



The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a “Positive” Approach

An analysis highlighting the need for a different approach when a state is unwilling to investigate and prosecute crimes that implicate its own international responsibility and that of its senior officials

As part of the Project Reinforcement and Promotion of the Rome Statute in Colombia, carried out in partnership with



Table of contents

Foreword.....	3
Executive Summary.....	4
Introduction.....	6
1. Complementarity and Inaction are Incompatible.....	8
1.1 Complementarity as a Legal Precept and its Strategic Use	8
1.2 The Margin of Discretion: Standards for Preliminary Examinations and the Decision to Open an Investigation.....	10
2. The ICC-OTP's Analysis of the Colombian Situation: A Commitment to the Values of Independence, Impartiality, and Objectivity?.....	12
2.1 Proceedings against Members of Guerrilla Groups	14
2.2 Proceedings against Members of Paramilitary Groups	14
2.2.1 <i>The OTP Limits its Review to the Justice and Peace Law</i>	14
2.2.2 <i>The ICC-OTP Limits its Assessment to the Number of Open Proceedings</i>	17
2.2.3 <i>The ICC-OTP's Analysis Ignores Qualitative Elements of the Justice and Peace Process that Illustrate Obstacles in the Prosecution of Crimes within the Jurisdiction of the ICC</i>	17
2.3 Proceedings against "Politicians"	19
2.3.1 <i>The "Parapolitics" Proceedings</i>	19
2.3.2 <i>The Proceedings Involving the DAS</i>	20
2.4 Proceedings against Police and Army Officials	21
2.5 Proceedings for Rape and Sexual Violence against Women.....	22
2.6 A Preliminary Conclusion: Unwillingness and Lack of Capacity are Problems in Colombia	23
3. Homicides to Win and to Cover up: the Institutional Lie Escaping Investigation.....	24
3.1 A Global and Quantitative Analysis of the Status of the Relevant National Proceedings Carried Out by the AGO: Many Cases, Few Advances.....	27
3.2 Military Criminal Justice Investigates the "Positives": An Affront to the Independence and Impartiality to the Proceedings	31
3.3 Weak Investigations Concentrating on the Mechanics of the Homicides: The Evidence that is Ignored and Disappears.....	36
3.4 "In Criminal Investigations, Time that Passes is Truth that Escapes"	41
4. A Good Time to Redirect the Analysis of the Colombian Situation: Complementarity with Objectivity, Independence, and Impartiality.....	43

Foreword

The armed conflict raging in Colombia for decades continues to cause serious human rights violations, including massacres, extra-judicial executions, kidnappings, forced disappearances, arbitrary arrests, internal displacement, etc. Lawyers representing victims of criminal acts committed by armed groups are also victims of threats, other forms of intimidation and serious violations of their own human rights. These attacks, unfortunately all too frequent, seriously interfere with the ability of vulnerable populations to access justice and also impact the rights of victims to effective representation by a competent and independent lawyer. Yet, without lawyers, there cannot be any justice, and without justice, there cannot be reconciliation and lasting peace in Colombia.

Since 2003, Lawyers Without Borders Canada (“LWBC”) is actively involved in Colombia, supporting the action of human rights lawyers’ groups in order to defend, promote and achieve the full respect of the human rights of indigenous communities and other victims who have been victims of the conflict, offering international accompaniment, training sessions and conducting trial observations.

The present report forms part of LWBC’s project promoting and reinforcing the International Criminal Court (“ICC”) in Colombia, created in partnership with Lawyers Without Borders in Brussels, which objective is to promote the victims’ use of the legal mechanisms meant to sanction, at the highest levels, the individuals responsible for the gravest human rights violations committed in Colombia. This report discusses the principle of complementarity, as developed under the Rome Statute system, which recognizes and promotes the primary role of national jurisdictions in the investigation and prosecution of international crimes, but allows the ICC to take over in case of inaction, unwillingness or inability of national jurisdictions. As the report underlines, the complexity of the Colombian situation in which the principle of complementarity must be analyzed cannot be a synonym for paralysis, and it is now time for the ICC Office of the Prosecutor to present its reasoned and detailed analysis of the Colombian situation.

The investigation, prosecution and punishment of the persons most responsible for the grave crimes committed in Colombia need to become a priority, in recognition of the rights of Colombian victims to justice, truth and reparation, as well as that of the Colombian population to peace and construction of its collective memory. It is also an important factor in bringing social peace, without which there can only be oppression. As lawyers around the world, we cannot remain indifferent to the situation of impunity that remains in Colombia.

By launching this report, LWBC hopes to increase the awareness and deepen the understanding about the ICC system in Colombia, both within the Colombian and the international community, with a view to engaging in a genuine and efficient dialogue between civil society, Colombian and ICC officials. The report’s conclusions are alarming but encouraging at the same time, as they underscore the appropriateness of this moment for concrete actions: for the Colombian State to investigate thoroughly and properly crimes under ICC jurisdiction or for the ICC Prosecutor to launch an investigation into the Colombian situation. Either way to be successful in the fight against impunity in Colombia and strive to achieve justice.



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Executive Summary

On 13 December 2011, the Office of the Prosecutor of the International Criminal Court (“ICC-OTP” or “OTP”) published a Report on Preliminary Examination Activities (the “ICC-OTP Report”). The present document contains a detailed analysis of the preliminary examination conducted by the OTP concerning the alleged commission of crimes falling within ICC’s jurisdiction in Colombia, as well as our related observations and recommendations.

The ICC-OTP Report asserts that there is reasonable basis to believe that crimes against humanity have been committed in Colombian territory. Preliminary research discussed in the report also suggests that various groups which have taken part in the hostilities in the context of the Colombian internal armed conflict may be responsible for the commission of war crimes. This is the first time that the ICC-OTP has publicly and officially shared its legal assessment in this regard. However, in concluding its analysis, the OTP states that it does not have sufficient basis to “conclude that the existing [national criminal] proceedings are not genuine, or carried out in good faith”, and it will continue to gather information.

For the past six years, the ICC-OTP has been monitoring the Colombian situation and conducting its preliminary examination of the possible commission of crimes against humanity and war crimes in Colombia. Nevertheless, it has neither initiated an investigation, nor has it made a determination as to whether reasonable basis exists to do so. Furthermore, the OTP suggests that it lacks sufficient information to determine whether there is absence of willingness or lack of ability to conduct relevant proceedings in a genuine manner.

Even if the ICC-OTP is correct in asserting that there is no fixed timeframe for making a decision concerning the results of a preliminary examination, this authority cannot be assumed as a license to put off making decisions. The ICC Prosecutor must be diligent in collecting the necessary information and in its analysis—with a view to catalyzing the national jurisdiction to act accordingly or, failing this, to initiating an investigation of the crimes against humanity and war crimes that it believes have been and are being committed in Colombia.

In the Report on Preliminary Examination Activities, the ICC-OTP concentrates on what it calls the analysis of complementarity and claims that “Colombian authorities have carried out and are still conducting a large number of proceedings relevant to the preliminary examination against different actors in the conflict in Colombia for crimes that may constitute crimes against humanity and war crimes. Colombia has an institutional apparatus available to investigate and prosecute crimes under the Rome Statute.”

Firstly, we underline that in reporting on national activity, the ICC-OTP, contrary to its own standards, concentrates only on a quantitative analysis of the number of open proceedings and indicted persons, without delving into the subject matter of the cases or evaluating their quality.

The analysis of complementarity starts with the trials against members of the guerilla forces. As highlighted by the ICC-OTP, the Colombian judiciary acts with diligence with respect to all type of crimes where these armed groups are concerned. However, it should not be surprising that the State displays a willingness and capacity to investigate, prosecute, and punish in such cases. On the contrary, international concern regarding these proceedings has been more over the respect of guarantees in the administration of criminal justice—for example, the arbitrary deprivation of liberty or the exercise of the right to a defense. In any event, neither unwillingness nor incapacity has been an issue with regard to the prosecution of leaders of Colombian guerrilla groups.

The ICC-OTP’s analysis continues with the proceedings against members of paramilitary groups. We consider this analysis to be incomplete, as the ICC-OTP limits its review of national proceedings against paramilitaries to the Justice and Peace Law (Law 975 of 2005), despite the fact that this legal framework has a rather limited personal jurisdiction, and further limits its assessment to a calculation of the number of proceedings in progress, without evaluating the substance of the proceedings. As a result, the OTP’s analysis ignores elements of the confessional mechanism under the Justice and Peace Law that do not satisfy investigative due diligence in criminal matters or the State’s obligation to ensure accountability for cases within the ICC’s jurisdiction.

Under the heading of proceedings against politicians, the OTP groups the criminal cases against the individuals that held elected office and colluded with the paramilitary groups (the “parapolitics” cases) and the criminal cases against members of the intelligence service assigned to the Presidency of the Republic, the Administrative Department of Security (*Departamento Administrativo de Seguridad – DAS*), for espionage, persecution, and homicides. The cases against politicians that the ICC-OTP mentions reveal the deep ties between political elites and the paramilitary groups. However, with the few exceptions noted in the report, these proceedings do not address the responsibility of politicians as indirect perpetrators, co-perpetrators, and authors of many violent crimes throughout Colombia. Moreover, the proceedings have been hindered by a general climate of terror and by attacks and threats against the independence of the judiciary as well as against the victims and their legal representatives. To the extent that some of the cases involve violations of international law that implicate individual representatives of the highest spheres of government and the international responsibility of the State, the OTP is faced with a State that does not want to investigate itself. This type of resistance warrants the activation of the jurisdiction of the ICC.

With respect to the proceedings addressing the involvement of directors and agents of the DAS, our most important observation is that they involve the use of the State apparatus for criminal purposes. While a few convictions have resulted, investigative and judicial challenges persist in establishing the ramifications of these convictions for those bearing the most responsibility, and bringing to the surface politics, practices and contexts which facilitated the perpetration of abuses in a systematic and generalized manner. It is surprising that six years after the beginning of the preliminary examination of the Colombian situation, the ICC-OTP has not yet collected enough information to assess these proceedings and to properly implement the principle of complementarity contained in the Rome Statute.

Finally, the ICC-OTP appears to express concern regarding the extrajudicial executions perpetrated by members of the armed forces, but simply states that it will continue gather information regarding proceedings on allegations of “*falsos positivos*.” Meanwhile, the progress of these proceedings in Colombia is limited: the vast majority of cases are in the preliminary stages; the focus is on reconstructing the scene of the crime; the role of official practices and policies in the commission of the crimes has not been investigated; the existence of patterns or systematization is not being explored; and while the direct perpetrators, and in a few cases officials (generally those who have confessed) are being tried and convicted, these cases are not pursued within a broader context that would connect these individuals to those with a greater level of responsibility in these crimes.

Given the gravity of these acts, and because that we consider them to be examples of a pattern of crimes committed in Colombia within the framework of temporal, material and personal jurisdiction of the ICC that are not being genuinely investigated or pursued, a section of this report is dedicated exclusively to analyzing the status of these relevant national proceedings. A rigorous quantitative and qualitative analysis of the available information concerning these proceedings leads to the conclusion that the jurisdiction of the ICC has been triggered and thus that the ICC-OTP should open an investigation.

The ICC-OTP has insisted for years that its action in Colombia has been a determining factor in the fight against impunity in this country. It has presented the Colombian case as an example of “positive complementarity” in action, when a thorough factual analysis demonstrates that the reality demonstrates otherwise. Holding up the Colombian case as a success—despite the lack of results against those bearing the most responsibility for crimes falling under ICC’s jurisdiction—undermines the credibility of the Rome Statute system and calls the principle of complementarity on which it is based into question.

There is no doubt about the number of proceedings that are taking place in Colombia or of the sophistication of the judicial apparatus. The number of criminal cases corresponds to the massive number of grave crimes. The question that should be concerning the ICC-OTP is the effectiveness of the proceedings in establishing responsibility. It may be that the Colombian justice system is comparatively more able than other systems that the ICC-OTP must consider or examine. Nonetheless, the assessment standards must be applied objectively. In addition to a lack of capacity to carry out prosecutions against those bearing the most responsibility (because of the lack of adequate resources to carry out the proceedings, the lack of guarantees of security, and the attacks on the independence and impartiality of the proceedings), the main problem in light of the principle of complementarity in the Colombian context is unwillingness. The ICC-OTP should redirect its efforts to confront the reality of a State that is able to investigate and punish when it wants to, but is unwilling to investigate crimes for which it bears international responsibility—namely, crimes of the State.

The Colombian case is complex, but complexity cannot be an excuse for stagnation. The ICC-OTP states that it has had the Colombian situation under watch since the moment the Office began its activities. It is time to take concrete action: with investigations into specific cases and with cooperative framework that consciously considers what other international bodies are doing in Colombia. It is time to bring transparency to the preliminary examination and avoid applying double standards with regard to the criteria that activate the competency of the ICC. Now is the appropriate moment for the OTP to strategically redirect the consideration of the Colombian situation and take decided and technically sound action to enforce the Rome Statute in relation to a State that is able but unwilling to adequately and diligently investigate crimes within the jurisdiction of the ICC.

Introduction

The Office of the Prosecutor of the International Criminal Court (“ICC-OTP” or “OTP”) says that it has had the Colombian situation on its radar since it began to operate.¹ In 2009 the OTP declared that Colombia had been under “preliminary examination” since 2006 but that it had not yet determined whether the situation warranted the opening of an investigation.² The ICC-OTP recently affirmed that according to its legal assessment there was a reasonable basis to believe that crimes against humanity have been committed in Colombia.³ It also stated that its preliminary research suggests that several groups may be responsible for committing war crimes.⁴ This is the first time that the ICC-OTP has publicly and officially shared its legal assessment in this regard. However, in concluding this diagnosis, the OTP asserts that it does not have sufficient basis to “conclude that the existing [national criminal] proceedings are not genuine [i.e. carried out in good faith]”⁵ and that it would continue to gather information.

The ICC-OTP has insisted for years that its action in Colombia has been a determining factor in the fight against impunity in this country. In political and academic events, Prosecutor Luis Moreno Ocampo has presented the Colombian case as an example of “positive complementarity”⁶ in action.⁷

Despite its rhetoric, the OTP’s action in the Colombian situation has not been characterized by “clarity and predictability”—nor has it been effective in achieving its stated objective that

¹ In October 2010 the Office of the Prosecutor of the International Criminal Court (ICC-OTP) described that “[u]pon taking Office, the Prosecutor conducted a review of information on crimes collected under article 15. The Office identified the situations in the DRC, Uganda and Colombia as containing the gravest occurrence of crimes within its treaty jurisdiction.” ICC, Office of the Prosecutor, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 57. Colombia signed the Rome Statute of the International Criminal Court (“Rome Statute”) on December 10, 1998 and ratified the Statute on August 5, 2002. According to Colombia’s deposit of its instrument of ratification and the declaration it made with regard to Article 124, the ICC has jurisdiction beginning November 1, 2002 over crimes against humanity and the crime of genocide committed in Colombia or by a Colombian. Once the time-frame established in the declaration had expired on November 1, 2009, ICC jurisdiction entered into force for war crimes perpetrated in Colombia or by a Colombian.

² UN General Assembly, *Report of the International Criminal Court*, U.N. Docs. A/64/356 (Sept. 17, 2009), paras. 45 & 47.

³ ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 72.

⁴ *Id.* at para. 73.

⁵ *Id.* at para. 87.

⁶ In a draft document that was circulated and dated October 2010, the Prosecutor asserted that “positive complementarity” is based on the preamble and Article 93(10) of the Rome Statute and that this concept is distinct from the principle of complementarity set out in Article 17 of the Statute. ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 93. The document explained: “At all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to article 93(10) of the Statute.” *Id.* at para. 94. The OTP noted that it has followed this approach with Colombia. *Id.* at para. 97.

⁷ For example, Prosecutor Moreno emphasized the Colombian case as an example of complementarity in action during the NGO roundtable with his Office on October 10, 2010 in The Hague. Likewise one of his representatives highlighted the Colombian case in an academic conference held in London in May 2011. The ICC-OTP officially reported both events as part of its activities aimed at “fostering complementarity in Colombia.” ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 84.

Colombia investigate and prosecute crimes in accordance with the dictates of the Rome Statute of the International Criminal Court (“Rome Statute” or “Statute”).⁸ Holding up the Colombian case as a success—despite the lack of results against those bearing most responsibility for crimes falling under ICC’s jurisdiction—undermines the credibility of the Rome Statute system and calls into question the principle of complementarity on which it is based.

The OTP has had the Colombian situation under preliminary examination for more than six years; yet it has not initiated an investigation, it has not determined conclusively that there is no reasonable basis to initiate an investigation, nor has it submitted to judicial review, if in fact its decision not to investigate is based on the “interests of justice.”⁹ Under the leadership of Luis Moreno Ocampo, the OTP’s preliminary examination of the Colombian situation has not been characterized by transparency or a technical adherence to the criteria established in Article 53(1) (a)-(c) of the Rome Statute. The reasons for this state of affairs call for political and academic reflection.

With the passage of time, the possibility of obtaining justice for many of the victims of crimes against humanity and war crimes in Colombia becomes increasingly slim. The change in leadership of the ICC-OTP offers a chance to review the Office’s strategies toward the Colombian situation and deepen the analysis of the legal grounds for initiating an investigation. In this report we seek to establish the bases for initiating an investigation into crimes perpetrated in Colombia and encourage the ICC-OTP to embolden its actions and recover the centrality of the principles of independence, impartiality, and objectivity in its application of the Statute.

In the first section we briefly review the principle of complementarity and the applicable standards for determining whether an investigation should be opened as a result of the preliminary examination of a situation. Second, we explore and expand on the general lines of analysis announced recently by the ICC-OTP as to the preliminary examination of the Colombian situation. Third, we illustrate a pattern of crimes that fall under the temporal, subject-matter, and personal jurisdiction of the ICC and are not being genuinely investigated or prosecuted in Colombia. We analyze the status of cases involving homicides that were systematically committed by members of the Armed Forces to fabricate results of military operations that would be deemed positive by the government and presented as such to the public (commonly referred to as “false positives”). This section provides a quantitative and qualitative analysis of the Colombian justice system’s progress with regard to these cases. Finally, the fourth section offers a series of conclusions and recommendations aimed at promoting the Colombian State’s compliance with international obligations with regard to the pursuit of justice.

⁸ See the criteria presented in International Criminal Court, Office of the Prosecutor, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 20.

⁹ See Rome Statute of the International Criminal Court (“Rome Statute”), U.N. Doc. 2187, U.N.T.S. 90, entered into force July 1, 2002, art. 53.

Complementarity and Inaction are Incompatible

The achievements of the ICC-OTP in terms of complementarity must respond to the implementation of a system of technical assessment that considers the different qualitative indicators of relevant proceedings to determine if the national activity satisfies the requirement that the proceedings be deemed genuine or in good faith.

The mere existence of relevant criminal proceedings is not enough to satisfy the threshold established by the Statute; the way that the proceedings are carried out (strategically and operatively) and the results obtained must be the subject of rigorous analysis. To avoid the instrumentalization of complementarity in the Rome system and the weakening of international law, the exercise of national jurisdictions must be technically and objectively appraised and assessed according to international standards.

The ICC-OTP's role as a catalyst for national jurisdictions must focus on the quality of the criminal proceedings and ensure that these comply with due process and investigative due diligence. This is required to avoid unjustified delays and to guarantee technical approaches that pursue plausible hypotheses into the different levels or modes of criminal participation in the crimes under the ICC's jurisdiction (especially those that imply a heightened level of responsibility). With regard to those situations in which the perpetration of crimes falling under ICC's jurisdiction is confirmed, the ICC-OTP's response cannot be passive. Otherwise, there is a risk of perpetuating the status quo in national jurisdictions and a danger that instead of promoting complementarity, the ICC-OTP is by default endorsing proceedings that do not comply with international standards.

Because of their relevance for analyzing the Colombian situation, we will review the standards that govern the preliminary examination of situations and the criteria established in the Statute for the opening of an investigation. Below we examine the legal standards derived from the Statute, which have been applied in the few decisions addressing the admissibility of cases, as well as the institutional doctrine produced by the ICC-OTP.

1.1 Complementarity as a Legal Precept and Its Strategic Use

The principle of complementarity is the cornerstone of the relationship between the ICC and national jurisdictions designed to implement States' obligations to investigate and prosecute those responsible for crimes against humanity and war crimes. This relationship is built around complementary or substitutive responsibilities in the exercise of jurisdiction over these crimes. This principle is derived from paragraph 10 of the Rome Statute preamble and Articles 17, 18, 19, 20, and 53. Thus, the ICC is constituted as an *ultima ratio* jurisdiction with competency only as the result of total inactivity or inefficiency by national jurisdictions—whether because of unwillingness or inability—in carrying out the proceedings against those responsible for crimes included in the Rome Statute.¹⁰

The Rome Statute's complementarity principle responds to a mixed logic. On the one hand it gives precedence to national justice systems to combat impunity and to assume responsibility for trying (or extraditing) those responsible for the crimes listed in the Rome Statute. On the other hand, in the event a State is unwilling or unable to try these types of crimes, it guarantees that there will be an international and permanent international jurisdiction that operates effectively and with legitimacy. For this system to work, the ICC organs, and especially the Office of the Prosecutor, must carry out their mandates with independence, impartiality, and objectivity.

¹⁰ Rome Statute, art. 17. For example, "inability" or lack of capacity can lead to inactivity or to sham trials, which, although they imply activity on the part of the national system, are totally ineffective for establishing criminal responsibility. See Robert Cryer, Hakan Friman, Daryn Robinson & Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press: New York, 2007). As is discussed further below, there are several indicators that allow for determining a national judicial system's ability and willingness to pursue justice in the relevant cases.

Except in the extreme cases of total inactivity with respect to crimes under the jurisdiction of the ICC,¹¹ the international justice system that is based on complementarity depends on the ICC's—and especially the OTP's—technical and objective monitoring of national proceedings in the different countries. In situations where there is some kind of judicial activity, the ICC-OTP must be in a position to evaluate the lack of will or capacity of national authorities according to the dictates of the Rome Statute

It is not enough simply that there be relevant proceedings in these cases; the proceedings must satisfy certain standards of quality and results. According to the Statute, the assessment of relevant national proceedings should cover at least the following elements:

- evaluation of compliance with principles of due process recognized by international law;¹²
- analysis aimed at establishing whether the decisions were made for the purpose or effect of shielding the person from criminal responsibility for crimes within the jurisdiction of the Court;¹³
- review of the due diligence evidenced in the criminal investigation and documentation of unjustified delays in the proceedings;¹⁴ and
- examination of the independence and impartiality for carrying out the proceedings, with particular emphasis on whether the criminal participation of those bearing most responsibility has been explored.¹⁵

The focus and standards for an assessment based on these criteria vary according to the particular phase of the ICC-OTP's examination of the situation or case. The complementarity analysis and evaluation of other admissibility requirements are part of a process that is not exhausted in the preliminary examination of a situation. The Rome Statute explicitly states that the ICC Prosecutor must verify the admissibility requirements for a case throughout the entire investigation phase.¹⁶ In fact, admissibility is subject to continuous debate until the confirmation of the charges before the trial and is subject to judicial review.¹⁷

¹¹ In cases of total inactivity, there is no need to analyze the lack of will or capacity. See ICC Pre-Trial Chamber II, "Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya," *Situation in the Republic of Kenya*, No. ICC-01/09-19 (hereinafter "Kenya Decision") (Mar. 31, 2010), paras. 53 and 70; In another case, the Appeals Chamber stated:

[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.

