are likely to be inadequate—violating state

178. EUR. COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2011 4-5 (2012), available at http://echr.coe.int/Documents/Stats_analysis_2011_ENG.pdf.

179. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 126 (2008).

180. See *infra* Part VI.

human rights obligations—as ensuring the fulfillment of human rights is a primary purpose of regional human rights courts.

In this context, it makes sense for the courts generally to limit the obligation to protect cases they are willing to hear by imposing strict threshold requirements, but to loosen those requirements when they would exclude cases where there is a systemic risk of state failure to protect. Such a principle allows the court to respect its limited institutional competence while also fulfilling its primary purpose of ensuring human rights, and specifically the right to state protection. It respects limited institutional competence by minimizing both the overall quantity of judicial resources devoted to protection cases and intrusions into state policy-making. But it simultaneously fulfills the purpose of ensuring human rights because the courts devote additional institutional capacity to issues of state protection when it is most needed. Given a systemic risk that the state will fail to protect, the use of court resources can provide new incentives for state compliance with the obligation to protect.

B. The Need for an Explicit, Broadened Responsibility Rule

These same reasons that support adjusting the scope of review of protection efforts in response to particular risks indicate that it is best to do so via an explicitly relaxed threshold requirement. In order to effectively allocate judicial resources to promote state compliance with protection obligations in light of a systemic risk of inadequate protection, the courts must be attentive to the various ways in which they can promote compliance. In light of some important methods of promoting compliance, a clear expression of a changed threshold requirement will be more effective in providing the desired motivation to states than a flexible, case-by-case application of a misleadingly limited requirement: many methods through which compliance is promoted depend on communicating court standards to third parties. Thus, even though the courts have sometimes applied the threshold requirement with flexibility, it is important that they formally and explicitly adjust it.

Regional human rights courts can promote state compliance with regional human rights obligations both directly and indirectly.¹⁸¹ The courts directly promote state compliance by providing oversight and accountability, in that they directly review state actions or omissions

181. Helfer, in fact, distinguishes four different international tribunal functions, two of which roughly correspond to the modes of promoting compliance discussed here. Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464 (Karen J. Alter et al. eds., 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194189.

for compliance with the relevant human rights standards.¹⁸² This method of promoting compliance is perhaps the most readily apparent to the casual observer, as it is a direct result of resolving contentious cases brought against states. But the courts also indirectly promote state compliance by providing a focal point or reframing an issue for further action by third parties, such as the international community of states, advocacy networks, domestic courts, or the public at large.¹⁸³ These third parties then act in a variety of ways to pressure the state to comply with the human rights standards as the human rights courts interpret them.¹⁸⁴ For example, domestic courts may apply those standards directly in domestic cases, advocacy networks may organize around the announced norm interpretation, and the public may reconceive of an issue through the lens of the interpreted norms.

Establishing a clear rule regarding the appropriate circumstances for review of state protection efforts against MCOs is important from the perspective of providing direct compliance through oversight and accountability. A clear rule promotes consistency across judgments and within judgments, assuring that the rule as announced and the rule as applied are one and the same.¹⁸⁵ Both are highly desirable characteristics to maintain the internal integrity of a human rights court's functioning and to avoid accusations of bias or unfairness from litigants. At the same time, a clear rule can invite appropriate lawsuits to be brought, by making it clear that the facts of a particular case meet the requirements for review according to regional human rights standards. For this reason, clearer threshold requirements would facilitate states being held accountable for failures to protect against MCOs adequately, thereby providing a source of motivation for such protection.

182. American Convention on Human Rights, *supra* note 134, at art. 62(3); European Convention on Human Rights, *supra* note 134, at art. 32; Helfer, *supra* note 181, at 464-66.

183. See Rodríguez-Garavito, *supra* note 17, at 1676 ("I posit that the potential range of relevant effects includes—in addition to governmental action specifically mandated by the court—the reframing of socioeconomic issues as human rights problems, the strengthening of state institutional capacities to deal with such problems, the forming of advocacy coalitions to participate in the implementation process, and the promoting of public deliberation and a collective search for solutions on the complex distributional issues underlying structural cases on SERs.").

184. See American Convention on Human Rights, *supra* note 134, at art. 62; European Convention on Human Rights, *supra* note 134, at art. 32; Helfer, *supra* note 181, at 464-66. Third parties commonly interpret the meaning of standards through decisions rendered in contentious cases and, on occasion, via advisory opinions. American Convention on Human Rights, *supra* note 134, at arts. 62, 64; European Convention on Human Rights, *supra* note 134, at arts. 32, 47.

185. For example, the *Pueblo Bello* decision arguably suffers from a grave defect in this regard. As previously argued, it announces a responsibility rule and threshold requirement for review that it then ignores in order to review state protection efforts.

