

Follow-up Communication

to the

**Office of the Prosecutor of the International Criminal
Court:**

**Violence Against Trade Unionists and Human
Rights Defenders in Colombia as a Crime
against Humanity**

- *Why the International Criminal Court must investigate* -

EXECUTIVE SUMMARY

submitted on 9 July 2013

by

European Center for Constitutional and Human Rights (ECCHR)

together with



and



I. Introduction

On 9 October 2012, ECCHR together with the Colombian human rights organisation CAJAR (Corporación Colectivo de Abogados José Alvear Restrepo) as well as the Colombian trade union confederation CUT (Central Unitaria de Trabajadores de Colombia) submitted a Communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) on violence against trade unionists in Colombia as crime against humanity.¹

In our analysis of widespread anti-union violence in Colombia, we concluded that there is a reasonable basis to believe that since 1 November 2002 crimes against humanity under Article 7 of the Rome Statute of the ICC (ICC Statute) have been committed against trade unionists as part of the broader attack against human rights defenders by State actors and paramilitaries in Colombia. The massive scale of violence against all human rights defenders fulfils the *chapeau* criteria of Article 7 of the ICC Statute. These crimes, moreover, are not being effectively investigated in Colombia, in particular with regard to higher levels of command. Colombia is hence not complying with its obligation to investigate and prosecute under the complementarity principle of the ICC Statute.

In our Communication we had noted with great concern the stagnation in the preliminary examination by the OTP on the situation in Colombia, which has been ongoing since June 2004.² In November 2012 the Office of the Prosecutor issued an Interim Report on the situation in Colombia reaching no conclusion on whether an investigation should be opened, and only finding that the preliminary examination of the situation should continue.³ With this Follow-up Communication we wish to comment on the Interim Report, and to provide the OTP with further information regarding the crime of persecution as a crime against humanity which is also fulfilled in the context of anti-union violence in Colombia. Our position remains the same and we urge the Prosecutor to submit a request for authorisation of an investigation to the Pre-Trial Chamber according to Article 15(3) of the ICC Statute.

II. Comments on the OTP Interim Report on the Situation in Colombia

1. General remarks

To request the authorization to open an investigation under Article 15 (3) of the ICC Statute, it is sufficient to show that there is a reasonable basis that crimes under the jurisdiction of the ICC have been committed. Even though we agree that the five issues on which the OTP announces to focus on in the future are of utmost importance and should be investigated further, we are convinced that other issues also merit the same focus of attention, in particular regarding the still occurring violence against human rights defenders, including trade unionists as one particular example. While mentioning “targeted attacks against human rights defenders, public officials, trade unionists, teachers as well as members of indigenous and afro-colombian communities”⁴, the OTP – unlike with respect to other crimes such as the

¹ *ECCHR/ CAJAR/ CUT*, Communication on violence against trade unionists in Colombia, submitted on 9 October 2012 (hereinafter: *ECCHR/ CAJAR/ CUT*, Communication; available upon request), p. 53.

² *Office of the Prosecutor*, Situation in Colombia – Interim Report, November 2012, para. 2 (hereinafter: *OTP*, Interim Report), available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%200ref/Pages/Situation-in-Colombia-Interim-Report.aspx (last accessed on 30 June 2013).

³ *OTP*, Interim Report, para. 1.

⁴ *OTP*, Interim report, para. 4.

“false positives” cases – does not expand on these crimes nor identifies responsibilities even though it had apparently received much information on the issue.⁵

The need for prioritization highlighted by the OTP with respect to prosecutions in Colombia should also be applied within the Office. In other words, it should prioritize crimes against humanity committed by the highest levels of State actors against those social activists, in particular human rights defenders, whose work is crucial for the implementation of the aims of the ICC Statute of the ICC within the country: for bringing an end to the vicious circle of violence and to the ongoing perpetration of international crimes, as well as for truth and accountability.