ICC Appeals Chamber, *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, ICC-01/04-01/07-1286 (Sept. 25, 2009), para. 78.

¹² Rome Statute, art. 17(2).

¹³ *Id.* art. 17 (2)(a).

¹⁴ *Id.* art. 17(2)(b).

¹⁵ *Id.* art. 17(2)(c).

¹⁶ *Id.* arts. 53(1)(b) & 53(2)(b).

¹⁷ The final decision is made by the Pre-Trial Chamber (according to article 61 of the Statute) and, if appealed, by the Appeals Chamber (according to article 82 of the Statute).

This is a dynamic exercise that should allow the OTP to evaluate whether the national proceedings are tainted by incapacity or unwillingness. For example, the ICC-OTP explained that the study of incapacity could look at, among other factors:

the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems; the existence of laws that serve as a bar to domestic proceedings in the case at hand, such as amnesties, immunities or statutes of limitation; or the lack of adequate means for effective investigations and prosecutions.¹⁸

The ICC-OTP has adopted a restricted focus when analyzing questions of capacity of national judicial systems, limiting its consideration to situations of "total or substantial collapse" of national justice systems. However, the elements outlined here are oriented more toward documenting a lack of availability of the national systems, namely when "the State is unable to collect the necessary evidence and testimony, or otherwise unable to carry out its proceedings."¹⁹

With regard to unwillingness, the ICC-OTP stated that this could be evaluated in light of the following indicators, among others:

the scope of the investigation and in particular whether the focus is on the most responsible of the most serious crimes or marginal perpetrators or minor offences; manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or cooperate with the ICC.²⁰

The OTP added that "[u]nwillfulness can also be found in light of unjustified delays in the proceedings and lack of independence or impartiality."²¹ These delays should be assessed, according to the OTP, in light of the time that passes in carrying out the proceedings and objective justifications that might explain the delays.²² The assessment can also look at evidence that would indicate a lack of intent to bring certain persons to justice.²³

¹⁸ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 59.

¹⁹ *Id.* para. 58.

²⁰ *Id.* para. 61.

²¹ *Id.* para. 62.

²² *Id.* para. 63.

²³ *Id.*

With regard to the lack of independence, the OTP noted that the analysis should look at the following criteria, among others:

the alleged involvement of the apparatus of the State, including those responsible for law and order; in the commission of the alleged crimes; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in the investigation, prosecution and trial; and corruption of investigators, prosecutors and judges.²⁴

Finally, the OTP established tentatively that the impartiality of proceedings could be assessed in light of indicators such as: “linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.”²⁵

Although the elaboration of these criteria is an unfinished exercise, the list illustrates the elements that should be considered in assessing the relevant national proceedings to enforce and promote the principle of complementarity. The criteria and the evidentiary standards should be adjusted according to the progress of the cases at the national level and the evolution of the analysis by the ICC organs. The substance and dynamics of this assessment are the elements that give life to the principle of complementarity. It is also what ensures the coherence and consistency of a system which advocates for and promotes the activity of national systems but, failing this, guarantees that the ICC will act in an independent, impartial, and objective manner with respect to crimes within its jurisdiction.

This overview of the different criteria and indicators for measuring State capacity and willingness in the relevant proceedings for the purposes of determining the admissibility of cases at the ICC illustrates the complexity and depth that should characterize such an analysis. This is especially true for situations, such as that in Colombia, where it has been determined that crimes under the jurisdiction (*ratione temporis, materiae, and personae*) of the ICC have in fact been committed and that these—because of their nature, scale, manner of perpetration, and impact on society—satisfy the threshold of gravity that warrants the action of an international tribunal.

1.2 The Margin of Discretion: Standards for Preliminary Examinations and the Decision to Open an Investigation

According to Article 15 of the Rome Statute, the purpose of the preliminary examination of a situation is to allow the ICC-OTP to gather and analyze information to determine whether crimes within the jurisdiction of the Court have been or are being committed in a particular context and to collect information necessary to move forward to an investigation. This phase of analysis allows the ICC Office of the Prosecutor to: (a) analyze the veracity of the information received under Article 15(1) of the Statute; (b) explore the parameters of the temporal, subject-matter, and personal jurisdiction of the Court with respect to the situation and the crimes alleged; and (c) begin the process of verifying the admissibility requirements for eventually requesting the opening of an investigation.

The Statute establishes the limited purposes of a preliminary examination of a situation and thus reduces the margin of discretion in the administration of justice. The Statute presents two options. In conducting the preliminary examination, the Prosecutor must: (1) initiate an investigation when there is reasonable basis to do so, or (2) demonstrate (and communicate) that there is no reasonable basis to proceed.²⁶ Thus, the preliminary examination of a situation cannot be *ad aeternum*. The ICC Prosecutor must determine whether crimes within the jurisdiction of the Court have been committed and whether “there is a reasonable basis to proceed” with an investigation. In communicating its decisions in this regard, the ICC-OTP should adhere to the principles of due diligence and transparency that should characterize the Rome system. Clearly, the Prosecution can reconsider the decision in light of new facts;²⁷ what it cannot do is postpone making a decision about whether to initiate an investigation. To act otherwise would be to incorporate into the work of the ICC-OTP the same counter-productive behaviors with respect to delays and postponements seen in national judicial systems.

Thus, the Statute establishes that: “[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.”²⁸ The language is peremptory: the Prosecutor shall initiate an investigation if there is reasonable basis to proceed.

²⁴ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 64.

²⁵ *Id.* para. 65.

²⁶ Rome Statute, art. 53. In some circumstances, the ICC-OTP must submit to judicial control, namely when arguing that a prosecution and trial would be against the interests of justice.

²⁷ *Id.* art. 53(4).

²⁸ *Id.* art. 53(1).

Opening an investigation is a decision that demonstrates the gravity and seriousness of the situation under examination. It does not imply an irreversible decision, given that throughout the investigative phase the OTP should continue to promote complementarity and deepen its analysis of the admissibility of the case (particularly in relation to the activity of the national jurisdiction). Moreover, once the investigation is opened, the ICC-OTP is in a better position to determine the veracity of the facts, propose investigation hypotheses, structure an investigative methodology, and determine the satisfaction of all threshold requirements to proceed with the criminal case (including admissibility).²⁹

The evidentiary standards that govern the assessment of admissibility before the ICC are higher as the consideration of the case moves forward through the procedure established in the Statute. The standard to be applied in the initial phase, the preliminary examination, has been interpreted as the lowest evidentiary standard established in the Rome Statute.³⁰

The preliminary examination phase allows the Prosecutor to establish “reasonable basis to open an investigation”³¹ and to explore a case or cases within that situation. Thus, passing from preliminary examination to an investigation does not imply that the OTP has identified a specific line of investigation³² or that the information obtained is conclusive or complete with regard to a crime or crimes perpetrated, much less with respect to the attribution of criminal responsibility.³³

On analyzing the type of information that constitutes “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”—the standard set out in Article 53(1) (a)—the ICC Pre-Trial Chamber reasoned:

[T]his is the lowest evidentiary standard provided for in the Statute. This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be “comprehensive” nor “conclusive”, if compared to evidence gathered during the investigation. This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which

cannot be compared to those provided in article 54 of the Statute at the investigative stage.³⁴

It should be emphasized that the leniency of the standard refers to the degree of persuasion that should exist at this stage as to whether a crime under the competence of the Court has been committed, and therefore, whether to proceed with an investigation. The leniency or flexibility does not refer to the discretionary action of the OTP. To achieve the Rome Statute’s declared objective of ensuring that “the most serious crimes of concern to the international community as a whole must not go unpunished,” the OTP’s action cannot be subject to absolute discretion or respond to criteria drawn from outside the Statute.

The principles of independence, impartiality, and objectivity demand that the ICC-OTP address all situations in which a crime under the jurisdiction of the Court has been or is being committed without distinction and according to the established procedures. Discretion in the administration of justice is not absolute; this is true even in national systems with greater political checks and balances in criminal prosecution, such as the United States. At the international level, and especially in the Rome Statute system, whatever discretion that the ICC-OTP may have is not absolute authority. Rather, the legality of its decisions is subject to judicial control by the different ICC chambers according to the given procedural stage.

Therefore, if the Prosecution is convinced that crimes within its competency have been committed, the preliminary examination is not the ideal mechanism to collect information for confirming the perpetration of crimes or the criminal participation of different individuals. It is an appropriate mechanism for preliminary inquiries but not for a deeper study of cases that are characterized by complexity and the possible obstruction of justice. As the ICC-OTP rightly noted, when a crime is perpetrated by State agents (or through the use of the apparatus of the State)³⁵ or where there is evidence of serious threats against the independence and impartiality of the national judicial apparatus,³⁶ the willingness of national authorities to pursue accountability with regard to these crimes may be compromised.

Once the persuasion threshold for believing that crimes under the competence of the Court have been or are being committed, the ICC Office of the Prosecutor must rigorously and pro-actively collect and analyze information that allows it to assess the quality of the relevant national proceedings being carried out. As was described above, this is a complex exercise that requires a thorough study of the cases—it is not satisfied by a simple verification of the existence of open national proceedings. The ICC-OTP’s analysis and resulting action must scrutinize the quality of those proceedings and ensure that they respond to criteria of due process and due diligence in the criminal investigation.

²⁹ *Id.* arts. 17 & 54.

³⁰ ICC Pre-Trial Chamber II, Kenya Decision, *supra* note 4, para. 27.

³¹ This standard is even lower than that of reasonable grounds to believe that a crime has been committed, for the issuance of a warrant of arrest. With regard to the announced standard, the Appeals Chamber has determined that it is not necessary that there be only one conclusion that could be reasonably inferred from the findings of fact. ICC Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”*, ICC-02/05-01/09-OA (Feb. 3, 2010), para. 33; see also ICC Pre-Trial Chamber II, Kenya Decision, *supra* note 4, para. 33.

³² See ICC Pre-Trial Chamber II, Kenya Decision, *supra* note 4, para. 34.

The Prosecution stresses that for the purpose of the investigation and the development of the proceedings, it is neither bound by its submissions with regard to the different acts alleged in its article 15 application, nor by the incidents and persons identified therein, and accordingly may, upon investigation, take further procedural steps in respect of these or other acts, incidents or persons, subject to the parameters of the authorised situation.

ICC Pre-Trial Chamber III, “Request for authorisation of an investigation pursuant to article 15”, *Situation in the Republic of Côte d’Ivoire*, ICC-02/11, (June 23, 2011), fn. 14.

³³ ICC Pre-Trial Chamber II, Kenya Decision, *supra* note 4, para. 27. See also Morten Bergsmo & Pieter Kruger, Article 53: Initiation of an Investigation, in Otto Triffterer (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, second edition, C.H. Beck, Hart & Nomos, 2008, p. 1065-1076.

³⁴ ICC Pre-Trial Chamber II, Kenya Decision, *supra* note 4, para. 27 (internal citations omitted). To meet the standard required to move from the preliminary examination to an investigation, “the Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed.’” *Id.* para. 35.

³⁵ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 64.

³⁶ *Id.* paras. 64 & 65.

2.

The ICC-OTP's Analysis of the Colombian Situation: A Commitment to the Values of Independence, Impartiality, and Objectivity?

In its Report on Preliminary Examination Activities, the ICC-OTP presents the Colombian situation, together with that of Georgia and Guinea, under the heading “Admissibility: Complementarity.”³⁷ This report asserts:

Complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, taking into consideration the Office’s policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Prosecution will assess their genuineness.³⁸

Notwithstanding this assertion, the ICC-OTP’s study of the Colombian situation is deficient. At best, it accounts only for the number of national proceedings, without any assessment of their quality or “genuineness.”

The ICC-OTP ignores the very criteria that it had proposed in October 2010 for assessing situations where there are open national proceedings: “[i]f there are or have been national investigations or prosecutions, then the question of unwillingness or inability arises and the Office will assess whether such proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings.”³⁹ However, despite having the Colombian situation under preliminary examination for six years, the OTP suggests that it still does not have enough information to conduct an assessment based on the criteria related to delay, impartiality, and independence discussed above.

³⁷ International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities* (Dec. 13, 2011), paras. 61-116.

³⁸ *Id.* para. 6.

³⁹ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 56.

The ICC-OTP is correct in asserting that there is no fixed timeframe for making a decision as to a preliminary examination.⁴⁰ However, this authority cannot be assumed as a license to put off making decisions indefinitely. The ICC Prosecution must be diligent in collecting the necessary information and in its analysis—with a view to catalyzing the national jurisdiction to act accordingly or, failing this, to initiating an investigation.

In this section we will review the OTP's main assertions about the preliminary examination of the Colombian situation and offer additional considerations for each.

To introduce the matter in its Report on Preliminary Examination Activities, the OTP notes that the preliminary examination of the Colombian situation was made public in 2006 and that it has received and analyzed 69 communications that it deemed to fall within its competency. After a summary review of the crimes reported, the OTP affirms in a section titled "Legal Assessment" that "[t]here is a reasonable basis to believe that the crimes against humanity of murder, enforced disappearance, rape and sexual violence, forcible transfer [of persons], severe deprivation of [physical] liberty, torture and ill treatment were committed by various parties to the conflict."⁴¹ Likewise, the report affirms that the OTP's "[p]reliminary research suggests that various groups may be responsible for committing the war crimes of killing and attacking civilians, enlisting, conscripting or actively using children in hostilities, forcibly transferring and deporting civilians, and rape and sexual violence."⁴²

Next, the OTP concentrates on what it calls the analysis of complementarity. Here it states that:

Colombian authorities have carried out and are still conducting a large number of proceedings relevant to the preliminary examination against different actors to the conflict in Colombia for crimes that may constitute crimes against humanity and war crimes. Colombia has an institutional apparatus available to investigate and prosecute crimes under the Rome Statute.⁴³

The OTP lists a series of cases according to groups of people that are implicated in the investigations and offers its considerations for each category.

Before commenting each of the categories of people or crimes presented by the OTP in its analysis of complementarity in Colombia, it is important to first note that the OTP does not follow its own standards. In reporting on national activity, the OTP concentrates only on a quantitative analysis of the number of open proceedings and indicted persons. The analysis does not delve into the subject matter of the cases or evaluate their quality. In this way, the ICC-OTP seems to endorse that what matters is the number of open cases, regardless of their substance or results.

To expand on these general observations, below we highlight the relevant elements for each of the different types of proceedings, according to how they have been grouped by the OTP.

⁴⁰ *Id.* para. 12.

⁴¹ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 72.

⁴² *Id.* para. 73.

⁴³ *Id.* para. 74.

2.1 Proceedings against Members of Guerrilla Groups⁴⁴

The ICC-OTP's complementarity analysis of the Colombian situation begins with the proceedings against the leaders of illegal armed groups, which the OTP limits to guerrilla groups. As the OTP notes, with regard to this group of persons the judicial apparatus has acted diligently for all kinds of crimes under national law, including homicides (aggravated and of protected persons), kidnappings, forced displacement, and terrorism. The State does not hold back any effort in the prosecution of these leaders, including using convictions *in absentia*.⁴⁵ Several members of different guerrilla groups are serving heavy sentences in prisons around the country. Given the crimes included in the Rome Statute, it is understandable that the ICC-OTP monitors these proceedings. However, it should not be surprising that in these cases—against the declared enemies of the State—the State's willingness and capacity to investigate, prosecute, and punish are more than evident.

Generally, the concern of international observers regarding these proceedings has focused less on the lack of State activity and more on the respect of guarantees in the administration of criminal justice—for example, the arbitrary deprivation of liberty or the exercise of the right to a defense. Moreover, given the most recent tendencies in Colombia's military strategy, the death of the guerrilla leaders is favored over their arrest and submission to justice. This decision would bring negative consequences for the administration of justice in any country, but its analysis would be beyond the scope of this report.

Regardless, neither unwillingness nor incapacity is an issue with regard to the prosecution of leaders of Colombian guerrilla groups.

2.2 Proceedings against Members of Paramilitary Groups⁴⁶

The OTP's analysis continues next with the proceedings against members of paramilitary groups. We consider this analysis to be incomplete, as the ICC-OTP limits its review of national proceedings against paramilitaries to the Justice and Peace Law (Law 975 of 2005), despite the fact that this legal framework has a rather limited personal jurisdiction, and further limits its assessment to a calculation of the number of proceedings in progress, without qualitative consideration. As a result, the OTP's analysis ignores elements of the confessional mechanism under the Justice and Peace Law that do not satisfy investigative due diligence in a criminal matters or the State's obligation to ensure accountability for cases within the jurisdiction of the ICC. Each of these assertions is developed further below.

2.2.1 *The OTP Limits its Review to the Justice and Peace Law*

The OTP's analysis of proceedings against paramilitaries is limited to what is taking place within the special procedure established by the Justice and Peace Law. This decision ignores the fact that the Justice and Peace Law is a confessional mechanism limited to those who have both voluntarily submitted themselves to the law and were selected or accepted as candidates by the Executive.⁴⁷ The personal jurisdiction of this special procedure is limited and the Executive branch acts as a filter for candidacy. This design removes from the judicial system (the Attorney General's Office included) the ability to carry out a technical selection of which individuals should be submitted to the procedure—for example, to concentrate on the prosecution of those bearing most responsibility. Moreover, the design of the procedure could be seen as undermining impartiality by allowing the Executive branch to introduce criteria into the selection or exclusion of the members of paramilitary groups for examination under the Law.

⁴⁴ *Id.* para. 75.

⁴⁵ See, e.g., Supreme Court of Justice, Criminal Cassation Chamber, No. 23825, Mag. Javier Zapata Ortiz, (Mar. 7, 2007) (Machuca Case); Supreme Court of Justice, Criminal Cassation Chamber, No. 25974, Mag. María del Rosario González de Lemos (Aug. 8, 2007) (Yamid Amat Case).

⁴⁶ See ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 76.

⁴⁷ Law 975 (2005), arts. 2 & 10.

The scope of the facts that will be uncovered under the Justice and Peace Law is absolutely conditional on the will of the demobilized paramilitaries. It is an incentive-driven mechanism (benefits for collaboration) and is therefore less suitable for reaching those bearing most responsibility. Several of the paramilitaries that were listed as candidates for the process opted to withdraw from the confessional framework challenging the capacity of the judicial apparatus and taking the calculated risk that the judicial system would not be able to obtain a conviction against them through an ordinary investigation. More than 1,200 paramilitaries have withdrawn from the process with confessing a single act.⁴⁸

Moreover, there are many paramilitaries that are not included in the Justice and Peace Law and are therefore ignored in the ICC-OTP's analysis. Many, including individuals with leadership roles, hid themselves in the anonymity that clandestine military organizations provide to avoid being brought to justice. Without the risk of being identified for their responsibility in grave crimes (as a result of the ineffectiveness of the investigative apparatus), these individuals have no reason to seek out the Justice and Peace Law. Instead, those outside the Justice and Peace Law solicited socio-economic and legal benefits (improper amnesties and pardons) afforded under the Law 782 of 2002 for certain crimes, such as conspiracy, illegal possession of weapons, and illegal use of military uniforms and insignia.⁴⁹ Others that were not covered by this mechanism will try their luck with a mixed (administrative and judicial) mechanism established by the Law 1424 of 2010, which will tentatively resolve their legal situation. This Law explicitly states that information provided by a participating paramilitary "cannot, under any circumstances, be used as evidence in a judicial proceeding against that individual ... or against a third party."⁵⁰ This mechanism is in an exploratory phase and there have been serious problems in its operation. Regardless, it represents an affront to the right to justice of the victims of grave crimes. The judicial exclusion of the paramilitaries' information also negatively affects the possibilities for the Attorney General's Office to successfully prosecute those bearing the most responsibility. These insider testimonies could have been very useful in building solid cases against those individuals at the highest levels of the criminal operation.

Another limitation of the ICC-OTP's exclusive focus on the proceedings against members of paramilitary groups under Justice and Peace proceedings is that it excludes all the paramilitaries that did not demobilize⁵¹ as well as others that were not included on the list of candidates presented by the Executive branch.⁵² Because the Executive is responsible for determining the persons subjected to the Justice and Peace Law, the selection of these people does not rest on technical or strategic criteria that would allow for moving toward the prosecution of the most serious crimes and of those bearing the most responsibility. There have even been reports that suggest that the lists of candidates were created by the paramilitaries themselves, with the national government's endorsement.⁵³ If these assertions are true, the stated purpose of the Justice and Peace Law would be completely compromised and justice submitted to the will of the perpetrators. There are members of these groups with high levels of responsibility in the systematic perpetration of grave crimes who are not in the Justice and Peace process. Examples include several members of paramilitary factions in the departments of Meta, Casanare, Boyacá, and Cundinamarca.

Likewise, the exclusive concentration on Justice and Peace keeps the OTP from analyzing the procedural consequences of confessions incriminating paramilitaries who have not demobilized and individuals that are part of the public authority or the local economic elite. While the OTP's report recognizes that Justice and Peace confessions have identified several authorities as possible accomplices, it does not assess these proceedings and asserts—six years after beginning the preliminary examination—that it does not have enough information to do so.⁵⁴

⁴⁸ The number of paramilitaries that have not ratified their willingness to participate in the process was initially reported regularly but the statistic has not been published now since 2009. The most recent report was that 1,212 paramilitaries listed as candidates for the special Justice and Peace process had withdrawn without confessing a single act. Attorney General's Office, Justice and Peace Prosecution Unit, Administration Report (Sept. 2009). In all likelihood, the number today is much higher.

⁴⁹ None of these 10,749 confessed paramilitaries contributed to truth as a condition of receiving the benefit. They received improper amnesties (cessation of the criminal proceeding in one of the stages prior to determination of guilt) and pardons; these decisions remain in effect today. Although the judicial authorities are under the obligation to investigate any possible criminal participation in grave crimes by the beneficiaries of the amnesty or pardon measures, the authorities do not comply with due diligence obligations—either intentionally or from an impossible work load (incapacity).

⁵⁰ Law 1424 (2010), art. 4 (emphasis added) (translated from Spanish original).