Although motivating compliance via oversight and accountability is an important function of human rights courts, indirectly promoting compliance by catalyzing third-party action through standard setting and interpretation is probably more important, given the limited institutional competence of the courts. For example, the limited number of cases that the courts can resolve substantially reduces the effect courts have on state human rights compliance via resolution of individual contentious cases. But standard setting and interpretation can have an effect that extends far beyond individual contentious cases. First, such standards may constitute rallying points for social movements, NGOs, and other actors at the national and international levels dedicated to affecting state human rights compliance.¹⁸⁶ Second, a clear court standard relevant to a social problem may affect the way policy makers and the public view it, causing them to reconceive the problem as a rights violation and change their views about its seriousness.¹⁸⁷ This effect is of particular importance when the state has actively rejected the human rights significance of MCO activity, such as when the Colombian government has dismissed neoparamilitaries as mere Bacrim or “criminal bands.”¹⁸⁸ Third, a clear standard provides an effective guide for domestic courts to apply the regional human rights instruments in domestic proceedings. This practice is particularly common in Latin American constitutional law due to the frequent incorporation of human rights instruments into constitutions.¹⁸⁹

In contrast to the substantial effects an explicitly modified review requirement can have, a non-explicit and contextually applied review standard for state protection efforts is less likely to serve these purposes. Such a standard fails to provide clear guidance or a clear interpretation of the human rights instruments for social movements, policy makers, national courts, and others. The courts may impose threshold requirements largely because of institutional competence issues—limited capacity and avoiding interference with state policy-making—so the requirements may not reflect fundamental human rights standards. But even if the threshold requirements are primarily created for the courts to manage institutional competence, actors

186. See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 770 (2008).

187. See Rodríguez-Garavito, *supra* note 17, at 1679.

188. See, e.g., *Presidente Santos puso en marcha el Consejo Nacional de Seguridad*, PRESIDENCIA DE LA REPÚBLICA DE COLOMBIA (Feb. 7, 2011), http://wsp.presidencia.gov.co/Prensa/2011/Febrero/Paginas/20110207_05.aspx.

189. See generally MANUEL EDUARDO GÓNGORA MERA, INTER-AMERICAN JUDICIAL CONSTITUTIONALISM (2011) (systematically analyzing the status of human rights treaties in the Latin American legal system and concluding that there is an emerging consensus that they have either supra-legal or constitutional rank).

external to the courts are likely to receive the threshold requirements as substantive descriptions of the state obligation to protect.¹⁹⁰ For this reason, a court that is concerned about maximizing its effect on human rights compliance in light of limited judicial capacity and avoiding interference with state policy-making should use that capacity to explicitly announce its review requirements.

C. Risk of State Failure to Protect and Protection against MCOs

As previously argued, the main reason to relax the threshold requirement for review of state protection measures against MCOs is the systemic risk for inadequate state protection in these circumstances. This subpart will discuss, using Colombian neoparamilitaries as an example, several reasons why this systemic risk exists: MCOs do not directly confront central state authority, they commonly corrupt state officials, and they most severely affect disfavored segments of the population that are of less interest to the state.

1. Limited Confrontation with the State

A systemic risk that the state will inadequately protect against MCOs arises from the fact that they are quite different in character from other sorts of violent groups that might operate within a state's territory. Insurgent groups seek to contest directly a state's control of its territory, either in whole or in part, generally in hopes of replacing the state or seceding from it.¹⁹¹ By directly contesting state control, such groups automatically provoke the state to respond to the group, generally with force, in an effort to maintain its territorial control. Of course, the response may not be concerned with citizen security and protection of individuals from violence, and may in fact lead to widespread violations of human rights. Colombia's decades-long armed conflict with the FARC-EP provides a clear example of the phenomenon. Particularly since the election of ex-President Uribe, the Colombian state aggressively fought against the FARC in

190. Although the courts have announced that the state obligation to protect is broad, this description is likely to be understood as aspirational, with the actual legal standard understood to be that which the courts themselves apply, including the threshold requirement. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006) (citing *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶¶ 62-63; *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶¶ 115-16 (1998)).

191. For example, in Colombia, the FARC-EP and the ELN are two revolutionary armed groups that seek to replace the state and that have incited a strong state response. See, e.g., Int'l Crisis Grp., *Colombia: Peace at Last?*, LATIN AM. REP. NO. 45, Sept. 2012, at 2-9, available at <http://www.crisisgroup.org/~media/Files/latin-america/colombia/045-colombia-peace-at-last.pdf>.

order to re-establish territorial control, albeit while committing serious human rights violations.¹⁹²

Unlike the FARC, neoparamilitaries in Colombia have a complex relationship to the Colombian state, despite probably constituting parties to the internal armed conflict.¹⁹³ Although the neoparamilitaries occasionally engage in hostilities with state armed forces, they do not have the overthrow of the Colombian state as a primary goal.¹⁹⁴ Instead, their goals are primarily to reshape local social structures in order to maintain and expand their illegal businesses, in part through expanding territorial presence.¹⁹⁵ While these goals of the neoparamilitaries may bring them into conflict with the state for some purposes—since they are engaged in illegal activities that the state may attempt to stop through law enforcement—the groups have no need to contest state authority for most purposes. So long as the state does not try to stop their illegal businesses, there is no intrinsic conflict with state presence—such as if the state enforces laws against unaffiliated criminals or maintains public infrastructure—in the areas that the neoparamilitaries control.¹⁹⁶ Because of the limited challenge to state authority, state officials, particularly at the local level, may have less motivation to respond to these groups effectively than they have for a guerrilla group like the FARC that seeks to overthrow the state completely. A potential *modus vivendi* exists between the Colombian state and the neoparamilitaries that simply does not exist between the Colombian state and the FARC.¹⁹⁷

The facts clearly reflect the potential of neoparamilitaries to develop something of a *modus vivendi* with parts of the state apparatus. Nuevo Arco Iris reports that between 2006 and 2008, 55 percent of reported neoparamilitary group actions involved offensive actions and only 12 percent of reported actions involved combat with

192. Although the FARC continues to provoke a strong state response, it is important to note that the effort against the FARC has been framed primarily as a matter of national security and has resulted in massive human rights violations. *See id.*

193. INT'L COMM. OF THE RED CROSS, *supra* note 6, at 3 (determining that both the Rastrojos and the Urabeños are parties to the Colombian internal armed conflict); Interview with Juanita Goebertus Estrada, *supra* note 27 (reporting that the Colombian government has determined that the organizations are legally not parties under IHL, but conceding that the determination is arguable).

