



ICC Communication on Sexual Violence in Colombia

Executive Summary

ECCHR, Sisma Mujer and CAJAR file this Communication with the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) under Article 15 of the Statute of the International Criminal Court (ICC Statute) on sexual and gender-based violence committed against women in the context of the armed conflict in Colombia.¹ It presents information that provides a reasonable basis to believe that sexual and gender-based crimes form part of the widespread violence perpetrated against the civilian population by state forces² in the course of the armed conflict in Colombia.³ We have decided to focus our Communication on state forces in order to complement the conclusions that the OTP has already drawn thus far

¹ This Communication will use the term "sexual violence" in the meaning of "sexual crimes" as identified by the OTP: "'Sexual crimes' that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes ('Elements'). (...) Sexual crimes cover both physical and non-physical acts with a sexual element." *ICC-OTP*, Policy Paper on Sexual and Gender-Based Crimes, June 2014, Use of Key Terms. However, this Communication additionally acknowledges the OTP's approach that sexual violence can be a form of gender-based violence, and provides information on how sexual violence has been used in the context of the Colombian conflict in order to diminish gender and ethnical identities of women. See *ICC-OTP*, Policy Paper on Sexual and Gender-Based Crimes, June 2014, paras. 16 and 20.

² This Communication uses the term "state forces" in the meaning of "military forces". According to Articles 216 and 217 of the 1991 Constitution of Colombia, public forces include military forces (army, navy and air forces) as well as the national police: "Artículo 216. La fuerza pública estará integrada en forma exclusiva por las Fuerzas Militares y la Policía Nacional. Todos los colombianos están obligados a tomar las armas cuando las necesidades públicas lo exijan para defender la independencia nacional y las instituciones públicas. La Ley determinará las condiciones que en todo tiempo eximen del servicio militar y las prerrogativas por la prestación del mismo. Artículo 217. La Nación tendrá para su defensa unas Fuerzas Militares permanentes constituidas por el Ejército, la Armada y la Fuerza Aérea. Las Fuerzas Militares tendrán como finalidad primordial la defensa de la soberanía, la independencia, la integridad del territorio nacional y del orden constitucional. La Ley determinará el sistema de reemplazos en las Fuerzas Militares, así como los ascensos, derechos y obligaciones de sus miembros y el régimen especial de carrera, prestacional y disciplinario, que les es propio."

³ When ratifying the Rome Statute on 5 August 2002, Colombia made use of article 124 of the Statute in its Declarations and Reservations, Under this article, a State may declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 (war crimes), when a crime is alleged to have been committed by its nationals or on its territory. Since the seven year period ended on 5 August 2009, war crimes fall under the jurisdiction of the ICC from that date on. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#EndDec (last accessed on 26 April 2015).

regarding sexual violence committed by other armed actors in the conflict as a crime against humanity.

We urge the OTP to include sexual and gender-based violence committed by state forces into its analysis of the Colombian conflict and to address these crimes, committed from 2002 onwards, as crimes against humanity within its preliminary examination. Furthermore, we urge the OTP to subsequently submit a request for authorization of an investigation to the Pre-Trial Chamber under Article 15(3) of the ICC Statute, in order to initiate a full investigation with all duties and powers provided by Article 54 of the ICC Statute.

This Communication focuses on sexual and gender-based violence committed by Colombian state forces for several reasons:

1. Sexual and gender-based violence in the context of the armed conflict mirrors broader structural discrimination in Colombian society and is one of the main types of violent acts (mostly) directed against women in the context of the conflict. However, little information is currently known about the specific characteristics, objectives and circumstances of such crimes. This Communication provides new analysis and offers a reasonable basis to believe that sexual and gender-based violence is part of the broader violence exercised against civilians by state forces in pursuit of two objectives: first, to stigmatize civilians perceived to be collaborating with the guerrillas and, second, to control parts of the territory and the population through the abuse of power.

