

COLOMBIA. THE WAR IS MEASURED IN LITRES OF BLOOD

**False positives, crimes against humanity:
those most responsible enjoy impunity**

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security



Introduction: why this report?-----	4
Methodology	
I. Extrajudicial executions in Colombia and the phenomenon of False Positives-----	7
A. Political context and motive of perpetrators: death of innocent civilians to show results and obtain benefits-----	8
1. The incentives and rewards system: the business of false positives -----	9
2. Pressure for positive results, measured by “number of casualties” (body count)-----	9
B. Extrajudicial Executions: International Crimes -----	10
1. False positives: war crimes? -----	11
2. False positives: crimes against humanity-----	12
C. Indications of Responsibility of the Top Military Leadership-----	23
1. Individual Criminal Responsibility in International Criminal Law-----	24
2. The Responsibility of Top Military Leaders in the Cases of False Positives -----	25
II. Administration of Justice for False Positives: Impunity of those Most Responsible de los Máximos Responsables -----	33
A. Individual Investigations and Lack of Investigation of those Giving Orders -----	34
B. Impunity of Senior Military Leaders-----	36
C. Lack of independence : Military Criminal Courts -----	39
D. Obstruction of Justice-----	46
1. Pressure on court personnel, lawyers, and human rights organisations -----	47
2. Threats against witnesses and victims -----	48
3. Excessive delay of cases, delaying tactics and loss of evidence -----	49
4. No investigation of offenses against the administration of justice: lack of incentives to uncover and speak the truth -----	52
E. Other observations-----	52
Conclusions-----	55

Introduction: why this report?

Colombia has been enduring an internal armed conflict for fifty years. In the conflict members of insurgent groups (guerrillas) have clashed with the National Army and paramilitary groups. Under these conditions, serious human rights violations and international crimes have been committed. Since November 1, 2002, Colombia is party to the Rome Statute, setting up the International Criminal Court (ICC)¹. According to the principle of complementarity established by that statute, Colombia is obliged to investigate and prosecute those responsible for the crimes considered therein, namely, genocide, crimes against humanity, and war crimes². The ICC went into operation in July 2002, when its Statute went into effect. Since ICC General Prosecutor took office in June, 2003³ Colombia has been under “preliminary analysis”,⁴ but this was made public only in 2006.

The International Federation for Human Rights (FIDH) and one of its member organizations in Colombia, the José Alvear Restrepo Lawyers Collective (CAJAR),⁵ have been working in research, advocacy, and support for victims of international crimes before the ICC since 2005. According to article 15 of the Rome Statute, interested parties (victims, non-governmental organizations, etc.) may submit to the ICC Office of the Prosecutor statements indicating crimes within the Court’s jurisdiction. The FIDH and the CAJAR have submitted twelve communications of this kind to the ICC Office of the Prosecutor since June 2005.

During this period the FIDH and the CAJAR were engaged in dialogue with the ICC Office of the Prosecutor and they continue to do so. This communication and careful monitoring of the policy of the Prosecutor’s Office with regard to the situations under preliminary analysis and particularly the situation in Colombia, has enabled the FIDH to monitor the evolution of the analysis carried out by the ICC Office of the Prosecutor. One of the observations that has emerged repeatedly during the dialogue between the FIDH and the ICC Office of the Prosecutor has been the need to identify the highest-level people responsible for the most serious crimes committed in Colombia which are under the jurisdiction of the ICC. It is appropriate to recall here that the ICC Office of the Prosecutor has made the investigation and prosecution of top

¹ In 2002 the Colombian State signed the Statute of the International Criminal Court, which Colombia joined on November 1 of that year for crimes of genocide and against humanity (which may be understood to encompass the systematic practice of arbitrary executions of civilians by members of government forces). However, inasmuch as Colombia signed the seven-year reservation established in article 124 of the Statute, it began to be formally applicable to Colombia in terms of war crimes on November 1, 2009.

² The Statute of Rome also grants the ICC jurisdiction to prosecute the crime of aggression; however, it is not yet operative. See Conference for review of the ICC Statute, resolution RC/Res. 6, 11 June 2010.

³ “Upon 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 on Preliminary Examinations, The Hague 4 October 2010, par. 57, available at: http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (accessed: 6 May 2012).

⁴ “Preliminary analysis” is the stage prior to the opening of an investigation by the ICC. During this stage, the ICC Prosecutor must carry out a study for the purpose of verifying that the requirements established in article 53, paragraph 1 of the Statute, are being met, namely: “(a) the information available constitutes a reasonable basis for believing that a crime within the jurisdiction of the Court has been committed or is being committed;” (b) The case is or would be admissible in accordance with article 17; (c) There are substantial grounds for believing that, even taking into account the seriousness of the crime and the interests of the victims, an investigation would not serve the interests of justice”.

⁵ FIDH member organizations in Colombia are: the José Alvear Restrepo Lawyers Collective, the Standing Committee for the Defence of Human Rights, the Latin American Institute for an Alternative Society and Law, and the People’s Women’s Organization.

commanders a key element of its policy.⁶ This is the context in which the FIDH transmitted this report to the ICC Office of the Prosecutor along with two confidential attachments which identify those most responsible.

The preliminary analysis is governed by article 53, paragraph 1 of the ICC Statute. In accordance with this provision, the ICC Office of the Prosecutor carries out analysis in three stages and in the following order: first, it must be determined whether crimes within the competence of the ICC have been committed; second, an analysis of admissibility is carried out, including analysis of the gravity of the phenomenon and the test of *complementarity*; finally, it is determined whether an investigation is in the interests of justice in the particular case.⁷

It should be kept in mind that in a December 2011 report, the ICC Office of the Prosecutor confirmed that, according to the assessment that it had made, crimes against humanity and war crimes have been committed in Colombia. The preliminary analysis is accordingly at the phase of study of complementarity which consisted of determining whether the Colombian state has carried out investigations and judicial proceedings against the perpetrators of such acts.⁸

The FIDH and the CAJAR have expressed their concerns in this regard on many occasions. While in Colombia cases are proceeding for deeds that would in principle fall within the jurisdiction of the ICC, the FIDH and the CAJAR have judged that in the case of senior military or paramilitary commanders there are no such cases, or they do not have the genuine character that they should have in accordance with the requirements of article 17 of the Statute. Thus, for example, the FIDH and the CAJAR expressed serious concerns when the highest paramilitary leaders were extradited to the United States, thus practically removing them from cases that were moving forward in Colombia for crimes against humanity under Law 975 of 2005, known as the law of Justice and Peace.⁹ Likewise in October 2010 the FIDH focused its presentation at the meeting of NGOs with the ICC Prosecutor¹⁰ on the need to open an investigation into the high military officers responsible for extrajudicial executions.

Indeed, in recent years, many civil society organizations have criticized with sharp concern the increase and spread of extrajudicial executions throughout Colombia. Concerned over the response to the phenomenon of the so-called *false positives* by the Colombian court system, the IFHR decided to undertake this study together with the Working Group on Extrajudicial Execution of Colombia-Europe-United States Coordination (CCEEU), focusing particularly on the responsibility of the top military officers and on the complementarity of the Colombian justice system.

⁶ ICC Office of the Prosecutor, *Prosecutorial Policy* 2009-2012, The Hague - 1 February 2010, par. 19 available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (last accessed : 3 May 2012)

⁷ ICC Office of the Prosecutor, *Draft Policy Paper on Preliminary Examinations*, The Hague, 4 October 2010, available at: http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (accessed: 6 May 2012).

⁸ ICC Office of the Prosecutor, *Report on Preliminary Examination activities*, 13 December 2011, p. 14-18, available at <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf> (accessed: 3 May 2012).

⁹ See: FIDH press release, *Gobierno colombiano consolida la impunidad de los crímenes de lesa humanidad y los crímenes de guerra cometidos en Colombia*, 14 May 2008, available at <http://www.fidh.org/Gobierno-colombiano-consolida-la> (last accessed: 7 May 2012).

¹⁰ Meeting of NGOs with the ICC General Prosecutor, held in the Hague in October 2010.

This report is structured in two parts: the first part analyses the practice of extrajudicial killings by state agents in the 2002-2008 period, highlighting its systematic and widespread nature; the second part focuses on the administration of justice in such cases by the Colombian courts, with particular emphasis on the responsibility of high military officers.

Methodology

For this report in particular FIDH established a cooperation agreement with the CCEEU Working Group.¹¹ From July 2011 to April 2012, two consultants did documentary research, monitoring of investigations and court cases, and interviews with lawyers representing victims of extrajudicial executions in cases brought before the Colombian justice system. The FIDH takes this opportunity to pay tribute to the men and women who defend human rights in Colombia for their tireless struggle for respect for human rights and against impunity, in the midst of threats, attacks, and intimidation.

¹¹. The following organizations comprise the Working Group on Extrajudicial Executions: The CCEEU Observatory on Human Rights, the Social Corporation for Community Guidance and Training (COSPACC), the CINEP Databank, The Sembrar Corporation, The Committee of Solidarity with Political Prisoners (CSPP), The Christian Centre for Justice, Peace and Non-violent Action - Justapaz, the Claretian Norman Perez Bello Corporation, the Alternative Centre of Research and Protection of Fundamental Rights in Colombia (CINPRODEC), the Corporation for Regional Development (CDR), the Association for Alternative Social Development - MINGA, the Intereclesial Commission of Justice and Peace, Juridical Freedom Corporation, Yira Castro Juridical Corporation, Corporation for the Defence and Promotion of Human Rights - Reiniciar Corporation, the "José Alvear Restrepo" Attorney Collective, the Carlos Pérez Lawyers Collective, the Orlando Fals Borda Socio-Juridical Collective, the Interdisciplinary Group for Human Rights (GIDH), and Humanidad Vigente, accompanied by Peace Brigades International.

