



**EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS**

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## **SPECIAL NEWSLETTER**

### **WHEN WOMEN BECOME TARGETS: SEXUAL AND GENDER-BASED VIOLENCE IN COLOMBIA'S CONFLICT**

#### **A Matter for the International Criminal Court**

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#### **Contents**

I. Introduction	3
II. Sexual and gender-based violence in Colombia's conflict – a well-known and still ignored fact: Interview with Claudia Mejía Duque	5
III. Colombia's unwillingness to investigate and prosecute	8
IV. Sexual and gender-based violence in Colombia - a matter for the ICC?	12
V. The peace negotiations and the ICC – an exclusive approach? Contribution by Luis Guillermo Pérez Casas	13
VI. ECCHR's role and mission Contribution by Wolfgang Kaleck	16



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## I. Introduction

Sexual and gender-based violence constitutes one of the largest and gravest expressions of structural discrimination against women in Colombia today. Although this has been confirmed by national courts in Colombia and by international mechanisms, these crimes continue to go unpunished. In the context of Colombia's ongoing armed conflict, both the Government of Colombia and the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) must clarify whether and how such crimes constitute crimes against humanity, including how they relate to prevailing gender norms and inequalities specific to the Colombian context. To date, the State's efforts to promote normative changes remain insufficient to overcome impunity.

In 2014, every 33 minutes a woman was raped in Colombia; every three days, this happened to two women in the context of the Colombian armed conflict. The overwhelming majority of victims from sexual violence and gender-based crimes in Colombia are women. Of all the sexual violence cases reported to the national forensic institute over the last 12 years, 84 per cent of the victims were women.

This special newsletter outlines the current situation of sexual and gender-based violence in Colombia's armed conflict, reviews relevant legal efforts to date, and summarizes our recent Communication to the ICC submitted by Sisma Mujer, CAJAR and ECCHR, making the case for an ICC investigation into the matter.

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. In order to provide appropriate care for women victims of the conflict, the Constitutional Court ordered Colombian state authorities to adopt measures to acknowledge and prevent the disproportional impact on women and to protect their fundamental rights. The Constitutional Court also remitted 183 specific cases of sexual violence to the Attorney General's Office to initiate criminal investigations in order to overcome impunity and to ensure the application of the principle of due diligence.

In its November 2012 Interim Report on the Situation in Colombia, the OTP acknowledged that between 2002 and 2008, paramilitaries and guerrilla groups committed sexual and gender-based violence amounting to crimes against humanity.

Although the OTP noted that rape and other forms of sexual violence were also committed by state forces in the context of the armed conflict, it has thus far only considered these crimes to be war crimes rather than crimes against humanity. Meanwhile, state forces, the very authorities charged with protecting the civilian population, have been identified as the aggressors in more than 50% of all conflict-related sexual violence reported between 2004 and 2012. Given this scale, the sexual violence crimes committed by

state forces cannot be seen as mere isolated acts; they clearly comprise a key component of a broader attack against civilians within the context of the conflict.

As such, conflict-related sexual and gender-based violence committed by state forces can and should be qualified as a crime against humanity.

*In 2006, an indigenous community was celebrating a traditional ceremony when, suddenly, a group of soldiers arrived and started shooting at them. Two men and a boy were killed, and others were injured while fleeing. Three men were arrested. Two indigenous women, A. and B., were subjected to sexual violence by soldiers who sought information on the whereabouts of the male community members who had fled. The documentation of the facts was first submitted to the Military Criminal Justice System, which initiated an investigation into the deaths of the three indigenous community members who had been killed. Six months later, the women had the opportunity to report the sexual assaults for the first time before an ombudsman, who is not part of an ordinary criminal investigation system. Although their statement was sent to the Attorney General's Office, it took two more years until they gave testimonies before the prosecutor. Nine years after the incident, no perpetrator has yet been convicted.*

*Also in 2006, C. was gang-raped by a group of soldiers, who accused her and her partner of being informants or supporters of the guerrillas. Three parallel investigations were launched: a disciplinary preliminary investigation by the military, disciplinary proceedings by the Inspector General's Office, and a criminal investigation under the ordinary justice system. Again, the military was the first one to take investigative measures within its disciplinary investigation. On one occasion, it was even the head of the very unit involved in the incident who accompanied the woman to her medical forensic examination.*