2. Although all armed actors have committed this kind of violence, a fact that has been recognized by Colombia's Constitutional Court, we focus this Communication on sexual violence allegedly committed by state forces as crimes against humanity because, so far, it has yet to be sufficiently evaluated by national authorities or by the OTP. Moreover, the impact of sexual violence committed by state forces, the very authorities charged with protecting the civilian population, is particularly grave, yet these crimes continue to result in almost absolute impunity. The responsibility of commanders and superiors to prevent and investigate crimes against humanity is of special relevance in times of armed conflict. Therefore the role of Colombia's military leadership in the commission, failure to prevent, and hindrance in investigations of sexual and gender-based violence by their troops and subordinates needs to be analysed.

3. The serious shortfalls in the Colombian justice system regarding sexual and gender-based violence must be assessed in light of the OTP's policy of including a gender-sensitive perspective in all of its work.⁴ Up to now, the OTP has only been gathering information on new investigations and protection policies issued by various government agencies in Colombia.⁵ By analyzing the exemplary cases and various legal and non-legal measures, we

⁴ See *ICC OTP*, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

⁵ *ICC OTP*, Report on Preliminary Examination Activities 2014, December 2014, (*ICC OTP*, Report on Preliminary Examination Activities, 2014), para. 131. These are policies of the Attorney General's Office

came to the conclusion that Colombian investigative authorities have, however, failed to adequately implement both existing and new policies. Thus, rather than helping to end impunity and prevent sexual violence, the policies actually serve as barriers to the investigation and prosecution of sexual violence in the context of the Colombian armed conflict.

II. Facts

In 2014, a woman was raped in Colombia every 33 minutes. Every three days, two women were raped in the context of the ongoing Colombian armed conflict. Although all armed actors have committed sexual violence, state forces have been identified as the aggressors in more than 50% of all conflict-related sexual violence reported between 2004 and 2012. Sexual and gender-based violence constitutes one of the largest and gravest expressions of structural discrimination against women in Colombia today, and is in a *continuum* of unequal power relationships and dynamics between women and men.⁶ It remains widespread in the context of the armed conflict and continues to go unpunished.⁷ Sexual violence by all armed actors, including state forces, relates not only to the specific dynamics of the armed conflict, but also to the general atmosphere of violence and broader structural discrimination against women in Colombia. All parties to the conflict have repeatedly asserted their domination over the bodies and lives of women, a fact that has been recognized both by national courts and international mechanisms.⁸

In its 2008 ruling referred to as “Auto 092,” the Colombian Constitutional Court highlighted the ongoing disproportionate effect of Colombia’s armed conflict and forced displacement on women, especially with regard to the risk of sexual violence and persisting impunity for the perpetrators of such crimes. The Constitutional Court also remitted 183 specific cases of sexual violence to the Attorney General’s Office to review or initiate criminal investigations in order to overcome impunity and to ensure the application of the principle of *due diligence*.⁹

(Fiscalía General de la Nación, FGN), the Ministry of Justice (*Ministerio de Justicia y del Derecho*) the Ministry of Interior (*Ministerio del Interior*), the Ministry of National Defence (*Ministerio de Defensa Nacional*), and the Office of the Inspector General (*Procuraduría General de la Nación*).

⁶ The *continuum* of violence is a way of explaining the interrelation between the acts of discrimination and violence against women, both in the public and private spheres and during both war and peacetime. See *Ruta Pacífica de las Mujeres*, Informe de Comisión de Verdad y Memoria de las Mujeres, 2013, p. 39-43; *Corporación Sisma Mujer*, Derechos en femenino, hacia un real camino a la igualdad?, VI Informe de Derechos Humanos de las Mujeres en Colombia 2010-2012, 2013, p. 50.

⁷ *Corporación Sisma Mujer*, Lineamientos de Política criminal para la protección del derecho humano de las mujeres a una vida libre de violencia sexual, 2013, p. 18.