⁵¹ The intentional disorder of the demobilizations was used to hide persons and entire criminal structures. The paramilitary activities and structures that were eventually encompassed in the figure of the United Self-Defense Forces of Colombia (*Autodefensas Unidas de Colombia* – AUC) during the demobilization process are only some of the most notorious—they do not constitute the whole of paramilitarism in the country. In addition to the strategic reserves that were not included in the AUC demobilization, there are a variety of paramilitary structures that never joined the demobilization process, such as the Campesinas de Casanare Self-Defense Forces (*Autodefensas Campesinas de Casanare* – ACC).

⁵² The irregularities in the demobilization and in the process of reorganization have been widely documented by the Inter-American Commission on Human Rights (IACHR) and by the Peace Process Support Mission of the Organization of American States (*Misión de Apoyo al Proceso de Paz de la Organización de Estados Americanos* – MAPP-OEA). For example, in its review of the demobilization process of the Bloque Norte, the IACHR confirmed that "there were no mechanisms for determining which persons really belonged to the unit, and were therefore entitled to social and economic benefits, nor for establishing consequences in case of fraud." IACHR, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, OEA/Ser.LV/II.129 Doc. 6 (Oct. 2, 2007), para. 14.

⁵³ For example, see the testimony of alias "Diego Rivera," a confessed paramilitary that describes the pacts and agreements that were made between the government and the paramilitaries in the Justice and Peace process. Reproduced in Alfredo Serrano Zabala, *Paracos* (Random House Mondadori: Bogotá, 2009), pp. 202-71.

⁵⁴ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 61.

The failure to make strategic use of the paramilitaries' Justice and Peace confessions to advance toward prosecuting criminals who have not submitted to the justice system is evidence of an unwillingness to truly investigate the ties between the political, military, and economic elite of the country and the paramilitaries—namely, the involvement of the former in the perpetration of grave crimes.

Any reference to a third party by a confessed paramilitary in the Justice and Peace process is remitted to the competent authority in the ordinary jurisdiction, without any type of monitoring of the procedural effect of this confession. The alleged participation of individuals outside the Justice and Peace process in criminal conduct confessed by paramilitaries has reached unexpected dimensions and warrants in-depth analysis. As of January 2012, the paramilitaries in their confessions have implicated 9,425 individuals in criminal acts.⁵⁵ These include: 589 elected officials, 588 members of the Armed Forces, and 214 public servants.⁵⁶ In fact, more people outside the process have been implicated in criminal acts than there are paramilitaries confessing; notwithstanding, there is no monitoring of what happens in the ordinary proceedings against these individuals outside the scope of Justice and Peace.

The limited jurisdiction of the special Justice and Peace procedure coupled with the lack of a coordination mechanism between the different specialized units of the Prosecutor General's Office, has meant that there is no overall view of the paramilitary phenomenon, which involved public servants and members of the political and economic elite. With the obligation to prosecute those bearing most responsibility as the frame of reference, the special prosecutorial initiative should be structured so as to facilitate the inquiry into the criminal responsibility of these individuals. However, because of how the procedure is structured, the only documentation available is the registry of the remittance of the information to the competent authority. This omission evidences a lack of due diligence and strategic vision in the confessional mechanism.

Given the stated concern of the ICC-OTP over those bearing most responsibility, the criminal participation of public servants should be given particular attention in its analysis of national proceedings' compliance with the aims of the Rome Statute. To reiterate, the ICC-OTP stated that one of the criteria that it would evaluate to assess the impartiality of proceedings is whether there are ties between the perpetrators and the authorities responsible for the investigation and prosecution of those crimes and whether the state apparatus was used for their commission.⁵⁷ Both have been proven in the proceedings against paramilitaries;⁵⁸ however, no mechanism has been put into place to ensure effective prosecution against those principals and accomplices identified in the Justice and Peace confessions.

For the above reasons, if the ICC-OTP's intention is to carry out an assessment of the status of criminal proceedings related to paramilitary activity in Colombia, it is patently erroneous to circumscribe the analysis to the Justice and Peace Law excluding all that is done or not done by ordinary jurisdictions. This is especially true given the fact that there is no guarantee that those bearing most responsibility are submitted to the special Justice and Peace process.

⁵⁷ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 64.

⁵⁸ For example, the confessions of alias "El Iguano" reveal the active participation of the security, intelligence, and justice sectors in the crimes of the paramilitaries in the department of Norte de Santander. See Superior Tribunal of the Judicial District of Bogotá, Justice and Peace Chamber, No. 110016000253200680281, Mag. Uldi Teresa Jiménez López, case against Jorge Iván Laverde Zapata for crimes of homicide *inter alia* (Dec. 7, 2009). Regarding the information included in the confession, its procedural effect is unclear. Likewise, the confessions of alias "Juancho Dique" regarding the dynamics of the violence in the Montes de María region, near the Colombian Atlantic coast, reveal the paramilitaries' ties with one of the military units that operated in this zone at the time of the Mampuján massacre and forced displacement. See Superior Tribunal of the Judicial District of Bogotá, Justice and Peace Chamber, No. 110016000253200680077, Mag. Uldi Teresa Jiménez López, case against Uber Enrique Banquez Martínez y Edwar Cobos T. for crimes of homicide *inter alia* (Jan. 25, 2010). A part of this decision even describes how the paramilitaries "established contact with the Marine infantry base in the zone so that they could borrow armories every Monday, to be returned every Thursday (rifles, M-60s, mortars, etc.)." *Id.* para. 99 (translated from Spanish original). Again, the procedural effects of this declaration on the implicated third parties are unclear.

⁵⁵ Attorney General's Office, Justice and Peace Prosecution Unit, Administration Report (Jan. 31, 2012), available at <http://www.fiscalia.gov.co/justiciapaz/index.htm>.

⁵⁶ *Id.*

2.2.2 *The ICC-OTP Limits its Assessment to the Number of Open Proceedings*

The appraisal presented by the ICC-OTP regarding the Justice and Peace process echoes the statistics that are regularly reported by the Colombian Attorney General's Office (AGO). The OTP's analysis is quantitative and ignores the type of qualitative assessments that according to its own policies are essential to an analysis of complementarity.

For example, the ICC-OTP highlights the certainly impressive number of violent acts that have been reported by paramilitaries in the Justice and Peace process (57,131 acts). Yet the OTP does not go deeper to look at the results in terms of advancing procedurally on these declarations nor does it analyze cases that would be within its temporal jurisdiction. There is no doubt that the victimization in Colombia was massive and that the paramilitaries were responsible for a large portion of these acts. However, the structure of the special criminal procedure does not lead to the elucidation of the acts, the means and methods of perpetration, the motivations behind the violence, or the different type of criminal participation—especially of those that controlled or decided their perpetration.

The Justice and Peace process is bottlenecking and producing extremely poor results. According to the registry of the Attorney General's Office there are more than 140,000 victims that have reported criminal acts or petitioned for assistance or reparations.⁵⁹ Of the approximately 4,500 candidates for the process, there is some kind of procedural advance in the cases of no more than 700 paramilitaries, many of whom were the direct perpetrators of the acts.⁶⁰ The process is paralyzed by the partial and fragmented investigations being carried out for each of the candidates.

The initiative did not prioritize proceedings against commanders or individuals with responsibility in particularly grave conduct. The prosecutors are working on the cases according to a basic geographic division of labor and several criteria of convenience based on the demobilized structures. The procedural advances do not respond to the gravity or patterns of crimes; there are paramilitaries indicted for isolated homicides with no connection to a broader context of violence or attack on the civilian population. The bottleneck effect is even more notable in terms of convictions. Although the process was expected to be marked by celerity given its nature as an incentive-driven confessional mechanism (substantial reduction in sentences), the Justice and Peace process has not produced results. Only 11 individuals have been convicted and given partial sentences based on a fragmented consideration of the relevant events.⁶¹

The AGO statistics demonstrate the massivity of crimes perpetrated. Almost seven years after Law 975 of 2005 was passed, the official statistics are also a testament to the impunity that continues to reign for thousands of crimes. In fact, the statistics themselves illustrate the poor administration of this special prosecutorial initiative and the failure to take advantage of the opportunity to confront the systemic criminality tied to some of the military structures that demobilized.

2.2.3 *The ICC-OTP's Analysis Ignores Qualitative Elements of the Justice and Peace Process that Illustrate Obstacles in the Prosecution of Crimes within the Jurisdiction of the ICC*

The ICC-OTP's analysis ignores structural and operational elements of the Justice and Peace process that signal indolence in the administration of justice in Colombia and that represent serious obstacles for the prosecution of crimes within the jurisdiction of the ICC. For example, the investigative activity under Justice and Peace is limited. The incentivized confession of the perpetrator is taken as procedural truth. By design, the truth that is being reconstructed in these proceedings is dependent on what is said by the confessed perpetrator. Prosecution of systemic criminality is not easy, but it is not reasonable or acceptable that the process be determined by the confessions of criminals. This type of engineering of the truth, together with deficient investigations, generates a strong indicator against considering Justice and Peace as a national process capable of leading to the prosecutions of bearing most responsibility for crimes within the jurisdiction of the Court.

Furthermore, the Justice and Peace process is plagued by legal uncertainty and constant changes in the jurisprudence and practice. The poor design of the procedural stages of the Justice and Peace Law and the normative gaps lead to interpretative battles that hold up and undermine the process. Examples include the partiality or fragmentation of the indictments⁶² and the repetition of procedural steps in the arraignment and confirmation of charges hearings. These problems have excessively delayed the cases, and the delays raise questions about the capacity to do justice.

⁵⁹ Attorney General's Office, Justice and Peace Prosecution Unit, Administration Report (Jan. 31, 2012), *supra* note 48.

⁶⁰ As of January 2012, the procedural results reported by the Attorney General's Office are: 615 candidates have been indicted (*imputación*); 249 have been arraigned (*formulación de cargos*); 107 are awaiting legalization of their acceptance of the charges; 50 have legalized their acceptance; and 11 have been convicted. Attorney General's Office, Justice and Peace Prosecution Unit, Administration Report (Jan. 31, 2012), *supra* note 48.

⁶¹ *Id.*

⁶² For example, on at least eight occasions the Supreme Court of Justice has assumed different positions with regard to the fragmentation or partiality of the Justice and Peace processes: Supreme Court of Justice (SCJ), Criminal Cassation Chamber (CCC), No. 31290, Mag. Augusto Ibáñez (May 11, 2008); SCJ-CCC, No. 30120, Mag. Alfredo Gómez Quintero (July 23, 2008); SCJ-CCC, No. 30955, Mag. José Leonidas Bustos Ramírez (Feb. 9, 2009); SCJ-CCC, No. 30775, Mag. Jorge Luis Quintero Milanés (Feb. 18, 2009); SCJ-CCC, No. 31115, Mag. José Leonidas Bustos Ramírez (Apr. 16, 2009); SCJ-CCC, No. 31539, Mag. Augusto Ibáñez (July 31, 2009); SCJ-CCC, No. 32.022, Mag. Sigifredo Espinosa Pérez (Sept. 21, 2009); SCJ-CCC, No. 32575, Mag. María del Rosario González de Lemos (Dec. 14, 2009).

Similarly, the coercion and deaths surrounding the implementation of the Justice and Peace process also raise serious doubts which should be the subject of ICC-OTP analysis. When defining the criteria to consider in assessing the independence and impartiality of the relevant national proceedings, the ICC-OTP highlighted that unwillingness can be demonstrated by acts that threaten the independence of the proceedings, such as harassment or persecution of victims, witnesses, and judicial personnel.⁶³

Given the national context, there are no guarantees for victim participation in the Justice and Peace process. The risks, threats, and homicides have been widely documented by intergovernmental bodies in the country.⁶⁴ The climate of violence and intimidation also extends to those working in the judicial system. In addition to directly obstructing the investigations, this scenario also generates a climate of anxiety that conditions the administration of justice more generally.⁶⁵ The ICC-OTP recognizes this fact by including these types of threats and obstructions as indicators of unwillingness to carry out the relevant proceedings.⁶⁶

Likewise, in the context of Justice and Peace, the assassination of paramilitary commanders and the silencing of subordinates through violent death have been egregious. The National Police reported more than 2,000 violent deaths between 2001 and 2009 of individuals that demobilized in collective processes. Among these are several cases of midlevel commanders that were assassinated to guarantee silence and destroy evidence.⁶⁷ With the authorities' inaction in preventing or investigating these deaths, valuable opportunities to collect evidence about the criminal apparatus are being lost. This is yet another indicator of unwillingness that the ICC-OTP highlighted in its draft paper on the analysis of complementarity.⁶⁸

This context of violence and intimidation should be considered by the ICC-OTP in its assessment of the legitimacy and genuineness of the relevant national proceedings. This context affects the national authorities' willingness and conditions their capacity to carry out investigations and prosecutions that satisfy the parameters of complementarity.

Aggravating the already difficult state of the Justice and Peace proceedings, in May 2008 and again in March 2009 the Colombian government decided to extradite several of the men that hold the master narrative about the organized apparatus of power—including some of the most notorious paramilitary commanders—to the United States on charges related to drug-trafficking.⁶⁹ The extradition for drug-trafficking crimes ignored the fact that these men were confessed paramilitaries and under the custody the Colombian justice system either in pretrial detention or serving a sentence. They all faced proceedings in the ordinary jurisdiction and were to varying degrees collaborating with the Justice and Peace confessional process. With their extradition, all incentives for these individuals to collaborate with the Colombian judicial system are lost. This decision subordinated the interests of Colombian justice to those of the requesting State and it ignored the rights of the victims of crimes under the jurisdiction of the ICC. The extraditions had a silencing effect and have caused delays in the administration of justice. These consequences should be the subject of rigorous monitoring and analysis by the ICC-OTP.

Each of the aspects highlighted above raise doubts about the performance of the Colombian authorities and about their capacity and willingness to carry out proceedings against the members of paramilitary groups in a way that would be compatible with the intention of investigating and punishing those bearing most responsibility for the gravest crimes. These elements speak to the quality of the proceedings and raise serious doubts—according to the ICC-OTP's own published doctrine—regarding the capacity and the willingness of the Colombian authorities, as a result of the delays and the negative indicators related to independence and impartiality.

⁶³ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (2010), para. 61.

⁶⁴ For example the Peace Process Support Mission of the OAS (MAPP-OEA) has reported several incidents of massacres, forced displacements, and executions, inter alia, directed against victimized communities in different regions of the country. See, e.g., MAPP-OEA, XIII Trimestral Report (Oct. 21, 2009), pp. 5, 8-11.

⁶⁵ For example, in the report presented in October 2009, MAPP-OEA highlighted as an example that "in the region of Magdalena Medio, there have been acts against justice-system personnel working in the Justice and Peace process. In the regard, MAPP-OEA is concerned about the attacks suffered by several public servants and condemns the assassination in Barranquilla of Larry Churrón, Chief Investigator of the Prosecutor's Office No. 14, who was leading investigations involving the Bloque Córdoba of the former AUC." *Id.* p. 5 (translated from Spanish original).

⁶⁶ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 61.

⁶⁷ To illustrate: Jairo Andrés Angarita Santos, alias "Comandante Andrés," a former official in the Colombian Air Force, assassinated in December 2006; Carlos Mauricio García, alias "Rodrigo" or "Doble Cero," former commander of the Bloque Metro that had spoken out regarding drug-trafficking, assassinated in May 2004; Severo Antonio López, alias "Job," assassinated July 28, 2008; Juan Carlos Jiménez, alias "Caliche," assassinated July 20, 2005; Daniel Alberto Mejía, alias "Danielito," assassinated in 2005 in Medellín; Francisco Enrique Villalba Hernández, alias "Cristian Barreto," involved in the El Aro massacre, assassinated by hit men on April 23, 2009; Diego José Martínez Goyeneche, alias "Daniel Bloom," commander in the department of Tolima who was poisoned and died in La Picota penitentiary in Bogotá.

⁶⁸ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 61.

⁶⁹ Several extraditions were especially grave in light of the information that the individuals could have contributed to criminal cases, namely those of: Salvatore Mancuso; Rodrigo Tovar Pupo "Jorge 40"; Guillermo Pérez Alzate "Pablo Seviliano"; Ever Veloza García "H.H."; Diego Murillo Bejarano "Don Berna"; Hernán Giraldo Serna "El Patrón"; Ramiro "Cuco" Vanoy Murillo; and Carlos Mario Jiménez "Macaco."

2.3 Proceedings against “Politicians”⁷⁰

Under the heading of proceedings against politicians, the ICC-OTP groups the criminal cases against individuals that held elected office and colluded with the paramilitary groups (known in Colombia as the “parapolitics” cases) and the criminal cases against members of the intelligence services assigned to the Presidency of the Republic, the Administrative Department of Security (*Departamento Administrativo de Seguridad* – DAS) for illegal surveillance, persecution, and homicides. This grouping of investigations is not logical and given the importance of the proceedings, the two categories should be analyzed independently.

2.3.1 The “Parapolitics” Proceedings

First, the proceedings against politicians stem from the investigations initiated and carried out by the Supreme Court of Justice against congress members who received support from paramilitaries during elections.⁷¹

The ties between politicians and paramilitaries became evident in allegations and complaints by members of opposition parties⁷² and in compromising documents that came to light—for example, the so-called Ralito Pact to “refund” the Nation⁷³ and the filtering of electronic documentation confiscated from paramilitaries who had remained active after the demobilization.⁷⁴ These debates set off the political and social alarms. In a tense and polarized context, the Supreme Court of Justice has moved forward with the “parapolitics” proceedings since 2008, but not without setbacks.

The ICC-OTP mentions that there are more than 100 congress members from both the Senate and the House that have been or are the subjects of criminal investigations.⁷⁵ These investigations are for electoral crimes committed in conspiracy with paramilitary groups and the majority of the proceedings refer to acts that took place before the Rome Statute entered into force. The Supreme Courts efforts are notable and have revealed the deep alliances between politicians and paramilitaries. However, with only one exception, these efforts have not been directed at crimes within the jurisdiction of the ICC.⁷⁶ The convictions have been mainly for conspiracy to commit a crime, (*concierto para delinquir*, Penal Code, Law 599 of 2000, art. 340), voter coercion (*constreñimiento al sufragante*, Penal Code, art. 387), and electoral fraud (*alteración de resultados electorales*, Penal Code, art. 394).

Generally, the alliances between the politicians with paramilitary groups are proven in these cases through pacts regarding the electoral distribution of local power⁷⁷ and changes in electoral patterns over time that demonstrate the illegal support given to a particular candidate. In light of the resounding evidence of electoral conspiracy, several of the congress members accepted the charges and benefitted from a type of negotiated sentence (*sentencia anticipada*).⁷⁸ Also, the dates of the acts place these cases outside of the temporal jurisdiction of the ICC.

The exception to the electoral-crimes cases mentioned above is that of Álvaro García Romero, a political heavyweight of the Atlantic Coast region who was convicted for homicide in February 2010. The judgment declared García Romero criminally responsible as perpetrator-by-means for the aggravated homicides of several victims of a massacre committed in 2000 by paramilitaries in the rural areas around Carmen de Bolívar, including Macayepo.⁷⁹

⁷⁰ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), paras. 77–79.

⁷¹ The Constitution grants the Supreme Court of Justice competency to investigate and try these individuals. Political Constitution of Colombia (1991), art. 186.

⁷² For example, Clara López Obregón, a member of the Polo Democrático Alternativo political party, lodged a complaint before the Supreme Court of Justice in 2005 regarding the ties between congress members and paramilitaries. Gustavo Petro, member of the same political party (at the time) also made allegations.

⁷³ The agreement for the “refounding” of the State, known as the “Ralito Pact,” marked the beginning of these processes. The Ralito Pact was signed on July 23, 2001 between the paramilitary leaders and several congress members and other politicians. This agreement is the bedrock for the criminal cases against the politicians from the Atlantic coast. Among the signatures for the AUC “Chiefs of Staff” (*Estado Mayor*) were Salvatore Mancuso, Diego Fernando Murillo alias “Don Berna,” Edward Cobos Téllez alias “Diego Vecino,” and Rodrigo Tovar Pupo alias “Jorge 40.” On the part of the politicians: Salvador Arana Sus, Rodrigo Burgos, Alfonso Campo Escobar, Miguel de la Espriella, José Gnecco, José María Imbeth, Jesús María López, Juan Manuel López Cabrales, William Montes, Reginaldo Montes, José de los Santos Negrete, and Eleonora Pineda.

⁷⁴ For example, the computers confiscated from Ignacio Fierro (alias “Don Antonio”) on March 11, 2006 contained, among other things, information that connects local politicians to Jorge 40. See Attorney General’s Office, National Human Rights and International Humanitarian Law Unit, Barranquilla, No.2030, Judicial Inspection of process No.1890 carried out in the specialized HR-IHL Prosecutor’s Office No.55 (Bogotá) (2006).

⁷⁵ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 78.

⁷⁶ The exception is the case of Álvaro García Romero, which will be discussed further below. Another ex-senator, Álvaro Araujo Castro, was investigated for the crime of aggravated extortionary kidnapping of one of his political opponents, but it did not prevail. Araujo was convicted for conspiracy to commit a crime and voter coercion on March 18, 2010 and sentenced to 112 months in prison. He is already out on parole. At the time of this writing, there is another proceeding in the Supreme Court of Justice against an ex-parliamentarian, Cesar Pérez García, for a series of homicide perpetrated in 1988 in Segovia, Antioquia. However its relevance is limited: the origins of the case are peculiar, it has not yet reached the sentencing phase, and it is outside the temporal competency of the ICC.

⁷⁷ In addition to the “Ralito Pact” mentioned above, there are 14 agreements of this type in different regions of the country that have since come to light. See León Valencia & Eduardo Pizarro L., *Ley de Justicia y Paz* (Grupo Editorial Norma: Bogotá, 2009), pp. 329–38 (describing the nature of each of the known agreements).

⁷⁸ For example: Dieb Maloof, Miguel de la Espriella, Alfonso Campo Escobar, Carlos Arturo Clavijo, Muriel Benito Rebollo, Rocío Arias, Eleonora Pineda, Jorge Luis Caballero, Enrique Emilio Ángel Barco, Jorge Ramírez Urbina, and Salomón Saade. Many continue to intervene in politics through agents (family members and associates) while serving their sentences; several of the individuals convicted for parapolitics are already free and, despite the formal limitation on their rights, they are active agents in local politics.

⁷⁹ Supreme Court of Justice, Criminal Cassation Chamber, No.56 (Feb. 23, 2010) (conviction and sentence of the ex-senator Álvaro García Romero).