*In another case, D., who allegedly collaborated with guerrilla groups, was illegally detained by a military unit and sexually assaulted by a soldier in a military base. Despite the fact that the alleged perpetrator was identified and biological evidence was available, after more than seven years of investigations, the case was eventually dismissed in 2013 on the grounds that the victim's account of the facts was deemed to be not credible and the forensic evidence had not been adequately handled.*

\* We decided to present the cases anonymously in order to protect the affected women, considering that, to date, there are insufficient judicial guarantees that would allow them to participate in national or international investigations against state forces

In our Communication to the ICC, ECCHR, Sisma Mujer and CAJAR present 36 cases that specifically address allegations of sexual violence committed by state forces between 1 November 2002 and 2011. These cases were selected from publicly accessible information and the vast majority of them are included in the

confidential annex to Auto 092 of 2008 and the Auto 009 of 2015, meaning that most of the cases therefore include a constitutional decision encouraging their criminal investigation. Despite this, sexual crimes committed by state forces continue to result in almost absolute impunity. In order to analyze the concrete failures in

criminal proceedings to date, the Communication provides in-depth analysis into the investigations of six out of these 36 cases. Each of the six exemplary cases involves acts committed in the context of the conflict, none of which have led to a conviction of the direct perpetrators of sexual violence. In all of the cases presented, there is no information to suggest that higher-ranking officers or commanders, i.e. the superiors of the direct perpetrators, have been subject to any proceedings. As outlined in the Communication, the significant obstacles to accessing justice for women victims contribute to the perpetuation of sexual and gender-based violence against women by obfuscating the existence and severity of the problem.

With this Communication to the ICC, ECCHR, Sisma Mujer and CAJAR present new analysis that provides a reasonable basis to believe that sexual and gender-based crimes form part of the widespread violence perpetrated against the civilian population in the course of Colombia's armed conflict, therefore necessitating adequate investigation and accountability. It demonstrates the strong link between sexual violence and the broader military campaign against the civilian population, which pursues two objectives: first, to stigmatize civilians perceived to be collaborating with the guerrillas, turning

them into legitimate military targets; and second, to enable members of the state forces to control parts of the territory and the population through the abuse of their power. The communication further highlights the lack of implementation of Colombia's legal obligations, as legal measures are not implemented despite enough legislation on the books to fight impunity for crimes of sexual and gender-based violence committed in the context of the armed conflict.

There are no criminal investigative strategies to overcome the distinct difficulties of sexual violence cases. Consequently, victims continue to be discredited if no other testimony can corroborate the incident. Moreover, investigations remain limited to the direct perpetrators, ignoring the responsibility of their superiors and commanders. This is due to widespread "judicialized sexism" and a lack of political will by the military and prosecution authorities. We therefore call on the OTP to include a comprehensive gender-sensitive approach in its current examination and subsequently, to submit a request for authorization of an investigation to the Pre-Trial Chamber, pursuant to 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.

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## **II. Sexual and gender-based violence in Colombia's armed conflict – a well-known and still ignored fact: Interview with Claudia Mejía Duque from Sisma Mujer**

### **1. In general:**

*What is the current situation in the Colombian armed conflict these days?*

Although a peace process is currently underway and despite the fact that the FARC has declared a ceasefire, the situation in Colombia remains highly

volatile. For instance on 14/15 April this year eleven soldiers died in the department of Cauca, and the Colombian Army has resumed its air strikes. Specifically regarding the situation of women, there are some key aspects to mention. The official figures on sexual violence committed against women in the context of the armed conflict reveal that it has not declined in recent years. The situation is particularly serious with regard to the increased risk for women rights defenders and women leaders advocating on behalf of victims. On the other hand, the number of armed fights that occur has declined, as has the number of individuals killed, wounded, abducted, or forcibly displaced as a result of the armed conflict. More generally, attacks against the civilian population have decreased by 40% as a result of the peace negotiations between the FARC and the Colombian Government. This was announced by the Peace and Reconciliation Foundation and confirmed by the Ministry of Defense.