⁸ *Colombian Constitutional Court (CC)*, Auto 092, 2008 (CC, Auto 092); CC, Auto 098, 2013 (CC, Auto 098), CC, Auto 009, 2015 (CC, Auto 009); *CEDAW Committee*, Observations on the combined seventh and eight periodic reports of Colombia, CEADW/C/COL/CO/7-8, 29 October 2013 (CEDAW, 2013), paras. 17-18; *IACHR*, Violence and discrimination against women in the armed conflict in Colombia, OEA/Ser.L/V/II.Doc.67, 18 October 2006 (IACHR, 2006).

⁹ After the Auto 092 was rendered, the Attorney General’s Office, the Inspector General’s Office and the Armed Forces issued several legal measures to overcome obstacles faced by women in their access to justice. In 2013 (Auto 098) and 2015 (Auto 009), however, the CC concluded that sexual violence continues to present a risk for women in the context of the conflict and of forced displacement, and that all parties to the

In January 2015, the Constitutional Court issued a follow-up decision, Auto 009, in which it again expressed its concerns about the persistence of specific gender-based risks faced by Colombian women. It called on the Colombian Government to counteract discriminatory gender stereotypes, and remitted a number of additional cases to the Attorney General's Office for review.¹⁰

Aside from these decisions, there is very little reliable data on sexual and gender-based violence in Colombia. The Constitutional Court has found that violence against women and the special risks they face in the armed conflict have been rendered almost invisible.¹¹ In relation to reporting rates for sexual violence in general and that in conflict situations in particular, both national and international bodies have recognized Colombia's high rate of under-reporting for such crimes.¹² The OTP has previously acknowledged the tendency of such crimes to go under-reported,¹³ such as in its assessment of a reasonable basis to proceed with an investigation into the *Situation in the Central African Republic II*. In this assessment, it also recognized that existing statistics for sexual violence are likely to represent only a fraction of all potential cases, citing the need for more information in order to properly assess the incidents of rape committed by both of the accused actors.¹⁴ In general, in its recent Policy Paper on Sexual and Gender-Based Crimes (Policy Paper),¹⁵ the OTP identified factors that can often deter victims of sexual violence from reporting the crime. These factors include insecurity, the social stigma attached to sexual violence, and the lack of medical and psychological support.¹⁶

conflict committed such crimes. It again ordered state authorities to ensure that these legal measures were effective in order to guarantee the rights of women and overcome impunity.

¹⁰ CC, Auto 009, p. 3, 121-123.

¹¹ CC, Auto 092, II.3., arguing that this is due to the fact that the state entities responsible for addressing these situations do not take into account categories of measurement and indicators that recognize the disproportionate impact of the conflict on this particular group nor the gender aspects of forced displacement.

¹² *Amnesty International*, 'This is what we demand. Justice!' Impunity for sexual violence against women in Colombia's conflict, 2011 (*Amnesty International*, 2011), pp.9 and 20-21; *Amnesty International*, 'Colombia: Hidden from Justice' Impunity for conflict-related sexual violence, a follow-up report 2012 (*Amnesty International*, 2012), p. 25-26; CC, Auto 092, Sentesis, c. and Section III.1.1.2.; *IACHR*, 2006, paras. 48-56; *IACHR*, Annual Report 2009, Chapter V - Follow-up report: violence and discrimination against women in the armed conflict in Colombia (*IACHR*, Annual Report 2009), para. 17; *OXFAM International*, Briefing Paper: Sexual violence in Colombia – Instrument of war, 9 September 2009 (*OXFAM International*, Briefing Paper, 2009), p. 11-13; *ABColumbia, SISMA, USOC and Oidhaco*, Colombia: Women, Conflict-related sexual violence and the Peace-Process, 2013 (*ABColumbia et al.*, 2013), p. 15; *CEDAW*, 2013, para. 17; *UN Secretary General*, Conflict-related sexual violence: report of the Secretary General, 13 March 2014, S/2014/181 (*UN Secretary-General*, Conflict-related sexual violence, 2014), para. 19.

¹³ *ICC OTP*, Situation in the Central African Republic II, Article 53 (1) Report, 24 September 2014, paras. 176 and 180.