I. Extrajudicial Executions in Colombia and the Phenomenon of False Positives

Between December 2007 and August 2008, at least 16 young men disappeared under mysterious circumstances in the municipality of Soacha (Cundinamarca). Some of them told their families that they were going away in response to an employment opening in Santander. Others simply did not return to their homes. All of them were subsequently reported as killed in combat by troops of the Francisco de Paula Santander battalion or Mobile Brigade 15, both units attached to the Second Division of the National Army.¹² The outcry erupted in August 2008, when the mothers of the youths of Soacha came together to call for their children, after several months of uncertainty about their whereabouts, unsuccessful searches, indifference and the lack of response from state authorities. The bodies of the young people appeared, inexplicably, 700 kilometres from Soacha, buried as N.N. (anonymous), in a common grave in Ocaña (Norte de Santander), falsely reported by the army as criminals, paramilitary or guerrilla fighters killed in combat. When these claims took on public notoriety, families across the country began to denounce the disappearance and murder of loved ones in similar circumstances.

Although this is not anything new, because historically instances are known in which people have been killed by the security forces and then presented as killed in combat, during the 2002 - 2008 period, this practice became an unprecedented phenomenon, with specific features, clear patterns, and a high degree of organization, which compel us to look at them as a set of interrelated events. It is this practice that has come to be commonly called *false positives*, a technical expression generally used to designate “the coldblooded and premeditated murder of innocent civilians for the sake of profit”.¹³

During his visit to Colombia in 2009, the United Nations Rapporteur on Extrajudicial, Arbitrary or Summary Executions noted that “the focus on the Soacha case fosters the perception that it is a limited phenomenon, both geographically and over time. Although the Soacha killings were flagrant and obscene, my investigation shows that they are just the tip of the iceberg. I have interviewed witnesses and survivors who described very similar killings in the departments of Antioquia, Arauca, Valle del Cauca, Casanare, Cesar, Córdoba, Huila, Meta, Norte de Santander, Putumayo, Santander, Sucre and Vichada”¹⁴.

¹² Divisions constitute the largest operational units and are responsible for leading operations in the departments of the country. The Second Division has jurisdiction in the northeast of the country, with command post in the city of Bucaramanga, the capital of Santander. It covers an area of 68,757 square kilometres, comprising 145 municipalities between the departments of Antioquia, Bolívar, Boyacá, Cesar, Norte de Santander and Santander. The mobile brigades are tactical units with great offensive capabilities. Mobile 15 was created in January 2006, under the operational command of the Second Division. Following the scandal unleashed by what happened in Soacha, this unit was dismantled.

¹³ That is how it was defined by Philip Alston, United Nations Special Rapporteur for Extrajudicial, Arbitrary and Summary executions, during his visit to Colombia in 2009. Cf. Statements by Professor Philip Alston, press release, Bogota, 18 June, 2009, available at <http://www.nacionesunidas.org.co/index.shtml?apc=i1&s=n&x=58590> (last accessed: 4 May, 2012).

¹⁴ *Ibid.*

Indeed, as will be seen below, there were many such cases and the practice became systematic. As we will study, there is a direct link between executions and the policies implemented by the government of President Alvaro Uribe Vélez starting in 2002. In his report to the Human Rights Council in March 2010, Philip Alston stressed that the documentary evidence indicates that cases of *false positives* began to occur with alarming frequency throughout the country starting in 2004¹⁵. It is also relevant to note the notoriety attained by the episodes of Soacha, recounted in this section prompted the Colombian Government to take series of measures starting in 2008, which helped reduce the number of extrajudicial executions of this kind.¹⁶

The CCEEU Observatory on Human Rights attributes 3,345 extrajudicial executions to the security forces between 2002 and 2008. Below we will study in more detail the widespread nature of executions across the country and the figures by region. Indeed, in its 2010 report, the Office in Colombia of the United Nations High Commissioner for Human Rights estimated “that more than 3,000 people may have been victims of extrajudicial executions, attributed mainly to the Army. Most of the cases occurred between 2004 and 2008”.¹⁷

Hence given the gravity of what happened between 2002 and 2008, in this report we have decided to concentrate on that period. However, we think it is important to point out that in its latest annual report on the human rights situation in Colombia (for 2011), the Office of the High Commissioner for Human Rights noted that the practice of extrajudicial executions has not been completely eliminated, and emphasized that such violations were still being committed in Arauca, Bogotá, Cauca, and Cesar.¹⁸

A. Political context and motive of perpetrators: death of innocent civilians to show results and obtain benefits

In order for the phenomenon of extrajudicial executions in Colombia to be understood, they must be set in the political context of the time. When Alvaro Uribe Velez took office as president of the republic in 2002, he made the counterinsurgency battle the central thrust of his administration. Thus, starting in August 2002, the Colombian government took a series of measures within the so-called Democratic Security Policy. Those measures granted a number of powers to the armed forces.¹⁹

For the purposes of this report, we speak of two key guiding directions that led to the implementation of the policy of *false positives*, namely a system of incentives and rewards; and the pressure to produce results.

¹⁵. UN Document No. A/HRC/14/24/Add.2 *Report of the Special Rapporteur on Extrajudicial, Arbitrary, and Summary Executions, Philip Alston, concerning his mission to Colombia* (8 to 18 June 2009), 31 March 2010 (hereinafter referred to as “Rapporteur’s Report”), par.10.

¹⁶. *Ibid.* par. 16-17.

¹⁷. UN document A/HRC/16/22, *Report of the Office of the of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, 3 February, 2011, par. 26.

¹⁸. *Ibid.* par. 30.

¹⁹. A state of emergency was declared by Decree 1837 (11 August 2002). Subsequently, through Decree 2002 (2002), rehabilitation and consolidation zones were granted to the armed forces with extraordinary powers for conducting military operations and restricting or limiting the rights to liberty, to due process, and to the movement of the civilian population, because it was said to be linked to or associated with guerrilla groups.

1. The system of incentives and rewards: the *business* of false positives

Granting rewards was nothing new, since such measures had been implemented for the previous twenty years.²⁰ However, after the Democratic Security Policy that system was perfected, and it was given a central role in the strategy for combating insurgency. The government's rewards program was bolstered with the policy of demobilization and reintegration into civilian life of members of paramilitary groups which were inserted into the intelligence work of the security forces as informants.²¹

A system of incentives was created for civilians to provide information that would lead to the capture or defeat in combat of leaders of armed organizations outside the law or drug trafficking leaders.²² The money for such rewards came from a budget item specifically set aside for this purpose. These funds were independent of others received as a "reserved expenses".²³ The latter were used with great discretion by the commanders.²⁴ Both categories of funds were used to compensate *recruiters*, who were civilians who contributed to criminal activity by attracting or *recruiting* the victims with false information and then turned them over to the army which handled the execution and simulation of death in combat.

Paralleling the system of monetary incentives, and given the pressure for results which we will describe below, there were rewards for army members consisting especially in leaves for the soldiers, and recognitions, decorations, transfers, promotions and even training courses abroad for the higher-ranking members.

This system generated strong competition among military units to show the best results in terms of hitting at the subversive groups. That has been recognized in various testimonies which have been rendered by members of the National Army who have been tried for cases of *false positives*: "one of the incentives that we granted the counter-guerrilla commanders from each battalion was a leave for the whole month of December to the platoons that tallied up the most dead in the year, in other words, if my platoon of the Calibío battalion was the one that had killed the most in the year, I and my people used to go out for the whole month of December [...] It was also said that the soldier with the most casualties would be incentivized by sending him to Sinai or to a course abroad".²⁵

Rewards systems also exist in other countries. What is worrisome in the Colombian case is that this policy was implemented without the necessary controls or the required transparency, which led to the irregularities described. As noted by the United Nations Special Rapporteur on Extrajudicial Executions: "In general, there was a fundamental lack of accountability, and problems at all stages of disciplinary processes and investigation".²⁶

²⁰ The Colombian government has maintained a policy of rewards that goes back at least to law 418 (1998), under which such incentives were offered someone collaborating with the justice system. Subsequently, law 548 (1999), added that rewards could be given to someone working with state intelligence agencies.

²¹ Law 782 (2002) created the National Fund for Security and Citizen Coexistence for intelligence network operations and rewards to those who are demobilized who cooperate with the justice system. Decree 128 (2003) established bonuses for collaboration, as did Decree 2767 (2004), and it was strengthened with Ministry of Defence Directives No. 029 (2005) and 015 and 016 (2007), completed by Decree 1400 on 5 May 2006, creating the bonus for operations of national importance, (Boina [acronym, also means "beret"]), and by Decree 1058 (2008).

²² Ministry of Defence Directive No. 29 (2005).

²³ *Ibid.*

²⁴ Rapporteur's Report, *op. cit.*, par. 26.

²⁵ "La directiva ministerial 029 de 2005", *El Espectador*, 1 November, 2008, p. 2A.

²⁶ Rapporteur's Report, *op. cit.*, p.2.

2. Pressure for positive results, measured by “number of casualties” (body count)

The large military operations deployed starting with the Democratic Security Policy and the consequent unprecedented investment demanded fast, tangible, and measurable results. The result was strong pressure to demonstrate what the security forces called casualties in combat or positives. At the time, five army officers even stated publicly: “People cannot imagine the psychological torture of having to deliver results every day”.²⁷ According to a former advisor to the Minister of Defense, Juan Manuel Santos,²⁸ there was “an insatiable pressure for casualties [...] And that is why the claims that not all the casualties of the Fourth Brigade have been men with rifles are plausible”.²⁹ In the opinion of a former national security advisor, in the army “a problematic system of evaluation [of performance] was set up: it values excessively - and, sometimes, exclusively - opposition casualties, and disproportionately punishes operational failures”. Consequence: tendency to obtain casualties without assuming risks, without being too exposed or, better, not at all. Results: defenceless civilians who appear as killed in battles that never took place”.³⁰

The testimonies of some of those involved in cases of false positives attest to the pressures to which members of the National Army were subjected in relation to operational results: “Colonel Ramírez said to us each company commander must give me one death in combat every month and the second section has to give me three dead per month. At this time the war is being measured in litres of blood; a commander who does not have results in deaths per month will be sanctioned accordingly and that will be reflected in his military record [...] Another time in early 2008, when he took command of the Colonel Juan Carlos Barrera Jurado Brigade, in a radio broadcast he told all battalion commanders that a battalion that has no casualties or battles in ninety days will cause the commander to be thrown out of the Army for his negligence or operational failure [...] The pressure began to become increasingly harsher, up to a point where they were telling us how many days we had gone without fighting; at the tactical operations centre, there was a board on which the statistics were kept on the companies, where the dead were tallied, and the days that we had spent without combat or deaths were counted”.³¹

B. Extrajudicial Executions: International Crimes

As discussed in this report, extrajudicial executions became extremely serious during the period of study (2002-2008). In this section we will examine the qualification of this phenomenon as an international crime.