In addition to the Supreme Court proceedings against those with constitutional privilege (including current congress members), the Attorney General's Office is investigating several local leaders and representatives for their ties with paramilitaries. These proceedings are based on much of the same evidence—confessions of paramilitaries (both in Justice and Peace and in the ordinary jurisdiction). In light of local dynamics, beyond the interventions in elections, these proceedings have exposed networks of corruption in public administration as well as illicit enrichment and mutual-benefit schemes between politicians and paramilitaries.

For example, reports document that in the Atlantic Coast region these groups, under the command of alias “Jorge 40,” continued after the demobilizations to rely on a “Political Commission” that exerted influence in the departments of Atlántico, Magdalena, Bolívar, and Sucre. This commission was in charge of “the relationships with local authorities (*corregidores*), mayors, senators, members of parliament, etc., in addition to the social work in the department and collecting the commissions on contracts in the different municipalities.”⁸⁰ The report documents the agreement between public administration organs and paramilitary structures to embezzle from the municipal and departmental coffers.

The case of the department of Casanare is also illustrative of the transactions between the political sphere and the paramilitary structures. There are manifest examples of the exchanges between paramilitary structures and the political movements in the region. What is more, the conflict between the Centauros bloc of the AUC and the Autodefensas Campesinas de Casanare (ACC) can be explained in part by the competition over the public resources of the department. The complexity of the relations in Casanare was evidenced in the criminal file of the ex-governor Miguel Ángel Pérez. Ángel Pérez was convicted to six years in prison for the crime of illegal enrichment for receiving money from the ACC to finance his political campaign for the 2004-2007 governorship.⁸¹ The multiple testimonies and other evidence revealed the fluidity between public affairs and the use of paramilitary power.⁸²

These examples are illustrative cases of the interrelationships and mutual exploitation between paramilitary structures and local political sectors; there are hundreds more just like them in other regions of the country. However the criminal cases, with very few exceptions,⁸³ do not address the perpetration of crimes that could be within the jurisdiction of the ICC.

The cases against politicians that the ICC-OTP mentions reveal the deep ties between political elites (national and local) and the paramilitary groups. However, with the few exceptions noted above, these proceedings do not address the responsibility of politicians that have acted as perpetrators-by-means, co-perpetrators, and instigators of many violent crimes in the different regions of Colombia. The proceedings have been interrupted by a general climate of terror and by the attacks and threats against the independence of the judiciary as well as against the victims and their legal representatives.

2.3.2 *The Proceedings Involving the DAS*

Second, the OTP addresses proceedings concerning the involvement of the directors and agents of the Administrative Department of Security (DAS). Our most important observation about these cases is that they involve the use of the State apparatus for criminal purposes. While a few convictions have resulted, investigative and judicial challenges persist in establishing the ramifications of these convictions for those bearing the most responsibility.

The Supreme Court of Justice's conviction on September 14, 2011 of one of the DAS directors, Jorge Noguera Cotes, illustrates that the findings relied on for this ruling are only the tip of the iceberg in terms of the criminal activities of the President's intelligence agency.⁸⁴ Noguera was convicted for committing the crimes of conspiracy; destruction, suppression, and hiding of public documents revealing a confidential matter; and the homicide of a social leader and human-rights activist from the Atlantic Coast, Alfredo Correa de Andreis.⁸⁵ The Criminal Chamber determined that the homicide was perpetrated by an organized power structure that combined State authority with the brute force of the paramilitaries in order to carry out the criminal plan.⁸⁶ Noguera was convicted as the “man behind the scenes” (mastermind) of this homicide.

⁸⁰ Attorney General's Office, National HR-IHL Unit, Barranquilla, No.2030, Judicial Inspection of proceeding No.1890 carried out in the HR-IHL specialized Prosecutor's Office No.55 (Bogotá), Annex (2006) (translated from Spanish original).

⁸¹ Supreme Court of Justice, Criminal Cassation Chamber, No.24679, Act No.77, Mag. Alfredo Gómez Quintero (July 27, 2006). See also the Attorney General's Office, Process No.8851 (Aug. 18, 2005) against Miguel Ángel Pérez for illicit enrichment.

⁸² For example, there was evidence of the use of intermediaries and political entrepreneurs, such as Andrés Rueda Gómez, former Secretary of Public Works under Governor William Hernán Pérez's administration. Rueda Gómez is known by the alias “El Ingeniero” (“The Engineer”), and he has been identified as the link with the paramilitary structures for the offering of public contracts, among other things. *Nuevas Denuncias comprometen al prófugo gobernador de Casanare*, *El Tiempo* (Mar. 29, 2005), pp. 2-8. See also Attorney General's Office, Process No.8851 (Aug. 18, 2005), against Miguel Ángel Pérez for illicit enrichment.

⁸³ One of these exceptions is the case of the former governor of the department of Sucre, Salvador Arana Sus, who was convicted as the author of the disappearance and homicide of Eudaldo León Díaz Salgado, former mayor of El Roble, Sucre, committed on April 5, 2003. Supreme Court of Justice, Criminal Cassation Chamber, No.374 (Dec. 3, 2009).

⁸⁴ Supreme Court of Justice, Criminal Cassation Chamber, No.33, Mag. Alfredo Gómez Quintero (Sept. 14, 2011).

⁸⁵ *Id.* p. 155.

⁸⁶ *Id.* p. 115.

To illustrate the criminal liability of the ex-director of the DAS for criminal conspiracy, the Court demonstrated how he favored the interests of the paramilitaries by politically appointing people tied to these groups. For example, he named Rómulo Betancurt as sectional director of the DAS in Bolívar despite Betancurt's history with organized crime and paramilitary groups in Córdoba since the 1980s.⁸⁷ The practices described in the ruling implicate the public authority in the perpetration of crimes. It illustrates how the State apparatus was placed at the service of criminal interests and how lethal violence was used to annihilate declared enemies. The decision reveals that the crimes perpetrated from within the DAS were committed through a detailed division of labor to compartmentalize and hide the responsibility of the officials at the highest level.

Some of the ex-agents of the DAS that have received benefits for their confessions have confirmed the gravity of the acts and the need to move up the ladder of responsibility as high as the Presidency of the Republic.⁸⁸

In the face of threats and harassment, the Colombian justice system has taken important steps toward establishing the criminal responsibility of some authors in crimes perpetrated from within the State's intelligence agency. However, the main investigative and prosecutorial challenge remains—that of establishing the continuum of power between principals and accomplices and identifying the policies, practices, and contexts that led to the perpetration of systematic and widespread abuses from within the presidential intelligence agency. The ICC-OTP should conduct a serious inquiry into the procedural status of these cases and identify the obstacles that exist for investigating all plausible hypotheses of criminal responsibility.

For these reasons, it is surprising that six years after the beginning of the preliminary examination of the Colombian situation, the ICC-OTP states that it has not yet collected enough information to assess these proceedings and the principle of complementarity contained in the Rome Statute.

2.4 Proceedings against Police and Army Officials⁸⁹

In the Report on Preliminary Examination Activities, it is not clear what is being analyzed in the discussion of the criminal proceedings against members of the Army. The ICC-OTP refers to the ties between members of the Armed Forces and paramilitary groups that have come to light through Justice and Peace confessions. However, as mentioned above, the Attorney General's Office does not have information about the procedural consequences of these confessions and the Attorney General's Office has not conducted a systematic exercise of overseeing the remittance of this information. In the same section, the Report mentions several deaths of indigenous peoples and crimes of sexual violence and asserts that it needs more information.

Lastly, in that same section, the ICC-OTP appears to express concern for the “extrajudicial killings” committed by members of the Armed Forces. The Report cites the AGO's statistics that as of August 30, 2011 there were more than 3,400 open investigations and 1,400 agents in custody.⁹⁰ The OTP then states that it will continue gather information.

Meanwhile the progress of these proceedings in Colombia is limited: the vast majority of the cases are in the preliminary stages; the focus is on reconstructing the scene of the crime; the role of official practices and policies in the commission of the crimes has not been investigated; the existence of patterns or systematicity is not being explored; and while the direct perpetrators, and in a few cases officers (generally confessed) are being tried and convicted, it is done without a line of investigation that would connect these individuals to those with a greater level of responsibility in these crimes.

A rigorous analysis of the available information leads to the conclusion that the jurisdiction of the ICC has been triggered and thus that the ICC-OTP should open an investigation. In light of this conclusion, and given the gravity of these acts, Section 3 of this report is dedicated exclusively to analyzing the status of these relevant national proceedings.

⁸⁷ *Id.* p. 103.

⁸⁸ For example, the declaration of the former Director of Intelligence for the DAS, Fernando Alonso Tabares Molina, confirmed the alleged responsibility of the former Director of the DAS, María del Pilar Hurtado. Pilar Hurtado is wanted by the Colombian justice system but protected by Panama as a political asylee. See the declaration of Fernando Alonso Tabares Molina, from the interrogation carried out from July 9-13, 2011. The statement is signed by Tabares Molina; Misael Fernando Rodríguez Castellanos, Deputy Prosecutor 8 before the Supreme Court of Justice; José C. Hernández Rueda, defense attorney; and Fredy Rubio Zafra, Forensic Investigator of the Technical Investigation Corps (CTI). Tabares Molina is a retired official of the Navy, where he was an intelligence officer with a notable career. He assumed the position of General Director of Intelligence for the DAS in 2007 and served for a semester. Tabares has implicated María del Pilar Hurtado—former director of the DAS and current fugitive—in several illegal actions against political opponents, journalists, and the Supreme Court. He has also declared that the President of the Republic was aware of these activities.

⁸⁹ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), paras. 80-82.

⁹⁰ *Id.* para. 81.

2.5 Proceedings for Rape and Sexual Violence against Women⁹¹

Reporting on the perpetration of rape and sexual violence against women in Colombia, the ICC-OTP references the statistic of 700 cases of women that have been victims of sexual violence or rape according to a report of the Inter-institutional Justice and Peace Committee in 2009. Relying exclusively on a Justice and Peace source for analyzing this type of crime again reveals a skewed perspective. This may simply be in response to the convenience of relying on these numbers, but it reveals that the ICC-OTP has not analyzed the situation of sexual violence against women in Colombia.

The Justice and Peace scheme is one of the least effective for investigating and prosecuting these types of crimes. Cultural factors play a role in rape rarely being confessed; given the voluntary character of the process, acts of sexual violence do not tend to surface. According to the Attorney General's Office, as of January 2012 there are 79 acts of sexual violence that have been preliminarily confessed; in several cases the incidents involve victims that are minors. To date, there is one conviction for sexual crimes in the framework of Justice and Peace;⁹² stemming from this, the AGO also indicted the supposed commander of a structure involved in drug-trafficking for sexual crimes.⁹³ These achievements in Justice and Peace are important; however, this special procedure is not the appropriate response to the need to bring to light and prosecute this type of crime. It is worth remembering that the special procedure has a limited personal jurisdiction and depends on the willingness of the confessed paramilitaries.

Sexual violence in the Colombian conflict has been documented through specific cases. Because of the deficiencies in the statistics produced by State entities, there is no quantitative approximation of the problem.⁹⁴

Nevertheless, a qualitative assessment helps to understand the dynamics and studying these could contribute to the comprehension of the phenomenon and therefore to the action of the ICC-OTP. For example, the United Nation's Special Rapporteur on violence against women stated in her 2002 report on Colombia: "Women have been abducted by armed men, detained for a time in conditions of sexual slavery, raped and made to perform domestic chores. Women have been targeted for being the female relatives of the 'other' side. After being raped some women have been sexually mutilated before being killed."⁹⁵ While these types of cases have been documented by social organizations, the fear of reprisal and of discrimination and mistreatment from members of the judicial system are such that these types of acts are not generally reported.

In 2005 the Rapporteur on the rights of women for the Inter-American Commission on Human Rights (IACHR) documented different forms of violence against women in the context of the armed conflict: rape, sexual abuse, sexual slavery, forced recruitment, forced prostitution, and forced abortion.⁹⁶ The report describes four contexts or situations in which the violence against women is aggravated: a) non-combatant women as direct targets or collateral victims of physical, psychological, and sexual violence (describing practices aimed at terrorizing or hurting the enemy); b) forced displacement, the humanitarian crisis, and women heads-of-household; c) forced and voluntary recruitment of women and girls (which includes the practices of forced abortions and providing "sexual services" to members of armed groups); and d) the imposition of rules of conduct over women and girls.⁹⁷ This type of descriptive study is useful for properly identifying priority areas and the needs of the victims in order to keep paving the way toward justice.

The sexual violence suffered by women in the context of the armed conflict was given special attention by the Colombian Constitutional Court when it highlighted "the risk of sexual violence, attesting to the gravity and magnitude of the situation," in the context of monitoring a writ of protection (ruling T-025 of 2004) related to the rights of persons displaced by the violence.⁹⁸ Beyond identifying the risk to fundamental rights, the Court ordered the Attorney General's Office to investigate a series of complaints of sexual violence against displaced women, which the Court remitted confidentially, requesting that they be given priority.

⁹¹ *Id.* para. 67.

⁹² Toward the end of 2011 the Justice and Peace Chamber of the Superior Tribunal of Bogotá convicted alias "Lucho" or "El Sargento" for rape (*acceso carnal violento*) of a protected person. The facts took place on March 7, 2003 in Tame, Arauca against two girls. Superior Tribunal of the Judicial District of Bogotá, Justice and Peace Chamber, sentence against José Rubén Peña Tobón (alias "Lucho") for crimes of homicide and others, No. 1100160002532008-83194; 1100160002532007-83070 (Dec. 1, 2011).

⁹³ The indictment hearing of Miguel Ángel Mejía Múnera, alias "El Mellizo," was held before the Tribunal of Bogotá on January 27, 2012. Mejía Múnera was a drug-trafficker that bought a franchise of the Bloque Vencedores de Arauca. He is currently extradited in the United States.

⁹⁴ See generally Francoise Roth, Tamy Guberek & Amelia Hoover Green, *El uso de datos cuantitativos para entender la violencia sexual relacionada con el conflicto armado colombiano: retos y oportunidades* (Corporación Punto de Vista & Benetech: Bogotá, 2011). This study concludes that: "Currently, the direct data about sexual violence, as well as case studies and surveys, cannot sustain rigorous affirmations about the magnitude or frequency of sexual violence related to the Colombian conflict. The authors call for continued research and recommend using direct and indirect data, employing 'mixed methods of investigation,' and exploring concrete and local hypotheses." *Id.*, p. 16.

⁹⁵ U.N. Human Rights Commission, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49, Addendum: Mission to Colombia* (1-7 November 2001), U.N. Doc. E/CN.4/2002/83/Add.3 (Mar. 11, 2002), p. 2.

⁹⁶ IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*, OEA/Ser.L/V/II, Doc. 67 (Oct. 18, 2006), available at <http://www.cidh.org/countryrep/ColombiaMujeres06eng/TOC.htm>.

⁹⁷ *Id.* Ch. III: Manifestations of Violence against Women Aggravated by the Armed Conflict, paras. 47-101.

⁹⁸ Colombian Constitutional Court, ruling 092 (2008) (translated from Spanish original).

In response to the Court's ruling, the AGO launched several ad hoc mechanisms. Working groups of prosecutors were assigned; however there was no exclusive dedication to the matter and there was a constant turnover in the assigned prosecutors.⁹⁹ To date, the results have not been satisfactory and the Constitutional Court's oversight measures evidence a failure to guarantee access to justice for the women that are victims of rape or other sexual violence.¹⁰⁰ There is also no comprehensive policy for investigating and prosecuting rape and other sexual crimes committed in the context of the armed conflict.¹⁰¹

In 2009 the IACHR again highlighted that access to justice for victims of sexual violence was not being guaranteed and that key entities in the prosecutorial process, such as the Attorney General's Office, did not have the resources available to attend to the victims of these crimes.¹⁰²

Rape and other forms of sexual violence continue to be invisible in Colombia. The ICC-OTP's approach to this problem has to improve if there is any hope for its activities aimed at the principle of complementarity to contribute to the prosecution of these grave crimes. For the moment, the investigation of the cases of sexual violence and rape in the context of the armed conflict demonstrates unwillingness and a lack of ability on the part of the authorities with jurisdiction over these matters.

2.6 A Preliminary Conclusion: Unwillingness and Lack of Capacity are Problems in Colombia

In this section we sought to comment on the way in which the ICC-OTP communicated its complementarity analysis with regard to Colombia. We highlight that in all likelihood the main problem with the operation of criminal justice in Colombia is not a question of capacity or ability. Nonetheless, there are areas of the investigative and prosecutorial work of complex cases that do evidence a system that is unable. Yet, the main obstacle for the national prosecution of crimes within the jurisdiction of the ICC is a problem of unwillingness. The authorities investigate acts that constitute international crimes as if they were common crimes; the investigations do not generally go beyond a reconstruction of the crime scenes and do not follow lines of investigation that would be capable of establishing the criminal liability of those most responsible.

Because it is facing a problem of unwillingness, the ICC-OTP should redirect its efforts and intervention in Colombia to confront this situation. One way to achieve this would be to initiate the investigation phase. The ICC-OTP should clarify the concrete results that are expected from the Colombian judicial system while the investigation advances and the study of admissibility of cases is carried out. To the extent that some of the cases involve violations of international law that implicate the international responsibility of the State (objective responsibility) and of individual representatives of the highest spheres of government (subjective responsibility), the ICC-OTP is faced with a State that does not want to investigate itself. The OTP needs to confront this type of resistance that warrants the intervention of the ICC.

⁹⁹ Currently there is a sub-unit for gender-based crimes in the framework of the National HR-IHL Unit, but its continuity is not guaranteed.

¹⁰⁰ The National Human Rights and International Humanitarian Law Unit reported that as of November 2010 it was in charge of 64 of the 183 cases that had been remitted by the Constitutional Court in the framework of Ruling 092. No information was offered about the remaining cases. Of the cases under its competency, the National HR-IHL Unit reported that in the Law 600 procedural system there were: 4 convictions, 12 indictments (*resoluciones de acusación*), and 24 cases under investigation (*instrucción*). In the accusatory procedural system (Law 906) it reports: 2 convictions and 38 indictments. The rest of the cases by default are in the preliminary phases or have been archived. Attorney General's Office, *Administration Report: August 2009 – November 2010*, p. 114, available at <http://fgn.fiscalia.gov.co/Fiscalia/archivos/InformedeGestion/infogestion2009-2010.pdf>.

¹⁰¹ In response to pressure from the Constitutional Court, the Attorney General's Office issued a series of memoranda and guidelines to address the matter. However, these documents have inherent problems in the design and have not been implemented. See, for example, Memorandum No. 0117 (Nov. 10, 2008), which establishes the Guide for Investigating Crimes of Sexual Violence in the Context of the Armed Conflict, or Resolution 0266 (July 9, 2008) and calls for generating spaces for dialogue with the different organizations that reported acts to the Constitutional Court in the framework of the Ruling 092 of 2009.

¹⁰² In its 2009 annual report, the Commission observed that in Colombia:

[T]here are still serious obstacles that make it difficult for women to have access to justice. It also finds critical shortcomings in the comprehensive assistance provided to victims and their effective protection from threats and the violence practiced by the actors in the armed conflict. The Commission is disturbed by the lack of resources and the inability of key institutions, such as the Office of the Attorney General of the Nation, to act with due diligence in prosecuting the investigating cases of gender and sexual violence perpetrated by actors in the armed conflict. The Commission has also learned that, despite the considerable advances in the statistical data systems and records, those systems still do not accurately depict the situation of violence against women nationwide and locally, especially the scale of problems like sexual violence perpetrated by actors in the conflict.

IACHR, Annual Report 2009, Follow-up Report: *Violence and Discrimination against Women in the Armed Conflict in Colombia* (Dec. 30, 2009), para. 12, available at <http://www.cidh.org/annualrep/2009eng/Chap.V4.htm>.

3.

Homicides to Win and to Cover up: the Institutional Lie Escaping Investigation

They killed people to make believe that they were effective in the war. They extrajudicially executed people that were captured and defenseless, imposing their own justice. They killed for recognition; they killed for profit; and they killed to earn vacation time. Was it on their own initiative or the consequence of an institutional practice? This is the uncomfortable question that the Colombian authorities do not want to examine about the so-called “false positives.”

“It was a business for them (noncommissioned officers and soldiers), and I, as a commander, benefitted—not economically, but with praise.”¹⁰³ This was the statement of Luis Fernando Borja Aristizábal in his narration of how innocent people were killed in fake operations and combats in order to gain recognition in the Tactical Force Team (*Fuerza Tarea Conjunta* – FTC) in the department of Sucre. Borja Aristizábal was the commander of this Team as a colonel in the National Army from March 2007 to June 2008. “I asked for results, and the Superior Commander asked me for results,” said Borja, referring to the pressure he received to produce “positives.”¹⁰⁴

In a deposition before a prosecutor at the end of December 2010, Borja recounts that when he arrived to the FTC, the team had a reputation for its operational results. He said:

Approximately two months after [becoming commander] I found out that some of these deaths from prior years, and those in my two months, had been set up and were false positives. After that I became a part of the illegal organization. First because, well, I preferred to keep quiet, and I don’t know, for fear of my life and my family’s. And second out of fear that they would kick me out of the army.

Because in a meeting in April in Corozal, well, Minister [of Defense, at the time, Juan Manuel] Santos, because of a lot of complaints from the ranchers, had told me that if this wasn’t fixed, he would kick me out of the Army. Basically for these two reasons I shut up and remained part of the army.¹⁰⁵

Convicted with Borja was Iván Darío Contreras Pérez, a professional soldier assigned to the FTC of Sucre who worked directly with the Colonel. In his sworn statement he describes the involvement of the different members of the military unit:

The guys from the TRES [operations department] only implemented the operations order; the guys from intelligence did the intelligence report; with that information the Coronel was the one that directly communicated with the patrols and coordinated the kills... To get the guns sometimes the counter-guerillas got the money together and bought the guns; other times the money came from the FTCS...for example, if we had to get a kill and the cost was two million, sometimes the company got together a million and the rest came out of the expenses of the FTCS. This money was delivered to a member of the DOS [intelligence department] who was in charge of going to buy the guns or arranging for it; the guns were delivered to whoever was going to make the kill.¹⁰⁶

¹⁰³ *Coronel ordenaba embriagar a víctimas de falsos positivos*, El Tiempo, (Mar. 13, 2012), available at <http://www.eltiempo.com/justicia/coronel-ordenaba-embriagar-a-victimas-de-falsos-positivos-11344327-4> (translated from Spanish original).

¹⁰⁴ *Id.*

¹⁰⁵ Attorney General’s Office, Deposition of Luis Fernando Borja A., before specialized Prosecutor 36 of Medellín, National HR-IHL Unit (Dec. 20-21), reproduced in part in CINEP, *Colombia, Deuda con la humanidad 2: 23 años de falsos positivos: 1998-2011* (2011), pp. 321-22 (translated from Spanish original). Translator’s note: This section of the report contains several excerpts from narrated confessions and depositions. The original texts in Spanish contain numerous errors stemming from both the conversational setting and mistakes in transcription. Every effort was made to faithfully translate the text while opting for readability in English.