¹⁴ *ICC OTP*, Situation in the Central African Republic II, Article 53 (1) Report, 24 September 2014, para. 180.

¹⁵ *ICC OTP*, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

¹⁶ *ICC OTP*, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 50: "In addition to general challenges such as conducting investigations in situations of ongoing conflict and a lack of cooperation, the investigation of sexual and gender-based crimes presents its own specific challenges. These include the under- or non-reporting owing to societal, cultural, or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary

We welcome the OTP's important efforts in addressing sexual and gender-based violence to date and respectfully suggest that it include the same considerations raised in the Policy Paper in its preliminary examination into Colombia.¹⁷ In its Interim Report on the Situation in Colombia from November 2012, the OTP acknowledged that between 2002 and 2008, members of the Colombian Army deliberately killed thousands of civilians to bolster its success rates in the context of the country's internal armed conflict. The OTP concluded that the available information indicated that these widespread killings, known as *false positives*, were directed against civilians, leading the OTP to classify them as crimes against humanity.¹⁸ Although the OTP has noted that rape and other forms of sexual violence can be attributed to all armed actors in the conflict, including state forces, paramilitaries and guerrilla groups, it has thus far only considered sexual crimes committed by state forces as war crimes going back to 2009.¹⁹ It has remained silent on the question of whether such crimes by state forces could amount to crimes against humanity. Neither the national prosecution authorities nor the OTP have comprehensively understood the nature of the Colombian armed conflict and how sexual crimes are used as a key component of the broader attack against civilians in the context of the conflict.

As demonstrated both by the circumstances surrounding sexual crimes by state forces in the context of the armed conflict and the objectives pursued in committing such crimes, we argue that Colombian state forces have committed crimes against humanity beyond the recognized cases of *false positives*.

ECCHR, Sisma Mujer, and CAJAR have selected and analyzed 36 publicly available cases that specifically address allegations of sexual violence committed by state forces between 1 November 2002 and 2011, which therefore serves as the temporal focus of this Communication. The vast majority of these cases are part of the confidential annex to Auto 092 and Auto 009 from 2015. Out of the 36 cases, the Communication provides in-depth analysis of six exemplary cases, for which we had access to the relevant files. Each of these exemplary cases involves acts committed in the context of the conflict and presents a concrete

evidence, owing, *inter alia*, to the passage of time; and inadequate or limited support services at national level.”

¹⁷ In its Policy Paper the OTP announced that it would improve the integration of a gender perspective and gender analysis into all of its work, enhance its capabilities to collect other forms of evidence, and be innovative in its investigations. In addition to evidence from victims, this could include “insider testimony, the statistical or pattern-related evidence from relevant experts, medical and pharmaceutical records, empirical research and reports and other credible data produced by States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources. Already according to Article 21(3) of the ICC Statute, the interpretation and application of the Statute must be consistent with international human rights law, including women's human rights instruments. Therefore the OTP must take into account the CEDAW and when interpreting this Convention the general recommendations by the CEDAW Committee. See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, paras. 5, 26-27 and 65.

¹⁸ ICC OTP, Situation in Colombia: Interim Report, November 2012, paras. 92-122.

¹⁹ Upon ratifying the ICC Statute, Colombia made a reservation concerning the applicability of war crimes which therefore only fall under the jurisdiction of the ICC since 1 November 2009. See ICC-OTP, Situation in Colombia: Interim Report, November 2012, paras. 3 and 24. See also *supra*, footnote 3.

link to the general attack against the civilian population. Of the six, none have led to a conviction of the direct perpetrators of sexual violence and there is no information on whether higher ranking officers or commanders, i.e. the superiors of the direct perpetrators, have been subject to any proceedings. With the problem of under-reporting in mind, we also identified general characteristics and circumstances in which sexual violence against women has been committed during the armed conflict. The analysis of these 36 cases already allows us to conclude that these are not isolated acts, but are directly linked to the broader behavior of military forces in Colombia's armed conflict.

