

# SPECIAL NEWSLETTER

## ON THE CRIMINAL COMPLAINT AGAINST NESTLÉ

IN THE CASE OF THE MURDERED COLOMBIAN TRADE UNIONIST  
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EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS



**MISEREOR**  
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## 1. The criminal complaint against Nestlé

On 10 September 2005 the Colombian trade unionist Luciano Romero was stabbed 50 times in a murder by paramilitaries in Valledupar, Cesar, in north eastern Colombia. Romero had for years previously worked for the Colombian Nestlé subsidiary company Cicolac.

In connection with this crime, the European Center for Constitutional and Human Rights (ECCHR) and the Colombian trade union SINALTRAINAL (Sindicato Nacional de Trabajadores del Sistema Agroalimentario) – both represented by Zürich lawyers Marcel Bosonnet and Florian Wick – filed criminal complaints with the public prosecutor in Zug, Switzerland, against the Nestlé corporation and many of its senior management employees.

Those named in the complaint are accused of negligently contributing to the death of Romero through omission of a duty. As principals and guarantors of the company, they had a duty to act to prevent the crime. The murder took place in the context of an armed conflict in which trade unionists and other social groups are subjected to systematic persecution, primarily at the hands of paramilitaries and public authorities. In the years before his murder, Romero was repeatedly falsely branded as a guerrilla fighter by the local representatives of Nestlé. In Colombia, a defamation of this kind can effectively amount to a death sentence. Added to this is the fact that Nestlé's local agents were closely involved, on a number of levels, with paramilitary circles. It maintained supply relations with major landowners with connections to such circles; there is also evidence that the local subsidiary

company made payments to paramilitary groups. The management of the Swiss company was aware of the risk-taking behaviour of their associates in Colombia and also knew of the resulting dangers for the lives of the affected trade unionists. It nevertheless chose not to act, saying that these matters were delegated to its Colombian subsidiary.

The public prosecutor in Zug must now examine whether this conduct is legally relevant under criminal law. Investigative approaches to the case are set out in the criminal complaint, which stretches to around 100 pages. The complaint follows one and a half years of intensive investigation by the complainants: hundreds of documents, court records and witness interviews were analysed. Complex legal questions, yet to be pronounced upon by Swiss courts, were assessed. Should a preliminary investigation be opened, the public prosecutor will have to thoroughly examine these findings, and will also have to open new investigations on points where the investigate powers of the complainants, as private actors, reached their limits. Whether or not the investigations will lead to an indictment depends on the quality of the investigations and on the assessment of the public prosecutor.

Regardless of the outcome of these proceedings, the organisations involved envisage that the assessment of corporate conduct under criminal law standards will result in the further development of human rights standards for companies in regions of armed conflict and weak governance. In this way, bringing Romero's killing before the courts will have ramifications beyond this one case;

it can also provide important guidance in risk management for multinational companies operating in areas of conflict. This, in turn, will help to specify what is involved under the responsibility of business enterprises to respect human rights, a responsibility set out by the former UN Special Representative on Business and Human Rights in the guiding principles on the “Protect, Respect

and Remedy” framework. The criminal complaint and resulting proceedings will also represent an important step forward in safeguarding the rights to truth, justice and reparation of persecuted trade unionists in Colombia. The case should encourage and help human rights defenders and trade unionists worldwide to make use of the justice systems internationally for the protection of their rights.

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## 2. Strategic litigation in human rights cases

The European Center for Constitutional and Human Rights (ECCHR) is an independent and non-profit human rights organization located in Berlin and working primarily through the use of legal means. ECCHR initiates, develops and supports precedent-setting cases, in order to hold state and non-state actors accountable for human rights violations. In doing so we focus on those cases most suitable for testing the existing legal framework and for setting precedents. We work together with those affected and their lawyers, as well as with local human rights organisations. Particularly when systematic violations – and their root causes – remain unresolved, we make use of instruments such as complaints to UN bodies, civil claims for damages or criminal proceedings in order to highlight human rights problems. Beyond the individual case we also aim to support those affected and their local organisations as they strive to ensure their rights. In contrast to the normal work of a lawyer, our work is not just about the result in a particular legal case. With the complaint against Nestlé in Switzerland we of course hope to bring about the opening of an investigation establishing Nestlé’s legal liability for the safety of trade unionists in their Colombian