The selection criteria taken into consideration by the OTP still suffer from a significant lack of transparency. For example, the Office does not state explicitly the selection criteria in the cases of “false positives”, sexual violence and enforced displacement. While the Report refers several times to violence perpetrated against trade union leaders, indigenous and Afro-Colombian communities⁶, it is not clear how this plays out in the OTP’s prosecutorial strategy with regard to Colombia. The lack of clear prioritization and selection criteria forming the basis of the OTP’s prosecutorial strategy demonstrates the urgency for the OTP to develop such a strategy.⁷

2. Crimes under the jurisdiction of the ICC, in particular violence against human rights defenders, perpetrated by paramilitaries and State actors

In its Interim Report, the OTP briefly considers crimes committed against human rights defenders as crimes against humanity. The OTP recognizes that “specific categories of the civilian population have, in particular, formed the target of such attacks” and includes amongst others “human rights defenders, public officials, trade unionists, teachers and journalists.”⁸ It concludes that “the large-scale commission of the crimes, the number of victims, and the organized nature of the acts of violence evidence the widespread and systematic character of the attacks against the Colombian civilian population carried out by the FARC, the ELN and paramilitary groups.”⁹

Whereas the OTP refers to the exceptionally high number of murders of trade unionists and lists the statistics for the last several years¹⁰, it only analyzes these crimes as part of alleged crimes against humanity committed by non-State actors and omits to mention the possible involvement of State actors in these crimes. However, as we show in our Communication of October 2012, the attacks on human rights defenders by paramilitary groups were greatly motivated by the State doctrine of National Security and can hence not be analysed in isolation of State involvement.

With regard to paramilitary perpetrators, the OTP finds that “paramilitary armed groups demobilized as of 2006”.¹¹ However, the successor paramilitary groups – albeit lacking an

⁵ OTP, Interim report, paras. 2 and 4: “The Office has received and gathered information on a large number of alleged crimes within the jurisdiction of the Court, including [...]. The allegations, in particular, include targeted attacks against human rights defenders, [...]”

⁶ OTP, Interim Report, para. 54 with regard to crimes committed by non-state actors.

⁷ Ambos, ICC OTP Report on the Situation in Colombia – A critical analysis, in: EJIL: Talk!, 1 February 2013, available under <http://www.ejiltalk.org/icc-otp-report-on-the-situation-in-colombia-a-critical-analysis/>; see also Ambos/ Stegmiller, Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?, in: Crime, Law and Social Change 59, 2013, available under <http://link.springer.com/article/10.1007/s10611-012-9407-9> (last accessed on 30 June 2013).

⁸ OTP, Interim report, para. 39.

⁹ OTP, Interim report, para. 50.

¹⁰ OTP, Interim report, paras. 45, 57.

¹¹ OTP, Interim report, para. 7.

overhead organisation such as the former AUC – continue to carry out the same policy, and continue to threaten and murder human rights defenders. In fact, attacks have even increased lately, in particular targeting land right activists and trade unionists.¹² Current statistics show that political violence against human rights defenders is still being carried out by paramilitary groups, which continue to commit these crimes in ongoing obedience to an organizational policy to threaten and eliminate those standing up for their and their communities' rights in opposition to the interests of the elites in power. Sufficient indicators exist to assume that many of the successor groups continue in the same paramilitary traditions; a fact which should be taken into account by the OTP in its continuous analysis¹³ of recent paramilitary violence and should lead it to the conclusion that the same organizational policy persists.

While the OTP hence accepted that violence against human rights defenders, including particularly trade unionists, reaches the level of crimes against humanity, in its chapter on alleged crimes against humanity committed by State actors, the Office fails to include the possible involvement of State actors even though paramilitary groups, in the words of the OTP, “assisted the Colombian military”¹⁴ and the armed forces operated “jointly with paramilitaries”¹⁵, at least with regard to the false positive cases.