First and foremost, it must be kept in mind that a deed can be qualified simultaneously as a war crime and crime against humanity. That is, these concepts are not mutually exclusive, but rather there is a situation of overlap in the notion of crimes. Thus when the same deed or set of deeds meets both definitions, those responsible are subject to punishment both for war crimes and for crimes against humanity. The practice and jurisprudence of international courts is uniform in this regard.

²⁷. “Cada día se van unos 17 hombres del Ejército”, *El Tiempo*, Bogotá, 2 July, 2006, p.1-2.

²⁸. Juan Manuel Santos is now president of Colombia.

²⁹. Sergio Jaramillo, “La crisis del Ejército”, *El Tiempo*, Bogotá, 11 June, 2006, pp”.1-7.

³⁰. Alfredo Rangel, “Qué pasa en el Ejército?”, *Cambio*, Bogotá, no. 677, 19 June 25, 2006, p”.27.

³¹. Procuraduría General de la Nación, Dirección Nacional de Investigaciones Especiales, Unidad de Derechos Humanos, *Diligencia de queja suscrita por el señor Edgar Iván Flórez Maestre*, Medellín, 15 December 2009.

1. False positives: war crimes?

As explained above, an armed conflict has been unfolding in Colombia for several decades. Even though it has been denied by previous heads of Government, it is now recognized and, in any case, the existence of an armed conflict does not depend on whether it is recognized by the government in question but on the de facto circumstances.

Armed conflicts, whether international or domestic in nature, are governed by international humanitarian law (IHL). International humanitarian law prohibits a number of behaviours within the context of a war. Among these behaviours, all of them punishable in criminal law, is the killing of non-combatants, i.e. civilians not involved in hostilities and combatants who are “*Hors de Combat*”. War crimes are regulated in article 8 of the Statute of the International Criminal Court. That article states: “c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely any of the following acts committed against persons taking no part in the hostilities [...]: i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ..”.

They are also regulated in Title II of the Colombian Criminal Code, concerning offences against property and persons protected by international humanitarian law. Article 135 states: “Homicide against a protected person. One who on the occasion of and during an armed conflict causes the death of a protected person in accordance with the international agreements on humanitarian law ratified by Colombia shall be liable to imprisonment for thirty (30) to forty (40) years, a fine of two thousand (2,000) to five thousand (5,000) legal monthly minimum salaries, and disqualification from the exercise of public rights and duties for from fifteen (15) to twenty (20) years”.

It should be kept in mind that Colombia made a reservation when it adopted the Rome Statute, invoking article 124 of that instrument which enabled a state, when adhering to the Statute, to declare that, for a period of seven years from the date of entry into force in this regard, it would not accept the jurisdiction of the ICC over war crimes. That reservation expired on October 31, 2009. The declaration of removal from the jurisdiction of the ICC for these offences by way of exception has no effect on domestic law. Colombia has a duty to investigate and prosecute those responsible for war crimes, as stipulated in the Geneva Conventions to which the Colombian state is a party, which are incorporated into Colombian domestic legislation through the body of constitutional law, as set forth in article 93 of the Colombian Constitution.

Likewise, it should be noted that while an investigation by the ICC into war crimes is ruled out by that declaration, it has no effect on the fact that those very same acts may be qualified as crimes against humanity.

That being said, it must be determined whether the cases of *false positives* would fall into the category of war crimes. During the investigation carried out for writing this report, various positions were found in this regard, even among organizations for the defence of victims, lawyers, prosecutors, and judges. Such diverse positions are shown in court procedures of assigning culpability and sentencing, inasmuch as while some qualify false casualties of

civilians in combat as aggravated homicide,³² (i.e. homicide as understood in ordinary law with aggravating circumstances), others do so as homicide against a protected person (i.e., as a violation of international humanitarian law or war crime).

Some believe that it should be prosecuted as aggravated homicide because, in practice, what was done had nothing to do with actual combat. They argue that not every homicide committed in a country in conflict is a war crime, just as not all criminal activity carried out by members of the army is a war crime. Others, however, claim that these are war crimes because those who commit them have taken advantage of the armed conflict to kill innocent civilians, and this has been fostered by a system of benefits and rewards, caused by pressure for results and supported by internal documents of the army, and by the respective orders of operations.

Without taking sides in this debate, it should be stressed that whatever determination is made, these deeds should be tried by the ordinary courts and not by military criminal courts, as will be seen later in this report. Apart from the discussion about the qualification of these acts as war crimes or violation of international humanitarian law within the domestic legal system, we repeat that the same facts may qualify simultaneously as war crimes and crimes against humanity. Our investigations enable us to state that the *false positives* constitute crimes against humanity (as it will be seen in the next section) and must be prosecuted as such by the Colombian legal system, or otherwise, by the ICC”.

2. False positives: crimes against humanity

We find the definition of crimes against humanity in article 7 of the Rome Statute, which states that it “means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a) Murder [...] (i) Enforced disappearance of persons...”

As a state party to the Rome Statute, Colombia is obligated to prosecute criminally such punishable conduct. It is obvious, however, that Colombia has not introduced legislation to specifically incorporate this definition of a crime into domestic law. Nevertheless, it should be noted that the Constitutional Court has recognized that the Rome Statute forms part of the constitutional corpus³³, confirming that Colombia is obligated to criminalize the behaviours defined in this international legal instrument. The extrajudicial executions carried out by the

³² Aggravating circumstances as set forth in Colombian criminal law, are as follows (article 104 of the Criminal Code):

1. *In the person of the ascendant or descendant, spouse, partner or permanent companion, brother, person adopting or adopted, or relative up to the second degree of affinity.*
2. *To prepare, facilitate or consummate other punishable conduct; to hide it, safeguard its product or impunity, for oneself or for one's accomplices.*
3. *By means of any of the behaviours set forth in chapter II of title XII and in chapter I of title XIII of book two of this code.*
4. *By price, promise of reward, zeal for profit, or for another base or trivial reason.*
5. *Utilizing the activity of one who is not subject to blame.*
6. *With excessive cruelty.*
7. *Placing the victim in a situation of helplessness or inferiority or taking advantage of such situation.*
8. *For terrorist purposes or in the course of terrorist activities.*
9. *Against an internationally protected person, other than those specified in title II of this book, and diplomatic representatives, in accordance with treaties and international conventions ratified by Colombia.*
10. *If committed against a person who is or has been a public servant, journalist, justice of the peace, labour union, political or religious leader for that reason.*

³³ Constitutional Court of Colombia, Ruling C-488, 2009, Judge Rapporteur Jorge Iván Palacio Palacio.

security forces have been related to crimes against humanity, in some isolated rulings, although often with an erroneous conception, or without appropriate justification.

We maintain that the *false positives* that were committed in Colombia during the period under investigation constitute crimes against humanity. We will next do an analysis based on international jurisprudence on the matter, especially the jurisprudence of the ICC, spelling out the requirements to be met in order to establish that such a crime has been committed.

In examining the elements of crimes, the general elements (in this case, those allowing for specifying crimes against humanity) are distinguished from the specific elements (which have to do with the specific acts listed in article 7 of the ICC Statute: murder, extermination, enforced disappearance, etc). The definition of the specific elements making it possible to conclude that homicides have been committed is not in dispute. Therefore, we will concentrate here on the general elements of the definition of crimes against humanity making it possible to determine that the cases of *false positives* can be qualified as such.

In interpreting paragraph 1 of article 7 of the Statute, the ICC has stated that the following elements must be established for the determination of crimes against humanity:

- a) Attack directed against a civilian population;
- b) Policy of the state or of an organization;
- c) Widespread and systematic nature of the attack;
- d) Connection between criminal acts and the attack; and
- e) Knowledge of the attack.³⁴

a) Attack directed against a civilian population

Paragraph 2 of article 8 of the Rome Statute states “a) ‘attack against a civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against a civilian population, in accordance with the policy of a state or an organization to commit such attack or to promote such a policy”.

This has to do with a campaign or operation launched against the civilian population, which need not be a military attack.³⁵ This requirement means that the civilian population must be the primary target of the attack, and not merely an incidental victim.³⁶ It need not be proven that the entire population of the geographical area where the attack took place was its target.³⁷ The attack is proven by the very perpetration of the crimes in question; thus it is clear that no additional evidence in addition to the commission of crimes is needed for meeting the definition of the element of “attack”.

³⁴ ICC Document No. 01/09-19, Situation in the Republic of Kenya, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Chamber for Preliminary Matters*, II, 31 March, 2010, available at www.icc-cpi.int/NR/exeres/422F24A9-5A0F-4FD0-BC3E-9FFB24EC7436.htm (accessed: 6 may 2012) (henceforth “document No. ICC-01/09-19”), par. 79. Unofficial translation.

³⁵ ICC, Elements of Crimes, article 7, par. 3.

³⁶ ICC, Document No. ICC-01/05-01/08-424, Prosecutor v.76. Jean-Pierre Bemba, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Division II of Preliminary Matters*, 15 June 2009, available at <http://www.icc-cpi.int/NR/exeres/269A305D-4F4F-4BF0-8F66-9B96B157DDC1.htm> (last accessed 6 May 2012) (henceforth “ICC Document -01/05-01/08-424”), par. 76 Unofficial translation.