operations and in this way to move closer to a conflict-sensitive business policy orientated around international human rights standards. Even if the Swiss authorities decide, however, not to continue with the proceedings, the time will still be ripe for a debate on the responsibility of the Swiss parent company for its operations in other countries. If the existing Swiss rules should prove to be insufficient for the implementation of international standards into Swiss law, then these will need to be reformed, as is currently being called for by the Swiss campaign ‘Corporate Justice’. Nestlé would also be well advised – regardless of the outcome of the current proceedings – to provide compensation for the killing of Nestlé trade unionists and to work together with other transnational companies to bring about an end to the brutal persecution of trade unionists in Colombia. Nestlé considers itself bound by the principle of *Creating Shared Value*, whereby society, as well as the shareholders, should profit from created value. How credible is this aim, however, when the company tolerates and fails to take action on the intimidation of trade unionists and the resulting weakening of union representation within its own operations?

### 3. Businesses must not contribute to human rights violations

*By Hein Brötz, head of the Latin America Department, MISEREOR*



In the last decades, the power and influence of transnational companies have grown significantly. While previously the rules for community living were set by states, today it is increasingly large corporations that are determining the rules of the game. As the former UN Special Representative on Business and Human Rights John Ruggie put it, corporations are going from being “rule takers” to being “rule makers”. In other words: they themselves set the rules which they then are subject to. But who monitors the corporations? How can state institutions continue to comply with their international law obligation to protect human rights, even through third parties such as corporations? And do they even want to? Often it is precisely the elite of a country that benefits when corporations disregard human rights or silently tolerate human rights violations by public actors or paramilitaries. The ones who lose out are those who are already living in poverty. And the people who actively stand up for the protection of those whose economic, social and cultural rights are denied, themselves become targets. Again and again, MISEREOR learns of attacks on the lives and safety of workers from partner organisations in Asia, Africa and Latin America, people who are peacefully campaigning for states and corporations to comply with their duty and responsibility to protect and respect human rights.

The human being, according to the teachings of the Second Vatican Council,

is the “author, centre, and goal” of all economic life. Responsible corporate behaviour gains legitimacy through orientation towards the common good and when the company adopts corresponding corporate policy, management structures, and practice to ensure that it does not contribute to human rights violations. The requirement to exercise the necessary care in upholding human rights does not end at the factory gates, but extends to the entire supply chain. The Nestlé parent company in Switzerland knew of the intimidation of Luciano Romero, the long-time employee of their Colombian subsidiary Cicolac and active trade unionist who was brutally murdered by paramilitaries in September 2005. The company is accused of contributing to his violent death by failing to take preventative measures. Under no circumstances can the lack of consequences for crimes be tolerated. Impunity must be brought to an end if human rights are to be protected. For this reason it is appropriate — parallel to the current proceedings in Colombia — to additionally bring before a court in Switzerland the question of the legal responsibility of the parent company.

MISEREOR supports the criminal complaints brought by ECCHR and the trade union because speaking out in the interest of the poor, here in the “North” as well, has been part of the mission of the church relief agency since its founding in 1958: helping people living in poverty to ‘help themselves’ and ‘calling the powerful to conscience’. These criminal complaints contribute to

both. Irrespective of the outcome of the proceedings, the process will bolster the rights of the victims and can contribute to

an improved risk management for corporations and therefore to the prevention of further human rights violations.

#### 4. The case of Luciano Romero — a not exclusively Colombian story of trade union persecution

Luciano Enrique Romero Molina was for many years an employee in the Nestlé factory Cicolac in Valledupar and active in the local management of the trade union SINALTRAINAL. On the evening of 10 September 2005 he was kidnapped by paramilitaries, tortured, and stabbed 50 times.

Luciano Romero campaigned for the rights of workers at Cicolac and documented violations of the human rights of trade unionists. He suffered repression at the hands of the state, was subjected to repeated arbitrary detention by Colombian judicial police and received threats from paramilitaries (AUC).

Leading officials of Nestlé-Cicolac also played a role: they repeatedly defamed him, falsely claiming he was a guerrilla fighter. He was accused, without grounds, of being responsible for a bombing on the factory premises in 1999.

When in 1999 the Inter-American Commission on Human Rights directed the Colombian state to adopt protective measures for Romero, all he received was a radio telephone. This did little to improve his level of safety. A security programme with bodyguards and a bullet-proof car was approved for him but never implemented.