Focus: The element of State policy

In our Communication we analysed violence against human rights defenders, taking as one particular example murders of trade unionists, as a crime against humanity, concluding that there is a State policy to commit these crimes and to target the civilian population and especially human rights defenders. The element of a State policy to commit such an attack can be inferred from national policies and counter-insurgent doctrines targeting trade unionists as “guerrilleros” and hence enemies of the State. This stigmatization and public discrediting of trade unionism is combined with the cooperation of State actors with illegal armed groups in a series of cases. It is regrettable that the OTP is more reluctant to include State actors as likely perpetrators than non-State actors, such as the guerrilla and paramilitary groups, regarding violence against human rights defenders. We urge the OTP to refrain from such selectiveness regarding one actor of a conflict and to include crimes committed by State actors against human rights defenders in its analysis and to request the opening of a formal investigation in order to have further investigative means available.

3. Admissibility, in particular complementarity

In analysing complementarity issues, the OTP must take into account, *inter alia*, whether there is a sufficient level of independence and impartiality in those who are investigating and trying the cases.¹⁶ In that regard, it is surprising that the OTP does not take into account the

¹² See *Amnesty International*, Urgent Action “Trade union leader shot at in Colombia”, 10 June 2013, UA 66/13, AI Index: AMR 23/026/2013; *Programa Somos Defensores*, Boletín Trimestral: Agresiones contra Defensores y Defensoras de Derechos Humanos en Colombia, Enero-Marzo 2013, available under <http://www.oidhaco.org/uploaded/content/article/2087377860.pdf>; *Programa Somos Defensores*, Informe Anual 2012, available under <http://www.oidhaco.org/uploaded/content/article/1661103593.pdf> (last accessed on 30 June 2013).

¹³ *OTP*, Interim report, para. 7: “the Office continues to analyse whether so called ‘successor paramilitary groups’ or ‘new illegal armed groups’ could qualify as organised armed groups that are parties to the armed conflict or would satisfy the requirements of organisational policy for the purpose of crimes against humanity.”

¹⁴ *OTP*, Interim report, para. 42.

¹⁵ *OTP*, Interim report, para. 93.

¹⁶ *OTP*, Draft Policy Paper on Preliminary Examinations, 4 October 2010, paras. 58-65, available under http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (last accessed on 30 June 2013).

conditions under which the Colombian judicial system operates, in particular with regard to threats and violence against members of the judiciary.¹⁷

Focus: Military justice reform

In its Interim Report, the OTP mentions the then proposed constitutional reform with regard to military criminal law, and took note of the strong criticism voiced by eleven Special Procedures mandate-holders of the UN Human Rights Council.¹⁸ In December 2012, the military justice reform was adopted by Congress, extending military jurisdiction over international crimes. It will make the military justice system the rule and civilian courts the exception for crimes committed by State security forces, including violations of international humanitarian law.¹⁹ It thus presents a real risk that it will lead to an even greater impunity for crimes committed by State actors.²⁰

On 18 June 2013, the Colombian Congress passed a bill implementing the constitutional reform.²¹ This law extends the preoccupying aspects of the constitutional reform. In particular, it pretends to define the rules of international humanitarian law while actually distorting some of its basic principles, such as the principles of distinction and of precautionary measures.²² The point of departure is already flawed, since it understands international humanitarian law not as a limiting factor for military forces in order to protect the civilian population for which it was created, but views it as a method of justification for the armed forces in order to protect the latter from accountability.²³

Some provisions of the bill should be highlighted since they might prove crucial in shielding high-ranking perpetrators from justice. The reform limits the modes of liability by eliminating the possibility of holding state actors as indirect perpetrators accountable.²⁴ Indirect

¹⁷ This issue is also pointed out by *Ambos*, ICC OTP Report on the Situation in Colombia – A critical analysis, in: EJIL: Talk!, 1 February 2013, available under <http://www.ejiltalk.org/icc-otp-report-on-the-situation-in-colombia-a-critical-analysis/>. For a recent analysis of this matter see the report of the *Colombian Caravana 2012*, Judges at risk, available under <http://www.oidhaco.org/uploaded/content/article/992012509.pdf> (last accessed on 30 June 2013).