³⁷ ICC Document No. 1/09-19, op. cit., par.82.

The civilian population in Colombia has unquestionably been the target of attacks within the internal armed conflict. In his statements after his visit to Colombia in 2009, the United Nations Special Rapporteur on Extrajudicial Executions stressed that executions committed by the security forces, paramilitaries, and other armed non-state actors “impact disproportionately on rural and poor populations, indigenous peoples, Afro-Colombians, trade unionists, defenders of human rights, and community leaders”.³⁸ As we will see below, in dealing with the profiles of the victims of cases of *false profiles*, they undoubtedly are classified as part of the rural and poor population.

It has also been argued that the National Security Doctrine that underpins the Democratic Security Policy, which in turn - as we have studied above - supports the extrajudicial executions considered in this report, fosters the notion of the *internal enemy*. This idea suggests that any person or organization that assumes democratic and critical stances other than those of the model being imposed from power is an enemy of the state.³⁹

The measures that were taken starting in 2002 as part of the Democratic Security Policy granted a series of powers to the military forces, for leading the struggle against terrorism or the counterinsurgency struggle, based on the idea of *depriving the fish of water*. According to this approach, the main military advantage of the subversive groups was due to the ties that they supposedly had with the civilian population and that took the form of complicity or concealment. Consequently, one of the main objectives of the military actions undertaken as part of the Democratic Security Policy was to isolate these groups, whose main support of action, according to the government, was “camouflaging its members within the civilian population”⁴⁰. Thus, the Democratic Security Policy generated a general attitude of suspicion toward rural people living in the areas controlled by the guerrillas or through which they passed.⁴¹

It is well to note that historically, we have seen how within the Colombian conflict in regions where the guerrilla forces operate, the civilian population has been likened to the members of guerrilla organizations, and has thus been the target of military and paramilitary attacks.⁴²

All these considerations allow us to conclude that the *false positives* took place as part of an attack aimed at the civilian population.

³⁸. Statements by Professor Philip Alston, press conference, Bogota, 18 June, 2009, available at <http://www.nacionesunidas.org.co/index.shtml?apc=i1-----ands=nandx=58590> (accessed: 4 May 2012).

³⁹. Interview with “Corporación Jurídica Libertad”, April 26, 2012, in the possession of the FIDH.

⁴⁰. Third Clause of Decree 2002 of 2002. In the ruling by which the constitutionality of all of the provisions contained in this Decree was decided, the Constitutional Court warned that this consideration clause, could not be regarded as an acceptable legal basis, for two reasons: i) accepting it as legal basis would mean “assuming that all the civilian inhabitants of Colombia, with no distinction of any kind, belong to such organizations [armed outside the law], thereby creating for everyone a generalized juridical uncertainty “; and ii) accepting it as legal basis would represent an absolute negation of the principle of distinction between combatants and non-combatants. Constitutional Court of Colombia, 2002 Ruling C-1024, Reporting Judge Alfredo Beltrán Sierra.

⁴¹. The measures taken by the Colombian government on security and national defence were strongly questioned at the time by the Office of the United Nations High Commissioner for Human Rights, noting that it was “crucial that policies and measures adopted by the Colombian State, including those for security, [be] compatible with international standards and principles and [be] surrounded by appropriate and independent controls so as to [guarantee] respect for people’s fundamental rights and freedoms”. Cited in the presentation of Mr Amerigo Incalcaterra, Deputy Director of the Office in Colombia of the UN High Commissioner for Human Rights, 25 July 2003, available at <http://www.hchr.org.co/publico/pronunciamientos/ponencias/ponencias.php3?cod=26andcat=24> (last accessed: 9 May 2012).

⁴². See reports of the Working Group on Historical Memory of the National Commission for Reparation and Reconciliation (CNRR) and specifically the report, “San Carlos, Memorias del Éxodo en Guerra”, 2011, p.108 ff. when it relates how “eviction orders, targeted assassinations, forced disappearances, and extortion were actions aimed at specific sectors and individuals of the population, who were considered militants, collaborators or social base of the enemy forces”, online: <http://www.memoriahistorica-cnrr.org.co/s-informes/informe-21/>.

(b) Policy of the State or of an Organization

It is understood that the “policy to commit such attack” requires that the state or the organization actively promote or encourage such an attack against a civilian population.⁴³ “A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack”⁴⁴.

In his report submitted to the United Nations Human Rights Council, the Special Rapporteur on Extrajudicial Executions stated: “Although apparently these so-called false positives were not the result of a State policy, there were not isolated events either. These killings were committed by a large number of military units throughout the country. They took place because military units were pressed to demonstrate that their battle against the guerrillas had positive results through the ‘number of casualties’. There were also some inducements: an informal system of incentives offered to soldiers to produce casualties, and a formal system of incentives offered to civilians to provide information leading to the capture or death of guerrillas. The latter system was lacking oversight and transparency. In general, there was a fundamental lack of accountability and problems at all stages of disciplinary and investigation processes [...] There have been too many killings of a similar nature to characterize them as isolated incidents carried out merely by a few soldiers, or rogue units, or ‘bad apples’”⁴⁵.

The rapporteur thus presents a preliminary observation on the absence of a state policy as such. However, these observations should be re-evaluated - within the framework of the analysis before us - in the light of theories of international criminal law. According to ICC case law, the requirement of the existence of a plan implies that the attack follows a regular pattern (we will study in detail the regular pattern of executions further on). This policy of attack can be conceived by groups of people who govern a territory or by an organization that has the capacity to commit widespread or systematic attack directed against the civilian population.⁴⁶ An attack that is planned, led, and organized (as opposed to spontaneous and isolated acts of violence) satisfies the criterion for the existence of a plan or policy. Certainly, the plan or policy means that the acts are rigorously organized and follow a certain pattern.⁴⁷ With regard to state policy, the ICC believes that the policy need not necessarily have been conceived at the highest levels of the state. Thus, for example, it may be a matter of a policy adopted by a regional government or local state agencies.⁴⁸

Upon examining international jurisprudence and confronting it with the data collected about the *false positives*, we comment as follows. Within the counterinsurgency struggle and the so-called Democratic Security Policy, a series of administrative and operational legal provisions, both ordinary and as exceptions, were designed and put into practice between 2002 and 2008. They fostered and encouraged the commission of extrajudicial executions on a large scale throughout

⁴³ ICC, Elements of Crimes, article 7, par. 3.

⁴⁴ ICC, Elements of Crimes, note no. 6.

⁴⁵ Rapporteur's report, *op. cit.*, par.14.

⁴⁶ ICC document No. 01/05-01/08-424, *op. cit.*, par.81.

⁴⁷ ICC, ICC Document No. -01/04-01/07-717, Prosecutor v.396. Katanga & Ngudjolo, *Decision on the confirmation of charges, Pre-Trial Chamber I*, 30 September de 2008, available at <http://www.icc-cpi.int/NR/exeres/0BCE59D4-4498-4846-BFD2-E165E0DB0A33.htm> (last accessed: 6 May 2012) (henceforth “ICC Document N° -01/04-01/07-717”), par. 396.

⁴⁸ ICC document No. 01/09-19, *op. cit.*, par.89.

the country, with the active participation of many units of the National Army, mainly from the Fourth, Second and Twenty-ninth brigades. Although the incentives system in itself does not constitute a plan of attack, the combination of this policy combined with the system of rewards for information, increasing pressure for results, and the lack of proper oversight, was certainly the basis for carrying out extrajudicial executions. Hence, there are reasons to think that executions were not isolated acts committed solely by lower-ranking members of the National Army, but that there was a high degree of organization and coordination, backed by official Army documents forged for that purpose, and orders from intelligence which commanded that they be carried out. Planning is also demonstrated by the existence of clear patterns for carrying out the attacks, as will be seen in the next section.

c) Widespread and Systematic Nature of Attack

As noted above, the extrajudicial killings of innocent civilians are set within a situation of attack on the civilian population in the context of the Colombian conflict which has resulted in a series of criminal acts, including massacres, forced displacement, disappearances, and other similarly serious situations.

Our reading of international jurisprudence in this area indicates that widespread or systematic nature applies to the attack in which the offences in question, in this case extrajudicial executions, are situated. Studying the entirety of the acts endured by the Colombian civilian population is beyond the purpose of this report and has been amply documented by various joint reports of Colombian human rights networks and platforms, to which we refer for consultation.⁴⁹ For the purposes of this study, we will here analyze the widespread and systematic nature of the *false positives*, on the understanding that individual cases of killings of innocent civilians are set within a context of a series of identical or very similar executions which, in themselves constitute an attack.

According to the definition of crimes against humanity, the attack may be widespread *or* systematic. The either/or nature of the adjectives characterizing the attack has been confirmed by the ICC case-law⁵⁰. In the case of the *false positives* occurring in Colombia during the period of the study, we affirm that they were both widespread and systematic, as will be seen below.

(i) Widespread nature of the cases of false positives

“Widespread”, when used to define crimes against humanity means a large-scale attack, that is, one that is massive, frequent, and launched collectively and aimed at multiple victims.⁵¹ Thus, the widespread character has to do both with the large-scale nature of the attack and the number of victims resulting from that attack. It implies an attack carried out in a large geographical area, or an attack in a small geographical area aimed at a large number of civilians.⁵² It is not merely a

⁴⁹ See for example, *La situación de los Derechos Humanos en Colombia 2002-2008. Informe para el Examen Periódico Universal de Colombia*. July 2008, presented jointly by Colombia - Europe - United States Coordination, the Permanent Assembly of Civil Society for Peace, the Colombian Platform for Human Rights, Democracy and Development, and the Alliance of Social and Similar Organizations, and various national and international human rights networks along with 1214 Colombian social organizations to the United Nations Human Rights Council. In: http://ddhcolombia.org.co/files/file/Publicaciones/informe_EPU_2008_espa%C3%B1ol.pdf. More recently, see *Tiempos de Sequía. Situación de Derechos Humanos y Derecho Humanitario en Colombia. 2002-2009. Informe Alternativo al Sexto Informe Periódico del Estado de Colombia, presentado al Comité de Derechos Humanos de la ONU por la Coordinación Colombia-Europa-Estados Unidos*, Junio 2010. 326 pp.