194. Oñate, *supra* note 36, at 10.

195. *See supra* Part II.

196. *See* Ortiz, *supra* note 50, at 17 (noting that the neoparamilitaries engage in very few attacks against state forces because they lack a counter-state purpose).

197. The differing potential for a *modus vivendi* between armed groups without a counter-state purpose and one with such a purpose is reflected in the relative rates of corruption of elected officials during the era of the AUC. *See, e.g.,* Claudia López Hernández, “La Refundación de la Patria”, *de la teoría a la evidencia*, in Y REFUNDARON LA PATRIA . . . : DE CÓMO MAFIOSOS Y POLÍTICOS RECONFIGURARON EL ESTADO COLOMBIANO 29, 51 (Claudia López Hernández ed., 2010).

state forces.¹⁹⁸ These numbers suggest that neoparamilitary groups have typically avoided targeting state forces despite engaging in a large number of violent actions, thereby not providing state forces any immediate reason to repress them. Other reports indicate that some segments of the state security forces have not aggressively initiated actions against the neoparamilitaries. For example, local police in one city in Meta failed to take action against ERPAC activity in surrounding areas because their responsibility was technically limited to the city.¹⁹⁹ Additionally, many military commanders have voiced reluctance to act against the neoparamilitaries, viewing the problem as principally one for the police, even though the military was formally assigned joint responsibility for the problem.²⁰⁰

2. *Corruption of State Officials*

A second source of risk that a state will be inadequately motivated to act against MCOs arises from the potential corruption of the state apparatus at a variety of levels. In Colombia in particular, there is substantial evidence that neoparamilitaries have co-opted local police and military officials through extensive payments. Beyond directly

198. Romero & Arias, *supra* note 37, at 38.

199. HUMAN RIGHTS WATCH, *supra* note 26, at 95.

200. OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 3; Interview with Juanita Goebertus Estrada, *supra* note 27. Responsibility for addressing the problem of neoparamilitaries was previously assigned to the National Police, with the armed forces having only secondary responsibility. The police were able to request military assistance if necessary, which was granted at the discretion of the military. In the absence of such a request, divisions of the military were permitted, but not required, to respond to neoparamilitary groups operating in their area. Ministerio de Defensa Nacional, Directiva Permanente No. 208, §§ 3(b)(1)(b), 3(b)(6)(f) (2008). Within the police, the Division of Caribineers and Rural Security had primary authority for combating the MCOs.

Dividing responsibility for a public security problem between the military and the police may make sense under some conditions, but not under those that exist currently in Colombia. A division of authority may make sense in order to keep the military from being involved in a law enforcement matter and the concomitant increased risk of serious human rights violations that accompany that role. However, such a division does not make sense in Colombia at present. The national police do not have a regular presence in many areas where the MCOs are active, while the military may have a substantial presence. See HUMAN RIGHTS WATCH, *supra* note 26, at 95; Int'l Crisis Grp., *supra* note 47, at ii. As a result, the military is often best positioned to take action to suppress MCO activity in many regions of the country. As the only security force presence, the failure of a military response allows the organizations to act with impunity.

The division of authority within the police itself was similarly problematic under the circumstances in Colombia. By assigning exclusive responsibility to a single Division of the National Police, it absolved other active police forces of the responsibility of confronting MCOs. Through the division of authority within the police, responsibility for addressing the problem of neoparamilitaries was effectively eliminated. Police areas of responsibility should be modified to reflect the reality that the police have limited resources that do not always cover an area where MCOs are active. Such a change of responsibility should be coupled with a standing order to confront the MCOs whenever they are encountered or their presence in an area is known.

interfering with the use of these elements of the public security forces to confront the neoparamilitaries when appropriate, such corruption can undermine suppressive actions taken by the other elements of the security forces as well as provide unique support for their illicit activities. Corrupt officials undermine suppressive actions of other state actors by providing both official cover for illegal activities and intelligence on likely law enforcement activities. For example, such aid allowed one neoparamilitary group leader to escape capture repeatedly by other elements of the public security forces.²⁰¹ They also provide unique support in the form of official cover and access to state resources, such as firearms and documents.

Moreover, the neoparamilitaries appear to have begun infiltrating local government bodies, via manipulation of local elections, in a repetition of the political control that the paramilitary groups established. In one particularly egregious example, a neoparamilitary group managed to secure the election of a local *personería*, the local official in charge of receiving complaints of human rights violations.²⁰² Additionally, in October 2011, during the run-up to the last local elections, a number of different observers warned of the potential for illegal interference, as indicated by substantial violence surrounding electioneering.²⁰³ The Misión de Observación Electoral found that out of 147 municipalities where there was violence against candidates, neoparamilitaries were present in 20, while out of the 87 municipalities with violence against election officials, neoparamilitaries were present in 14.²⁰⁴ Moreover, Nuevo Arco Iris analyzed the backgrounds and connections of a number of candidates and identified a substantial number with potential links to illegal actors, including neoparamilitaries.²⁰⁵ Following the election, Nuevo Arco Iris

201. HUMAN RIGHTS WATCH, *supra* note 26, at 98; *see also* Conflict Dynamics and Peace Negotiations Area, *supra* note 19, at 4 (reporting that alias Cuchillo escaped capture through official complicity).