¹⁸ *OTP*, Interim report, paras. 222-223.

¹⁹ Article 3 of the constitutional reform, Legislative Act No. 2 of 27 December 2012, available under http://servoaspr.imprenta.gov.co:7778/gacetap/gaceta.mostrar_documento?p_tipo=1097&p_numero=02&p_consec=35404 (last accessed on 30 June 2013).

²⁰ For a detailed analysis see *CAJAR*, Lo lamentable, lo preocupante y lo inaceptable del proyecto de reforma constitucional al fuero penal militar, 22 November 2012, available under <http://www.colectivodeabogados.org/Lo-lamentable-lo-preocupante-y-lo>; *Lawyers without Borders Canada*, Legal Analysis of Legislative Act No. 2 of 2012 (Expansion of the jurisdiction of the Military Criminal Justice System), 15 February 2013, available under http://www.asfcanada.ca/uploads/publications/uploaded_analisis-jpm-asf-canada-2013-02-15-eng-pdf-42.pdf; *Oidhaco*, Ampliación del fuero militar: Un “retroceso histórico” para Colombia, April 2013, available under <http://www.oidhaco.org/?art=1628&lang=es> (last accessed on 30 June 2013).

²¹ Draft bill available under http://www.camara.gov.co/portal2011/proceso-y-tramite-legislativo/proyectos-deley?option=com_proyectosdeley&view=ver_proyectodeley&idpry=1113 (last accessed on 30 June 2013); the final version after the conciliation process is not yet publicly available.

²² For a detailed analysis see *Oidhaco*, Reglamentación de la reforma a la justicia penal militar: Profundización y extensión de los aspectos de preocupación de la reforma constitucional, May 2013, available under <http://www.oidhaco.org/?art=1658&lang=es> (last accessed on 30 June 2013).

²³ See also *Gustavo Gallón Giraldo*, Principio pro violador vs. Principio pro persona, in: *El Espectador*, 18 April 2013, available under <http://www.elespectador.com/opinion/columna-416795-principio-pro-violador-vs-principio-pro-persona> (last accessed on 30 June 2013).

²⁴ *La Silla Vacía*, La llave que podría abrirle las puertas de la celda a Plazas Vega, 20 April 2013, available under <http://m.lasillavacia.com/node/43859> and *Semana*, Un articulito a favor de Plazas Vega? Según Guillermo Rivera, la redacción del proyecto de fuero militar abriría las puertas de la libertad al coronel, 28 May 2013, available under <http://www.semana.com/nacion/articulo/un-articulito-favor-plazas-vega/344739-3> (last accessed on 30 June 2013) Analysts hold that this new limitation, and hence more favorable law, might

perpetration from now on will only be applicable to inherently illegal systems, such as the paramilitary structures.²⁵ Furthermore, while the reform provides for command responsibility, it limits its application to crimes in the course of hostilities²⁶, i.e. to war crimes where a nexus to an armed conflict is required, thereby excluding crimes against humanity where such a link is not required under the ICC Statute. These narrow understandings of liability are contrary to international criminal law obligations and might lead to the exclusion of certain groups of perpetrators from prosecution.

Military tribunals in Colombia belong to the executive power and depend on the Ministry of Defense.²⁷ Therefore, the military justice system in Colombia cannot be qualified as independent and impartial as demanded by the standards of complementarity under the ICC Statute.

The former United Nations Special Rapporteur on extrajudicial, summary and arbitrary executions, Mr. Philip Alston, stated that one of the main obstacles to the effective prosecution of members of the security forces in the Colombian context is precisely the failure of military judges to voluntarily transfer these cases to the ordinary courts.²⁸ A closer scrutiny not only by UN mandate holders, but also of the ICC is needed in order to avoid broadening impunity for State actors responsible for international crimes.