⁵⁰ ICC, Document No. ICC-01/09-19, *op. cit.*, par. 94.

⁵¹ ICC, Document ICC No. -01/05-01/08-424, *op. cit.*, par.83.

⁵² Document No. ICC-01/04-01/07-717, *op. cit.*, par.395. Unofficial translation.

quantitative or territorial issue, but the circumstances of the case must be taken into account.⁵³ .

With regard to extrajudicial executions by members of the Colombian army, a substantial increase can be identified between 2002 and 2008, contrasting sharply with what happened during previous years. According to figures from the CCEEU Observatory, between 1996 and 2001, the number of extrajudicial executions of civilians attributed to the security forces was 664, an average of 132 people each year. That figure more than quadrupled between 2002 and 2008. The total of extrajudicial killings attributed to the security forces was 3,345, that is, over 557 each year (see Figure 1).⁵⁴

**Extrajudicial executions in Colombia
Consolidated 1996-2001**

No.	Department	Total	%
1	Antioquia	112	16.87%
2	Bolivar	79	11.90%
3	Arauca	51	7.68%
4	Valle	46	6.93%
5	Sucre	42	5.57%
6	Santander	37	4.22%
7	Norte de Santander	28	3.46%
8	Bogota	23	3.46%
9	Meta	23	3.46%
10	Putumayo	23	3.46%
11	Cesar	19	2.86%
12	Caqueta	17	2.56%
13	Cauca	17	2.56%
14	Cordoba	16	2.41%
15	Casanare	15	2.26%
16	Chocó	15	2.26%
17	Magdalena	15	2.26%
18	Tolima	14	2.11%
19	Huila	13	1.96%
20	Atlantico	12	1.81%
21	Caldas	11	1.66%
22	Cundinamarca	11	1.66%
23	Vichada	8	1.20%
24	La Guahira	5	0.75%
25	Boyacá	4	0.60%
26	Nariño	4	0.60%
27	Risaralda	3	0.45%
28	Guainía	1	0.45%
Total		664	100.00%

Source: CCEEU Observatory

**Extrajudicial executions in Colombia
Consolidated 2002-2008**

No.	Department	Total	%
1	Antioquia	922	27.56%
2	Meta	233	6.97%
3	Huila	193	5.77%
4	Cesar	172	5.24%
5	Caquetá	165	4.93%
6	Norte de Santander	165	4.93%
7	Tolima	134	4.01%
8	Arauca	122	3.65%
9	La Guajira	115	3.44%
10	Cauca	114	3.41%
11	Valle	110	3.29%
12	Córdoba	102	3.05%
13	Putumayo	98	2.93%
14	Casanare	97	2.90%
15	Sucre	74	2.21%
16	Bolivar	69	2.06%
17	Nariño	63	1.88%
18	Samtander	49	1.46%
19	Caldas	47	1.41%
20	Boyacá	43	1.29%
21	Magdalena	42	1.26%
22	Bogota	38	1.14%
23	Quindio	38	1.14%
24	Chocó	36	1.06%
25	Cundinamarca	27	0.81%
26	Atlantico	23	0.69%
27	Risaralda	22	0.66%
28	Buaviare	18	0.54%
29	Vichada	8	0.24%
30	San Andrés	4	0.12%
31	Guania	1	0.03%
32	Vaupes	1	0.03%
Total		3,345	100.00%

Source: CCEEU Observatory

Although there are discrepancies between different sources of data on the number of people killed due to the so-called *false positives*, there is agreement indicating the 2002 to 2008 period as particularly critical. A report prepared by the data bank of the Centre for Research and Popular Education (CINEP), gives a total of 1,741 victims of extrajudicial executions from 1984 to 2011. Of those 1,189 took place between 2002 and 2008, amounting to 68% of cases recorded.⁵⁵ These data coincide with the dramatic increase in extrajudicial executions committed by military, reported by the CCEEU Observatory. In any case, these figures constitute a partial record in relation to the totality of extrajudicial executions committed in Colombia during those years. Many of the deeds may never have been reported for fear of reprisals. It is also likely that the whereabouts of many of the victims of *false positives* remain still unknown, because they were buried as N.N. (anonymous) and their family members may still be looking for them. For its part, on 15 December 2010, the Office of Attorney-General of the Nation said it was acknowledging 1,571 cases at the National Human Rights Unit, processed both by Law 600

⁵³ ICC document No. ICC-01/09-19, op. cit., par. 95. Unofficial translation

⁵⁴ CCEEU (Colombia-Europe -United States Coordination) Observatory of Human Rights and International Humanitarian Law , Working Group on Extrajudicial Executions.

⁵⁵ CINEP Human rights and Socio-political Violence Database, Programa por la Paz (PPP), Deuda con la Humanidad 2: 23 años de falsos positivos (1988-2011), Bogotá, 2011, Table 1, p.. 325

(2000) and by law 906 (2004). Of these cases 1509 had been committed between 2002 and 2010 (96.1% of the cases)⁵⁶. These cases, which represent 2,679 victims⁵⁷, do not include those being processed in the sectional or local offices of the public prosecutors offices, much less those being prosecuted under the military criminal justice jurisdiction.

To get an idea of the undercounting, the official figures of deaths in combat should be kept in mind. According to the Ministry of National Defence between from 2002 and 2008, 12,713 people belonging to the guerrillas, and 2,602 members of paramilitary groups fell in combat. The Ministry also reported 49,523 captured, of whom 32,335 belonged to the guerrillas and 13,456 to paramilitaries⁵⁸. This means that between 2002 and 2008, a total of 45,048 members of the guerrilla groups and 16,058 members of paramilitary groups had to go into armed battle as a result of the action of the security forces. However, the data do not match the official reports which give a number of 20,000 guerrillas and 12,000 paramilitaries at the beginning of the Uribe Vélez mandate.⁵⁹ These figures highlight serious inconsistencies in official reports on the results of operations of the security forces and it is likely that cases of civilians extrajudicially executed have been included among them.

The information from the CCEEU Working Group on Extrajudicial Executions takes into account the widespread manner in which the crimes took place throughout the country. Cases were reported in 32 of the 33 departments in the country, with the exception of the Department of Amazonas, where no sustained military operations took place. Almost 30% of the events recorded took place just in the department of Antioquia, followed by the departments of Meta, Huila, Cesar, Caquetá and Norte de Santander, where the vast majority of the cases were concentrated, (see figure no. 1).

(ii) Systematic manner in which the false positives were committed

In analysing the definition of crimes against humanity, the ICC has declared that the term “systematic” is a qualitative element which refers the organized character of acts of violence, and the unlikelihood that they would occur by mere coincidence.⁶⁰ It is demonstrated by patterns in the commission of crimes: the non-accidental repetition of a similar criminal conduct on a regular basis.⁶¹ Patterns are determined around the circumstances of the case.⁶²

⁵⁶. Fiscalía General de la Nación. Unidad Nacional de Derechos Humanos y Derecho Internacional Humanitario. Estadísticas de Homicidios cometidas por agentes del Estado. Updated as of 15 December 2010. Official letter in possession of the CCEEU.

⁵⁷. United Nations. Office of the High Commissioner for Human Rights. Presentation of the Annual Report of the United Nations High Commissioner for Human Rights for 2010. Bogotá, 24 February 2011, At <http://www.hchr.org.co/publico/pronunciamentos/ponencias/ponencias.php3?cod=133&cat=24>. p. 12.

⁵⁸. Ministerio de Defensa de la República de Colombia, *Logros de la Política de Consolidación de la Seguridad Democrática*, Septiembre de 2008, available at http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Sobre_el_Ministerio/Planeacion/ResultadosOperacionales/ResultadosOperacionalesEne-Sep2008.pdf (last accessed: 6 May 2012).

⁵⁹. These data were analyzed by the Advisory Group for Human Rights and Forced Displacement (CODHES), acknowledging the inconsistency of official figures in relation to the operational results of the security forces. See CODHES, *Las cifras no cuadran*, Boletín Especial, Bogotá, 12 November 2008.

⁶⁰. ICC, document No. ICC-01/09-19, *op. cit.*, par. 96.

⁶¹. ICC document No. ICC-01/04-01/07-717, *op. cit.*, par. 397.

⁶². For example, in the case Attorney General v. Ruto & Sang, Pre-Trial Chamber II of the ICI, the systematic nature of the attack was regarded as proven when the following elements were established: i) the attackers approached the groups to be attacked in large contingents and coming from several directions; ii) roads around these locations were blocked; iii) in preparation for the attack, the properties of those who supported the enemy camp were identified; and iv) gasoline and other flammable materials were used to burn properties of those who supported the enemy band. See: ICC, Document Nº ICC-01/09-01/11-01, Prosecutor v. Ruto & Sang, *Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Division of Preliminary Matters II*, March 8 2011, par. 19, available at <http://www.icc-cpi.int/NR/exeres/E0EB838E-59AA-4F92-9B6D-E66DD194050E.htm> (last accessed: May 6 2012). See also: ICC document No. ICC-01/09-01/11-373, Prosecutor v. Ruto and Sang, *Decision on the Confirmation of Charges Pursuant to Article 67 (a) and (b) of the Rome Statute, Division of Preliminary Matters II*, 23 January 2012, par. 179, available at <http://www.icc-cpi.int/NR/exeres/E987F04C-CE75-4CB8-BC75-091AA838D21E.htm> (last accessed: 6 May 2012).

- ✧ In all the cases of false positives in Colombia, the same patterns of action by the military units involved could be identified, even though the events sometimes took place in areas very distant from one another, and even though they were carried out by military units under different commanders (who reported, however, to the same central command).