¹⁰⁶ Declaration of Iván Darío Contreras Pérez, cited in the Attorney General’s Office written accusation for the homicides of Fabio Alberto Sandoval and Eleonais Manuel González, committed in Galeras, Sucre on November 1, 2007 (pp. 11-12) (translated from Spanish original). These homicides were initially presented as “two subversives taken down” in the military operation “Excalibur,” tactical mission “Oráculo.”

Once the papers were in order and the “goods” (the victim) and the weaponry in place, the “positive” could be produced.

“Positives” were called for everywhere and at any cost. The testimony of a confessed officer is revealing. Lieutenant Edgar Iván Flórez Maestre declared that when Colonel Wilson Ramírez Cedeño became the commander of the Infantry Battalion No. 14 Batalla de Calibío, headquartered in Puerto Berrío, Antioquia, the Colonel said:

every company commander should report one death in combat each month to me and the second section should give me three kills a month; right now the war is measured by liters of blood; the commander that doesn't have the results of kills per month will have the corresponding punishment and it will be reflected on his career record.¹⁰⁷

Likewise, Flórez told how in 2008 Colonel Juan Carlos Barrera Jurado, then commander of the XIV Brigade of the Army, communicated to the battalion commanders through a radio program that “the battalion that did not have [deaths in combat] in ninety days would see its commander kicked out of the army for negligence or operational incompetence.” The Lieutenant's testimony continues:

At that time the pressure was getting more and more intense. It got to the point that they were counting the days that we had gone without a combat. In the tactical operations center there was a chart that had the statistics of the companies where the kills were tallied and the days we had gone without any combat or kills were counted.¹⁰⁸

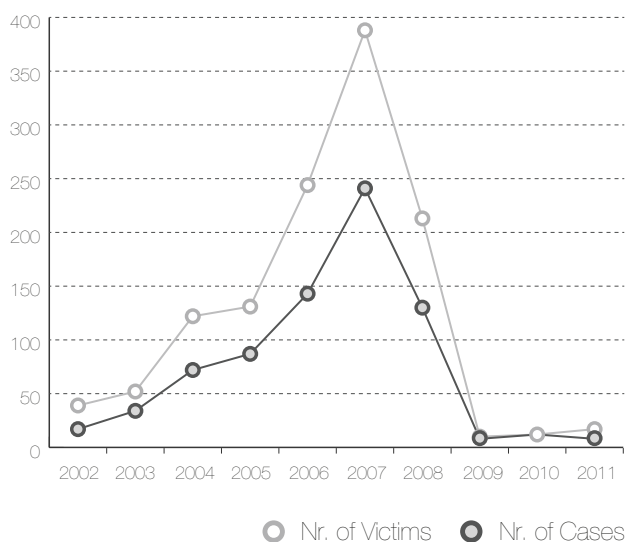
The pressures have been documented in several judicial rulings, but their implications have not been investigated.

When they became known, the false positives shook and divided Colombia. The society continues to be divided into those that cry and protest and those that do not believe or do not want to believe that what is being said is true. It continues to be a polarizing subject. In many cases the victims are denied and those that protest are condemned. The current administration minimizes the gravity of what happened and endeavors to ensure legal security for the troops.¹⁰⁹ It explains the false positives as the consequences of the actions of “a few bad apples.”

Although registries vary, it is generally accepted that there have been more than 2,000 intentional homicides legalized as deaths in combat, with a noticeable peak between 2004 and 2008. The Attorney General's Office reports that more than 1,500 proceedings have been opened between January 2000 and January 2012. The Research and Popular Education Center (*Centro de Investigación y Educación Popular* – CINEP) reports a

similar number of cases over the same time period. The following table shows the alleged cases of homicides presented as false positives during the time period that falls within the temporal jurisdiction of the ICC for the Colombian case. (See Graph No. 1: The Quantitative Dimension of the “False Positives.”) This is an approximation of the statistics to offer an overall look at the criminal phenomenon. It is difficult to understand how a practice that was widespread throughout the entire national territory and which exhibits similar patterns from one military unit to another could be explained as a problem of “bad apples.”

Graph No. 1: The Quantitative Dimension of the “False Positives”



Source: CINEP, Colombia, *Deuda con la humanidad 2: 23 años de falsos positivos, 1998-2011*, (Bogotá, 2011), p.325.

The graph reflects the increase in the number of victims relative to the number of false positives cases beginning in 2006. Each incident was maximized to “legalize” more positives. This tendency should be investigated, particularly to the extent that it corroborates some of the testimonies of the confessed criminals. For example, Lieutenant Flórez told about his introduction to the practice of false positives in 2007: “Lieutenant Rodríguez had five kills and he told me that when he got the first kill [he realized] it was better to have more than one kill at a time because then it looked more real, so that is how the next two kills had each resulted in two deaths.”¹¹⁰

¹⁰⁷ Procurator General of the Nation, written complaint presented by Edgar Iván Flórez Maestre, in Medellín (Dec. 15, 2009), p. 6 (translated from Spanish original).

¹⁰⁸ *Id.* p. 7.

¹⁰⁹ The administration of President Juan Manuel Santos recently presented a proposed modification to the Constitution to provide legal security to the troops. Juan Carlos Pinzón Bueno, Minister of National Defense, Proposed Legislative Act No. 192/2012 “*Por el cual se reforman los artículos 116, 152 y 221 de la Constitución Política de Colombia.*” The administration is promoting the constitutional change to respond to “the lack of guarantees and clear rules for the members of the Armed Forces.” *Id.*

¹¹⁰ Procurator General of the Nation, written administrative complaint and testimony presented by Edgar Iván Flórez Maestre, in Medellín (Dec. 15, 2009), p. 4 (translated from Spanish original).

It is also surprising to see the paralyzing effect that official measures taken in 2007 had in curbing the practice.¹¹¹ The concurrence between the decrease in false positives and the expedition of the Permanent Directive of the General Command of the Military Forces NR. 300-28/2007 is particularly noteworthy. This directive established a new way of measuring the impact of the operational results, prioritizing demobilization and capture over deaths in combat, except in the case of leaders.¹¹² The ability to halt the practice of false positives through this type of directive is indicative of the previous existence of a policy that provoked or promoting the practice of false positives.¹¹³ The dramatic reduction is an indicator that the authorities at the highest level had sufficient control (“negative control”) over the acts to have stopped the criminal practice (in terms of criminal responsibility as “masterminds”). This scenario is another element that undermines the “bad apples” explanation and calls for investigations that pursue plausible hypotheses considering the role of institutional policies and practices.

This report does not aim to analyze or recount the practice of false positives. There are a variety of sources—from the United Nations, journalistic reports, complaints, research and analysis materials, and artistic mediums—that offer many rich perspectives of the phenomenon.¹¹⁴ This brief introduction seeks only to present the general context and elucidate some of the key characteristics that have been documented in terms of the commission of these crimes. This serves as the background for our analysis of the relevant national proceedings related to the homicides systematically committed by members of the Armed Forces to fabricate positive results of its military interventions.

As the ICC-OTP notes in its report on the preliminary examination of the Colombian situation, there are multiple open investigations, several individuals detained, and some convicted for these acts.¹¹⁵ However, the quality of the investigations is deficient and the results raise doubts as to the genuineness of these proceedings in terms of the type of prosecution that Rome Statute crimes require. To explore these aspects further, the section below presents a quantitative analysis of the open proceedings, according to the Attorney General’s Office. To complement this numeric reading, we will also present the risks and problems that the different false positive cases pose, based on a review of the judicial files.

This qualitative perspective alerts to serious deficiencies in the investigations and in the prosecutions and trials. These deficiencies support the argument that the ICC-OTP needs to initiate an investigation into these cases and deepen the line of inquiry with the specific objective of prosecuting those bearing the most responsibility. The following analysis looks beyond the high number of proceedings—a natural result stemming from the extremely high number of homicides—to a deeper evaluation of the quality of the proceedings, their seriousness, and their suitability for establishing higher levels of responsibility.

¹¹¹ For example, the Ministry of Defense’s Directives 10 and 19 of 2007, which reiterate the obligations for competent authorities to enforce the law and avoid homicides of protected persons, and the Permanent Directive 300-18 (2007) of the General Command of the Armed Forces.

¹¹² Ministry of National Defense, General Command of the Armed Forces, Permanent Directive NR. 300-28/2007 (Nov. 20, 2007). In the particular missions, it established that the Army, Navy, Air Force, and Joint Commands: “favor collective and individual demobilizations as a measure of the operational results over the number of captures, and the latter over deaths in combat.”

¹¹³ For example, the use of the number of deaths as an indicator in the performance of the different military units should be documented and the directives and orders that established this practice must be investigated. Likewise, the effects of the different practices and policies that could have fostered the false positives should be explored, as well as the reward payments established in the 2005 ministerial directive that came to light when the disappearance of several execution victims were reported. See, for example, Ministry of National Defense, Permanent Ministerial Directive No. 29 (Nov. 17, 2005).

¹¹⁴ See, e.g., U.N. Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Mission to Colombia*, U.N. Doc. A/HRC/14/24/Add.2 (Mar. 31, 2010); CINEP, *Colombia, Deuda con la humanidad 2: 23 años de falsos positivos: 1998-2011* (2011); Colombia-Europe-United States Coordination (CCEEU), Human Rights and Humanitarian Law Observatory, *Informe final de la Misión Intencional de Observación sobre Ejecuciones Extrajudiciales e Impunidad en Colombia*, Thematic Document No. 4 (2008); CCEEU, *Ejecuciones Extrajudiciales: Realidad inocultable* (2009); CCEEU, *Trimestral Bulletins about extrajudicial executions* (Spanish), available at <http://ddhncolombia.org.co/taxonomy/term/28>; Felipe Zuleta, *La pobreza, un “crimen” que se paga con la muerte: Un documental de Felipe Zuleta Lleras* (2010), available at http://www.youtube.com/watch?v=Ym_nL8NN9r4; Colbert García Benalcázar (Director), *Silencio en el paraíso* (2011), summary and credits available at <http://www.silencioenelparaiso.com>.

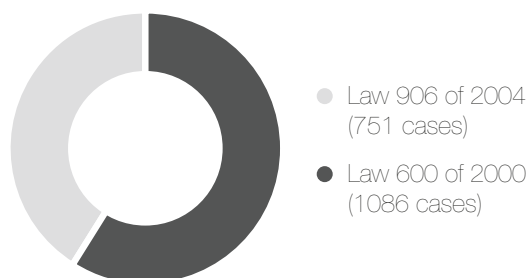
¹¹⁵ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 81.

3.1 A Global and Quantitative Analysis of the Status of the Relevant National Proceedings Carried Out by the AGO: Many Cases, Few Advances

As of September 30, 2011, the Attorney General's Office has competency over the investigations of more than 1,800 cases of "homicides attributed to State agents"—the categorization used in its reports. The AGO provides regular information about the progress of these proceedings, separating those that are being conducted under the mixed (inquisitive/accusatory) criminal procedural system, Law 600 of 2000, and those that are being processed in the newer (oral accusatory) system, Law 906 of 2004. The new system has been applied gradually throughout Colombia since its entry into force.¹¹⁶ The cases are carried out in one system or the other depending on which was in force at the time of the acts, according to the date and place of the events. As the follow section will show, each procedural system presents different challenges and obstacles.

The general analysis is constructed based on the status of the proceedings as of September 30, 2011. The main finding is that the proceedings are overwhelmingly in the preliminary stages. Of the 1,837 proceedings reported by the AGO, only 72 have advanced to trial: 51 cases under Law 600 and 21 cases in the new procedural system. Of all the proceedings, 59% are under the mixed procedural framework of Law 600 of 2000 (a total of 1,086 cases). The remaining 41% are subject to the procedural rules of Law 906 of 2004 (a total of 751 cases). (See Graph No.2, presenting the total number of proceedings and their distribution between the procedural systems.)

Graph No.2: Total Number of Proceedings by Procedural System as reported by AGO as of September 30th, 2011

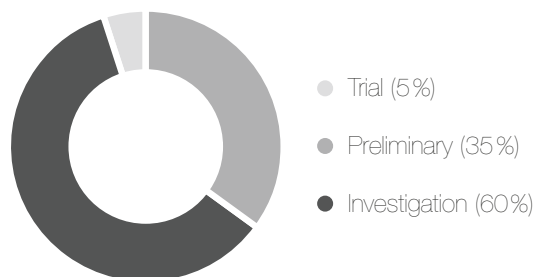


Graphic representation of the status of the proceedings may contribute to a better understanding of the situation. Graph No.3 represents the proceedings under Law 600 (mixed procedural system)—1086 cases distributed throughout the country—according to the respective procedural status. An important number of these cases (870) are concentrated in the AGO's National Human Rights and International Humanitarian Law Unit (National HR-IHL Unit), a specialized unit headquartered in Bogotá and in several other cities of the country. The remaining Law 600 proceedings (216 cases) are distributed territorially in different sectional offices of the AGO. Thus, in addition to providing the total by procedural phase, the graph disaggregates the data between those assigned to National HR-IHL Unit (based on technical specialty) and those based in the AGO sectional offices (because of the type of case and territorial jurisdiction).

Graph No.3: Number of Proceedings for Homicide by a Member of the Armed Forces (Law 600)



Graph no.4: Proportion of Proceedings by Procedural Phase under Law 600



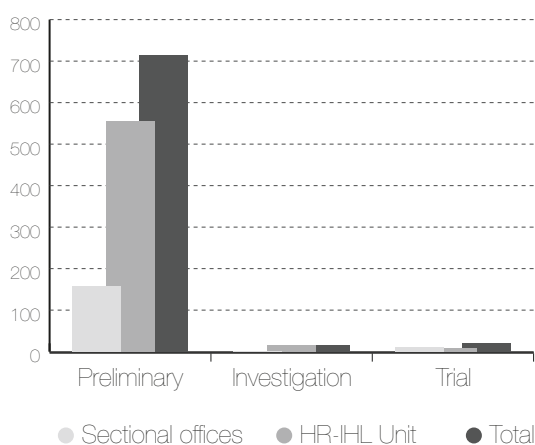
¹¹⁶ The analysis in this section relies on information taken from official sources. The records used are drawn from official reports or formal requests for information answered by the competent authority. Unfortunately, not all of the authorities use the same nomenclature or categories to describe the events or variables; for this reason, not all of the information is easily comparable. The data is analyzed within these limitations and respecting the cut-off dates of each report, cautious to not make any inappropriate aggregations. In this way, the analysis seeks to reduce error and circumscribe the conclusions to only those which the reported data allows. For this analysis the different official documents and reports include: AGO, No. UNDH-DIH 000669 (Feb. 27, 2012); AGO, No. DNF 17592 (Sept. 16, 2010); AGO, Excel charts produced by the National Direction of Prosecutors' Offices about the competency and procedural progress of the homicide cases attributable to a State agent, as of September 30, 2011; Procurator General's Office, No. DD DDHH 3316 and annexes (Oct. 4, 2011); Ministry of National Defense, No. 99151 (Oct. 26, 2011); and several electronic correspondences from the Attorney General's Office, the Procurator General's Office, and the Ministry of National Defense with annexes that contain numeric registries of the open cases.

The delay in the proceedings and the lack of trials are evident. As Graph No.4 illustrates, 35% of the cases continues in the preliminary stage prior to the opening of an investigation; 60% is in one of the different investigative phases; and only 5% has made it to trial. The proportional distribution of all the cases according to procedural stage (shown in Graph No.4) is reasonably consistent with the distribution seen in both in the National HR-IHL Unit and in the different sectional offices. The proportional distribution of cases in the sectional offices

reflects a greater concentration in the procedural stages prior to the investigation (40%), but the percentage of cases that have made it to trial is the same (5%).

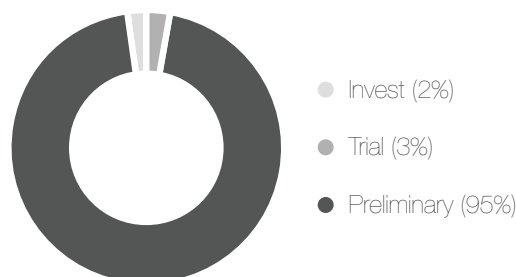
The proceedings in the new accusatory procedural system (Law 906) tend to be concentrated in the preliminary inquiry—the stage before the indictment. In other words, the proceedings are in the stage before the formal initiation of a criminal case and could remain stuck in this phase. Graph No. 5 illustrates the 750 proceedings from across the country that are under Law 906 (oral accusatory system) disaggregated according to their procedural stage as of September 30, 2001. A significant number of these proceedings (580 cases) are based in the National HR-IHL Unit; the remaining Law 906 proceedings (171 cases) are distributed among different AGO sectional offices.

Graph No. 5: Number of Proceedings for Homicide by a Member of the Armed Forces (Law 906)



The lack of formal investigation and the delay in advancing procedurally in these cases are dramatic in both procedural systems; yet they are even graver in the accusatory procedural system (Law 906). Of the 751 cases in this procedural system, 714 proceedings are in the inquiry stage; in other words, 95% of the cases have not advanced passed the preliminary phase of inquiry. (See Graph No. 6, illustrating the proportional distribution of the procedural phases in the cases falling under Law 906 of 2004).

Graph No. 6: Proportional Distribution of the Proceedings by Procedural Stage in Law 906



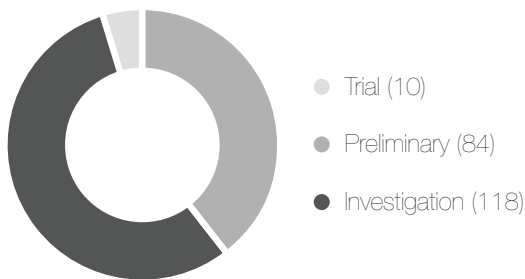
The inquiry phase in this context corresponds to the preliminary stage, characterized by a preeminent role of the prosecutor, confidentiality, and the lack of a regulated space for the intervention of the victims and their representatives. The inactivity of the prosecutors under Law 906 inquiry phase results, in part, from the overload of cases in the different offices and a consequent lack of capacity to investigate. The high number of cases assigned to each prosecutor requires them to concentrate on the cases that are in the more advanced procedural stages and which have impending time constraints as a result of the initiation of the formal investigation phase. Consequently, the initial work for the cases in the inquiry phase is neglected.

This pressure on the prosecutors and the demands to produce measurable results in terms of indictments and convictions generate a distortion in the system of administration of justice that leads to the easiest cases (generally involving an arrest *in flagrante delicto*) being the ones that prosper. Thus, the complex cases, such as the false positives, get lost in the growing volume of cases and the likelihood that the cases will be archived.

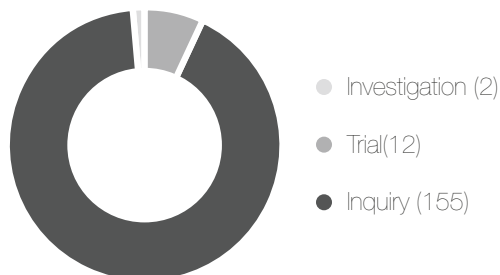
The more time that passes with a case in a pre-investigation phase (whether under Law 600 or Law 906), the more likely it is that the case will be closed without a final determination of responsibility. Given this hypothesis, below we will analyze the amount of time that has passed since the acts, grouping the proceedings according to the procedural stage reached. The analysis is based on the official information available, as of September 30, 2011. Given the suitability of the information produced by the National Direction of Prosecutors' Offices of the AGO, we chose to apply this analysis to the cases that are housed in the different sectional offices of the country. Again, among the sectional offices the total number of cases of homicide attributed to a State agent is 387: 216 cases under Law 600 procedural system and 171 under Law 906. Of the 387 proceedings, 6 were excluded because of errors in the data entry of the registries. Notwithstanding, we were able to analyze the progress over time for 98% of the total relevant proceedings based in the sectional offices.

The breakdown by procedural phase according to the respective procedural system for the cases analyzed in this exercise is as follows: 84 cases in the preliminary phase (Law 600); 118 cases under investigation (Law 600); 10 cases in trial (Law 600); 155 cases in the inquiry phase (Law 906); 2 cases in investigation (Law 906); and 12 cases in trial (Law 906). This is illustrated in Graphs Nos. 7a and 7b divided according to the applicable criminal procedure.

Graph No. 7a: Distribution of the Law 600 Proceedings in Sectional Offices, by Procedural Phase (with valid registries)



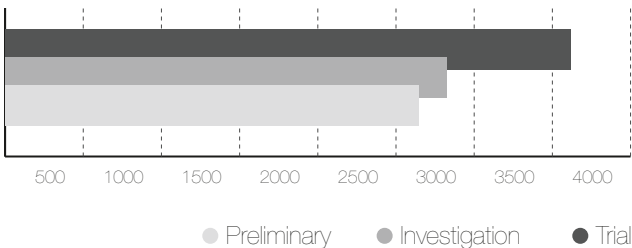
Graph No. 7b: Distribution of the Law 906 Proceedings in Sectional Offices, by Procedural Phase (with valid registries)



For this temporal analysis we took the date of the violent act and determined the time that has passed between the homicide and the cutoff date (September 30, 2011) and determined which procedural stage each of the cases had reached. This allows us to observe the evolution of each of the proceedings in light of the date on which the violent act took place and to draw conclusions about the average time associated with the proceedings currently in each phase. These times were measured in days. In calculating the average time we also identified the minimum and maximum limits (shortest and longest timespans) corresponding to each procedural phase to reveal the range of dates represented in the average.

Graph No.8 illustrates the average number of days that the different cases under Law 600 have taken since the violent acts took place, grouped by procedural phase reached.

Graph No. 8: Average Time Passed, By Procedural Stage in Law 600 (Number of Days)



It can be seen that in the 10 cases that have reached trial, on average 3,619 days have passed since the occurrence of the violent act.¹¹⁷ In other words, the 10 cases that have arrived at the trial phase have each taken on average 9 years and 11 months. The proceedings in the preliminary stage have taken 7 years and 3 months on average;¹¹⁸ and the proceedings in the investigative phase have taken 7 years and 9 months.¹¹⁹ The delay between the occurrence of the violent act and the trial is excessive; especially considering that few proceedings reach this stage. Again, in Law 600 only 5% of the cases have reached the trial phase.

The proceedings in the preliminary phase (before the formal investigation), which on average have gone more than 7 years without advancing, are particularly concerning. Looking to the maximum range determined for the 84 cases in the preliminary phase, there are cases that date back to May 1998 without any advances. Likewise, for those in investigation, there are cases dating from 1990. The probability of any advance in the cases with such a long time span is close to none. These are cold cases that are not given any attention and that, with the passage of time, face increasingly serious evidentiary problems.