***What are the underlying reasons for sexual violence in the armed conflict?***

The widespread violence against women in the country is an expression of the broader discriminatory and unequal culture. This discrimination against women exists in everyday life and is further exacerbated by the dynamics of the armed conflict. The expressed stories of violence against women exhibit a *continuum*, from childhood to old age, both within and outside the armed conflict.

This situation is exacerbated by the Colombian state's breach of its duty to act with due diligence to prevent and address violence and punish those responsible. As the Colombian state does not ensure the

implementation of all these components, it may not only be failing to eradicate such violence, but perhaps actually deepening it. In a confirmation of this negative state of affairs, the Constitutional Court, through Court Order 009 in 2015, established that structural changes are required to eliminate violence and discrimination against women. In this regard, we must recognize the efforts of the Colombian state to date, driven by women's organizations, in achieving positive regulatory developments. Despite these developments, however, the state's efforts remain totally inadequate, as the rising figures on violence against women confirm. Besides this, the United Nations, in a recent review conducted on the progress in implementing the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), stated that despite its broad policy framework, Colombia has a very low implementation capacity.

**2. In the peace negotiations:**

***What role does accountability for sexual violence committed by militaries play in the peace negotiations?***

There is a considerable debate within Colombian society on the appropriate scope of the right to justice in the context of the peace negotiations. There is a maxim that explains the current situation: "In a peace process, we hope for as much justice as necessary." In regards to sexual violence, there are two main opinions held by Colombian society, the international community and the women's movement. On one side, there are those who believe that the standards of justice should not be set too high, in order to match the expectations of the combatants. On the

other side, there are those who think the standards of justice should be as high as possible. In this interpretation, the level of justice to be achieved should prioritize the rights of women victims over the expectations of the combatants. According to this rationale, the more justice that can be achieved, the greater the benefit to Colombia as a country, and to combatants, victims and society on the whole.

We believe that in the social, political and moral fiber of combatants and ex-combatants, there is ignorance regarding discrimination against women, especially concerning the widespread and systematic use of sexual violence and the obstacles facing women in their attempts to access justice.

The main concern of the women's movement centers on the assumption of responsibility for sexual violence and gender-based crimes by the state, the guerrillas and the paramilitaries, who have often acted with the acquiescence, omission or support of the security forces. What we are demanding is not just a declaration of liability and a penalty consistent with this responsibility; we also seek to ensure processes of rehabilitation and training for those responsible for these crimes, to go beyond the merely punitive solution of confinement in a prison.

***Is there an adequate transitional justice mechanism to challenge structural gender-based discrimination?***

Currently, there is not. However, we are in a decisive moment for agreeing on the terms of the transitional justice process within the peace negotiations. We will only know whether the transitional justice mechanism adopted in Colombia is

suitable when the final agreement is reached. The structural causes of violence against women should be addressed in the peace agreements, which should focus on the legal, social, institutional and political measures necessary to ensure a re-ordering of Colombian society. Speaking as part of the women's movement, we believe that the silencing of guns does not necessarily mean that peace has been achieved; it only represents the opportunity to begin building it.

At the same time, we are clearly trying to maintain very high standards regarding the right to truth, reparation and guarantees of non-repetition. As for the right to truth, some women's organizations are proposing a truth commission for sexual violence. Concerning the right to reparation, we are proposing to structure an affirmative action program to address the root causes of inequality and discrimination against women. With respect to the guarantees of non-repetition, we are proposing reforms to state institutions, particularly the justice and security institutions, which would transform their regulations, practices and dynamics to advance a culture of equality in the country.

**3. For the future:**

***What gives you hope that things might change?***

We believe there is an opportunity for change. Our main reasons for hope include the appointment of two women plenipotentiaries at the negotiating table and the structuring of a gender subcommittee responsible for reviewing all agreements for the effective incorporation of gender perspectives and women's rights. Both the plenipotentiaries and the

subcommittee have received various women's organizations and women victims of sexual violence in order to ensure the inclusion of their claims in the agreements. At the moment, we have every hope of achieving good results within the framework of the agreements. Besides this, it will be particularly important during the implementation of the agreements that the specific transitional justice mechanisms will be able to address discrimination against women and overcome the obstacles in their access to justice. Achieving a

structural change in recognizing sexual violence in the armed conflict and the difficulties of criminal investigations will also positively impact women's access to justice. This is why, within the women's movement, we will continue deliberating, proposing solutions and demanding change. Under the peace process, “*queremos ser pactantes y no pactadas*” – we want to be part of the agreement, not to be agreed upon — this is our aspiration.