These patterns can be analyzed under the following headings:

➤ ***Profile of the victim***

The profile of the victims is very similar in all reported cases:

- ✧ The vast majority are young men because only they fit the profile of the guerrillas or combatants who would be disguised as them. While it was not widespread, there were a number of cases of minors, especially youth around 16 years old.
- ✧ One of the main features is that they were small farmers or inhabitants of rural areas against which military operations were directed.
- ✧ They often came from low-income families, and/or they were unemployed, and hence easy to attract under the lure of labour promises. Young people commonly disappeared after responding to a job offer, so at first their family members had no suspicions about what was happening.
- ✧ In some instances, they were young people who had had minor problems of delinquency or had been involved in false demobilizations.
- ✧ In other cases, those chosen were indigents or socially marginalized, people who were not assumed to have anyone come questioning what had happened to them, or whose families were unaware of how to proceed for presenting a complaint.
- ✧ These actions were often akin to actions of “social cleansing”, because the victims were individuals regarded as homeless, addicted, or disabled.⁶³

➤ ***Modus operandi***

Most of the extrajudicial executions fit the following common pattern:⁶⁴

- ✧ The executions took place in remote rural areas where counterinsurgency military operations ordered by the Democratic Security Policy were being carried out.
- ✧ In some instances, the victims were detained arbitrarily where they lived or did farm work or when they were on their way toward one of these. These detentions took place with no judicial warrant from a competent authority, and even though they were not caught in the act of committing a crime, and hence it was in instance of forced disappearance.⁶⁵

⁶³ UN Document No. E/CN.4/2006/009, *Report of the Office of the High Commissioner for Human Rights on the situation of Human Rights in Colombia* (on the situation in 2005), 20 January 2010, par. 28. See also: UN Document No. A/HRC/4/48, *Report of the Office of the High Commissioner for Human Rights on the situation of human rights in Colombia* (for the situation in 2006), March 5, 2007, par.6.

⁶⁴ On the modus operandi, see for example: Rapporteur's Report, *op.cit.*, par. 11; *Observatorio CCEEU, Ejecuciones extrajudiciales: el caso del oriente antioqueño, marzo de 2007*, pág. 35-37; Fundación para la Educación y el Desarrollo (FEDES), *Soacha: La Punta del Iceberg – Falsos Positivos e Impunidad*, 2010, pp. 33-37.

⁶⁵ Our research shows that this mode of operation was used primarily during the early years covered by this study, up to 2005 - 2006. From then on, the way the crime was committed became more complex and organized. There were cases in which the victim was previously identified, tricked, and transferred along with other victims to another locality.

- ⤴ In its most organized variant, the victims were previously identified and/or selected by an informant or a *recruiter* who usually went along with military operations that ended in false positives, and who was paid for such work (which was passed off as a *reward* within the directives which encouraged providing information on members of armed organizations outside the law so as to make it possible to capture or kill them).
- ⤴ The *recruiter* tricked the victim with false claims (e.g., job offer) and transported him long distances, to avoid the possible identification by local witnesses.
- ⤴ Shortly after arriving there, members of the Army killed the individual. In many cases, more than one victim was transported and executed at the same time.
- ⤴ After the murder was committed, the crime scene was tampered with to simulate a casualty occurring legitimately in the heat of a battle: the victims were outfitted in military garb, weaponry, and ammunition previously prepared for that purpose. Sometimes the victims were given weapons on some pretext before the simulated combat so that their fingerprints would be recorded on the weaponry.
- ⤴ The simulations were usually very clumsy. For example, there were cases in which the alleged guerrilla was wearing clothing far too large for his body, had on two lefts boots, or was carrying the weapon in his right hand even though he was left-handed. Even though there was supposedly a *battle*, no member of the army was ever wounded. The crude manner in which the crime scene was tampered with can be taken as indication that the perpetrators were certain that what they did would remain in impunity.
- ⤴ In manipulating the crime scene, the bodies were stripped of identity documents and the victims were buried anonymously (as NN), sometimes in common graves.
- ⤴ The first *investigations* at the crime scene were carried out by the very military involved in the deeds, who took photographs of the simulated scenes once the charade had been mounted.
- ⤴ The victims were thus presented as combatants killed during a military operation.
- ⤴ Once the *casualty* had taken place, the positive result of the operation was reported to the military command of the battalion under which the military unit operated.
- ⤴ The operations were supported by fabricated intelligence orders (sometimes even produced after the criminal act).
- ⤴ Those responsible for the operation received benefits, some of them economic. They generally consisted of leaves for soldiers and congratulations⁶⁶ which would appear in the military record of the commander..

The *modus operandi* that we summarize here obviously required a high degree of internal synchronization for carrying out the killings, including assigning tasks and specific roles to people involved in the military operations organized for that purpose. Indeed, the testimonies of various members of the army involved in the so-called *false positives* attest to a high degree of coordination and preparation of the crime, thereby denoting the existence of a premeditated *plan*.

For example, in the case of executions carried out by the Fourteenth Brigade of the National Army, “The soldier arrived with the following arguments: he used to downtown Medellin and looked for street vendors, or people out there who had no family; he bought them clothes, he

⁶⁶ Colonel Luis Fernando Borja Aristizabal has said: “This was a business for them [his subordinates]. As Commander I profited, not economically, but with congratulations”, Editorial: “La verdad, aunque sea dolorosa”, *El Tiempo*, 19 March 2012, available at http://www.eltiempo.com/opinion/editoriales/ARTICULO-WEB-NEW_NOTA_INTERIOR-11385365.html (last accessed: 8 May 2012). See also: Foundation for Education and Development (FEDES), *Soacha: La Punta del Iceberg – Falsos Positivos e Impunidad*, 2010, pp. 34-35.

offered them money and work in Puerto Berrío on a farm, and told them that they had to travel to Puerto Berrío, and when they were getting close to Puerto Berrío, at a place called Puerto Nare, he had them get off the bus [...] there, in that place a third sergeant was waiting for them on a private motorcycle; sometimes they were picked up by professional soldiers of the second section of the Calibío battalion.⁶⁷ Similarly, in the case of the youths of Toluviejo executed by the Sucre Joint Task Force, the Prosecutor's Office noted that "the criminal enterprise apparently arose out of the need of the National Army to present people killed in combat. To that end they went about contacting individuals who did not belong to the troops (civilians) who undertook recruiting or getting people for that purpose, providing economic incentives for those who got them [...] when the victims were selected and ready to travel, they told the Gringo and he in turn told the army contact, who indicated at what place and site he would pick them up. From there he transported them towards the place where they would supposedly work [...] the distribution of functions was only a way of distorting reality, performing a specific function in order to achieve a common purpose"⁶⁸.

The testimony of one of the recruiters in the Soacha case, also attests to the division of labour and the allocation of specific tasks: "I know that the people I'm going to name are those who did the recruiting: Eder Obeso, known in the neighbourhood "El Costeño" or "Pique," Alex Díaz also from the coast and the storeowner and Dairo Palomino; I know that Pique was the one who made the offers of work [...] the only thing I know is that a contact was made with a professional soldier, Dairo Palomino, I got to know Dairo Palomino, I was with Dairo about two months ago and he told me that he had asked for discharge and that he worked with the B2 of the Ocaña Battalion."⁶⁹

Once the victims were handed over to the Army, an elaborate procedure was set motion to carry out the executions, pretending that military operations were being carried out, duly documented and reported. For example, in the case of the Fourteenth Brigade, "When the victim was assured, the intelligence officer, that is, Captain Alarcón, and Lieutenant Rodríguez, who was the company commander, went to meet with the battalion commander, who was Colonel Camelo Piñeros, so he would approve the operation. Then the tactical mission for the special group was drawn up in the operations section, which was under Major Fonseca. The tactical group included the number of soldiers who were going to take part, but in reality this was false, because for example, said that it went 01-02-10, in other words, one officer, two non-commissioned officers and 10 soldiers. This was false because the only ones who went were those who were going to do the job, and they sometimes went in civilian dress. After they reported the battle death, Colonel Camelo coordinated with the judicial authorities for the removal of the body and he went personally to all places where the deeds took place".⁷⁰ For its part, the Sucre Joint Task Force "chose the critical points from the information that was actually in the section about the places where the guerrillas had done things. This information was the starting point for doing the casualties; that information was gathered to bring about the result but, they did what was easiest, someone was brought in to produce the casualty [...] in the second information was

⁶⁷. Complaint signed by active Lieutenant Edgar Ivan Flórez Maestre, before the Office of General Attorney of the Nation, in the case of the extrajudicial execution of Valle del Rio Cimitarra peasant leader Aicardo Antonio Tobón Ortiz, which took place 8 July 2008 between the settlements of Jabonal and Puerto Matilda de Yondó (Antioquia).

⁶⁸. Fiscalía General de la Nación, Fiscal 2do. Especializado de Sincelajo, Diligencia de formulación y aceptación de cargos para sentencia anticipada, proceso 4540C.

⁶⁹. Office of the Attorney General of the Nation, bill of indictment, filing 11001600009920080033-01. Victim: Julián Oviedo Monroy.