¹¹⁷ The average amount of time is calculated from the 10 cases in the trial phase; the sample includes all possible cases. The average beginning date of the 10 cases was November 2, 2001. The maximum date is November 30, 1994; and the minimum date is October 15, 2007. The maximum and minimum dates represent the limits of all the cases studied and thus reflect the range of all the dates included in calculating the average.

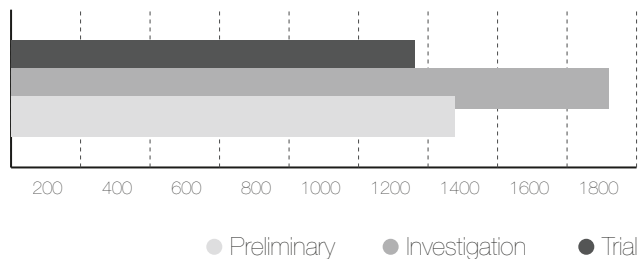
¹¹⁸ The average time was calculated from the 84 cases in preliminary phase that had valid registries. The average beginning date for the 84 cases was July 4, 2004. The maximum of the date range was May 23, 1998, and the minimum was December 25, 2007.

¹¹⁹ The average time was calculated from the 118 cases in the instruction phase that had valid registries. The average beginning date for these 118 cases was January 4, 2004. The maximum of the date range was July 24, 1990, and the minimum was December 27, 2007.

Beginning January 1, 2008, all criminal proceedings were handled under the new procedural system (Law 906), which was gradually implemented throughout the country. Therefore the maximum temporal limit for the cases processed under Law 600 is acts committed before December 31, 2007. The new Criminal Procedure Code was approved in 2004; it applies for crimes committed after January 1, 2005, beginning in Bogotá and then gradually in other parts of the country in following years as set out in the Law.¹²⁰ Because of where the acts that led to false positives took place, the first cases out of the AGO sectional offices to be processed under Law 906 started in 2007. The analysis here is applied to 169 cases of the total 171 cases in sectional prosecution offices¹²¹ and the procedural activity is what was reported up to September 30, 2011, the cutoff date of the report. The averages and ranges of time are thus calculated in light of this limit.

Graph No.9 illustrates the number of days that have passed since the occurrence of the violent deaths and the evolution of the cases according to its current procedural phase under Law 906.

Graph No. 9: Average Time Passed, By Procedural Stage in Law 906 (Number of Days)



As can be seen above, the 12 cases that have reached the trial phase have taken an average of 1,160 days, the equivalent of 3 years and 2 months.¹²² While this is an acceptable average, the number of cases that have reached trial is a negligible part of the overall cases. The large majority of the proceedings—more than 90%—are frozen in the phase prior to investigation. This inquiry phase tends to extend without producing results. These cases have taken an average of 3 years and 6 months (1,276 days) with no procedural advances.¹²³ Only 2 cases are reported to be in the investigative stage; and these have taken more than 4 years and 8 months. The early stagnation of the cases has very grave repercussions on the probabilities of success and reflects a violation of the principle of due diligence in the criminal investigation.

This overall review of these cases points to serious problems in the diligence of the investigations. The analysis identifies that, while a few cases have produced results, the majority of the cases are not advancing procedurally. This is a technical indicator that confirms that the national criminal proceedings for false positives present delays that could lead to impunity. The overall and quantitative analysis of these processes are supplemented below with a qualitative analysis concentrating on the substance of the investigations, the lack of strategic consideration in the delays, the manifest obstacles to the action of the ordinary jurisdiction, and the blatant violations of due diligence in the criminal investigation.

¹²⁰ Law 906, arts. 530 & 533.

¹²¹ The two cases that were excluded presented data-entry errors in the registry.

¹²² The average time was calculated from the 12 cases in the trial phase; the sample includes all possible cases. The average beginning date for these 12 cases was July 27, 2008. The maximum of the date range was April 29, 2007, and the minimum was June 2, 2011. The maximum and minimum dates represent the limits of all the cases studied and thus reflect the range of all the dates included in calculating the average.

¹²³ The average time was calculated from the 155 cases in the inquiry phase that had valid registries. The average beginning date for the 155 cases was April 1, 2008. The maximum of the date range was March 26, 2006, and the minimum was June 26, 2011.

3.2 Military Criminal Justice Investigates the “Positives”: An Affront to the Independence and Impartiality to the Proceedings

The Military Criminal Justice (MCJ) system in Colombia is an administrative branch of the Ministry of National Defense that, according to the Colombian Constitution “administers justice.”¹²⁴ For years, members of the Armed Forces—military and police—who found themselves involved in acts that constitute human rights violations or grave breaches of international humanitarian law have used the MCJ as a shield.¹²⁵ In the case of homicides presented as false positives, the MCJ has actively intervened to assume competence over some of the cases, asserting that they involved deaths in combat and thus, conduct by members of the Armed Forces in the course of official duty. Although this judicial practice is contrary to the law, it is quite widespread.

For determining the competent authority or resolving any conflict of competency that arises between military criminal justice and ordinary jurisdictions, the constitutional and legal parameters are clear in cases involving possible human rights violations.¹²⁶ The rule establishes that if there is any doubt over whether the military actions can be considered in the course of duty, the case must be investigated by the organs of the ordinary jurisdiction.¹²⁷

In a nutshell, the High Courts have reiterated that military criminal justice is by definition exceptional and is limited to the crimes considered to be committed in the course of duty. Under current law, the MCJ can never assume cases of human rights violations or grave breaches of international humanitarian law, such as torture, forced disappearance, rape, or extrajudicial execution. Moreover, the existence of criminal intent in the carrying out of a military action severs any purported nexus to official duty.¹²⁸

The constitutional standard set in 1997 by the Constitutional Court has been adopted in the military criminal codes promulgated since then.¹²⁹ It has also been reiterated in Ministry of Defense and AGO guidelines and directives.¹³⁰

Notwithstanding, practice has been otherwise and many of the possible false positive cases are lodged in the MCJ system.

The facts of these cases are presented in the context of combats or predetermined military operations so as to keep the case under the competency of a military criminal judge: ensuring impunity for the acts is part of the criminal plan. We turn next to an analysis of some of the elements of the false positives practice designed to keep the cases under the protection of the MCJ.

First, individuals that are later used to produce bodies are recruited or abducted in such a way as to leave no trail. The deaths are registered without identification (or as “John Does”). Generally it is asserted that the individual belonged to an illegal armed group. As is discussed further below, only the identification of the victims provides for the chance to confront the official version that reports the kills or the “positives.” As long as the “kill” remains a John Doe, the case is generally processed in the military criminal jurisdiction without objection.

Second, the majority of the acts take place in rural areas and generally late at night—responding to the military motto “observe during the day, move during the night, attack before dawn.”¹³¹ This way, the only eye witnesses are usually those involved in the acts and there is one single, shared version of events.

The perpetrators or passive participants in the acts frame their testimonies in the routinization characteristic of military institutions and the bureaucratic dimensions of war.¹³² In file after file, the soldiers and noncommissioned officers questioned about the deaths in combat tell identical stories—they show no emotion and they stick to the script of “death in combat.” The testimonies are part of the process of legalizing the deaths, and therefore part of the criminal plan. For example, the following is a soldier’s deposition after the Tactical Mission No.266 “Avispa,” part of the “Sovereignty Operation”:

We got some information from the second-in-command of the battalion in the area...that there was a group of bandits ...we went toward that area...when we were arriving the lookout saw some shadows of people and said “we are army troops.” They responded with fire, we also responded with fire, the result was three casualties.¹³³

¹²⁴ Political Constitution of Colombia, art. 116.

¹²⁵ For an exhaustive analysis of the problems of the military jurisdiction, see Federico Andreu-Guzmán, *Fuero militar y derecho internacional* (International Commission of Jurists & Colombian Commission of Jurists: Bogotá, 2003). For a summary review of the principles that apply in the jurisdictional conflicts, see U.N. Commission on Human Rights, *Draft Principles Governing the Administration of Justice Through Military Tribunals* (“Decaux Principles”), U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006).

¹²⁶ Colombian Constitutional Court, rulings C-358 (1997); C-878 (2000), C-713 (2008); and SU-1184 (2001).

¹²⁷ *Id.*

¹²⁸ *Id.* See also Supreme Court of Justice, Criminal Cassation Chamber, No.26137, Approved act No. 127, Mag. Sigifredo Espinosa Pérez (May 6, 2009), detailing the Court’s position on the military criminal jurisdiction and nullifying a military-jurisdiction case involving a false positive.

¹²⁹ Law 522 of 1999, art. 3; Law 1407 of 2010, art. 3 (regulating the matter of crimes not related to official duty).

¹³⁰ See, for example, Ministry of National Defense, Directive No. 10 (2007) & Directive No. 19 (2007), stating that the competency of the Military Criminal Justice is limited and exceptional. For example, Directive No. 19 reiterated the rule regarding possible conflicts of competencies in 2007: “Where the facts do not clearly reveal their direct relation to duty, ordinary criminal law must be applied. Therefore, any doubt as to the relation of the allegedly punishable act to official duty must be resolved in favor of the ordinary jurisdiction.” Ministry of National Defense, Directive No. 19 of 2007, p. 2 (translated from Spanish original).

¹³¹ National Army, Mechanized Infantry Battalion, No.4 Antonio Nariño, Barranquilla, (Jan. 20, 2004), summary of operational permanent orders (SOP), related to “special considerations that every commander must take into account.”

¹³² See generally Martha K. Huggins, Mika Haritos-Fatouros & Philip G. Zimbardo, *Violence Workers* (Univ. of California Press: Los Angeles, 2002); Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (Random House: New York, 2007); John Conroy, *Unspeakable Acts, Ordinary People* (University of California Press: Los Angeles, 2000).

¹³³ Ministry of National Defense, Executive Direction of Military Criminal Justice, Military Criminal Investigation Court 40 of the National Army, Criminal Process No.2008-0071-J40IPM.

Then, there is the statement of a noncommissioned officer about the moment of death: “The lookout started to make the announcement, yelling to them, ‘we are troops from the National Army,’ in response we heard some shots.”¹³⁴ These types of statements are made over and over; they seem like a ritual in disciplinary and criminal proceedings. The names of the tactical mission and the operational orders change, as do the actors, the places, and the dates, but the sequence of events is almost always the same: someone makes the announcement of the Army, the response is gunfire, the military company responds (in the darkness) with fire, and then the casualties are reported.

The consistency in the statements can only be pierced through an autonomous and independent investigation. Absent this investigation, the logic and routine of the military operation takes advantage of the mystery surrounding all deaths that happen at night in rural areas and are reported as “deaths in combat.”

Third, it is important to remember that the deaths are covered in all the formality that military doctrine requires: operational orders, a tactical mission, the related intelligence annexes, an operational report, and any other document that might be required. All of this is done by professionals to mask the event in acceptable operational terms.

One of the findings of the *ad hoc* commission established to investigate the alleged forced disappearances by members of the National Army in the Soacha district¹³⁵ was that there were serious problems “in the observance and oversight of the procedures that govern the intelligence process and the planning, directing, execution, and evaluation of military operations.”¹³⁶ The Commission’s report finds multiple irregularities in the documentation that supposedly supported the operations. For example, the intelligence information was not registered according to standard procedure and only personal notebooks or agendas of people involved were registered; the same people involved in the “casualty” took the statements to confirm that the person killed had been involved in illegal activities; the operational orders were given verbally and then were legalized with the insertion of boilerplate language; the separate tactical missions were not disseminated or communicated to others working on the broader mission; and the missions did not include a specific intelligence annex.¹³⁷

The official report raised an overall doubt regarding the formality of the military orders and missions. This should be taken into consideration by all actors in the judicial system in assessing the supposed orders that are presented to justify military action. The *ad hoc* Commission’s conclusions are extremely useful for understanding the use of operational rules and doctrine in the perpetration of the false positives.

Insider testimony also illustrates that the production of military documentation was part of the criminal practice. For example, according to the statement of a young officer in the context of the practice in the department of Antioquia:

Once there was a victim the intelligence officer ... and ... the company commander would speak with the battalion commander so that he would back the operation. Then in the operations section ... the tactical mission was designed so that a special group would carry it out. The mission design included the number of troops that would participate but in reality this was fake, because for example if the tactical mission said it would be 01-02-10 [i.e. an officer, two noncommissioned officers, and ten soldiers] that was a lie because only those that were going to do the work would go; sometimes they would go in civilian attire. Then the casualty would be reported, [the commander of the battalion] coordinated with the judicial authorities for the removal of the body.¹³⁸

The testimonies and the findings of the “administrative and operational investigation of the Commission” about the Soacha false positives illustrate how easy it is to simulate a combat and produce an apparent “positive” couched in the rules of military operations and doctrine. If the investigation only reviews the formality of the documentation compiled by the different military units to “legalize” the acts, it will be endorsing the very mechanism designed for covering up the crimes. To do so would be to adopt a presumption that the acts occurred in the course of duty, even though experience and knowledge of the manner of perpetration of these crimes indicate that the investigation should not accept these documents at face value.

Nonetheless, many judicial authorities limit themselves to the formal review of the documentation that supports the supposed operation and the consistency of the statements of those involved. They thus send the cases to the military criminal justice, even before having conclusive information about the identity of the deceased or establishing whether there was a combat (for examples, through the detection of residues on the clothing of the supposed combatants).¹³⁹ In the MCJ, the cases are usually archived or closed through the cessation of proceedings or the preclusion of the case, depending on the procedural phase.

¹³⁴ *Id.*

¹³⁵ Commission created by the Ministry of National Defense through Resolution 4342 (Oct. 3, 2008).

¹³⁶ Press Release, Minister of National Defense Juan Manuel Santos (Oct. 29, 2008), available at <http://web.presidencia.gov.co/sp/2008/octubre/29/01292008.html> (translated from the Spanish original).

¹³⁷ Report of the *ad hoc* commission established by Ministry of National Defense Resolution 4342 (Oct. 3, 2008), pp. 15-16.

¹³⁸ Procurator General’s Office, written administrative complaint and testimony signed by Edgar Iván Flórez Maestre, in Medellín (Dec. 15, 2009), pp. 3-4.

¹³⁹ This type of superficial analysis extends to the practice of some prosecutors who initially take the cases as “deaths in combat” and then, without any further action on their part, accept the official version of the facts and voluntarily cede jurisdiction to the military criminal justice. Whether because of ignorance or complacency, the prosecutors opt to send the cases to the MCJ.

The judicial practice is even more arbitrary when the individuals killed “in combat” have not been identified. As we alerted to above, part of the criminal plan is precisely that the victim not be identified; this allows for the deceased to be presumed a clandestine member of an illegal armed group that was taken down. When the deceased is not identified, there is no one to contradict the military version of events. One of the most serious problems in the open cases is that the identification of the deceased can take years; in the meantime, the criminal proceeding in the military criminal justice system may be archived or closed.

The common practice with the cadavers of the “positives” is to take a copy of the fingerprints. The post-mortem fingerprint record must be acknowledged by the National Civil Registry (*Registraduría Nacional del Estado Civil*). This process should be quick but it is excessively prolonged, which avoids the identification of possible victims of extrajudicial executions.

The case review that was conducted for this analysis revealed several where the identification of the deceased was delayed for two years. Among these were cases in which the family members had reported the individual as missing under a law that should activate a rapid-response search mechanism and incorporate the information of the supposed victim into a database.¹⁴⁰

The case of Anderson Bladimir Monsalve Vinasco is illustrative. Monsalve was initially reported dead on June 4, 2007 as a John Doe, together with two other people, in the municipality of Nariño, Antioquia. The report cited the deaths as a result of the action of the Counter-guerrilla Battalion No.4 “Granaderos,” Baluarte Company, of the IV Brigade.¹⁴¹ In this case, the identification of the cadaver confirmed by the Automatic Fingerprint Identification System (AFIS) was produced two years later, on November 30, 2009.¹⁴² The other two deceased were not identified because the record of the fingerprint impression was not deemed suitable for comparison. The delay in submitting the post-mortem fingerprints for comparison has no justification; moreover comparison in the AFIS system is quick. In this case, the delay is even more egregious given that the victim, Anderson Bladimir Monsalve, had been reported to the AGO as missing on October 18, 2007.¹⁴³ As long as Monsalve was not identified, his family received no word as to his whereabouts. As a result, they could not intervene in the judicial proceeding that was taking place in the military criminal justice system. This case, among others, demonstrates the negligence of the judicial authorities in identifying the victims.

A similar story is seen in other cases, with the aggravating factor of practices that illustrate an intentional suppression or obstruction of justice on the part of those working in the military criminal justice system. For example, in a case that took place in Segovia, Antioquia, not only did the fingerprint comparison take a year and a half but the military judge in charge of the criminal investigation notified the victims’ family members one year after the positive identification.¹⁴⁴

Despite a failure to identify the deceased, the prosecutor of Segovia, Antioquia remitted the case to the military criminal jurisdiction on August 29, 2007. The prosecutor transferred the case in response to a request by the military criminal investigative judge eleven days after the facts of the case had taken place. Without explanation, the sectional prosecutor of Segovia granted the petition and remitted the case to the military jurisdiction, “since the evidence collected indicates that the military members acted in the course of duty.”¹⁴⁵ In 27 days and without having identified the deceased, this prosecutor determined that the evidence confirmed that the acts were in the course of duty. The case was processed by the military criminal justice system, without victims, for two and a half year, on the presumption that the deceased were members of illegal armed groups.

The failure to identify or the delays in identifying the victims are obstacles to the pursuit of justice and affronts to the rights of the victims. Not appropriately collecting the necessary evidence¹⁴⁶ becomes a mechanism of impunity endorsed by the judicial authorities. Obviously, it is only once the deceased is identified that the family members and their legal representatives can intervene in the process. Before this point, the case is processed like any other death in combat of a supposed guerrilla member.

The cases that prosecutors have transferred *sua sponte* to the military criminal justice system are not few. Between January 2008 and August 2010 the AGO remitted 995 cases to the MCJ. The table below illustrates the number of homicide investigations that were remitted to the MCJ, including a breakdown by the procedural system applied in the case.¹⁴⁷

¹⁴⁰ Law 589 of 2000, ordering the National Registry of the Disappeared and regulating the mechanism of rapid-search measures.

¹⁴¹ See Ministry of National Defense, Military Criminal Tribunal 11, No. 103/2009.

¹⁴² *Id.* p. 340.

¹⁴³ *Id.* p. 345.

¹⁴⁴ Ministry of National Defense, Executive Direction of Military Criminal Justice, Military Criminal Investigation Court 40 of the National Army, Criminal Process No.2008-0071-J40IPM. The proceeding addresses three homicides that took place in August 2007 in the city of Segovia. Troops from the National Army assigned to the Special Energy and Road Battalion No. 8 killed three people on August, 2, 2007. The fingerprint comparison of the three victims was done 16 months later. The police investigator submitted the conclusive report identifying the three individuals to military investigative judge 40 on January 9, 2009. However, the military judge did not notify the victims’ next-of-kin until January 7, 2010. National Army Military Criminal Investigation Court 40, Nos. 0014, 0015, 0016 MDN-DEJUM-J40IPM-746 (Jan. 7, 2010) (Cantimplora, Santander). The three people killed remained unidentified for two years before the fingerprint comparison was conducted on January 9, 2009, upon the remission of the record to the National Civil Registry.

¹⁴⁵ Attorney General’s Office, Sectional Prosecutor’s Office 87, Segovia, Antioquia, investigation code 05-736-60-00348-2007-80162 (August 29, 2007) (translated from Spanish original).

¹⁴⁶ The ICC-OTP has suggested that unwillingness in national proceedings can be inferred from insufficient progress in the cases, delays or irregularities in the collection of evidence, or deviations from established judicial practices. ICC-OTP, *Draft Policy Paper Preliminary Examinations* (Oct. 4, 2010), para. 61.

¹⁴⁷ Prosecutor General’s Office, Bogotá, No. DNF 17592 (Sept. 16, 2010).

Table Nr. 1.

Number of Homicide Investigations Remitted to the MCJ by the AGO

Year	Law 600	Law 906	Total
2008	63	416	479
2009	24	279	303
2010 (Aug)	11	202	213
Total	98	897	995

The number of Law 906 cases remitted is especially concerning in light of the low level of investigative activity that we highlighted above: 95% of the cases that are being processed under the accusatory procedural system are in the inquiry phase. Therefore, these cases are being remitted without the prosecutor having collected the minimum elements of proof to determine whether the case involves the commission of a grave crime. The massive transfer of cases to the MCJ is evidence of a system that is unwilling to investigate the institutional repercussions of the false positives.

On June 13, 2011, as part of the measures to address the reports of false positives, the Ministry of National Defense the AGO launched an action plan to review “those cases where there is doubt as to the competency of the military criminal justice to carry out the investigation.”¹⁴⁸ For this, a technical working group was formed to serve as “a space for dialogue and shared analysis among those working in the military criminal jurisdiction and the ordinary jurisdiction, with the participation of the Public Ministry (*Ministerio Público*). Case files will be examined in this forum to determine the jurisdiction.”¹⁴⁹ This group has been working informally since February 2011.

The language used to describe the action plan introduces an erroneous understanding of the problem and demonstrates the privilege afforded to the MCJ in these cases. First, the fact that the cases that are studied are those “cases where there is doubt as to the competency of the military criminal justice to carry out the investigation” presumes that the MCJ is the competent authority and not the ordinary jurisdiction. This is a distortion of the law that favors the competency of the MCJ over the cases. The legal standard is that where there is doubt as to the nature of the acts the case will be processed by the ordinary jurisdiction. The MCJ is exceptional and residual; there must not be a presumption in favor of MCJ competency.

Second, this “technical working group” should not be the forum for “determining” which system has jurisdiction. The competency determination is a judicial function assigned by law; the “technical working group” is informal and operates outside the framework of procedural law. Moreover, the forum excludes the participation of the *parte civil* (Law 600) or the victims’ representatives (Law 906). This measure created by the Ministry introduces ambiguity into the judicial process of determining the competent jurisdiction; the source of its authority to assign competencies is not clear and its decisions are outside the existing legal framework.

According to the information of the Executive Direction of Military Criminal Justice of the Ministry of National Defense, as a result of the action plan the MCJ remitted to the AGO 249 investigations and the AGO sent 81 investigations to the MCJ in 2011. Because the forum is outside the procedural framework, the reasons for these remissions and any possible control over them are not clear.