*Claudia Mejía Duque, Director, Sisma Mujer*

### III. Colombia's unwillingness to investigate and prosecute

The Colombian state has so far failed to provide adequate support for victims of sexual violence and to bring those responsible to justice. Women in Colombia subjected to sexual violence still face several legal, procedural, institutional and socio-economic obstacles in their access to justice, which has resulted in a massive underreporting of this phenomenon.

This has been confirmed by the Colombian Constitutional Court in its latest decision of January 2015, as also before in 2008. The Court concluded once again that the

activities undertaken by the Colombian state fail to provide victims with adequate care and protection, and to ensure their right to truth, justice and reparations. In recent years, several legal and non-legal measures have been taken to prevent and investigate sexual violence by state authorities. However, most of these measures have not been applied appropriately in the cases included in our Communication to the ICC, or because of the principle of retroactivity, are not even applicable to the presented cases.

*To mention only a few of the measures taken to prevent and investigate sexual violence by state authorities:*

***Memorandum 0117 of 2008 of the Attorney General's Office*** establishes a broad set of guidelines and criteria for prosecutors and investigators to be followed when dealing with these types of cases. It also lists other judicial regulations and decisions concerning conflict-related crimes as well as procedures for the proper attention to victims and the rights of victims of sexual violence.

***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.

*Directive 001 of 2012 of the Attorney General's Office addresses the need for an accurate contextualization of conflict-related sexual violence.*

*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.*

In light of an eventual peace agreement and transitional justice initiatives, the OTP stated that it will monitor whether "any eventual peace agreement, as well as legislation implementing the LFP [Legal Framework for Peace], remain compatible with the Statute." It also announced that it "has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine."

A primary barrier to justice for women victims of violence relates to the social stigma attached to sexual violence. Survivors of sexual violence are often afraid to be blamed for what happened and often choose to remain silent about the crime. Gender stereotypes and prejudices exist within the judicial system. Such "judicialized sexism" creates serious obstacles for women who do turn to authorities for assistance, as little credibility is afforded to the victim. Moreover, the women are forced to undergo unnecessary and re-victimizing physical examinations and inquiries into

their past social and sexual behavior. Prosecutors also question whether their reactions to the crime are appropriate for and consistent with those of a victim of sexual violence. Significant delays in proceedings, the failure to ensure victims' rights, and a general lack of communication regarding the development of their cases further discourages women from seeking support from state authorities, resulting in a general distrust in the Colombian justice system.

*In the case of C., her moral behavior and previous sexual partners were made the subject of testimonies. E. and F., who were abducted and gang-raped by soldiers, were also questioned about their sexual life and finally, their testimony was found to lack credibility when they could not answer in which order they had been raped and could not provide the names of all their rapists.*

*In the case of D., a forensic examination was only conducted five years after her assault of the boots that she had been wearing at the time the assault occurred. A spermatozoon could still be found on the boots, but for unknown reasons, no DNA test was performed. Three years later, the case was dismissed, mainly on the grounds*

*of the low credibility of the victim in light of i) her failure to independently undergo a medical examination to prove the occurrence of sexual violence – an omission the Prosecutor considered unlikely for a victim of sexual violence, and ii) the inconsistency in her testimonies.*

A further obstacle is that investigations into allegations of sexual violence are often initially handled by the military itself, despite their lack of competence. Particularly, the current reform proposals to expand military jurisdiction have been strongly criticized by various international organizations, including the UN, due to the military's lack of impartiality and independence. Even though dealing with sexual violence is beyond the military's recognized competencies, in practice, there are no restrictions placed on state forces that would prevent their ability to interfere with investigations.