⁷⁰. Complaint signed by active Lieutenant Edgar Ivan Flórez Maestre, before the Office of General Attorney of the Nation, in the case of the extrajudicial execution of Valle del Rio Cimitarra peasant leader Aicardo Antonio Tobón Ortiz, which took place 8 July 2008 between the settlements of Jabonal and Puerto Matilda de Yondó (Antioquia).

gathered from the people and they did the intelligence report and passed it on to Colonel Borja and he organized everything”.⁷¹

This high degree of coordination also required significant use of economic resources for paying guides and informants, and for obtaining military gear (uniforms, weapons and ammunition) with which the bodies were presented after the murders were committed. On the way in which these operations in the Sucre Joint Task Force were coordinated, the testimony of one of the non-commissioned officers of the army implicated in the Toluviejo case states: “I was ordered by Colonel Borja to get kids to show them as *false positives*. So if a squadron or a counterinsurgency unit was going to do a casualty, I made an arrangement with the commander of the squadron or counterinsurgency unit. After that an agreement was reached on how much the package was worth, that is, the victim and the armament that was needed. I passed on the order to the professional soldier Ivan Contreras, and he already knew what he had to do to bring about a result as a false positive. Ivan handled getting the recruiters, and the money was gotten like this: half was put up by the patrol that was going to do the casualty, and the rest was given by the colonel [...] to get weapons sometimes the counterinsurgency unit gathered some money and bought the weapons, and other times the money came out of the Joint Task Force. That money was given by Colonel Borja to an official in the Second Section, to the one who made the contacts.”⁷²

The money came from the fund for reserved expenses assigned to each military unit, from which the funds for paying informers came. As explained by Lieutenant Florez of the Fourth Brigade, there were two modalities for justifying the expenses charged to this fund: “we get you the guide, you get the money to buy the legalization KIT, the tactical mission is set up in the order of operations, and the operation is carried out, and you recover the money with the payment for information. You speak with the guide, you arrange it, and you tell him to give you \$200,000 to sign and you take the rest of the money so as to recover. Or the other is that you yourself get everything: Guide, KIT and information but this for sure, you get us someone who comes to sign, you give him \$100,000 and that’s it.”⁷³

Finally, military units handled preparing the scene of the crime suitably, so that it would seem that a battle had really taken place. For that, the victims were dressed up, weapons and ammunition were put on them, and shots were even fired. There are many witnesses who tell how things were set up: “I told the soldiers to organize a camp up on top, and to organize it so that the scene would be well set up”. The CTI helicopter arrived with Sergeant Soler who brought a white bag with camouflaged uniforms, FARC pamphlets, radio equipment, and some FARC armbands”.⁷⁴ On many occasions, the troops came from the battalion ready with weapons and gear necessary for dressing up the victims who would then be presented as killed in combat.

The elements set out above show that inside the military units involved in cases of false positives there was a significant level of organization and planning of crimes that cannot be considered the result of chance.

(d) Connection between the criminal acts and the attack

⁷¹. Office of the Attorney General of the Nation, Human rights and International Humanitarian Law Unit, Specialized Office 36, Resolution of Juridical situation, filing 4540E

⁷². *Ibid.*

⁷³. Complaint signed by active Lieutenant Edgar Ivan Flórez Maestre, before the Office of General Attorney of the Nation, in the case of the extrajudicial execution of the Valle del Rio Cimitarra peasant leader Aicardo Antonio Tobón Ortiz, which took place 8 July 2008 between the settlements of Jabonal and Puerto Matilda de Yondó (Antioquia).

⁷⁴. *Ibid.*

This requirement refers to the term “as part of”, that is, that the crimes must be committed *as part of* a widespread or systematic attack on the civilian population. That is why there is talk of a nexus between criminal acts and the attack. To establish that this criterion is met, the characteristics, the objective, and the nature and consequences of the criminal act are considered. Thus, isolated acts that differ in terms of their nature, aim, and consequences from other acts that are part of the attack would be outside the scope of the definition of crimes against humanity.⁷⁵

We will not pursue this point at great length because we believe that the information transmitted in this report demonstrates sufficiently the nexus between individual executions and the phenomenon of *false positives* throughout the country. In this regard, we refer to observations contained above in this report.

(e) Knowledge of the attack

The perpetrator of the crimes must know that there is an attack aimed at the civilian population and that his acts are part of this attack. However, it is not necessary to prove that the perpetrator was aware of all the characteristics of the attack or the precise details of the policy or plan of the state or the organization.⁷⁶ Circumstantial evidence is sufficient, for example: position of the suspect in the military ranking system; the assumption of an important role in the criminal campaign; his presence at the scene of the crime, references to the superiority of his group over the enemy group; and that which is drawn overall from the historical and political context in which the crimes were committed.⁷⁷

Because it has a direct bearing on the responsibility of the perpetrators of what was done, we refer to the analysis presented further on in this report in relation to the responsibility of the military high command.

C. Indications of Responsibility of the Top Military Leadership

During the investigation that led to this report, we noted a lack of understanding of some concepts of international criminal law among those working in the justice system and even lawyers. It has been recognized that “in Colombia the debate about the responsibility of the heads of criminal organizations is just getting started”.⁷⁸ References to the “theory of organized schemes of power” are beginning to be heard.⁷⁹ It is not our purpose in this report to refer specifically to the theory that ought to be used, but we wish to point out that it should allow for investigation of the highest-level people responsible in accordance with Colombia’s commitment as a state party to ICC Statute.

⁷⁵ ICC, Document No. ICC-01/09-19, *op. cit.*, par.97-98.

⁷⁶ Elements of Crimes, article 7, par.2.

⁷⁷ ICC, document No. ICC-01/04-01/07-717, *op. cit.*, par. 402.

⁷⁸ Fiscalía General de la Nación, *Huellas*, N° 72, July 2011, p. 60.

⁷⁹ *Ibid.*

By way of reference, we here explain the types of criminal responsibility accepted by the ICC, concentrating in particular on the responsibility of the top person in charge for its possible applicability to the case of *false positives*.

1. Individual Criminal Responsibility in International Criminal Law

Article 25 of the ICC Statute provides for individual criminal responsibility, which may be defined under different forms of commission. They are individual responsibility and shared responsibility (with another or through another). These manners of commission may be presented as follows:⁸⁰

(i) ordering, proposing, or inducing the commission of crimes (whether consummated or attempted);

(ii) facilitating commission as an accomplice, abettor, or accessory after the fact, or otherwise collaborating in the commission or attempt, including supplying means for its commission; or

(iii) contributing in some other way in the commission or attempt by a group of persons having a common purpose. In this case the contribution must be intentional.

The various forms of commission have different elements: For example, to prove the shared responsibility, the following elements must be proven:

(i) that the suspect is part of a common plan or an agreement with one or more other persons; and (ii) that the suspect and fellow perpetrator made essential contributions in a coordinated manner which resulted in the performance of the material elements of the crime.

Moreover, in the interpretation of article 25, the ICC has indicated responsibility and shared responsibility imply that the suspects had “control” over the criminal act.⁸¹

The criminal responsibility of superiors is codified in article 28 of the Rome Statute. Two types of superiors fall into this category: “military commander” and “other superiors”. The ICC has identified the following elements of responsibility for meeting the criterion of responsibility of the military commander:⁸²

(i) The suspect must be a military superior or act in practice as a military superior.

(ii) The suspect must have actual command and control, or actual authority and control over the forces (subordinates) who committed one or more of the crimes within ICC jurisdiction:

(iii) The crimes were committed by forces (subordinates) because the suspect did not exercise appropriate control over them;

(iv) The suspect knew or, in accordance with the circumstances of the time, ought to have known that the forces (subordinates) were committing one or more of the crimes within the scope of ICC jurisdiction, or were intending to commit them; and

(v) The suspect did not take all necessary and reasonable measures at his disposal to prevent or halt the commission of such crimes, or did not inform the competent authorities of the matter to investigate and prosecute the subordinates responsible.

⁸⁰. Here we simplify the concepts. For an exact formulation see Article 25 of the ICC Statute.

⁸¹. ICC, Document N° ICC-01/05-01/08-424, *op.cit.*, par. 350.

⁸². *Ibid.* par. 407.

2. The Responsibility of the Top Military Leaders in the cases of False Positives

Without going into an analysis of the applicable theory, but in the light of the principles set out in the preceding section, we will now proceed to specify the elements that point strongly to the responsibility of military commanders in relation to cases of extrajudicial executions committed during the period of study.

a. The very widespread and systematic character points toward a responsibility located “higher up”

We recall that, in his 2010 report, the United Nations Special Rapporteur on Extrajudicial Executions stated: “I have seen no evidence to indicate that the commission of such killings official was officially part of, or was were ordered by high government officials. However, I received credible and detailed reports of executions of this type in the country, committed in numerous departments, by many different military units. My investigations have made it clear that members of the security forces of Colombia have committed a considerable number of illegal executions and that the systematic picture of *false positives* has been repeated throughout the country”.⁸³

The high degree of organization and coordination for committing crimes, the premeditated manner in which the victims were chosen, and the existence of clear patterns for carrying out the attacks which were repeated in various regions of the country, are clear indications that decisions were not taken in isolation by the brigades, and suggest that the higher levels at least knew about them.

By way of example, we cite the case of Colonel Luis Fernando Borja Aristizabal, who commanded the Sucre Joint Task Force and has accepted responsibility for cases of *false positives* perpetrated by that force. Colonel Borja has stated that when he came to Sucre in 2007, creating combat casualties by killing innocent civilians was already underway. Indeed, before coming to the Joint Task Force, Borja was commander in Sumapaz, Department of Cundinamarca, where there are strong suspicions that he had ordered cases of *false positives* in 2006.⁸⁴ This case suggests that, on the one hand, the systematic character of patterns was independent of who commanded the respective unit. On the other hand, it is likely that the mobility of commanders from one military unit to another reinforced that way of operating. As will be seen below, the high number of casualties presented in a particular unit or brigade earned their commanders promotions rather than criminal investigations, thereby encouraging, expanding, perpetuating, and accentuating the impunity of the criminal activity of *false positives*. Regarding promotions, the case of Colonel Juan Carlos Barrera Jurado should be noted. He was commander of the Jorge Eduardo Rodriguez Battalion, attached to the Fourth Army Brigade (which has been very much linked to cases of extrajudicial executions), and then became a commander of the Fourteenth Brigade, also linked with cases of false positives.

⁸³. Rapporteur's Report, *op.cit.* par. 14.

⁸⁴. See: “Sobreviviente de ‘falso positivo’ relata su experiencia”, *El Tiempo*, 5 May 2012, available at http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-11728441.html (last accessed: 9 May 2012).

The following figure (Figure 2) shows the distribution of extrajudicial executions by brigades between 2002 and 2008, according to records systematized by the CCEEU.