202. Interview with Camilo Sanchez, Investigator, DeJuSticia, in Bogotá, Colom. (Jan. 12, 2012).

203. Int'l Crisis Grp., *Cutting the Links Between Crime and Local Politics: Colombia's 2011 Elections*, LATIN AM. REP. NO. 37, July 2011, at 15-16; Elizabeth Dickenson, *How Colombia's Criminals are Bullying and Buying Their Way into Office*, FOREIGN AFFAIRS (Oct. 17, 2011), <http://www.foreignaffairs.com/print/133716>.

204. MISIÓN DE OBSERVACIÓN ELECTORAL, *VIOLENCIA POLÍTICA* 7, 12 (2011) (electoral violence in the period from Feb. 2, 2011 to Oct. 20, 2011). The organization confirmed the reports of violence following the elections. *See* Alejandra Barrios Cabrera, *Asonadas y disturbios postelectorales: entre la indignación ciudadana y el fraude electoral*, CIEN DIAS, Dec. 2011–Mar. 2012, at 41, 41-42.

205. NUEVO ARCO IRIS & OBSERVATORIO DEL CONFLICTO ARMADO, *MAFIAS Y AGENTES ILEGALES BUSCAN RENTAS Y EL PODER LOCAL* (2011) (Colom.), *available at* <http://www.arcoiris.com.co/2011/11/mafias-y-agentes-ilegales-buscan-rentas-y-el-poder-local>.

managed to identify eight specific examples of candidates who were probably elected with the support of neoparamilitaries.²⁰⁶

While the corruption of local state officials is troubling enough from the perspective of assuring an effective state response, there is also some potential that national officials will also be corrupted, as happened during the era of the AUC paramilitaries.²⁰⁷ In 2013, the Colombian Supreme Court expanded its investigation of politicians backed by paramilitaries to politicians backed by neoparamilitaries, in response to evidence that neoparamilitaries are seeking political power in this way.²⁰⁸ Indirectly, the groups may form beneficial alliances with the local elite, who can use their political influence to affect national policy regarding the organizations and the implementation thereof.²⁰⁹ More directly, the organizations may place their supporters in national offices, such as the national legislature, through a variety of means, including funding and intimidation.²¹⁰

3. *Preferential Protection for Certain Groups*

Finally, there is a serious risk that any state protection against MCOs will protect some places and people while failing to protect others—in particular, marginalized and vulnerable segments of the population. In Colombia, the neoparamilitaries operate across the country but have a heavy presence in rural areas or regions of the country considered to be of less significance from the perspective of national policy makers. For example, the Rastrojos have a stronghold in the southwestern department of Nariño, while the ERPAC focuses its activity in the Meta department.²¹¹ During 2011, the Urabeños and Rastrojos fought for control of the largely rural Córdoba department.²¹² Additionally, neoparamilitary activity in cities tends to occur primarily in lower class neighborhoods that provoke less concern among state officials.²¹³ The fact that neoparamilitary activity tends to emphasize regions and persons unlikely to be a priority for state

206. Ariel Fernando Ávila & Juan David Velasco, *Triunfos y derrotas de las mafias en las locales*, 17 ARCANOS 76, 87, 89-90 (2012) (Colom).

207. See generally NUEVO ARCO IRIS, PARAPOLÍTICA: LA RUTA DE LA EXPANSIÓN PARAMILITAR Y LOS ACUERDOS POLÍTICOS (Mauricio Romero ed., 2007) (Colom.).

208. Arrázola, *supra* note 112.

209. See generally NUEVO ARCO IRIS, *supra* note 207.

210. See generally *id.*

211. See INDEPAZ, VII INFORME, *supra* note 36, at 11, 18.

212. Ortiz, *supra* note 50, at 31-35.

213. See, e.g., Elyssa Pachico, *Urban Battle in Medellín as Outsider Drug Cartel Moves in*, INSIGHT CRIME (June 28, 2012) (Colom.), <http://www.insightcrime.org/investigations/urban-battle-in-medellin-as-outsider-drug-cartel-moves-in>.

officials creates a substantial risk that protection against the neoparamilitaries will be based on the needs of the elite.²¹⁴

The events surrounding the murder of two *Universidad de los Andes* students in Córdoba in January 2011 provide a clear, if counterintuitive, illustration of this risk. According to the Fundación Ideas para la Paz, this event increased the attention that elite policy makers gave to the problem of neoparamilitaries. For example, the Ministry of Defense and the National Security Council discussed the topic of the neoparamilitaries for the first time following these murders²¹⁵ and decided to implement the first Operation Troya to reduce neoparamilitary activity in Córdoba.²¹⁶ While the groups had previously been active in the region, it took an attack on students of an elite university to focus the attention of the national government.

D. Conclusion

Regional human rights courts view the state as having a broad obligation to protect individuals under its jurisdiction from violations of their human rights, including the right to life. For a variety of reasons connected to institutional competence, they decline to review judicially the full scope of this obligation and normally limit review of state protection efforts to situations in which state officials knew or should have known of a real and immediate risk. However, the courts have been willing to review state protection actions beyond the narrow confines of the official threshold requirement when there was a systemic risk that the state would fail to fulfill its broad protection obligation. The circumstances that MCOs—such as the neoparamilitaries in Colombia—present is precisely one that establishes such a risk. Because the neoparamilitaries do not intrinsically oppose the state, but systematically corrupt state officials and primarily affect disfavored social groups, there is a significant risk that the Colombian state will not fulfill its basic obligation to protect individuals within its jurisdiction from neoparamilitary violence. By lowering the threshold requirement from state officials' knowledge of a real and immediate risk to mere knowledge of the threat posed by an MCO, the courts would effectively require the state to take many of the most important protective actions.