*In the case of A. and B, the Military Criminal Justice System initiated an investigation into the death of three indigenous men killed during the same violent incident in which A. and B. were assaulted, but completely failed to address the issue of their sexual assault. During subsequent investigations by the ordinary justice system, the prosecutor tried in vain over a period of several years to gather the necessary information on the involved soldiers from the Army. Later, he organized an identification line-up, but the majority of soldiers who had been involved in the incident were missing.*

*In the case of C., the military authorities directly interfered in important investigative activities. For instance, the victim was accompanied to her forensic medical examination by the head of the*

*very military unit involved in the incident. During an inspection of the crime scene and an identification line-up, the only persons present were the victim, her partner and soldiers of the implicated Battalion. All this happened in the course of the military disciplinary investigations of the Army, while the proceedings of the prosecutor did not move forward.*

Additionally, victims of sexual violence also encounter practical and economic difficulties in obtaining appropriate assistance from the state. This is particularly the case for rural women, who often live in geographically remote locations far from state institutions, and who often lack the financial means to travel. They neither receive adequate attention nor information about their rights, such as legal counseling and representation.

*Only in two cases did the victims have legal representation, thanks to human rights organizations. In the cases, which involved indigenous women, the Prosecutor's Office did not provide translation services, meaning that the women encountered significant obstacles in obtaining the necessary translation between their indigenous language and Spanish in order to participate in the proceedings.*

Women victims of sexual violence in Colombia also face serious security concerns, causing them to live in a well-justified state of fear that they may be re-victimized or suffer repercussions for reporting sexual crimes. This fear becomes even stronger in areas that are heavily militarized or disputed by different armed actors. This often leaves victims with no authority to turn to but the very authorities

responsible for the violence. There is a general failure on the part of the Colombian state to protect victims of sexual violence and their families by providing effective measures to ensure their safety. Judicial authorities do not sufficiently consider risk factors and often fail to respond to suspicious scenarios, such as when the victim cannot be located or misses procedural appointments. Even when victims clearly express that they have been receiving threats as a consequence of their complaint, authorities still fail to provide them with adequate protection.

*In the case of D. neither the civilian prosecutor nor the military disciplinary investigation authorities assessed the victim's security situation after having received information on potential threats. Rather, they decided to further expose D. by broadcasting her name over a local radio station in order to contact her. When she did not react, the criminal investigation department concluded that this was due to a lack of interest in solving the case, rather than a result of fear.*

Another important obstacle for women relates to the manner in which judicial officials classify sexual violence. Often authorities register only the crime of homicide or forced displacement, leaving out related reports of sexual violence. They

thus fail to create an accurate record of these incidents, which further contributes to the invisibility of sexual violence. In addition, cases of sexual violence are often inaccurately qualified as ordinary crimes rather than crimes within the scope of the Colombian armed conflict. This forecloses the possibility of recognizing the existing relationship between everyday violence against women and violence in the context of the conflict.

So far, very few investigations into sexual violence committed by members of the security forces have led to trials and far less have occurred against high-ranking officials. Investigations into the responsibility of the commanders of the armed actors are rarely opened, which is itself often a direct consequence of the failure to adequately qualify conflict-related sexual violence as such. Of the six exemplary cases highlighted in our Communication to the ICC, only one case includes at least the leader of the operation as a suspect, based on his responsibility by omission.

**Based on this information, we argue that the deeply-rooted gender discrimination in both Colombian society and its justice system creates serious obstacles for women who seek justice for the sexual violence they have suffered.**

#### **IV. Sexual and gender-based violence in Colombia - a matter for the ICC?**

The OTP of the ICC started preliminary examinations in relation to the Situation in Colombia in June 2004. In its Interim Report of 2012, it noted that rape and other forms of sexual violence could be

attributed to state forces as war crimes going back to 2009, but remained silent on the issue of whether these could also amount to crimes against humanity and

failed to include them in its complementarity assessment.

The proceedings at the ICC consist of various stages. During preliminary examinations, the OTP makes an assessment on whether it has jurisdiction, whether a case is of sufficient gravity, and whether the domestic state is “unwilling” or “unable” to carry out adequate investigations and prosecutions. The latter evaluation is based on the so-called “complementarity principle,” which entails that the ICC should act as a court of “last resort” and only step in when the country with primary jurisdiction lacks the means or political will to ensure that those most responsible for the crimes committed are brought to justice.