In addition to these problems, there are irregularities in the way in which the High Council of the Judiciary resolves jurisdictional conflicts. A conflicts decision is issued when the authority of the MCJ or the AGO claims a jurisdictional conflict (positive or negative) exists that should be resolved by the Disciplinary Jurisdictional Chamber of the High Council of the Judiciary.¹⁵⁰ The jurisprudence of this Chamber is inconsistent and it has issued decisions that are manifestly contrary to the applicable law. The poor classification of the jurisprudence also impedes any systematic consultation.¹⁵¹ As the following example shows, there are cases that demonstrate a clear obstruction of justice and violations of the basic rules for determining the competent tribunal. The case of the violent death of a 17-year-old boy, Jesús Oreste Morales, in San Francisco, Antioquia, in March 2003 is illustrative.¹⁵²

According to the boy’s family members, Oreste said goodbye to his mother on the morning of March 13, 2003 on his way to school—he was in sixth grade in the rural village school. On his way to school, members of the Army detained the boy, together with other men, in a rural sector of the municipality. Among the other people detained was his great uncle. In the afternoon, several of them were released, including the boy’s relative, who later gave a statement about the events. Oreste was not released. At 3:30pm, shots were heard in the area. The boy’s mother was notified on March 16, 2003 that her son was in the morgue of the neighboring town and that he was reported to have been killed in combat.

¹⁵⁰ The definition of a conflict in the Criminal Procedure Code of 2000 is simple and direct: “There is a conflict of competencies when two or more judicial authorities each considers that the process is within its jurisdiction, or when each rejects the process considering that it does not have competency.” Law 600, art. 93 (translated from Spanish original).

¹⁵¹ The total universe of competency conflicts between the Military Criminal Justice and the Attorney General’s Office cannot be analyzed because of a lack of systematization in the High Council of the Judiciary’s database. For example, if the cases are consulted according to the descriptor “positive conflict between the military criminal and ordinary jurisdictions,” the result is three decisions from 2010. See the jurisprudence page of the Disciplinary Chamber of the High Council of the Judiciary, <http://190.24.134.250/juriswebdis/RESULTADOS.ASPX>. According to the information reported by the Executive Direction of Military Criminal Justice, the High Council resolved competency conflicts in favor of the Attorney General’s Office in 91 cases in 2010 and in 79 cases in 2011. There is no systematized information regarding the cases that were remitted to Military Criminal Jurisdiction.

¹⁵² Ministry of National Defense, Executive Direction of Military Criminal Justice, Military Tribunal 24, preliminary investigation No. 007-2003.

¹⁴⁸ Ministry of National Defense, *15 Measures against Impunity* (June 13, 2011), p. 3 (Measure #3) (translated from the Spanish original).

¹⁴⁹ *Id.* pp. 3-4.

The official version of events is radically different and can be summarized as follows: in the context of the Operational Orders No. 18 “Marcial” of March 8, 2003, of the Fourth Brigade and signed by the General Brigadier Mario Montoya Uribe, Army troops carried out a military control and registration operation in the municipality of San Francisco. On March 13, 2003, “battalion troops from the Alcatraz company ... engaged in armed contact with terrorists from the Carlos Alirio Buitrago squad of the ELN.”¹⁵³ This confrontation resulted in two dead guerilla members. After the combat, explosive material, a Remington shotgun (with eight 12-gauge casings), and a sawed-off double-barrel shotgun (with one 16-gauge casing) were found.

The criminal proceeding was initiated by the civil prosecutor in Santuario, Antioquia. Parallel to this, on March 27, 2003 the military criminal investigation tribunal 24 opened preliminary proceedings. On March 31, 2003 the Santuario sectional Prosecutor’s Office 31 remitted the case to the military criminal justice system asserting that it had competency, without further reasoning.

Seven years later, in November 2010, prosecutor 37 of the National HR-IHL Unit requested that the case be remitted to him, but the military judge denied the request. The prosecutor thus asserted a jurisdiction conflict; however, this was also unsuccessful. On December 15, 2010, the High Council of the Judiciary determined that the case should be assigned to military criminal justice concluding that no valid evidence “contradicts the Report of Operations and the statements of the military personnel involved.”¹⁵⁴ With regard to the testimonies of the family members of the dead boy, including the great-uncle that was detained with the victim, the high court stated that, these “cannot be given credibility by the Chamber in light of the family tie that they had with the deceased, leading them to believe that his death did not occur in combat as the members of the National Army and the whole of the evidence affirm.”¹⁵⁵

According to this decision remitting the proceeding back to the military judge, the family members could not generate the necessary level of doubt for the case to be investigated by an independent and autonomous authority. Moreover, it seemed to matter little to the tribunal that with the exception of the explosives, the “war materials” recovered consisted of weaponry that is useless for combat. This exemplifies how cases that raise manifest doubts as to exactly what happened are nonetheless remitted to the MCJ, where they are not independently and impartially investigated.

In another case of alleged homicide disguised as a “positive,” the Disciplinary Jurisdictional Chamber of the High Council of the Judiciary, upon reviewing the conflict of competency between the AGO and the MCJ, again demonstrated the judicial practice of only assessing the documental evidence that “covers” the positive.¹⁵⁶ In this case, a specialized prosecutor of the AGO’s National HR-IHL Unit asserted a jurisdictional conflict with regard to the deaths of José Alfredo Botero Arias and Albeiro Giraldo García, which took place in September 2003 in the municipality of San Carlos, Antioquia. The conflict was asserted because the family members and neighbors maintained that there had not been a combat and that the peasants had been executed. However, the High Council reasoned only that the deaths:

had happened in compliance with the sub-operations order No. 059 of the operation No. 045 “Macial Norte,” carried out by troops of the Artillery battalion No. 4 “Co. Jorge Eduardo Sanchez Rodriguez” with the Offensive Artillery (1-3) beginning at 18:00 on September 14, 2003, in the general area of the municipalities of Cocorná, Granada, San Carlos, and San Luis, against the 9th Front of the FARC and the Carlos Alirio Buitrago squad of the ELN and self-defense groups.¹⁵⁷

The tribunal’s assessment incorporates the official version of events word-for-word,¹⁵⁸ while trivializing and excluding the testimonies of family members and neighbors in the area.

The High Council concluded in this case that “the mission was properly planned and coordinated”¹⁵⁹ and that the doubt presented by the AGO “is not sufficient to assign it jurisdiction over this investigation.”¹⁶⁰ Furthermore, it stated that “it is unlikely that the existence or not of an armed confrontation can be contradicted by exceptional testimonies, such as those in the case at hand, which are not sufficiently persuasive to reject what was said by the members of the National Army, the subjects of the investigation in question.” The tribunal ruled that “the sworn statements of the members of the Armed Forces that the deaths of the citizens José Alberto Botero Arias and Albeiro Giraldo García took place in a military operation must be upheld.”¹⁶¹

¹⁵³ *Id.*

¹⁵⁴ High Council of the Judiciary, No. 110010102000201003625 0, Mag. Angelino Lizcano Rivera (Dec. 15, 2010), p. 12 (translated from Spanish original).

¹⁵⁵ *Id.*

¹⁵⁶ High Council of the Judiciary, Disciplinary Jurisdictional Chamber, No. 110010102000200901257 00, approved according to Act No. 79 (July 30, 2009).

¹⁵⁷ *Id.* pp. 15-16.

¹⁵⁸ *Id.* p. 16.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* p. 19.

¹⁶¹ *Id.*

In this decision, the High Council declared that competency over the investigation belonged to the MCJ, ignoring the doubt generated by the testimonies of the family members and neighbors and extending full value to military documents that could have been falsified. Moreover, it advances a new theory for deciding conflicts cases: assume that the MCJ is the appropriate jurisdiction unless the opposite is proven or rebutted by a “reasonable” doubt. The Council went a step beyond the determination of jurisdictional conflicts: it made findings of fact that negate any criminal responsibility of those involved. This decision assessing the substance of the evidentiary material related to criminal responsibility of the defendants is manifestly contrary to the law and violates the right of the victims to access justice.

We have shown in broad strokes how the MCJ in Colombia is an obstacle to the proper investigation and prosecution of the false positives cases. Because of both direct action and omission of the ordinary judicial authorities, many of the false positive cases wind up in the MCJ—an authority that does not have competency over the matter and is not independent or autonomous. According to the criteria presented by the ICC-OTP, the intervention of the MCJ in these cases must be assessed as an obstacle that leads to a lack of legitimacy and good faith in the investigation and prosecution of these homicides disguised as positives in the context of operations by the Armed Forces.

In this sense, it is concerning that instead of reducing the reach of the MCJ, the current administration and Congress are promoting constitutional changes to extend the military jurisdiction, including for breaches of international humanitarian law in the context of the internal armed conflict.¹⁶² There is also a second reform bill moving through Congress that would take effect immediately upon approval and establish a presumption that all acts committed by members of the Armed Forces (military or police) are acts in the course of duty, and therefore that the MCJ is the competent authority to investigate.¹⁶³ This presumption would be an obstacle for any independent and impartial investigation because the competent jurisdiction would always be the MCJ when members of the Armed Forces are involved. These changes are moving rapidly through Congress with overwhelming majorities. Instead of guaranteeing good-faith investigations, the changes seek to expand the jurisdictional forum for members of the military and police involved in criminal acts so that they are judged by an administrative dependency of the Executive made up of members of the different branches of the Armed Forces. If approved in its current form, these reforms would apply not only to future investigations but also to current proceedings.

3.3 Weak Investigations Concentrating on the Mechanics of the Homicides: The Evidence that is Ignored and Disappears

There is no doubt that the extremely high number of false positives cases would be an investigative and prosecutorial challenge for any justice system. The high number of cases and their complexity demand that a strategic and technical approach be designed and implemented to ensure that criminal justice contributes to elucidating what happened; not only with regard to the multiple crime scenes, but also in terms of the logical joining of cases to determine patterns in their commission (frequency, special location, and manner of perpetration) and establish the relationships between direct perpetrators and those that determined or controlled the events. As a result of their widespread perpetration, the investigation of these homicides should pursue rational hypotheses related to the role that institutional practices and policies had in their commission.

On the occasion of the first, controlled, revelation of truth about the false positives, the ex-president Álvaro Uribe Vélez recognized before the press that “there may have been members of the Armed Forces involved in assassinations and failures in terms of procedure, protocols, and supervision.” But he insisted that “the High Commanders, the Ministry of Defense, and the Administration have sought to be good examples in terms of the rigorous observance of the respect for human rights.”¹⁶⁴ In the same press conference, then Minister of Defense and current President, Juan Manuel Santos, stated that “serious indicia of negligence at different levels of command” had been found and that “this negligence could have been facilitated by the collusion of some members of the National Army with external delinquents who enjoy impunity, in exchange for contributing to achieving the irregular results.”¹⁶⁵ At this time, the high commanders announced that they had “decided to call for the dismissal or discretionary resignation” of a group of 27 officers and noncommissioned officers “without prejudice for the results that the criminal and disciplinary proceedings may produce.”¹⁶⁶

¹⁶² See House of Representatives, First Constitutional Commission, Text approved in the first debate of the Legislative Bill No. 192/12 “reforming the articles 116, 152, and 222 of the Political Constitution of Colombia.”

¹⁶³ See Senate of the Republic, Legislative Bill No. 07/11, “through which articles of the Political Constitution related to the administration of justice are reformed and other dispositions.” The legislative bill adds the following language to the constitutional article that defines the military jurisdiction (Article 221): “In every case the operations and methods of the Armed Forces are presumed to be related to the course of duty. When there is need for criminal justice to be exercised, this will be conducted by the Military and Police Criminal Justice.” On the premise of needing legal security for the military and the police, these changes would establish that the MCJ is not the exception but the rule.

¹⁶⁴ Presidency of the Republic, Press Secretary, *Las investigaciones administrativas continuará* (Oct. 29, 2008) (emphasis added), available at <http://web.presidencia.gov.co/sp/2008/octubre/29/04292008.html> (translated from Spanish original). The ex-President made explicit reference to the conclusions of the ad hoc Commission that conducted an administrative investigation in 2008 into the cases of disappearances in Soacha.

¹⁶⁵ Presidency of the Republic, Press Release No. 19191 (Oct. 29, 2008), available at <http://web.presidencia.gov.co/comunicados/2008/octubre/191.html>.

¹⁶⁶ *Id.*

The controlled recognition of the crimes evidences the complexity of the matter. Both ex-President Uribe and current President Santos cautiously referred to the role that policies and practices could have played in the perpetration of the false positives (both in terms of the active commission of the crimes and omissions of legal duties that could imply criminal liability). They also mention the extension of this practice throughout the country. On being asked about the implications of the false positives, ex-President Ernesto Samper succinctly described the overlap between policy and the criminal commission of the false positives: “to some extent, it is the sum of a series of mistaken policies, for example demanding that the military members measure their work in numbers of deaths that they cause and not in their effectiveness in controlling security.”¹⁶⁷

This is the line of investigation that has not been explored. The Attorney General’s Office approaches the cases in a fragmented way, case-by-case, according to the division of labor that corresponds to each prosecutor—whether in the National HR-IHL Unit, where the knowledge of the prosecutors is supposedly specialized, or in the different sectional offices divided by territorial jurisdictions. The AGO does not take advantage of the overall knowledge that exists about the practice (including the outcomes of the ad hoc Commission created by the Ministry of Defense); it does not accumulate information to reflect on patterns or concepts of greater responsibility; it limits its work to reconstructing what happened in a given crime scene (a necessary but insufficient step); and it does not explore investigative tools more suitable for the type of criminality that it must confront. We will explore each of these elements in turn.

First, the objective of investigating and prosecuting these crimes cannot be exclusively to clarify what happened in isolated events; it must be to determine the continuum of power between direct and indirect perpetrators and to identify the policies, practices, and contexts that determined (or facilitated) the perpetration of systematic or widespread abuses.¹⁶⁸ The task of the investigative and prosecutorial apparatus “is not simply to describe the carrying-out of the criminal act, but to elucidate the operation of the elements of the machinery.”¹⁶⁹

The AGO has not strategically approached the false positives. To date, it has not incorporated a temporal and spatial analysis of all of the homicides attributable to members of the Armed Forces so as to analyze patterns and establish investigative hypotheses that would serve to frame a case against those bearing greatest responsibility. The cases are processed in isolation according to the division of labor between individual prosecutors, without having explored the basic relational matrices. In the different cases, the AGO should have a mechanism that facilitates an interaction with overall body of evidence to explore, among other things:

- the existence of common *modus operandi* (for example, in relation to the strategies of recruitment or fabrication of official documents to legalize the deaths);
- the confluence of alleged authors or participants in other cases and the effect this has on the practice of transfers of commanders;
- the presence of patterns in the selection of victims (exploring the victimological profiles, including the possible selection of victims based on social marginalization, employment needs, or supposed delinquency); and
- the existence of common motives that explain the perpetration of some of the crimes (execution of intelligence targets, notes on resumes, formalization of praise, receipt of bonuses, and extension of informal incentives such as leave, vacation days, and family trips).

This type of analysis would assist in making connections between cases and would allow prosecutors to form investigative hypotheses that could lead to establishing criminal responsibility in the highest levels of the chain of command. For example, there could be a hypothesis that explores in the different cases how the informal incentives (leave and vacations) were conceded from commanders to the noncommissioned officers that produced the false positives, and under what criteria. The interaction with the overall body of evidence would also facilitate procedural groupings or substantive connections. This would be positive in terms of procedural economy, the efficiency of the proceedings, and the impact of the strategic message of the prosecutions, transcending the traditional results of investigating ordinary crime.

¹⁶⁷ Interview shown in Felipe Zuleta’s documentary, *La pobreza: un “crimen” que se paga con la muerte* (2010), which can be seen in Spanish on YouTube at http://www.youtube.com/watch?v=Ym_nL8NN9r4. The interview begins at 2:06.

¹⁶⁸ See generally Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, *Prosecution Initiatives*, HR/PUB/06/4 (2006).

¹⁶⁹ *Id.* p. 12.

Along the same lines, the type of investigations carried out by the AGO lacks a technical multidisciplinary focus,¹⁷⁰ which should include the support of specialized knowledge about military matters. The perpetration of these homicides involved the use of military institutions and procedures. Without the knowledge about how the military institution works, the perpetration of the homicides and disguising them as “positives” in the context of the war would have been impossible. Thus, the investigations should rely on analysts with knowledge of the different phases in the intelligence cycles and military operations, including the procedures for registry and control of actions.

The need for this type of expertise in military matters is crucial for the AGO to be able to independently and technically gather and analyze persuasive evidence. Despite not being an independent body, the findings of the *ad hoc* Commission created by the Ministry of Defense through Resolution 4342 of October 3, 2008 (concentrating on “the alleged disappearances in the Soacha district and ... alleged homicides in the jurisdiction of the II and VII Division of the National Army”) illustrated this need.

In the framework of this Commission, a group of civil servants from the Ministry of Defense and officers of the Armed Forces carried out an internal administrative investigation that relied on expert and practical knowledge. Its inquiry into a small set of cases allowed it to conclude that, more than arbitrary individual actions, the situation suggested that policies and practices of the military institution could have had a role in the perpetration of these crimes.

Although the focus of the *ad hoc* Commission was not criminal justice, its methodology should be adapted by the AGO to confront the criminal investigation within the broader context of cases. Ex-president Uribe stated with regard to the work of this Commission that “the findings of this investigation that could have legal implications are immediately transferred to the Attorney General’s Office for its respective assessment.”¹⁷¹ However, the investigative entity has not incorporated the report of the *ad hoc* Commission as a procedural component in the case files because of its “secret” nature, limiting its effectiveness in informing the prosecutors’ work.

On the basis of the study of the Soacha disappearances and the homicides committed in the municipalities of Ocaña (Norte de Santander), Cimitarra (Santander), and Yondó (Antioquia), the *ad hoc* Commission explored the following lines of analysis, among others, which could supplement the current focus of the investigations being carried out by the AGO:

- qualified analysis of the operational circumstances that framed the tactical missions (including reviewing the process of the dissemination of the orders, the respect of the chain of command, the method for communicating the orders, the quality of the intelligence annexes, and the quality of the registry in the daily operational book);
- review of the roles played by the different agents involved in the acts, according to their role in the broader mission (administration, intelligence, operations, and communications, among others);
- review of the respect for the division of responsibilities—for example, between the intelligence department and operations—and the respect for the regular conduct of command and communications;
- expert review of the intelligence process related to the supposed missions (including the suitability of the person involved, the quality of the registry, and the compliance with rules related to the archives of sources and agencies);
- detailed study of the procedures followed in the warehousing of the weaponry and in the registry of the decommissioned weapons and ammunition in the different military units;
- analysis of the documentation offered with regard to the “death in combat,” according to military knowledge and experience (to determine the veracity of the testimonies around the events and to ensure the technical assessment of the evidence);
- review the expenses assigned to the respective military units (including the authorization of payment for information, the verification of the type of information received, and the documents to legalize the payments);
- review of the procedures of retraining and other prevention mechanisms related to possible abuses committed by personnel of the different military units; and
- analysis of the work of the internal control mechanisms and the practical review of their operation.

¹⁷⁰ Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, *Prosecution Initiatives*, HR/PUB/06/4 (2006), pp. 5-10.

¹⁷¹ Presidency of the Republic, Press Secretary, *Las investigaciones administrativas continuará* (Oct. 29, 2008), available at <http://web.presidencia.gov.co/sp/2008/octubre/29/04292008.html>.

These areas or fields of analysis are illustrative of the need to integrate military analysts into an interdisciplinary team to appropriately carry out the investigations into the false positives. This list points to the gaps in the work of the AGO to date in relation to the areas of military intelligence, operations, and communications, as well as the command structure and dynamics in military institutions.¹⁷² These are technical fields that cannot and should not be the exclusive domain of the military members, particularly in criminal investigation cases that implicate the military.

If the AGO does not make a substantial shift and advance in the criminal investigations, the only thing that will be proven is the mechanics of the different false positives and the responsibility of the direct perpetrators of the homicides. It will not demonstrate the practices or policies that led to the commission of these crimes, nor identify those bearing the greatest responsibility. The AGO faces other evidentiary challenges and obstacles. We will look at two of these: loss of evidence as a result of the passing of time and destruction of evidence.

One of the main problems that the AGO faces stems from taking up the investigations years after the events took place,¹⁷³ because of a lack of diligence in the activity after the commission of the crimes and the interference of the MCJ described above. The problem is aggravated because the scene of the “deaths in combat” was not treated as a crime scene at the time and therefore the reconstruction is based mainly on testimonies that tend to have inconsistencies due to the passage of time. In the context of war and insecurity in Colombia, using testimonies to reconstruct what happened is even more elusive since it is conditioned by the fear and imminent danger experienced by those who would testify regarding violent acts.

In addition to the loss of evidence due to the passage of time, the investigative body faces another type of obstacle. On one hand, prosecutors and investigators face direct threats and intimidation coming from those being investigated.¹⁷⁴ Also, prosecutors assert that they do not receive support from the Armed Forces in carrying out the investigations. For example, they report not receiving security support to work in war zones; they do not receive responses to the requests to certify personnel in the investigative units; they face obstruction in the judicial inspection of MCJ files; and they are not able to obtain statements from military personnel involved in the deaths because they are kept in areas of military operation and their transfer is not approved. A victims’ representative put it bluntly: “The information gets only as far as the battalion commander wants it to.”

Moreover, there are incidents of intentional destruction of evidence that quash any chance of justice for the victims of the crimes. We find a clearly documented example of such an incident in the municipality of Nariño, Antioquia.¹⁷⁵

In the course of a supposed military operation,¹⁷⁶ the Army killed three supposed members of illegal groups on June 4, 2007. The bodies were taken to San Joaquín Hospital in Nariño, where a doctor performed the autopsies. The doctor decided which pieces of clothing from the deceased should be packaged and labeled for the investigation. He likewise decided “to discard and destroy” others, without describing them. These included pants, belts, boots, shorts, and socks.¹⁷⁷ The case file affirms the “destruction of several items of clothing” by a police officer, in the presence of a staff member of the local authority (the City Attorney’s Office).¹⁷⁸ As is widely known, the condition of clothing and its size can serve as basic evidence to refute or corroborate testimony. The destruction of evidence obstructs justice; moreover, it can entail criminal liability for fraud related to a matter of criminal procedure.

Another evidentiary challenge that the AGO faces is the effective use of insider testimony as part of a prosecutorial strategy aimed at those bearing the most responsibility. In many of the cases that have been judicially decided, the cooperating witnesses are assumed to be “bad apples” who are trying to blame others to lessen their responsibility. The use of confessions is limited to the case at hand and they are not effectively leveraged in exploring the responsibility of the highest links in the chain of command. Because of the institutional interests and the influence and power of the people possibly involved in the perpetration of these crimes, the design of a strategy of logical and effective use of these insider testimonies is crucial for the success of the prosecutorial initiative. The pressure on the cooperating witnesses detained in military garrisons, as well as on their families, is extreme. All have manifested fear about the consequences of their statements.