214. For example, Indepaz reports that government attention to the issue of neoparamilitaries waxed and waned depending on whether particularly salient events recently occurred. Interview with Carlos Espitia & Juan Carlos Jiménez, Investigators, Indepaz, in Bogotá, Colom. (Jan. 12, 2012).

215. Interview with Carlos Andrés Prieto, *supra* note 33.

216. Ortiz, *supra* note 50, at 7, 10; *Cuatro mil hombres ejecutan la 'Operación Troya,' supra* note 92; *En 90 días, Policía pretende asfixiar finanzas de bandas criminales*, EL TIEMPO (Feb. 6, 2011) (Colom.), <http://m.eltiempo.com/justicia/as-ser-la-operacion-troya-contra-las-bandas-criminales-en-crdoba/8831980>.

VI. INTRUSION ON STATE POLICY DISCRETION AND REQUIREMENTS FOR REVIEW

One important reason why the regional human rights courts may have limited institutional competence for reviewing state protection measures has to do with the need to avoid inappropriately intruding on state policy-making discretion. This factor has been important in leading the human rights courts to establish a strict threshold requirement for reviewing state protection efforts. Regional human rights courts have acknowledged that the state should not be responsible for just any human rights violation committed by a private individual: “[I]ts obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger.”²¹⁷ They arrived at this limitation for court review of state protection efforts despite acknowledging a broad state obligation to protect in order to avoid inappropriate interference with state policy-making.²¹⁸ In the preceding part, I suggested that one reason to limit court review except in the face of systemic risks of inadequate state protection was to avoid inappropriate interference in policy-making, given the limited institutional competence of the courts. In this part, I will directly argue that loosening threshold requirements for review of state protection efforts against MCOs would not give rise to such inappropriate interference.

A. Intrusion on State Policy Discretion as a Limiting Principle

A primary reason that the regional human rights courts limit their review of state protections efforts to situations in which public authorities knew about a risk of a particular violation and failed to act is to avoid inappropriate interference with the state. This preoccupation is rooted in the particular jurisprudential history of the responsibility rule for inadequate state protection. In the cases in which the current threshold requirement for review developed, absent knowledge of a specific risk, it would have been inappropriate to review the protective actions that authorities had implemented and possibly to hold them responsible for inadequately protecting. Consequently, the courts sharply limited the circumstances in which they would review inadequate protection, presumably to avoid improperly intruding on the legitimate sphere of state policy discretion.

217. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 123 (Jan. 31, 2006).

218. *Id.* ¶ 124 (citing *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶¶ 62-63; *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R., 1, ¶¶ 115-16 (1998)).

The lead case for this proposition is the European Court of Human Rights' decision in *Osman*, which concerned an obsessive teacher's attack on a family, resulting in the death of the student's father. In deciding the case, the Court recognized that a state could, on occasion, be responsible for failure to protect a person against the violation of his or her rights by third parties. However, it limited the scope of the responsibility on the following pragmatic grounds:

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.²¹⁹

In effect, the Court identified three reasons for limiting the scope of responsibility so as to avoid imposing an inappropriate burden on state authorities. First, it acknowledged that it could be difficult to police modern societies. Second, it noted that human conduct is unpredictable. Third, it agreed that the state must be given some scope to allocate resources and set priorities.

The last of these considerations—that the state should be given scope to set priorities and allocate resources—is analytically unhelpful because the consideration is supposed to help determine exactly that: the appropriate scope of state independence from human rights court review. The Court advances this consideration when deciding how far court review of state protection efforts should extend. But the extent of such review is exactly a question of the extent to which the state should be deprived of the ability to determine resource allocation and to set priorities, with the consequence of potential international responsibility for failure to comply. In this context, it makes no sense to refer to the state the scope of setting priorities and allocating resources, because that scope is exactly what the Court is attempting to determine. Instead, the appropriate scope of state discretion must depend on the other considerations that the Court advances.

The first two considerations in turn seem to be of one piece: the reason it is difficult to police modern societies is because human conduct is unpredictable. In a society like England, where there is a general background of law compliance, if human conduct, and, in particular, criminal conduct, were predictable, it would be easy to police the society. A society with limited and predictable criminal acts could be controlled with a minimum of resource expenditures. However, human criminal conduct is unpredictable, as the facts of *Osman* itself

219. *Osman*, App. No. 23452/94, Eur. Ct. H.R. ¶ 116.

attest: while it is imaginable that an obsessive teacher might attack the family of a student, it is far from expected. Because the conduct is unexpected, it is very difficult to control. Absent intrusive surveillance or omnipresence of police or other state security agents, it would be almost impossible to eliminate attacks of this sort completely. Instead, a society must implement general systems of law enforcement and criminal justice to decrease the overall levels of such crime. But the exact degree to which a state attempts to reduce such violence depends on a complex set of competing considerations, including the costs of prevention, alternative uses of those resources, the possibilities for effectively reducing such instances of violence, intrusion on privacy resulting from increased enforcement, the desirable degree of due process protection, and the acceptability of harsh punitive measures. Under these conditions, applying an open-ended review of state protection measures for their reasonableness would require a regional human rights court to review the general balance of priorities that a particular state has chosen to adopt. Except in the most egregious cases, such as, for example, failing to implement any law enforcement and criminal justice mechanisms, such unrestrained and unlimited reconsideration of these priorities issues may be best avoided by regional human rights courts.