From our analysis, three *characteristics* of sexual violence in Colombia can be drawn: i) it often takes place in the context of militarization; ii) it often occurs in correlation with internal displacement; and iii) it is often accompanied by other cruel human rights violations. To sum up, sexual violence often coincides with military operations by state forces against the civilian population in particular regions of the country as part of the military's efforts to achieve its objectives in the armed conflict.

A comprehensive gender analysis into the characteristics of human rights violations further demands an assessment of the *objectives and circumstances* under which conflict-related sexual violence is committed by state forces as part of its broader military campaigns. The main goal of the Colombian military's campaigns is to regain power in regions controlled and influenced by the guerrillas and to combat any real or perceived support of the guerrillas - or the "enemy" - by the civilian population. The information analysed for this Communication demonstrates that sexual violence is often used with these objectives in mind, thereby comprising part of the military's conflict-related strategy.

More specifically, *one of the aims* of socio-political violence, including sexual crimes, in this context is to attack the civilian population perceived to be collaborating with the guerrillas, making them into military targets. State forces have committed sexual violence against women within civilian populations stigmatized as a whole for their rumored provision of social support or concealment to certain armed actors. They have also targeted specific women with sexual violence due to their perceived or real relationships with the "enemy side," i.e. the guerrillas. In the pursuit of this first objective, specific circumstances are recurring. Sexual violence frequently occurs (a) in military operations meant to intimidate civilians and maintain territorial control, (b) in operations where paramilitaries participate; (c) in settings of detention and criminalization of persons; (d) against stigmatized communities which already suffer from processes of discrimination, like indigenous peoples and Afro-descendants.

The second aim is to enable members of the state forces to control the population and the territory through the abuse of power towards the civilian population. This may or may not be directly connected to military interests (e.g. diminishing the capacity of the enemy or punishing the civilian population), political interests (e.g. controlling territories and

communities), or economic interests (e.g. control over resources). However, the use of sexual violence is still related to the armed conflict in that the latter provides a coercive setting which: i) drastically limits the autonomy and rights of women; ii) deepens the invisibility and lack of attention with regards to violence against women; and iii) facilitates the commission of crimes while guaranteeing impunity. Thus, it strengthens the control of armed actors over the civilian population. Sexual violence in these situations cannot be qualified as merely opportunistic or reduced to the acts of isolated aggressors taking advantage of the violent atmosphere generated by the conflict. Perpetrators belonging to the state forces represent an armed state authority exercising a public function in the context of an extended armed conflict.

II. Legal Analysis

Firstly, there is a reasonable basis to believe that sexual violence committed by Colombian state forces qualifies as a *crime against humanity* under Article 7 of the ICC Statute. This conclusion arises from a legal assessment of the presented information and a gender-sensitive analysis of crimes against humanity committed by the military, taking into account the underlying differences and dynamics which determine and shape gender roles in society.²⁰ In the context of Colombia's armed conflict, state forces have conducted an attack directed against the civilian population in furtherance of a state policy and which can be qualified as widespread and systematic. In this regard, it must be highlighted that the analysis concerning this "attack" against the civilian population goes beyond a specific set of crimes, such as the use of sexual violence mentioned in the present Communication, but also includes broader circumstances surrounding the attack as a whole. Colombian state forces have implemented a campaign to weaken the guerrillas' territorial control and to extinguish any real or perceived support for the "enemy." This campaign has included efforts to control parts of the territory or the population through the abuse of the military's authority and power. Violence of this characteristic and scope needs to be recognized as an attack against the civilian population amounting to crimes against humanity and not only as the necessary nexus to an armed conflict as part of war crimes. All of the cases of sexual violence presented in the Communication were not isolated acts, but "part of" such a broader military campaign targeting civilians in certain regions of the country. Moreover, the OTP has affirmed that one act of sexual violence, committed in the course of a broader campaign of crimes, is sufficient to determine that the act may be considered as a crime against humanity.²¹

Secondly, assessing the *responsibility of military commanders* (Article 28 of the ICC Statute), this Communication highlights the foreseeability of sexual crimes and the military commander's failure to take necessary and reasonable measures within their power to prevent or repress the commission of such crimes. While there is still no common standard for

²⁰ ICC OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 20.