The legal analysis of a conflict situation under international criminal law and the complementarity assessment require a comprehensive understanding of both the conflict and the national legal framework. This involves a gender perspective in order to uncover and avoid discriminatory, patriarchal means of applying international norms and international criminal law. For this purpose, the new Policy Paper on Sexual and Gender-Based Crimes (PP) produced by the OTP of the ICC provides a helpful tool for applying international criminal law norms without reproducing gender inequalities. With this Policy Paper, the OTP announced its integration of a “gender perspective” and “gender analysis” into all stages of its work. Already at the stage of preliminary examinations, the OTP intends to examine the general context in which the alleged sexual and gender-based crimes have occurred. Taking into account recent decisions by the OTP, it has clearly advanced in this regard already. However,

the OTP should follow up on its recent progress by also considering the relationship between Colombia’s long-standing armed conflict and the occurrence of sexual and gender-based violence crimes. It should also recognize how underlying structural gender discrimination creates serious obstacles for Colombian women in their attempts to access justice in relation to such crimes.

Our Communication to the ICC presents an analysis that provides reasonable basis to believe that sexual violence can be considered “part of” the wider violence perpetrated against civilians in Colombia’s armed conflict. It demonstrates that a nexus indeed exists between individual acts of sexual violence against women and the overall attack against the civilian population in Colombia, as sexual violence has been used to stigmatize civilians perceived to be members or supporters of the guerrilla groups and also results from an abuse of power by state forces. As long as sexual and gender-based crimes form “part of” a widespread or systematic attack against a civilian population, and hence a nexus exists between these crimes and the attack as a whole, they can be qualified crimes against humanity.

In its complementarity assessment, the OTP acknowledges that the investigative measures taken by the Colombian state so far have been insufficient. It also raises particular concerns about the limited number of proceedings concerning rape and other forms of sexual violence committed in the context of the conflict. However, in spite of this conclusion, the OTP has, to date, not opened a formal investigation. Instead, it announced that it will continue to “follow-up closely on concrete progress in terms of national

proceedings.” With this “positive complementarity” approach, which entails “a proactive policy of cooperation aimed at promoting national proceedings,” the OTP seeks to actively bolster the ability of the Colombian state to carry out effective national investigations and prosecutions. Nevertheless, as explained in the previous section, while these are important efforts to support the improvement of the Colombian justice system, domestic proceedings remain insufficient. The OTP thus has an obligation to step in and open a formal investigation.

To conclude, it is of utmost importance that the ICC acknowledges the widespread

and systematic use of sexual violence by state forces in Colombia’s armed conflict. It must also address the negative impact of existing, deeply-rooted gender discrimination in Colombian society on the use of and investigations into sexual violence in the context of the conflict. While the Colombian government has been taking positive steps to improve investigation and prosecution of these crimes, efforts have so far been insufficient. It is therefore time for the ICC to intervene, in accordance with its principle of complementarity.

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## V. The peace negotiations and the ICC – an exclusive approach? Contribution by Luis Guillermo Pérez Casas, President of CAJAR

**Why a criminal investigation by the ICC against those most responsible for war crimes and crimes against humanity in Colombia would not harm the peace process, but could contribute to strengthening it.**

During the debate about the constitutionality of the Legal Framework for Peace (Marco Jurídico para la Paz; Law No. 01/2012) in Colombia, the ICC Prosecutor Fatou Bensouda stated in a letter to the Constitutional Court of Colombia that:

“...I have come to the conclusion that a conviction that is grossly or patently inadequate – considering the seriousness of the offense and the participation of the defendant in it – would invalidate the authenticity of the national judicial process, even though the previous procedural stages were

legitimate. Given the fact that the suspension of the prison sentences means that the defendant spends no time in detention, I believe this is a manifestly inadequate decision in the case of individuals who are allegedly those most responsible for war crimes and crimes against humanity... As the Prosecutor of the ICC, I would welcome a solution for the armed conflict, as it would put an end to a situation in which crimes – which could fall under this jurisdiction of the Court - have been committed repeatedly.”

Even though this statement affirms that the peace agreement would contribute to ending the commission of crimes falling under the jurisdiction of the ICC, it was not received well by the Colombian Government and the delegation of the FARC guerrillas in Havana. Instead, it was

interpreted as an obstacle to considering a peace process that might include transitional justice mechanisms offering alternative sanctions rather than imprisonment, one that might more easily enable a transition from the insurreccional armed struggle to a political struggle within a democratic framework.