In 2002 Romero represented the workers as the trade union's chief negotiator in talks on a collective agreement in the Cicolac factory. Months passed without

any agreement. The management of the company spread accusations among the major land owners and milk suppliers that the demands of the trade unionists would push down the price of milk and threaten the company's Valledupar base. Claims like these are dangerous since Nestlé-Cicolac had business dealings with milk suppliers who had links to paramilitaries. Figures such as Hernando Molina Araujo and Hugues Rodríguez were later handed down long prison sentences for paramilitary activities. As such, statements such as the one from the Nestlé-Cicolac management could place the lives of trade unionists in danger.

Local Nestlé representatives were clearly aware of these risks, because as the labour dispute and the tensions reached their peak, they offered Romero help in obtaining a visa. He declined, explaining that his interest lay in continuing the work of the union in freedom and safety and that leaving the country would have been more counterproductive than helpful in this respect. When, in October 2002, the company parted ways with Luciano Romero in connection with the labour dispute, the threats continued. In 2004 he was forced to temporarily go into exile.

After his return he took a claim for reinstatement against his former employers. He also offered to act as a witness at the Permanent People's Tribunal to give testimony on Nestlé's corporate and trade union policies in Colombia. The Tribunal is an independent, inter-

nationally active institution which investigates complaints against corporations relating to human rights violations. Romero was unable to appear at the hearing in Bern in October 2005; he had been murdered just a few weeks before.

### **Will the case of Luciano Romero go unpunished?**

The court proceedings in Colombia have already begun. Five junior paramilitaries have been convicted of the murder and investigations and proceedings are currently underway against other paramilitaries and against informers and members of the (former) Colombian secret service DAS (Departamento Administrativo de Seguridad). In one decision, Judge Nirio Sanchez explicitly requested the public prosecutor to also examine the role of the company, since

*“it has emerged during the proceedings that the deceased had been preparing for*

*his testimony before the Permanent People's Tribunal, which was due to be heard on 29<sup>th</sup>-30<sup>th</sup> October 2005 in Bern, Switzerland, and that other trade union leaders of Sinaltrainal (Sindicato de Trabajadores de la Industria de Alimentos) and former Cicolac workers have also been killed under similar circumstances: Victor Mieles, Alejandro Martínez Toribio de la Hoz and Harry Laguna.”<sup>1</sup>*

The investigations against staff at the Colombian company have been at a standstill since 2007. They also fail to address the question of the criminal liability of actors in Switzerland, which is why the question has been raised in a criminal complaint to the Swiss investigative authority. In this way the complaint also aims to follow up on the investigation request of Colombian Judge Nirio Sanchez, and ensure that the crime against Luciano Romero does not continue to go unpunished.

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## **5. Trade unions and persecution in Colombia**

Colombia has one of the highest rates of attacks on human rights defenders of any country in the world. In Colombia they continue to be victims of stigmatisation, intimidation, sexual violence, arbitrary criminal trials, violent attacks and murder by all actors in the armed conflict (state security forces, paramilitary units and guerrilla groups).

Trade unionists are particularly at risk. For the last ten years Colombia has held the unhappy record as the home of nearly half of all the murdered trade unionists worldwide. The vast majority of these crimes are attributed to the paramilitaries and state security forces. Concerns are also raised about a very high rate of im-

punity. Despite the programme for demobilisation of paramilitary groups between 2003 and 2006, trade unionists continue to be intimidated and killed by paramilitaries. State security forces are also responsible for the murder of trade unionists and initiate arbitrary trials against them. Amnesty International (AI) maintains that there is a coordinated military-paramilitary strategy aimed at undermining the work of the trade unions through intimidation and public discrediting. The widespread and systematic attacks on trade unionists represent grave human rights violations and international crimes.

The Colombian state is unwilling or unable to effectively protect trade unionists. Even in cases in which the Inter-American Commission on Human Rights has called upon the Colombian government to adopt protective measures for threatened trade unionists, these measures are not implemented. This was widely reported and therefore already common knowledge in the years before the murder of Romero. Noteworthy here for example are the annual reports from the Office of the High Commissioner for Human Rights in Colombia, from AI or from the

International Trade Union Confederation (ITUC).