¹⁷² For example, an independent analyst of the military operation can assess the technical attributes (level of specificity in the orders, the quality of the intelligence contained in the annexes, and the suitability of the organization of the initiative) of an operational order and the respective missions. An analyst would be able to compare the content of what was officially reported and what was stated by witnesses that present a different version of the events. Also, an independent analyst can assess whether certain orders of the military units would induce the type of action that is being investigated. For example, to facilitate the task of the AGO, the analyst could evaluate the summaries of standing operational orders of the different military units involved and detect operational frameworks that are outside of legal and constitutional bounds. There are standing orders that were in force during the time period of the perpetration of the false positives that echo military doctrines that have been criticized since the 1980s for having the potential to generate cycles of violence against the civilian population. For example, one of these documents from 2004 announced how one of the “Special Considerations for Every Commander to Take into Account” is that “[t]he civilian population is to the guerrilla what water is to fish.” National Army, Mechanized Infantry Battalion No. 4 Antonio Nariño, Barranquilla, summary of standing operational orders (Jan. 20, 2004).

¹⁷³ In some cases, the investigative entity has demonstrated its capacity to reconstruct the crime scene technically. For example, the AGO Technical Investigation Corps (*Cuerpo Técnico de Investigación – CTI*) has a team of investigators dedicated to crime-scene reconstruction which uses 3-D reconstruction technology. However, the capacity of the team is limited relative to the demand.

¹⁷⁴ Interview with Marlene Barbosa, Bogotá (Feb. 27, 2011).

¹⁷⁵ Ministry of National Defense, Military Criminal Tribunal 11, No. 103/2009.

¹⁷⁶ Orders for Operation “Espuela,” Tactical Mission No. 089 “Jora.”

¹⁷⁷ Ministry of National Defense, Military Criminal Tribunal 11, No. 103/2009, pp. 65-71.

¹⁷⁸ *Id.* Colombian National Police, Nariño Police Station, Act No. 113 (June 7, 2007).

Although the AGO has the burden to obtain testimonies that support the analysis of any given criminal proceedings, the judiciary also has an important role in assessing the weight and relevance of testimonies in proceedings that involve crimes perpetrated by the State apparatus. In several decisions first-instance judges have limited the scope of the testimonies of cooperating witnesses to an admission of guilt and denied its value in contributing to establishing the responsibility of others.¹⁷⁹ There are also prosecutors that have used confessions of subordinates to negate the responsibility of their superiors.¹⁸⁰ The management and assessment of insider testimony is complex, but experience from around the world shows that its use is key in the elucidation of these types of cases.

The AGO has access to the testimony of retired Coronel Luis Fernando Borja Aristizábal and his admission of guilt in several false positives cases in the contexts of the Sucre Tactical Force Team.¹⁸¹ The use of this testimony and others with the same hierarchical importance, together with other evidence, is fundamental for drawing lines of investigation that point to those bearing the most responsibility in the cases of false positives. To date, insider testimony has not been used to get indictments or convictions against the most responsible.

To summarize, the type of military personnel that are the focus of the AGO National HR-IHL Unit's investigations reflects the concentration on the direct perpetrators of the acts. As of February 2012, the HR-IHL Unit reported that almost 90% of its investigations concentrate on soldiers and noncommissioned officers.¹⁸² Only 12% of those being investigated are officers, and of these, the vast majority are low-ranking officers (lieutenants and captains).¹⁸³ In an interview toward the end of February 2012, the Director of the National HR-IHL Unit stated that the officers "involved" in the investigations (under inquiry or indicted) are primarily officers of the National Army: 18 colonels, 27 lieutenant colonels, 61 majors (including three members of the Police), 108 captains (including one member of the Police), and 137 lieutenants (including three members of the Navy).¹⁸⁴

By constitutional mandate (Article 235), the Supreme Court of Justice is the competent authority to conduct trials of the generals of the different branches of the Armed Forces and the Police, as well as governors, and cabinet ministers. This competency is triggered once the Attorney General has formulated an accusation. For this reason the investigation into the highest levels of responsibility in the acts directly depends on the Attorney General personally—this realm of action is not delegable. Given the high number of pending investigations in cases of corruption and parapolitics, among others, that the Attorney General must handle personally,¹⁸⁵ the false positives proceedings have not advanced and there are no reports of any accusation against a senior official in these cases.

¹⁷⁹ See, for example, Fourth Circuit Criminal Tribunal, Valledupar, Law 600 sentence, J. Hernando de Jesús Valverde Ferrer (July 29, 2011). This sentence was for the homicides of Juan Carlos Galvis Solano and Tania Solano Tristancha, committed August 17, 2003 in the rural zone of the department of Cesar by members of the Army (assigned to the La Popa Battalion of Valledupar). The judge used the negotiated sentence of a lieutenant (Carlos Andrés Lora Cabrales) and a soldier to avoid considering the responsibility of the higher ranks and to relativize the value of their testimonies by the fact that they had initially denied the acts. In this case, the responsibility for the "false positives" begins and ends with the decisions made by the confessed lieutenant. In the decision, there is no discussion about the orders, tactical missions, or the context (including the multiple cases of false positives attributed to this military unit). Based on the assertions of another officer that was involved in the case but who was exonerated, the ruling judge wrote:

Lora Cabrales [the lieutenant] was the mastermind of the deaths of these victims and the one who set up the supposed combat, to such an extent that he was the one who offered the weapons to give more credibility to the engineered combat. This indicates that it was planned from the very beginning of the so-called operation Arrasador, because they carried weapons that could be placed on the persons of whoever had the misfortune—as Tania and Juan Carlos did—to fall into their hands. The soldier Abel Domingo Salcedo Jimenes testified to the same. He had no doubt in affirming under oath that his oft-cited superior Lora Cabrales was the person that gave the order to shoot one of the victims, Tania Solano Tristancha. This was because of a macabre agreement through which they had divided the deaths between the Trueno squad and the Gaula group, and a member of the latter was responsible for executing Juan Carlos Galvis Solano. In addition to this evidence against [Lora Cabrales], there is the fact that he lied; before admitting what had really happened, after being obliged to do so by the plea entered by his subordinate, Abel Domingo Salcedo Jiménez, he had sustained, and had induced the men under his command to sustain, that the deaths in question had been produced in combat.

Id. pp. 63-64 (emphasis added) (translated from Spanish original). This very narration by the judge contradicts his simplified vision of the case in which the only person responsible for "perpetration as mastermind" is the lieutenant Lora Cabrales. This type of assessment is oblivious to the function of mechanisms of effective cooperation and the incentives that criminal law offers for collaboration. The judge demonstrates a protectionist attitude toward the military superiors without looking to the logical conclusions to be drawn from the evidence included in the case file.

¹⁸⁰ For example, in a proceeding for three homicides and a forced disappearance in the department of Bolívar, a prosecutor took the admission of guilt of a few defendants as a negation of the responsibility of any other person involved. She therefore revoked the preventative measures against an officer. In the decision revoking the detention measure she asserted: "with regard to the commission of these acts, those that legal speaking have a debt to pay with the criminal justice system are those persons that in one way or another have confessed to the perpetration of or participation in the events and are the subject of this investigation." AGO, Humanitarian Affairs Specialized Unit, Deputy Prosecutor's Office No. 1, Brief requesting the revocation of the preventative measure against the retired Major Luis Francisco Espitia Estévez (Oct. 15, 2010), p. 6 (translated from Spanish original).

¹⁸¹ For example, consider the officer's statements in relation to the disappearances and homicides in the framework of the supposed military operation Excalibur, tactical missions Oráculo and Orión 86, in which he testifies to the complexity of the criminal plan, involving the military institution and external agents. In one of the statements that establish the criminal responsibility of the retired Coronel, he affirms the existence of a "criminal industry." Criminal Tribunal of the Specialized Circuit, Sincelejo, Sucre, first instance No. 2011-0010-00 (Sept. 28, 2011), p. 16. Without denying his own responsibility, the confessed criminal signals the responsibility of his superiors.

¹⁸² AGO, No. UNDH-DIH 000669 (Feb. 27, 2012). According to the response in this formal petition for information, the National HR-IHL Unit "is carrying out investigations for homicides attributed to State agents against 2,642 soldiers, 629 noncommissioned officers, and 427 officers.

¹⁸³ *Id.*

¹⁸⁴ Interview with Marlene Barbosa, Bogotá (Feb. 27, 2011).

¹⁸⁵ This is a result of the constitutional privilege granted to certain categories of individuals (by Political Constitution, Articles 235 and 251). For example, the cases related to the corruption detected in the *Agro Ingreso Seguro* (Farm Aid) program, which involves an ex-minister, and the proceedings against the ex-secretary general of the Presidency and ex-directors of DAS for the electronic interceptions of members of the Supreme Court of Justice and others, must be personally conducted by the Attorney General. In these and many other cases, the Attorney General has the special and non-delegable task of investigating and accusing the highest-ranking civil servants who enjoy a privileged constitutional jurisdiction before the Criminal Cassation Chamber of the Supreme Court of Justice.

To conclude, the convictions that have been achieved to date illustrate the type of procedural truth that is being constructed.¹⁸⁶ We do not want to minimize the efforts expended to obtain these convictions; however, we highlight that these do not reflect anything other than the reconstruction of the one or two homicides of the specific criminal case. An illustrative example is the conviction of Humberto Antonio Zapata Ruiz for aggravated homicide, which came down from the Mixed Tribunal of the Segovia (Antioquia) Circuit on August 12, 2010.¹⁸⁷ After assessing the evidence under the procedure established by Law 906, the judge convicted a staff sergeant and a lance corporal of the homicide of the peasant and sentenced them to 30 years in prison.

According to the military version of events, the noncommissioned officers each commanded one company in the context of the partial operations orders No.0005 “MT Emperador,” of the operations orders “Majestad.”¹⁸⁸ Complying with all the formality, the orders stated: “[t]he respect of human rights and IHL is an imperative of the Army in all its actions.”¹⁸⁹ On January 18, 2008, based on information from an informant, they proceeded to the village of La Po in Segovia, where after proclaiming “the announcement that they were from the National Army, [the subject] started to run, they heard a shot coming from behind, this was the moment that his men opened fire.”¹⁹⁰ Hours later, “at one thirty in the morning” they find the victim injured, but he later dies.¹⁹¹ This story reflects the same routine as many other cases that have wound up in the MCJ.

The insistence of the legal representatives of Zapata Ruiz’s family members motivated the AGO to fight for competency over the case, and eventually a conviction was achieved. Although we do not minimize these efforts in reaching a trial, obtaining a conviction, and having it upheld on appeal,¹⁹² this case does not fully comprehend what happened on the night of January 18, 2008 in this rural area of Antioquia: there is no consideration of the responsibility of the commanders and no inquiry into the reasons or motives that led the guilty parties to produce the “false positive.” This type of conviction is necessary but insufficient for confronting the type of criminality involved in this practice widespread through the entire national territory.

3.4 “In Criminal Investigations, Time that Passes is Truth that Escapes”¹⁹³

The Superior Tribunal of Medellín used this phrase about the passage of time and its negative impact on the reconstruction of the truth in its August 2011 decision to overturn the conviction against a group of soldiers for the homicide of Duberney Galeano Mira. The homicide was allegedly committed in the context of the military operation “Jalón” on June 6, 2002 in a neighborhood on the outskirts of Medellín.¹⁹⁴ While this is a case that took place outside of the temporal jurisdiction of the ICC, it is illustrative of the cases that are coming before it and presents a highly concerning precedent in the Colombian administration of criminal justice.

This proceeding, like many of the false positives cases, was full of irregularities and characterized by a deficient investigation. According to the ruling on appeal, the case was in the MCJ until December 14, 2007, when it was remitted to the AGO, five and a half years after the events took place. The AGO issued the indictment in August 2009, seven years after the death, and the first-instance tribunal issued a conviction on December 14, 2010, more than eight years after the events.

The time lapses led the appeals court to assert that no criminal investigation could “produce definite results under these conditions.”¹⁹⁵ The court offered the following examples:

The delay in the investigation led, among other things, to the CTI [Technical Investigation Corps] of the prosecution stating in its report ... that the physical and geo-political formation of the “08 de Marzo” neighborhood had notably changed in comparison to the day of the events in question. This report is dated April 14, 2009—in other words, almost seven years after Galeano Mira’s deaths. Under these circumstances, it is practically impossible to gather reliable evidence.

Likewise, the CTI investigator looked into the “El Parce” pool hall, from where the victim was allegedly taken. The residents reported that they had been living in the building for five years and had heard that the previous tenants had a pool hall and slot machines on the first floor. In other words, as one of the defense attorneys argues, there is no clear, direct, and irrefutable evidence that the pool hall even existed. These shortcomings would not exist if the CTI’s visit had taken place in the days following the events being investigated.¹⁹⁶

¹⁸⁶ According to the information provided by the AGO, there have been 166 convictions involving 502 people from 2000 to February 2012. AGO, No. UNDH-DIH 000669 (Feb. 27, 2012).

¹⁸⁷ Mixed Tribunal of the Segovia Circuit, Antioquia, first-instance sentence No. 077-038 (Aug. 12, 2010).

¹⁸⁸ Colombian Armed Forces, National Army, Special Energy and Road Battalion No. 8, partial operations orders No. 0005 “MT Emperador,” of the operations order “Majestad,” No. 0005/DIV07-BR14-BPEEV 8-S3-375 (Jan. 18, 2008).

¹⁸⁹ *Id.*

¹⁹⁰ Mixed Tribunal of the Segovia Circuit, Antioquia, CUI: 05-736-60-00000-2009-00001, first-instance sentence No. 077-038 (Aug. 12, 2010), p. 43 (translated from Spanish original).

¹⁹¹ *Id.*

¹⁹² Superior Tribunal of Antioquia, Criminal Chamber, Medellín, CUI: 05-736-60-00000-2009-00001, Approve through Act No. 072 (Sept. 8, 2011).

¹⁹³ Superior Tribunal of Antioquia, Criminal Chamber, No. 05001-31-04-021-2010-00281, second-instance sentence (Law 600), approved through Act. No. 0052 (Aug. 18, 2011), p. 11. This phrase used the deciding magistrate in the appeals decision does not include a reference but is surely drawn from the quote of Edmond Locard, a French pioneer in forensic science: “Time that passes is truth that escapes.”

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* p. 11.

¹⁹⁶ *Id.* p. 12 (translated from Spanish original).

The considerations of the court reveal the difficulties faced by any investigation into “cold” cases. While we agree that proving the existence of places and reconstructing what happened is difficult under these circumstances, this difficulty must be overcome by the use of technical means. Unfortunately, the conditions described in this case are the same in all of the false positives cases that have not yet reached the formal investigation phase. It is worth remembering that the average time that has passed in the cases falling under the framework of Law 600 (such as this case) is more than 7 years. This makes the assessment made by the Tribunal of Antioquia about the futility of evidence of even more concern.

After these considerations about the passage of time and the difficulty that it causes for criminal investigations, the tribunal makes a sweeping review of the other problematic elements found in the case, including the doubt generated by the fact that the family members’ reported Galeano’s homicide two months after it occurred. On this point, the tribunal observed: “Any analyst would wonder about this delay in light of such a grave act that so seriously affected the Galeano Mira family.”¹⁹⁷ The tribunal does not reflect upon the fact that the report was made within the legal time limits and that any delay could be a result of the climate of coercion and intimidation that reigned in Medellín and the surrounding areas in 2002. It also failed to consider that the family members could have wavered given that the investigating authority was part of the military, just like the alleged perpetrators of the death. Regardless, the delay in reporting the death should not be considered sufficient to raise reasonable doubt in the case.

The point here is not to question the ruling, because the case does in fact present serious evidentiary problems; moreover, in light of factual and legal errors, the tribunal’s decision could be the object of the extraordinary recourse of cassation. The point here is about the investigation and prosecution of the “false positives” cases in Colombia, and it is exactly the admonition made in this absolution: the combination of the passage of time, the action of the MCJ, and the deficient investigation of a “cold case” is a recipe for impunity.

¹⁹⁷ *Id.* p. 14.

4.

A Good Time to Redirect the Analysis of the Colombian Situation: Complementarity with Objectivity, Independence, and Impartiality

Based on the analysis presented in this report, we must insist on the need for the ICC-OTP to diligently conduct an objective, independent, and impartial analysis of the national proceedings being carried out in Colombia. The six years that have passed since the preliminary examination of the Colombian situation was made public must not be in vain. The ICC OTP should not wait until the passage of time means that the truth has escaped.

There is no doubt about the number of proceedings that are taking place in Colombia or the sophistication of the judicial apparatus. The number of criminal cases corresponds to the massive number of grave crimes. The question that should be concerning the ICC-OTP is the effectiveness of the proceedings to establish responsibility. It may be that the Colombian justice system is comparatively more able than other systems that the ICC-OTP must consider or examine. Nonetheless, the assessment standards must be applied objectively. In addition to a lack of capacity to carry out prosecutions against those bearing the most responsibility (because of the lack of adequate resources to carry out the proceedings, the lack of guarantees, and the attacks on the independence and impartiality of the proceedings), the main problem in light of the principle of complementarity in the Colombian context is unwillingness. The ICC-OTP should redirect its action to confront the reality of a State that is able to investigate and punish when it wants to, but which is unwilling to investigate international crimes for which it bears international responsibility—namely, crimes of the State.

In this report we have summarized and reviewed the ICC-OTP's assessment of the preliminary examination of the Colombian situation, which it has been conducting for more than six years. This assessment was published in a December 2011 report about the Office's preliminary examinations.¹⁹⁸ We have shown how the OTP's assessment deviates from commonly accepted technical criteria and namely, from the OTP's own criteria for determining the ability and willingness reflected in the different investigative and prosecutorial initiatives that it must evaluate.¹⁹⁹ Our analysis warns that it would be a lack of diligence on the part of the ICC-OTP to prolong the preliminary examination of the Colombian situation and to assert that after more than six years of analysis it does not have the necessary information to assess the genuineness of the national proceedings. Affording this delay or truce to the Colombian authorities undermines the basis of the very complementarity principle that is the supposed motivation for the ICC-OTP's actions in relation to Colombia.

In addition to considering briefly the categories of relevant national proceedings that the ICC-OTP presents in its analysis of the Colombian situation, Section 3 of this report offers a technical (quantitative and qualitative) analysis of the procedural status and progress of the investigations and prosecutions for the false positive cases—homicides systematically committed by military units in Colombian territory to present the bodies as deaths in combat in the context of a policy used by the authorities to measure the results of the different military units.

¹⁹⁸ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011).

¹⁹⁹ ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010).

Our aim here was not to analyze how the false positives happened; as was stated above, this exercise has been carried out by numerous academic entities and human-rights organizations. Our objective was to present an assessment of how the proceedings have progressed in the Colombian jurisdiction. This endeavor is in response to the fact that the ICC-OTP has evaluated only the number of open proceedings and has asserted that it does not have enough information to assess whether there are obstacles that keep these proceedings from satisfying the conditions of prosecution established in the Rome Statute.²⁰⁰

We present technical and verifiable indicators that illustrate excessive delays in the prosecution of homicide and enforced disappearance cases within the jurisdiction of the ICC, as well as the concentration of the vast majority of proceedings in the preliminary phases prior to a formal investigation, years after the violent acts took place. We also demonstrate quantitatively and qualitatively that the proceedings focus on the direct perpetrators, ignoring those bearing most responsibility, and that initiatives have failed to explore the determining role of institutional policies and practices as factors in the commission of the crimes.

Our analysis illustrates the obstacles caused by the military criminal justice's interference in the investigation and prosecution of these cases. In addition to highlighting arbitrary decisions that ignore principles for determining the appropriate jurisdiction, we seek to establish qualitative and quantitative indicators that measure the obstruction caused by the MCJ. Finally, we offer technical observations about the focus of the investigations and the evidentiary deficiencies and problems that the relevant national proceedings face. The analysis emphasizes that even in the best case scenarios, the investigations advance only toward establishing what happened in isolated incidents and do not explore the existence of patterns or the responsibility of the people that decided or controlled the events.

For these reasons, we reiterate the need for the ICC-OTP to open an investigation into the Colombian situation. We make this assertion on the firm belief that this procedure, which is more transparent and public than the preliminary examination process, will more actively promote the objectives that complementarity under the Rome Statute seeks to achieve.

As we stated in the first section of this report, the opening of an investigation in the Colombian context is a decision that would demonstrate the gravity and seriousness of the situation. The initiation of an investigation is not an irreversible decision, given that during the investigative phase complementarity continues to be promoted and the analysis of the admissibility of the case is deepened. Once the investigation phase is activated, the ICC-OTP would be in a better position to make technical decisions with regard to a concrete case, including making a determination about the compliance with all of the admissibility requirements.²⁰¹

The preliminary examination of the Colombian situation has come full circle and it is therefore time to apply the Statute: "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute."²⁰² The ICC-OTP has determined that there is a reasonable basis to believe that crimes against humanity and war crimes have been or are being committed in Colombia. After six years, it is time to initiate an investigation, which does not imply that the OTP's constructive dialogue with the Colombian authorities needs to change.

It not in the best interest of the ICC-OTP or the Rome Statute that the Prosecution asserts that it can continue a preliminary examination *in aeternum*.²⁰³ With objectivity, impartiality, and independence, the ICC-OTP needs to publicly present its reasoned analysis of the situations that it has under preliminary examination and offer its reasons for proceeding or not with an investigation in a particular case in light of the provisions in the Statute. Only in this way can the ICC-OTP fulfill its stated objectives of transparency and predictability in its preliminary examinations activities.²⁰⁴

The Colombian case is complex; but complexity cannot be a synonym for stagnation. The ICC-OTP states that it has had the Colombian situation under watch since the moment the Office began its activities. It is time to take concrete action: with investigations into specific cases and with cooperative framework that consciously considers what other international bodies—namely, agencies of the universal and inter-American system for the protection of human rights—are doing in Colombia. It is time to bring transparency to the preliminary examination and avoid applying double standards with regard to the criteria that trigger the competence of the ICC. Now is the appropriate moment for the OTP to strategically redirect the consideration of the Colombian situation and take decided and technically sound action to enforce the Rome Statute in relation to a State that is able but unwilling to adequately and diligently investigate crimes within the jurisdiction of the ICC.

²⁰² *Id.* art. 53(1) (emphasis added).

²⁰³ See ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), para. 12.

²⁰⁴ See ICC-OTP, *Draft Policy Paper of Preliminary Examinations* (Oct. 4, 2010), para. 20.

²⁰⁰ ICC-OTP, *Report on Preliminary Examination Activities* (Dec. 13, 2011), paras. 81-82.

²⁰¹ Rome Statute, arts. 17 & 54.



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