Even in a society that has a widespread problem of murder, it may not be possible to avoid a general balancing of competing policy concerns when adjudicating inadequate protection. The Inter-American Court in *González v. Mexico* considered the kidnapping, rape, torture, and murder of three young women in Ciudad Juárez that took place amidst a wave of similar violence directed at women.²²⁰ While the Court ultimately found Mexico responsible for failure to take preventative measures, it did so not on the basis of failure to take adequate measures prior to their abductions but for failure to respond appropriately to their disappearances.²²¹ The Court rejected holding Mexico responsible for failure to take measures to protect women in Ciudad Juárez because the state did not know “of a real and imminent danger for the victims in this case” even though it knew that women in the city were generally at risk.²²² Although state officials knew there was a wave of violence against a vulnerable subset of the population, evaluating whether the protective measures it took were reasonable in such circumstances would have required balancing a wide range of considerations relevant to criminal justice and law enforcement policy. Given the widespread and unpredictable violence, there were no

220. See *González v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 277-78 (Nov. 16, 2009).

221. *Id.* ¶¶ 280-84.

222. *Id.* ¶ 282.

more specific protective measures that could be evaluated. In this sense, the Court rejected the possibility that women in Ciudad Juárez might constitute a group of individuals at imminent risk,²²³ presumably because the risk to any particular individual in the group was so low and the at-risk group included a substantial portion of the population.

However, by limiting review of inadequate protection to those instances where state officials knew of a focused risk, the courts would not have to consider the appropriate balance of competing policy considerations. A focused risk is one that allows the state to take specific protective measures to stop the risk from materializing in injury and could include risks from a particular source or to a particular target. Such risks reduce the need for courts to balance competing policy considerations when determining if the state took adequate protective measures. First, the mere existence of a focused risk potentially reduces the number of actions that might be reasonably taken to protect a person. For example, if state officials know that a violent group will attempt to assassinate a particular journalist, reasonable protective measures might include having the police provide protection or investigating the source of the threat. They will not require rethinking whether the entire law enforcement apparatus has sufficient police officers or whether the criminal justice system has sufficient judges and prosecutors.

Second, the fact that the state must know of the focused risk further reduces the extent to which the inquiry will extend into the balance of priorities. A court's inquiry need not focus on what a state that knew nothing of the risk could have done to prevent the particular violation, which would normally consist in strengthening the general preventative capacity of law enforcement or the deterrent capacity of the criminal justice system. Instead, the inquiry would focus on what a state with knowledge of the risk could do, which would generally consist of specific actions, circumventing the need for a broad balancing of policy priorities.

Third, even if a court will inevitably have to balance various policy considerations and prioritize some interests, the difficulty and controversy of this determination is further reduced by the fact that the state knew of a serious risk. When the state knows of a focused risk and it is severe, responding effectively to that risk will almost always outweigh other policy priorities, in part because addressing a particular risk generally will not have a significant effect on competing priorities.

However, neither these considerations nor the jurisprudence support restricting review of protection measures to only those cases

223. *Id.*

where there was a known or knowable threat to a particular individual or small group of individuals. There are other focused risks that allow for court inquiries that can avoid balancing policy priorities. For example, knowledge of a significant source of risk to individuals, even if the individuals at risk are unknown, substantially limits the field of reasonable actions, allowing for a court inquiry that does not overly intrude in delicate policy balances. The court need not evaluate whether the overall resources devoted to criminal justice and law enforcement systems were adequate. Instead, it need only evaluate whether the protective measures were adequate in response to a given threat, a determination that would have an effect on resource allocation but that does not require a potentially broad inquiry into resource allocation. And, in fact, in many situations the court may only determine whether the resources made available were reasonably deployed to stop a source of risk.

Understanding the underlying limitation in terms of focused risks explains the result in *González*, in which the court would have had to determine whether overall resources dedicated to law enforcement were adequate. According to the facts of the case, state officials knew of a disproportionate risk to young, impoverished women of being kidnapped, raped and murdered,²²⁴ but the risk was statistical in nature. An effective response to such a risk would not have involved merely protecting a particular person or persons, as the group of individuals at risk constituted a substantial subset of the population at large. Nor would it have involved taking targeted and focused measures to eliminate a particular source of risk, such as detaining the members of a particular organization devoted to committing such crimes. Instead, an effective response would have required controlling an entire society via a new general law enforcement policy.²²⁵ There was no focused risk that would have allowed for particular state protective measures, such as providing the victims with police protection.²²⁶

This interpretation of the knowledge of risk requirement—where it restricts review only if there was no focused risk allowing for specific protective measures short of a new general criminal justice or law enforcement policy—makes particular sense: it is not much more intrusive for the courts to review protection against a risk from a particular source than to review protection against a risk to a partic-

224. *Id.*

225. *Id.* (suggesting that the lack of a general policy, without more, is not sufficient for state responsibility).