Over the last 25 years more than 2,500 trade unionists have been murdered in Colombia. While the numbers may be currently in decline, in the time leading up to the violent murder of Romero in 2005 they were exceptionally and alarmingly high (up to 200 murders every year). In the year 2011 there were 51 murders of trade unionists. Colombia therefore remains at the top of the list of most dangerous countries for trade unionists.

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## **6. Nestlé in Colombia**

Nestlé has been operating in Colombia since 1944 and now oversees numerous subsidiary companies and factory sites there. In the year 2005 Nestlé was the third largest purchaser of milk in the country, with an estimated purchase volume of 248 million litres. In Valledupar (Cesar Department, north eastern Colombia), the Nestlé factory Cicolac was the main purchaser of milk and was also one of the most important employers and business operators.

In the 1990s, paramilitary control was established in this region by the Bloque Norte, a bloc of the paramilitary organisation “Autodefensas Unidas de Colombia” (AUC), under the command of Rodrigo Tovar Pupo (alias “Jorge 40”). Despite the official demobilisation of the organisation in 2006, paramilitary groups are still active today. They are financed by illegal business dealings and protection taxes, which they collect from companies in the region. Some of the paramilitary leaders are members of the country’s business and political elite, which habitually leads to close links between major landowners – in Cesar the

large dairy farmers – and the paramilitaries.

This context of conflict also had implications for the Nestlé subsidiary Cicolac in Valledupar. Salvatore Mancuso, former leader of the AUC, testified a number of times in court that Cicolac made payments to the AUC. It remains unknown how high these payments were and when they were made. Nestlé bought Cicolac in 1997. At the time, the Bloque Norte of the AUC was active in the region. Among the suppliers of Cicolac in Valledupar were leading figures of the paramilitary in Cesar, including the cattle farmer Hugues Manuel Rodríguez Fuentes. In October 2008 he was convicted of conspiracy with an illegal armed (paramilitary) organisation. Investigations revealed that under the alias “Barbie” he acted as deputy for the Bloque Norte commander Rodrigo Tovar Pupo and as chief financial officer of the local frontline unit of the AUC in Valledupar. In this environment, working for a trade union can be life-endangering. Between 1986 and 2011 at least thirteen Nestlé employees and leaders of the food

industry trade union SINAL-TRAINAL have been murdered or disappeared; five more were forced to leave their homes. This state of intimidation damages the viability of the trade union and thus weakens the bargaining position of the workers of a company, a situation from which the company — whether it wishes to or not — in turn profits.

The trade union saw the paramilitary links of the Colombian subsidiary as a risk factor and asked the Swiss parent company to intervene. The Swiss corporation repeatedly referred the problem back to its Colombian representatives, saying that the responsibility for the matter lay with the subsidiary. This is irreconcilable, however, with the Corporate Business Principles of the corporation. In these principles Nestlé pledges to comply with human rights and the ILO core labour

standards on employment and trade union rights and also declares that honouring these principles won't be left to local representatives but will be centrally prescribed. In the forward to the newest edition (2010), Peter Brabeck-Letmathe and Paul Bulcke state:

*“As the Chairman and the Chief Executive Officer of Nestlé, we are committed to making sure that our entire Company is managed according to these principles and require adherence to them from all our employees around the world.”*

If the protection of trade union rights is connected to the safety of trade unionists, then the Swiss parent company — in accordance with its own Corporate Business Principles — should have intervened instead of delegating in the case of Luciano Romero.



## **7. The significance of corporate liability in the context of violent acts against trade unionist in Colombia — the Nestlé case**

**By lawyer Alirio Uribe Muñoz**

*Alirio Uribe Muñoz is a member of the Colombian Colectivo de Abogados José Alvear Restrepo, which has over the last 25 years been supporting the victims of the gravest human rights violations in Colombia as well as representing them in court cases. In this capacity it provides legal advice to the trade union SINALTRAINAL. The Collective has taken emblematic cases of torture, extrajudicial executions and disappearances before Colombian courts, the Inter-American Court of Human Rights and the United Nations. Because of its courageous work, the Collective and its members are continually subjected to intimidation and defamation.*



Corporación Colectivo de Abogados  
**José Alvear Restrepo**

The criminal complaints relating to the alleged responsibility of directors of the multinational corporation Nestlé for the killing of trade unionist and human rights defender Luciano Romero is particularly significant because it allows for a legal debate on the phenomenon of violence against trade unionists in Colombia. This violence has cost the lives of more than 3,000 trade unionists, including 24 from SINALTRAINAL. These crimes generally (over 90% of the time) go unpunished. Occasionally the immediate perpetrators, who are usually contract killers, are convicted. Many of these, however, are still at large.