²¹ ICC OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 32.

indicators of foreseeability of sexual violence in international jurisprudence, the OTP has addressed this challenge in its consideration of whether the accused superior had sufficient knowledge.²² The foreseeability element can also be proven through reference to the mental element of ‘should have known,’ which examines how leaders are informed about such crimes. Regarding the “should have known” standard, the superior must have “‘merely been negligent in failing to acquire knowledge’ of his subordinates’ illegal conduct.”²³ Therefore if the accused superior had ‘alarming information’ he or she had a duty to inquire about the conduct of subordinates.²⁴ Even past crimes by the subordinates that went unpunished should put the superior on notice of the risk for future crimes.²⁵

Finally, ECCHR, Sisma Mujer and CAJAR consider the requirements of *complementarity* under Article 17 (1) of the ICC Statute to be fulfilled, as the Colombian state has been inactive and/or not willing to investigate against middle or high-ranking officials of the Colombian military in cases of sexual violence. Various state authorities have issued a number of legal measures in order to improve access to justice for women, but none have been sufficiently implemented.²⁶ The few proceedings that have been initiated to date have only investigated lower-level perpetrators and remain grossly inadequate. For the last seven years, since the decision in Auto 092, the Colombian government and judiciary have remained unwilling or unable to genuinely carry out investigations or prosecutions. The Colombian

²² *ICC- OTP, Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 81. Although the OTP did not refer directly to Article 28, but to the mental element of Article 30 (2)(b) of the Rome Statute, it clarifies; “The experience of the ICC and other international tribunals demonstrates that there is often no evidence of orders to commit sexual or gender-based crimes. In such circumstances, evidence such as patterns of prior or subsequent conduct or specific notice may be adduced to prove an awareness on the part of the accused that such crimes would occur in the ordinary course of events, which would satisfy the mental element under article 30 (2)(b).”

²³ *ICC, Prosecutor v. Jean-Pierre Bemba Gombo (Bemba), Pre-Trial Chamber II*, , Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute on the Charges of the Prosecutor Against *Jean-Pierre Bemba Gombo*, 15 June 2009 (*Bemba*, Decision on the Confirmation of Charges), para. 432, referring to *Bemba, Amnesty International, Amicus Curiae Observations on Superior Responsibility* submitted pursuant to Rule 103 of the Rules of Procedure and Evidence , 20 April 2009 (*Bemba, Amnesty International: Amicus Curiae Brief*), paras. 3 and 6.

²⁴ *Special Court of Sierra Leone, The Prosecutor v Sesay et al*, Case No. SCSL-04-15-T, "Judgment", 2 March 2009, para. 311.

²⁵ *Bemba*, Decision on the Confirmation of Charges, para. 434.

²⁶ To mention only a few of the measures taken to prevent and investigate sexual violence by state authorities: **Memorandum 046 of 2009 of the Attorney General’s Office** recognizes the need for adequate treatment of victims during proceedings and emphasizes the need for improved investigative strategies for gender-based crimes; **Resolution 5101 of 1998 of the Attorney General’s Office** stresses that authorities should consider situations of high-vulnerability and areas with a high-level of conflict in assessing who should be granted protective measures; **Directive 001 of 2012 of the Attorney General’s Office** addresses the need for an accurate contextualization of conflict-related sexual violence and specifies the implementation of a prioritization system which includes gender-based violence in its criteria.; **Law No. 1719 of 2014** intends to overcome various barriers by now including other crimes under international criminal law into the Colombian Criminal Code, namely forced pregnancy, enforced sterilization and forced abortion. It also adapts the concept of “violence” to that found in the ICC Elements of Crimes. However, the new crimes still do not comply fully with the standards of the ICC Statute, and the ICC has already expressed doubt as to whether the actual investigations will fulfill international standards given that no new conceptual elements for the investigation and prosecution of sexual crimes are provided in the new law. Moreover, in accordance with the principle of legality, these changes are only applicable to acts committed after the passage of the law on 18 June 2014.