III. The crime of persecution

In this communication, we also analyse violence against trade unionists as a crime of persecution, forming part of the crimes against humanity committed against human rights defenders. We take the five cases presented in our Communication of October 2012 as examples for this analysis and come to the conclusion that the crimes committed can be qualified as the crime against humanity of persecution.²⁹

In our analysis, we find that both the *actus reus* – namely, deprivation of fundamental rights, targeting of an identifiable group, connection to other crimes against humanity – and the *mens rea* of persecution, in particular discriminatory intent, are fulfilled by the facts of these exemplary cases. This analysis supports the finding that Colombian State actors committed acts of persecution as a crime against humanity as described in Article 7(1)(h) of the ICC Statute. The Colombian government and military forces participated in various violent attacks against trade unionists significantly. Their role in the killings and disappearances of trade unionists constitutes an infringement of the victims’ enjoyment of their fundamental rights and this act was taken specifically against trade unionists, thereby exhibiting a discriminatory basis for these actions and demonstrating that this discrimination was on political grounds.

lead to a reversal of one of the few convictions of higher ranking military officials, Coronel Plazas Vega, for enforced disappearances in the Palace of Justice.

²⁵ Article 33 requires a hierarchical illegal structure.

²⁶ Article 32 lit. a) “La comisión de un delito ocurra en desarrollo de las hostilidades”.

²⁷ See Homepage of the Colombian Military Justice System as part of the Ministry of Defense, El ABC de la Justicia Penal Militar. Pregunta: “La justicia penal militar hace parte de la rama judicial? Respuesta: “De conformidad con la Sentencia C-037 de Febrero 5 de 1996 de la Corte Constitucional, la Justicia Penal Militar administra justicia, pero hace parte de la Rama Ejecutiva del Poder Público, depende del Ministerio de la Defensa y su organización está definida en normas concretas.” <http://www.mindefensa.gov.co/irj/portal/JPM?NavigationTarget=navurl://2473b73c962920fb9fc387964d601fe5> (last accessed on 30 June 2013).

²⁸ *UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Report on the Mission to Colombia*, UN Doc. A/HRC/14/24/Add.2, 31 March 2010, para. 37, available under http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add.2_en.pdf (last accessed on 30 June 2013).

²⁹ For the facts of these cases see *ECCHR/ CAJAR/ CUT*, Communication, p. 22 et seq.

The distinction between genocide and the crime against humanity of persecution is all the more relevant in cases such as the one at hand: The crime of persecution recognises, for instance, the full criminality of violations of social and political rights.³⁰ It is especially these violations that form the basis of the conflict in Colombia, and the recognition that human rights defenders are being persecuted would be of great significance.

IV. Conclusion

We reiterate our conclusion that violence against human rights defenders committed in Colombia by non-State actors, but especially also by State actors, amounts to crimes against humanity, including the crime of persecution. There are only very limited ongoing investigations into these crimes, in particular not against those bearing the greatest responsibility. Therefore, the cases presented in our Communication of October 2012 fulfil all elements of a crime under the jurisdiction of the ICC and also would be admissible taking into account the criteria of Article 17 of the ICC Statute. We thus urge the OTP to request the authorization of the opening of an investigation with the Pre-Trial Chamber according to Article 15 (3) of the ICC Statute.

We furthermore recommend carrying out a qualitative analysis of ongoing proceedings in Colombia, not only evaluating statistical information, but also taking into account the context of the justice system as a whole, in particular issues of the lack of security of judicial actors. Regarding military jurisdiction, the recent reform does not comply with the standards set out by the ICC Statute, which is a further reason for the opening of an investigation by the ICC.

Finally, we ask the OTP to clarify its criteria for the selection of cases in order to reach a greater transparency, and make its decisions more understandable for the international community, especially victims.

Please find more information at www.ecchr.eu.

The complete texts of this communication and of our communication of October 2012 are available upon request (info@ecchr.eu).

³⁰ See also *Laurence Carrier-Desjardins*, The Crime of Persecution and the Situation in Darfur: A Comment on the Al Bashir Arrest Warrant Decision, The Hague Justice Portal, available under <http://www.haguejusticeportal.net/index.php?id=10761> (last accessed on 30 June 2013).