At the same time, no progress is made on investigations into the instigators, the contractors and the economic beneficiaries of these crimes. Consequently, the case currently being brought before the Swiss legal authorities could be an important precedent for two reasons: first, it could break this system of impunity. Secondly, it will raise awareness of the responsibility of corporations like Nestlé. These companies know what kind of danger their employees are exposed to if they organise into trade unions or defend workers' rights. When companies tolerate the crimes committed against those, they become silent accomplices.

The violence against SINALTRAINAL is some of the worst in the country's trade union history, as shown by the table on the following page.

Not only is it urgently necessary that such cases are brought before the courts in the corporations' home countries, it must also be understood that corporations operating in areas of armed conflict must fulfil a greater duty of care if they wish to avoid being complicit in the violence against trade unions. This violence not only threatens the survival of the workers and the unions themselves, but also violates the rights to freedom of association and collective bargaining as well as the right to strike. Violence against trade unions in Colombia is not a random occurrence. On the contrary, it is the result of criminal practices which are tolerated, at the very least, by the local

authorities and companies, who in some cases actively assist or even initiate such crimes. For the Lawyers' Collective José Alvear Restrepo, which has for many years been representing the family members and affected trade unions in cases of the gravest violent crimes against trade unionists, the Nestlé case represents a glimmer of hope — and a signal! It's not just about the past; violence against trade unionists is ever-present. We hope that this case brings us further in our search for truth and justice for this grave crime against Luciano Romero, a death foretold, like so many in Colombia.

Threats	192
Assaults with and without bodily harm	6
Forced disappearances	2
Forced displacements	2
Arbitrary imprisonments	10
Killings	24
Persecutions	15
Torture	2
<b>Total</b>	<b>253</b>
Databank of the National Trade Union School (ENS), Colombia – SINALTRAINAL 2nd Februar 2012	

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## 8. Can companies be held criminally liable in Switzerland? A critical appraisal of the Swiss solution

Switzerland is in line with a European trend. Something which has been recognised in the USA since 1909 is increasingly gaining acceptance on this side of the Atlantic too: commercial enterprises (and other organisations) may be held to be criminally liable. This development is overdue because the traditional criminal law – based on the individual – requires the principal liability of an individual person to be demonstrably proven, and thus cannot satisfactorily be applied to developments in modern corporate structures. Large, globally operating corporations are increasingly decentralised with a functional distribution of competencies: instead of one dominant central figure there is a complex network of functionaries with executive, regulating, supervisory and advisory roles.

Legal systems have developed various solutions to this problem: in Germany and Austria, for example, corporations can only be prosecuted for administrative offences and not for crimes. This is because for a crime to be committed, in accordance with the legal doctrine, a person must take concrete action, and this person must be in a position to understand the wrongfulness of this action. It would not be possible, from a theoretical or literal point of view, for corporations to fulfil these criteria.

Switzerland's solution to the problem is to move away from the dogmatic concepts of action and culpability and allow for criminal liability of social actors. Business organisations are held criminally liable as 'organised collectives', whereby the actions and culpabi-

lity of employees are attributed to the company. Roughly this approach is also taken in the UK, Ireland, the Netherlands, Iceland, France, Finland, Denmark, Slovenia, Belgium and recently also in Spain.

Corporate liability under Art. 102 (1) of the Swiss Criminal Code is, however, very different from other criminal law models. It takes the form of an offence against the administration of justice with a secondary function: it only comes into effect when a crime originates within a company and the employees responsible for the crime cannot be identified due to insufficient internal organisation, supervision and documentation within the company. Liability is not based on the actual crime which originated with the company – the company is instead held liable for its organisational deficiencies. In other words: starting point for the criminalization of corporations is not the duty of the corporation to prevent crimes, but rather its duty not to obstruct the criminal investigation of individual crimes.