Constitutional Court similarly concluded in 2015 that the steps taken by judicial authorities have so far been insufficient to ensure the adequate investigation and prosecution of sexual violence.²⁷

More precisely, the Colombian investigative authorities fail to genuinely and adequately investigate and prosecute sexual violence committed by state forces as crimes against humanity. This *inaction* by the Colombian judiciary is due to several institutional failures of the Colombian justice system and a lack of political will to investigate these cases. First, the justice system is not equipped to adequately contextualize sexual violence and to link sexual crimes with the broader violence against the civilian population. The policy-driven aspects of these incidents and their relation to the military's broader attack against civilians in the armed conflict are hardly investigated. In addition, there is an absence of an investigative methodology that takes into account barriers to accessing justice for women, the specific risks they face in this context, and evidentiary difficulties in relation to sexual violence.²⁸ Furthermore, the recognition of the armed conflict context is necessary to establish the responsibility of the direct perpetrators as well as the commanders of the armed forces involved.²⁹ A second obstacle that exemplifies Colombia's inaction concerns the exercise of military jurisdiction over cases of sexual violence. Investigations into allegations of sexual violence are often initially handled by the military itself, despite their lack of competence for dealing with such crimes. Various international organizations have repeatedly criticized this practice due to the general lack of independence and impartiality of the military justice system.³⁰

In addition, the Colombian Constitutional Court has also highlighted the insufficiency of protection measures for survivors and witnesses of sexual violence,³¹ and the general tendency for such crimes to go under-reported.³² Moreover, the investigative authorities lack political will to adequately investigate and prosecute sexual violence. Women face discriminatory social barriers, such as gender prejudices from state officials, who often neglect claims of sexual violence because of their personal views on women's rights. Other barriers include the lack of a gender-sensitive perspective in methods of obtaining evidence and in the identification and characterization of the victim.³³ The judicial system suffers from

²⁷ CC, Auto 009, p. 88.

²⁸ *Dejusticia*, Acceso a la justicia: mujeres, conflicto armado y justicia, 2013, p. 102; Working Group to monitor compliance with Auto 092 of 2008 (Mesa de Seguimiento al Auto 092), Access to Justice for women victim of sexual violence: Fifth Follow-Up Report to Auto 092 of the Colombian Constitutional Court, 2013, (Mesa Auto 092, 2013) p. 18.

²⁹ *Ibid.*

³⁰ In particular, the Inter-American Court of Human Rights has repeatedly ruled that the procedure of military courts does not comply with the duty of States to investigate and prosecute effectively and independently violations of the American Convention on Human Rights. *Inter-American Court of Human Rights*, Case of Vélez Restrepo v. Colombia, Judgment of 3 September 2012, Series C No. 248, para. 240 with further references in footnote 229.

³¹ CC, Auto 009, p. 95, and CC, Judgment T-234 of 2012, section 6.2.5 and conclusions no. 5 and 6.

³² CC, Auto 009, p. 30.

³³ CC, Auto 009, pp. 88 and 92.

serious institutional weaknesses, including the lack of autonomy and independence of the judiciary, and a low level of understanding and awareness of the peculiarities of certain violations of women's rights. It suffers from widespread corruption, deficiencies in the initial investigative phase, and a general lack of control and culture of impunity. A number of obstacles also relate to the inadequate application of procedural rules.