Even if amnesties and pardons are not explicitly prohibited by the Rome Statute, it is understood that any act or omission committed by the State which contributes to the impunity of perpetrators of crimes mentioned in the Statute can provoke the intervention of the ICC. There are some notable exceptions worth mentioning in order to add nuance to the Prosecutor's opinion:

The Rome Statute allows the Prosecutor to decide not to open an investigation when "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice" (Art. 53(1)(c)). It has been discussed whether this provision could be applied in order to prioritize a peace process over international criminal accountability\* (see: summary of the discussion below). We are of the view that this can be applied in such a manner. The Colombian criminal justice system has collapsed as a result of the large number of victims of international crimes in the context of the armed conflict, which amounts to over seven million people according to [official state statistics](#). Three years ago, acknowledging the structural problems hindering the investigation of the most serious crimes, the Attorney General's Office established Directive 001 of 2012 to prioritize certain cases. Even though the collapse of justice is one of the

factors to be considered when assessing an intervention by the ICC, the best guarantee for the non-repetition of crimes would be to prioritize the Colombian population's right to peace. In the event that the ICC decides not to open a full investigation, the preliminary examination should continue in order to deter the commission of new crimes.

Other possibilities also exist in the Rome Statute that would allow for an interpretation favoring transitional justice processes, such as Article 30 which states: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court..." Similarly Article 31(3) states the possible grounds for excluding criminal responsibility: "At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21." These Articles refer to the individual criminal responsibility of persons who have already been accused by the OTP – or were even found guilty – and to whom no criminal sanction would be applied. Even though these norms have not been regulated, they allow a glimpse at the possible flexibility allowed by the Rome Statute so as not to hamper considerations in an ongoing peace process.

We believe that the best way to avoid the repetition of crimes falling under the jurisdiction of the ICC is for the OTP to open investigations focusing on those most responsible for the international crimes committed in the Colombian armed conflict, starting with state officials. If the ICC acts in an impartial and independent manner, such an intervention could

safeguard the lives of demobilized guerrilla members who seek to return to civil life, stop retaliation or acts of revenge, as well as prevent new attacks against the civilian population.

Once a formal investigation is opened and even if trials are already taking place before the ICC, Article 16 of the Rome Statute would still enable the UN Security Council, in accordance with its obligations to ensure peace under Chapter VII of the UN Charter, to suspend the activities of the ICC for one year. This suspension is renewable and requires that it contributes to the consolidation of peace. This provision could be used in case of a genuine peace process and as a means to deter the repetition of international crimes in Colombia.

It is important to point out that in regards to sexual violence crimes, the Colombian justice system has so-far failed to establish the responsibility of those high-ranking state officials who have promoted such crimes either through their actions or omissions over the course of the conflict. Instead, the Colombian justice system has focused only on investigating the alleged responsibility of members of the FARC for acts of sexual violence.

*Luis Guillermo Pérez Casas, President, Colectivo José Alvear Restrepo (CAJAR)*

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\* Kai Ambos in the sense that within the interests of justice is precisely the peace (*Kay Ambos*, "Procedimiento de la Ley de Justicia y Paz (Ley 975 de 2005) y Derecho Penal Internacional. Estudio sobre la facultad de intervención complementaria de la Corte Penal Internacional a la luz del denominado proceso de "justicia y paz" en Colombia". Bogotá, 2010). *Michael Otim*

and *Marieke Wierda* express that the OTP pointed out in a memo that "the interest of justice" could not be compared to the interests of peace, and only exceptionally, Article 53 could be applicable (*Michael Otim* and *Marieke Wierda*, "Uganda: Pursuing peace and justice in the shadow of the ICC" in *International Centre for Transitional Justice (Ed.), Contested transitions Dilemmas of transitional justice in Colombia and comparative experience*, 2010). *Richard J. Goldstone* and *Nicole Fritz* understand that amnesties can be in line with certain parameters which are consistent with justice, but this seems to be not the case of any of the crimes which fall under the jurisdiction of the Court (*Richard J. Goldstone* and *Nicole Fritz*. "In the Interests of justice 'and independent referral. The ICC prosecutor's unprecedented powers ". (2000) 13 *Leiden Journal of International Law*, pp. 355 et seq). Similarly in the restrictive application, thinks *Carsten Stahn* (*Carsten Stahn* "Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court", (2005) 3 *Journal of International Criminal Justice* 695, 719): "The Statute leaves some room to recognize amnesties and pardons where they are conditional and accompanied by alternative forms of justice which may lead to prosecution". *Marta Valiña* requires "a certain process of accountability" not complete impunity (*Marta Valiña*. "Interpreting complementarity and Interests of justice in the Presence of restorative-based alternative forms of justice" in *Carsten Stahn* and *Larissa van den Herik (eds)*, *Future perspectives of international criminal justice*. The Hague: T.M.C. Asser Press 2010, pp. 167, 269). She also reinforces the idea of