This solution is only partly satisfactory: it still proceeds on the assumption that individuals, not juridical persons, are criminally liable, and it fails to take into account that the changing corporate structures of large companies are based on the very idea of decentralisation and division of competencies. It allows corporations to appoint nominee directors, whose main role is not to contribute to the actual exercise of managerial functions, but instead to take on criminal liability for the company, relieving the latter of this responsibility, and who are then financially compensated for any

eventual penalties suffered. It does not address the duty to prevent crimes within corporations, and as such also inhibits that the level of punishment correlates with the seriousness of such crimes committed.

The Swiss law has been in force since 2003. To date it has not been made use of in any notable way, so it remains to be seen how successful it will be. There is,

however, a glimmer of hope for the victims of human rights violations, who are trying to enforce their rights to truth, justice and non-recurrence, that the investigations and the company's attempt to exonerate itself will at the very minimum lead to the disclosure of internal business procedures, so that the victims and their family members can at least learn how and why crimes were committed against them.

## **9. Risk management: what international standards exist?**

There is a higher risk of human rights violations in areas of conflict. For companies, doing business in these areas entails a danger of exposing the actors involved in their operations to higher risks, but it also presents the potential to profit from limited supervision and regulation and from the absence of fair procedures in the context of weak governance. Corporations with subsidiaries in such regions must correspondingly adjust their risk management. These corporations are subject to higher standards, which must ensure that a company is neither directly nor indirectly involved in human rights violations. The necessary precautionary measures for organisations can be derived from internationally recognised standards.

The basic principles of corporate risk management were originally developed with financial risks in mind, such as corruption and money laundering. But since at least 2000, the discussion on due diligence of companies in conflict regions has been gaining in significance, both in the context of the UN Global Compact – of which Nestlé is a member – and at the international level. This followed the publishing in the year 2000 of the UN

Voluntary Principles on Security and Human Rights.<sup>2</sup> These were then further developed in the 2006 OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.<sup>3</sup> Prior to 2006 these standards could not be seen as sources of law, but as standards which even then were customary within the economic sector and enjoying ample recognition, and which were to be followed by conscientious business people and companies when exercising the due diligence expected of them.

According to these standards, corporations must ensure that their economic activities do not support any authoritarian regimes and do not make the corporations complicit in conflict-related human rights violations. Businesses with operations in conflict regions should examine to what extent they maintain links with or support those active in the conflict. A company must also employ heightened care when it has business or other connections with high-ranking individuals within politics and industry, if there is an elevated risk that these persons might be involved in the conflict. It is also seen as being good risk management if companies, in as far as is

possible, publicly denounce and adopt a stance against human rights violations, to ensure that such violations do not receive any kind of support from businesses.

As detailed above, the context of conflict and the resulting risk factors would have been clear to Nestlé. As such, and in accordance with international standards, the company was under a requirement to undertake a thorough analysis and forecasting of the specific risks involved. This entails more than an examination of the active conduct of the company itself; it also involves considering the influence exercised by the company — arising from the sheer fact and nature of its presence as an important economic actor in the region — as well as looking at the acts and omissions of all its entire workforce. Such an analysis would have revealed that actors in the conflict were being directly or indirectly supported through the associations with milk suppliers with paramilitary links. This cooperation, as well as the stigmatisation of trade unionists by company employees, should have consequently been prevented. The same applies to the payments possibly made to illegal paramilitary groups. Furthermore, Nestlé should have taken a public stance against human rights

violations and against the kind of defamations that put individuals' safety in jeopardy, and should not have declined to enter into a dialogue on the issue with trade union representatives.

For companies to simply point out that public authorities are the primary duty-bearers for the protection of the safety of citizens is not sufficient, particularly in regions of weak governance. It was obvious from the number of unpunished homicides of trade unionists that the state was unwilling or unable to effectively protect trade unionists. Indeed, the wide scale persecution of civil society actors, to which state authorities actively contributed, was a permanent feature of the Colombian conflict, also in the area around Valledupar. Despite this, Nestlé neglected to ensure that international standards on risk management in conflict regions were upheld, and thereby failed to ensure the safety of Luciano Romero and his colleagues.

When deficiencies in risk management impinge on human rights, the question of the legal status of international standards is no longer a politically negotiable issue. It must instead be evaluated and assessed under standards of criminal law.