The nature, quality, and widespread delay of existing investigations and prosecutions demonstrate that Colombia is neither investigating nor genuinely willing and able to investigate and prosecute those bearing the greatest responsibility for sexual violence committed as a crime against humanity between 2002 and 2011. From analysing the proceedings in the cases presented in the Communication, in which some investigative steps were indeed taken, it can be concluded that higher-ranking officials are left out of the investigations, leading to the assumption that they are being shielded from prosecution. Proceedings are often delayed without justification, especially in politically-sensitive cases that implicate the military or other state forces, and independence and impartiality are not guaranteed. Finally, the Colombian prosecution authorities charged with investigating human rights violations lack sufficient resources, both in terms of manpower, as well as financial capacity and training.³⁴ Even though special prosecutor's offices have been assigned to deal specifically with sexual violence, these are not funded in a way to assure that the judiciary may effectively contribute in the fight against impunity.

Although the OTP has recognized some positive steps achieved by Colombia, it has also expressed its concerns about the limited progress attained in relation to investigations of sexual crimes.³⁵ In this regard, the OTP has highlighted the very low number of convictions achieved in the 183 cases of conflict-related sexual violence remitted to the Attorney General's Office by the Constitutional Court for additional review. It also underlined the fact that, since its last report, only one conviction for rape against a member of the Armed Forces had been reported to the OTP.³⁶ However, to date, the OTP has taken the position that the delays are justified as a legitimate by-product of Colombia's legislative framework. It has claimed that Colombia is genuinely trying to prosecute criminals, as evidenced by the prosecutions that have taken place so far. However, even in those cases in which the Colombian Constitutional Court has ordered adequate investigations, no real progress can be ascertained.³⁷ After the rendering of Auto 092, the Attorney General's Office, along with the Inspector General's Office and the Armed Forces, issued several legal measures aimed at overcoming the obstacles faced by women in accessing justice. Despite these measures, the Constitutional Court concluded in both 2013 (Auto 098) and 2015 (Auto 009) that sexual

³⁴ *Ambos*, The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court, Heidelberg 2010, p. 86 with regard to the special units for Justice and Law proceedings within the Prosecutors' offices. See also *Human Rights Watch*, Breaking the Grip, 2008, p. 33.

³⁵ *ICC OTP*, Report on Preliminary Examination Activities, 2014, para. 123.

³⁶ *ICC OTP*, Report on Preliminary Examination Activities, 2014 paras. 123-125 and 130.

³⁷ *CC*, Auto 009, p. 88.

violence continues to present a risk for women in the context of the conflict and forced displacement, noting that all parties to the conflict continue to commit such crimes. In 2015, it again ordered state authorities to “increase their efforts to initiate corresponding criminal and disciplinary investigations,”³⁸ and to ensure that existing legal measures are effective enough to guarantee the rights of women and overcome impunity. The failure of prosecutors to incorporate the guidelines of the Constitutional Court is the main cause of impunity in the 183 cases in Auto 092. Judgments have been rendered in only three of these 183 cases, making the impunity rate 98.8%.³⁹ The analysis of the proceedings in the six exemplary cases highlighted in the Communication confirms that barriers to accessing justice persist and that existing regulatory attempts to overcome these barriers are both inadequate and suffer from a lack of implementation.

Therefore, ECCHR, Sisma Mujer and CAJAR come to the conclusion that there is a reasonable basis to believe that Colombia is not complying with its obligations under the complementarity principle. As such, complementarity considerations should no longer prevent the OTP from requesting the opening of a formal investigation, including an investigation into sexual violence by state forces as a crime against humanity.

IV. Conclusion

With this Communication, ECCHR, Sisma Mujer and CAJAR intend to provide sufficient guidance for an analysis that could lead the OTP to: i) include a gender-sensitive perspective in its assessment of the Colombian conflict; ii) recognize sexual violence as crimes against humanity committed by state forces in Colombia; and iii) determine that there is a reasonable basis to proceed with an investigation into the situation of the Republic of Colombia. We welcome the 2014 Policy Paper on Sexual and Gender-based Violence and highly appreciate these new developments with regard to including a gender-sensitive perspective and analysis into the work of the OTP. We hence suggest that the issue of sexual violence in Colombia offers an opportunity for the OTP to implement this new approach.

³⁸ CC, Auto 009, p. 10.

³⁹ Mesa, Auto 092, 2013.