226. It is worth noting that *González* appears to reject subjecting state policy to searching review only when determining state responsibility. In the reparations section, the Inter-American Court sets out extensive and resource intensive orders for changing the law enforcement structures that respond to reports of disappearances. *Id.* ¶¶ 474-508.

ular individual or individuals. For example, the European Court case of *Kılıç v. Turkey* found that the known risk was sufficient for state responsibility simply because the victim was a journalist for a newspaper that had suffered a series of attacks against its journalists, producers, and distributors.²²⁷ That is, the individual was a member of a group at particular risk of suffering rights violations. However, the implied source of the risk was contra-guerrilla or terrorist groups possibly allied with state forces in their conflict with the PKK.²²⁸ The Court effectively recognized that the primary state failure was that it did not attempt to dismantle or at least neutralize the danger from these groups.²²⁹ Given that the required state actions principally required taking effective measures against the contra-guerrilla groups, it is largely irrelevant that state officials knew of the risk to the particular members of the newspaper. Instead, the Court would have imposed no greater burden had it simply required the state to take identical measures in light of state knowledge of the danger posed by the contra-guerrilla groups.

All that said, even though the courts would not have to determine whether the overall balance of policy priorities is acceptable when there is a focused risk, their decisions would still have effects on permissible resource allocation. And, as Barbara Armacost has argued, courts are ill-positioned to make decisions that could have substantial effects on the permissible allocation of public resources, so they should avoid these areas of social policy-making.²³⁰

However, there are two important reasons that such a conclusion should not be used to interpret regional human rights court principles. First, the regional human rights courts have already effectively decided that they are competent to make decisions that affect resource allocation. They frequently consider inadequate protection cases, where their decision could have a substantial effect on the required distribution of public resources, and in fact may tacitly involve second-guessing those resource allocations.²³¹ Second, the idea that the courts should never involve themselves in protection decisions with a substantial effect on resource allocation makes sense only if the resources dedicated to protection are considered a discretionary matter, and not a matter of rights. But the courts have quite clearly established that providing protection is a general state obligation and

227. *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R., 75, ¶¶ 66-67; *see also Akkoç v. Turkey*, 2000-X Eur. Ct. H.R. 389, ¶¶ 85-93; *Koku v. Turkey*, App. No. 27305/95, Eur. Ct. H.R. 1, ¶¶ 137-41 (2005); *Mahmut Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, ¶¶ 99-116.

228. *Kılıç*, 2000-III Eur. Ct. H.R. ¶ 68.

229. *See id.* ¶¶ 68, 71-75.

230. *See* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH L. REV. 982, 1003-08 (1996).

231. *See supra* Part III.

that receiving protection is a matter of right.²³² In general, prior rights and obligations, such as the obligation to respect the right to life or freedom of expression, limit state policy-making discretion and are a matter of judicial competence even when a particular problem is highly complex and involves many competing considerations.²³³

The general conclusion to be drawn from this discussion is that regional human rights courts have restricted themselves from reviewing state protective measures when the state merely had knowledge of a generalized risk to a population with no focal point for specific protective actions. They restrict themselves to avoid evaluating the state's potentially delicate balance of policy priorities, at least when the state failure to protect is not egregious. However, so long as the state knew of a serious and focused risk that allows a specific state protective response, court review of the protective measures will not intrude into the sphere of policy discretion best left to the state. In such circumstances, the field of review is reduced from general criminal justice and law enforcement policy to the specific use of those and other resources to deactivate the threat.

B. Intrusion on State Policy Discretion and Protection Against MCOs

From the perspective of these considerations, MCOs like the neoparamilitaries in Colombia present a problem quite distinct from that of unpredictable violence. Unlike isolated actions by non-distinctive individuals, neoparamilitary groups pose a focused risk that potentially can be targeted to eliminate their capacity to cause harm. Considered as a national phenomenon, there are only a handful of groups in total, including the Rastrojos, the Urabeños, and ERPAC.²³⁴ In any one area, there are generally only a few active groups, and in many areas only one group, a phenomenon that results from the fact the groups attempt to control territory and exclude other groups from that which they control. Additionally, the groups are organized to some degree at the national level,²³⁵ and at the local level they have a substantial degree of internal organization, arguably sufficient in

232. *See id.*

233. Perhaps the complicated debates over freedom of speech provide a good example. They involve considerations—such as autonomy of the individual, the market of ideas, and the potential harms that might arise from speech—that must be balanced to arrive at specific rule. Yet it is widely accepted that the courts are competent to determine the correct balance, in part because freedom of speech is a matter of rights and obligations, not mere policy discretion.

234. CAMILO GONZÁLEZ POSSO, INSTITUTO DE ESTUDIOS PARA EL DESARROLLO Y LA PAZ (INDEPAZ), *LOS GRUPOS NARCOPARAMILITARES AVANZAN 2* (2011) (Colom.), available at http://viva.org.co/cajavirtual/svc0278/pdfs/articulo632_278.pdf; Interview with Juanita Goebertus Estrada, *supra* note 36.

235. Interview with Juanita Goebertus Estrada, *supra* note 36; Interview with Ariel Fernando Ávila Martínez, *supra* note 29; Interview with Carlos Andrés Prieto, *supra* note 33.

some cases to render them parties to the internal armed conflict.²³⁶ Given the small number of groups and their substantial organization, the groups themselves provide an easy focal point for efforts to protect the population from their violence.