## 10. What is the future significance of the Nestlé case? Notes on the legal reform debate

As a minimum standard for corporate responsibility businesses recognise that they must adhere to existing laws. The criminal complaint against Nestlé and its senior management demonstrates the potential, but also the limits, of current laws on establishing the criminality of corporate risk taking. Legislative action on the issue is necessary:

### **A corporate criminal law for Germany**

The Nestlé case demonstrates the complexity of the links between the management structure of a corporate entity and its companies. Risk management is assigned to various persons, but in some circumstances it remains unclear who is ultimately responsible. This makes it impossible to hold individual persons legally liable for deficiencies in a company's internal risk management. While the debate on corporate criminal law may not currently be high on the political agenda in Germany, the need to close criminal loopholes means that calling for the introduction of criminal liability for corporations is warranted.

### **Clear standards on the corporate duty of human rights risk management**

Basic principles for appropriate risk management for the prevention of human rights violations, as well as criminal offences, are much more clearly defined in the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones or in the UN Guiding Principles on Business and Human Rights and the accompanying Protect, Respect, and Remedy framework than under national laws. The meaning of legal terms like *due diligence*, *duty of care*, or *guarantor's duty* can be determined with reference to these instruments. What is

missing, however, is legislation to reinforce what in the meantime can only be determined through methods of legal interpretation on a case by case basis and with insufficient legal certainty for actors and victims: clear standards on the extent of corporate due diligence for a corporation with global operations and, on the possibilities and limits of delegating between different management positions on various levels of the company. There is a need for regulation:

### **Human rights risk analysis**

The management of a corporation must ensure a constant and comprehensive process of risk management, encompassing not only subsidiary firms, but also any other business relations, such as those with suppliers and buyers, employees and trade unions, including any outsourced contract or seasonal workers. Particular attention must be paid to the dangers specific to areas of conflict and regions of limited statehood.

### **The management of a corporation is obliged to supervise the risk management of a subsidiary**

The management of a corporation must additionally secure conflict-sensitive operations in relation to its business relations and employees, also in its subsidiary companies, to ensure that business partners and employees neither generate nor are exposed to human rights risks related to the company's operations. While certain tasks may be delegated, the ultimate responsibility for risk management may not.

### **Individual and collective responsibility**

Members of the management of a corporation hold individual responsibility

as well as collective responsibility for actions and omissions of the corporation's managerial panels of which they are members (such as the board of

directors, board of managers or as representative positions within management).

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## 11. Closing remarks

Our partners in the Global South often undertake great efforts – often at great risk – in order to ensure that human rights violations are punished under the law. In doing so they often come up against the limits of their respective legal systems and in these cases hope for action to be taken on an international or European level. It is clear that bringing cases before European courts may not compensate for deficiencies in the judicial systems of other countries. It is, however, both justified and imperative to turn to the courts in Europe when the issue of the specific responsibility of European actors is at stake. There remains a dearth of landmark decisions from European courts on the human rights related limits to

corporate conduct. In his contribution, Alirio Uribe has outlined the significance for trade union freedom of prosecuting acts of violence committed against their members.

At this stage almost every case brought against human rights violations involving corporations is a 'pilot case', raising legal questions that have until that point gone unsolved. This also means that with every case the judiciary has a new opportunity to further develop the law, so that victims can effectively defend their rights and corporations can in future have greater legal certainty as to what is expected of them by law in the context of corporate responsibility for human rights.

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## Footnotes

<sup>1</sup> 2nd Criminal Court of the District of Bogotá, decision in the trial of José Ustariz Acuña und Jhonatan David

Contrera Puello from 26/11/2007, P.106. et seq.: “dentro del plenario se decantó que el occiso se preparaba para ser testigo de la política de la transnacional Nestlé-Cicolac, en la sesión del Tribunal Permanente de los Pueblos, que se realizaría los días 29 y 30 de octubre de 2005 en Berna Suiza, y en similares circunstancias también fueron asesinados dirigentes sindicales de Sinaltrainal (Sindicato de Trabajadores de la Industria de Alimentos) y extrabajadores de Cicolac: Victor Mieles, Alejandro Martínez Toribio de la Hoz y Harry Laguna”.

<sup>2</sup> Available at [www.voluntaryprinciples.org/](http://www.voluntaryprinciples.org/).

<sup>3</sup> Available at <http://www.oecd.org/dataoecd/26/21/36885821.pdf>

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