exceptional cases, comparable to a state of necessity, p. 277. She mentions very specific criteria to consider in p. 287. See also *Michael Scharf*, "The amnesty exception of the jurisdiction of the International Criminal Court," (1999) 32

Cornell International Law Journal 509, 524; and *Matthew Brubacher*. "Prosecutorial discretion Within the International Criminal Court," (2004) 2 Journal of International Criminal Justice 71, 81.

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## VI. ECCHR's role and mission – Contribution by Wolfgang Kaleck

When it comes to crimes of sexual and gender-based violence, we face a complex challenge. Many international treaties and courts have characterized various forms of sexual and gender-based violence during armed conflicts as grave crimes. However, the extent of such violence is still not adequately reflected in the number of court convictions. There are many different reasons for this; some relate to legislation and procedural rules, while others relate to the treatment of survivors of sexualized violence. The European Center for Constitutional and Human Rights (ECCHR) aims to tackle this issue by using international and national law to combat impunity for sexual crimes. International criminal law, the UN Convention on the Elimination of Discrimination against Women (CEDAW) and UN Security Council resolutions on women, peace and security all provide for a range of measures which can be used to ensure effective criminal prosecution in national as well as international courts. We aim to boost the profile of these options.

It is no longer acceptable or sustainable for political considerations to hinder the enforcement of international women's human rights, or to apply these standards selectively by only employing them with respect to cases in weakly governed or patriarchal states, or against state

representatives deemed unfavorable by the international community. ECCHR is an independent, non-profit human rights organization located in Berlin that works primarily through legal means before domestic courts in Europe and international courts such as the ICC to protect and enforce human rights. ECCHR engages in strategic litigation, by which it initiates, develops and supports exemplary cases in order to hold state and non-state actors accountable for human rights violations. Our selected cases test existing legal frameworks, and have the potential to set legal precedents for the enforcement of human rights. Currently, we focus on the situations in Sri Lanka, Pakistan, Sudan, Bahrain as well as in Germany and the U.S.. We work together with those affected, their legal representatives, as well as with local human rights organizations. Particularly in cases where the perpetrators and facilitators of large-scale human rights violations remain unpunished, we make use of instruments such as complaint mechanisms to UN bodies, civil claims for damages, or criminal proceedings at both the national and international levels. Turning to legal measures enables us to raise awareness about specific human rights issues, with the ultimate goal of supporting those affected beyond the context of the individual case, in order to

facilitate their wider struggle in realizing their rights.

As part of our strategic litigation approach, ECCHR fights against double standards in the application of international law. We are, therefore, particularly active in cases in which those responsible for international crimes are shielded from legal action or those in which victims are denied comprehensive access to justice, whether it is because the perpetrators hold a high position in a particularly powerful state or due to a lack of political will for any reason.

We aim not only to achieve a satisfactory result in a particular legal case, as any group of lawyers hopes, but we also seek to create an impact beyond this. Reconstructing events of mass violations of human rights, drawing legal analyses and presenting them before national or international institutions can be a

significant preliminary step for those affected, and help them actively assert their rights. Such legal proceedings can significantly contribute to the debate on accountability and help push progressive developments.

This communication presents options for applying international criminal law in a non-discriminatory manner without reproducing gender inequalities. We do not call for new rules, but rather demand that existing rules be rigorously implemented. The consistent application of gender-sensitive perspectives not only strengthens awareness for the need of such approaches in international criminal law, but also makes an important contribution to the fight against impunity for sexual and gender-based violence.

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