Beyond the purely structural feature, the groups provide a viable focal point for protective efforts because they have predictable methods, practices, and goals. Their primary businesses are the drug trade and extortion, both of which require that they control the territories in which these businesses occur. Maintaining this territorial control involves violently excluding competing groups from the territory, corrupting or otherwise circumventing state repressive efforts, and maintaining social control over the local population through fear and violence.²³⁷ For example, the neoparamilitaries have regularly employed murder and massacre as tools to consolidate territorial control and advance their illegal business goals.²³⁸ Once the groups have gained and consolidated control of particular areas, they maintain that control and are commonly present. The general pattern of activities of the groups provides an additional focal point for protective measures.

For example, the mere known presence of the group in an area can provide state officials with a sufficient focal point to take actions to protect the nearby population's physical security, which it is entirely foreseeable that the neoparamilitary groups will violate. At a local level, public security forces can take actions to prevent the members of a neoparamilitary group from committing acts of violence against the local population by capturing them or otherwise denying them access to the area. In cases where the presence is less obvious, police investigators and prosecutors can effectively and proactively develop intelligence on who belongs to these groups, in an effort to ensure that there is no impunity and that members of the groups face justice. Finally, targeted anti-corruption efforts could deprive a group of the local support it requires in order to survive and flourish. All of these actions would contribute to depriving neoparamilitary groups of access to a particular area, thereby protecting the local population from acts of violence.

The state response to the neoparamilitaries in Colombia has shown that a state is capable of implementing many of these protective measures against MCOs. National prosecutors have investigated and brought charges against the neoparamilitaries with the goal of

236. Int'l Comm. of the Red Cross, *supra* note 6, at 3; Interview with Ariel Fernando Ávila Martínez, *supra* note 29.

237. *See supra* Part II.

238. *See supra* Part II.

dismantling their organizational structures.²³⁹ Although these efforts are not necessarily tied to protecting individuals in particular areas, they demonstrate that it would not be unreasonable to require targeted prosecutions of MCO members as a measure to protect against their violence. If effectively adopted by local prosecutors, it could potentially aid in excluding the groups from a particular area. Additionally, public security forces have undertaken targeted initiatives, such as the Troya operations, which included coordinated and non-lethal joint military and police operations to weaken groups operating in and around areas of particularly elevated violence.²⁴⁰ These actions indicate that even the local military and police forces could identify the MCOs and their members, if they so choose, and in the process protect the local population from their violence.

C. Conclusion

This part has argued that a primary factor the human rights courts consider in limiting the review of state protection efforts—the burden it imposes on state policy-making authority—should not constrain review of inadequate protection against MCOs. The courts have rejected interfering with state policy-making when there is no specific target for protective measures, as is the case with much crime in a moderately law-abiding society. In contrast, the MCOs provide ample targets for state action, as they are limited in number, predictably violent, and have standard practices. As a result, the burden on the state should not limit the scope of state responsibility for failure to protect against MCOs.

VII. CONCLUSION

In this Article, I have argued that international courts should adopt a relaxed threshold requirement for reviewing state failure to protect against MCOs. Instead of a review requirement that state officials knew or should have known of a real and immediate risk to an individual or group of individuals, they should only require that the state officials knew or should have known about the threat to human rights posed by an MCO. As a result, the state should be held responsible for a violation of the right to life as a result of an MCO action when: (i) the acts result in the victim's death, (ii) the authorities knew or should have known that the MCO posed a general risk

239. See Interview with Juanita Goebertus Estrada, *supra* note 36; see also OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 25, at 9; OFICINA DEL ALTO ASESOR PARA LA SEGURIDAD NACIONAL, *supra* note 102.

240. Juan Carlos Jiménez, *Detrás de las cifras oficiales*, PUNTO DE ENCUENTRO, Mar. 2012, at 49, 57; Ortiz, *supra* note 50, at 7, 10; *Cuatro mil hombres ejecutan la 'Operación Troya'*, *supra* note 92; *En 90 días, policía pretende asfixiar finanzas de bandas criminales*, *supra* note 216.

to the lives of individuals, (iii) they failed to take reasonable measures to prevent the risk from materializing, and (iv) the omitted measures would have had a reasonable possibility of preventing the victim's death.

The human rights courts have recognized a broad state obligation to protect, but they limit court review of state protection efforts by imposing a threshold requirement for review. This threshold requirement arises from concerns about interfering with state policy-making, the limited capacity of the courts, and their primary purpose of ensuring the fulfillment of human rights. A less restrictive threshold requirement is appropriate in light of MCO violence because it would not unreasonably interfere with state policy-making and because there is a systemic risk that states will fail to protect adequately. For these reasons, the courts should recognize and apply the proposed threshold requirement and related responsibility rule, which enforces a broader swath of a state's fundamental obligation to protect in circumstances involving MCOs. The proposed changes would allow a state to be held responsible for failure to take proactive action, at least at the local level, to eliminate the threat posed by MCOs and not just for the isolated circumstances in which officials knew or should have known of a particular act of violence that the MCOs were going to commit.

Even though the relaxed threshold requirement will put more pressure on states to protect adequately, it should not lead to substantial human rights violations by public security forces overzealous to protect. The state is and should be fully subject to the other human-rights-based restrictions on state conduct that apply independently of the obligation to protect. That is, no reasonable protective measure required by the state obligation to protect would involve the violation of other rights of individuals. Consequently, state forces would gain nothing by fulfilling the duty to protect by committing independent rights violations, since these violations will equally subject the state to responsibility. In the end, the primary effect of the proposed expansion of court review would be to require local security forces already present in an area to take protective measures against MCOs they know or should know are active in the area, thereby increasing security for individuals.