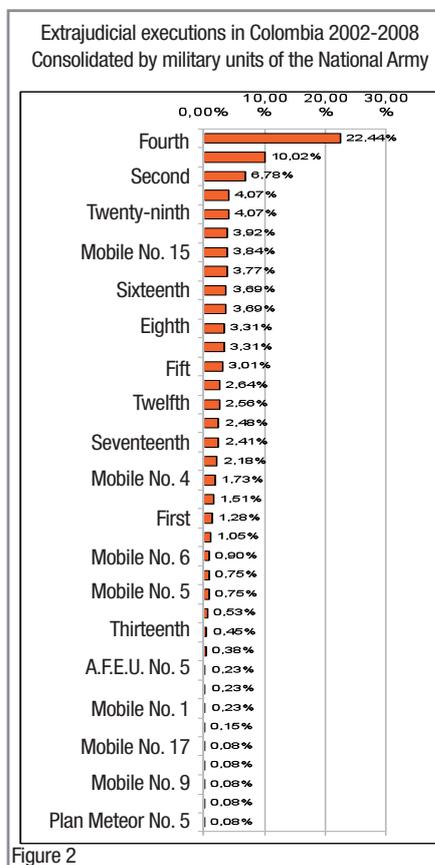


Figure 2

The geographical distribution of executions makes it possible to learn which military units were involved in the events. The Fourth (belonging to the Seventh Division), Second (belonging to the First Division), and Twentieth-ninth (belonging to the Third Division) Brigades of the National Army, accounted for nearly 40% of the total number of extrajudicial executions which occurred during the period in study. Although there were similar cases in the seven divisions of the National Army existing at that time,⁸⁵ this impressive concentration of cases in a few operational units is striking. Any observer presented with information would soon conclude that the heads of these units had some kind of responsibility in the executions, either by direct knowledge, or by having been presented with such a sudden number of casualties, or simply by having failed to control their subordinates in relation to this unusual situation.

b. A Highly Hierarchical Institution Pressured for Results

The Colombian security forces have a centralized command. Article 189.3 of the Colombian Constitution states that the President of the Republic is the commander-in-chief of the Armed Forces of the Republic. Decree Number 1512 (2000) specified the nature, competence, functions, and structure of the Ministry of National Defence. It also states that the Ministry of National Defence will be responsible for orientation, oversight, and evaluation of the exercise

⁸⁵ The Eighth Army Division was created in November 2009 with territorial jurisdiction over the departments of Arauca, Casanare, Guainía and Vichada, and the municipalities of Cubará, Pisba, Paya, Labranzagrande and Pajarito in Boyacá.

of the functions of the agencies and entities comprising National Defence Administrative Sector, without detriment to their own decision-making powers and their participation in policy formulation, in the preparation of sector programmes, and in their implementation.⁸⁶ It provides that the Ministry of National Defence is to be directed by the minister, who does so with the immediate cooperation of the General Commander of the Armed Forces, the force commanders, the General Director of the National Police, and the Deputy Minister.⁸⁷

Each of the commanders of armed forces exercises control and direct command over all its members. The Commander of the Army gives direct orders to the commanders of the eight divisions which cover the entire national territory. Likewise, the division commanders of the Army issue orders to the brigades attached to each division, and these in turn to the commanders of battalions, which are divided into companies of three or four platoons. Finally, the platoons are made up of approximately 40 people, in which there is a squadron commander for every ten soldiers.

A principle of the functioning of the military institution is the clarity of orders and knowledge of them by all members comprising it. Thus there is a clear division of functions within the institution, and many levels of command between the highest-ranking military and the lowest level for the purpose of achieving the objectives of the Armed Forces as an institution. Each command unit has a limited decision-making authority, because a single centralized command is exercised in which higher levels, starting with the president of the republic and the minister of defence, make the largest number of strategic decisions and the most important ones in terms of policy, mission, objectives and methods.

Military organizations are characterized by narrow ranges of control, that is, with a small and limited number of immediate subordinates reporting directly to the superior and careful and constant monitoring of the fulfilment of orders, which may be issued orally. Although the superior in the chain of command does not directly control all subordinates, all the decisions that he makes at the top of the institution are binding on all members, and are going to be carried out at once, due to the strong discipline entailed in this model of organization and to the principle of due obedience.

Thus, a statement by the President of the Republic or the Commander of the Armed Forces will be understood as an imperative for the remaining military structures. Under this logic, the statement by Lieutenant Colonel Wilson Cedeño of the Fourteenth Brigade when he said that “each company commander must get me one killed in combat every month and the second section must get me three killed a month. At this time the war being measured in liters of blood; the commander who does not have results of killed per month will be sanctioned accordingly, and it will be reflected in his military record”⁸⁸ should be interpreted as a direct order to all his subordinates. It also reflects an efficiency-driving and inappropriate vision of the definition, orientation, and objectives of the Armed Forces, in the context of the Policy of Democratic Security, in which “military successes” become ends in themselves in the armed forces.

⁸⁶. Presidency of the Republic. Decree 1512 (2000) (August 11). Article 1-

⁸⁷. *Ibid.* Article 2.

⁸⁸. Procuraduría General de la Nación, Dirección Nacional de Investigaciones Especiales, Unidad de Derechos Humanos, *Diligencia de queja suscrita por el señor Edgar Iván Flórez Maestre*, Medellín, 15 December 2009.

Thus, the military institution in general feels obliged to show results, due to military discipline, due obedience, and competition with other military units to present the “best” results, but also a unit military that shows results, even if they are the result of extrajudicial executions, does so in order to attain the mission objective of the institution and to increase organizational efficiency.

This situation is further aggravated by the threat of military commanders imposing sanctions in response to failure to meet the goal of casualties laid down by the Armed Forces. All military units in Colombia are heavily pressured to present positive combat results. Thus, all mid-level and top commands, under pressure to show results, found in extrajudicial executions the figures that backed their performance as military commanders. Thus, the so-called *scandal of false positives* amounts to the combination of the reward policy, the pressure for results of the war policy, and a deep-rooted practice of extrajudicial executions in the Colombian security forces.

The implementation of the Democratic Security Policy required the expansion and upgrading of the armed forces, particularly the Army, as a core element for its implementation. Between 2002 and 2006, troop strength rose from 124,000 to 170,000 soldiers. Seven mobile brigades,⁸⁹ six high-mountain battalions⁹⁰ and two new divisions (the Sixth and Seventh) were also created. Since that time, each Army division has had a mobile brigade, except the Fourth, which has two.⁹¹ In addition, platoons of “Soldiers of My people” were created almost everywhere in the country.⁹²

c. Neglect of Oversight in the Context of Directives that Encouraged Homicides

As part of this counterinsurgency strategy, the so-called Democratic Security Policy encouraged the involvement of the civilian population in tasks proper to the security forces, by setting up a network of collaborators and informants defined as “a network of citizens in urban and rural areas of the country who cooperate actively, voluntarily and unselfishly with the authorities, participating in citizen culture programs for security providing information that will allow for the prevention and prosecution of crime.”⁹³ The measure was supplemented by a system of rewards for information aimed at the citizenry as a whole. To that end, specific funds from the national budget were provided to be allocated for the payment of rewards and incentives for information.⁹⁴ For that purpose, the Armed Forces had a fund for reserved expenses with complete discretion.⁹⁵ However, the policy did not make provision for adequate oversight or

⁸⁹ The Ninth, with jurisdiction in the departments of Meta, Guaviare, Huila Vaupés and Vichada; the Eighth covering Cundinamarca, Tolima, the Sumapaz region, Boyacá and Caldas; the Twelfth in Córdoba; the fifteenth in Norte de Santander; the Tenth and the Thirteenth in Caquetá, Putumayo and Amazonas; and the Fourteenth in El Valle.

⁹⁰ One in Serranía del Perijá with jurisdiction in the departments of Cesar and Norte de Santander, one in the Sierra Nevada of Santa Marta, with jurisdiction in the department of Magdalena; one in Los Farallones, with jurisdiction in the departments of Valle, Tolima and Chocó; one in El Espino with jurisdiction in the departments of Boyacá, Arauca and Casanare; one in the department of El Cauca; and one in the coffee-growing region.

⁹¹ In this regard, see: *Fundación Seguridad y Democracia* (FEDES), *Revista Coyuntura de seguridad*, N° 13, April- June 2006, pp. 19-21.

⁹² The “Soldiers of my village” Program consisted of recruiting youth from the smallest settlements, especially in rural areas of the country, who after a mere three months of training were brought in as troops. Their functions were limited solely to the perimeter of the area where they lived. The advantage sought from soldiers of this kind was, on the one hand people familiar with the area who could provide information on the people living there, and on the other, to have guides who could orient the actions of troops in jungle or mountain areas. It was also hoped that being soldiers from the region, they would enjoy the protection of the civilian population. See: *Comisión Internacional de Juristas (CIJ)*, *Colombia: socavando el Estado de Derecho y consolidando la impunidad*, Bogotá, 2005.

⁹³ The formulation of the policy expressly states that, “The government will promote the voluntary and patriotic active participation of citizens in fulfilling their constitutional duties and in applying the principle of solidarity, so that each citizen contributes to preventing terrorism and delinquency”, Presidencia de la República, Ministerio de Defensa Nacional, Política de Defensa y Seguridad Democrática, Bogotá, 2003, par. 130-131

⁹⁴ *Ibid.* par. 132.

⁹⁵ According to point 5 of Ministerial Directive 029 (2005), “those handling the reserve expenses will have the power to negotiate the information with the human source, in accordance with factors proper to the information supplied and to fulfilment of strategic plans, neutralization of

means for verifying the truth of the information provided through informers and collaborators, so that the lack of adequate oversight combined with the assumption that the civilian population was the main source of support for the guerrillas created a hazardous situation primarily for the peasant population, which was associated with the insurgency and therefore became a primary target for extrajudicial executions.

The top military, including the Ministry of Defence, is responsible for the implementation of directive 029 (2005), because a structured system of payment of reward for killing someone was set up. That implied enhanced oversight responsibility for this reward system, especially when the phenomenon of murdering civilians at the hands of the state, on multiple occasions and presenting them as killed in combat, was nothing new.

Indeed, ministerial directive 029 (2005) further bolstered extrajudicial executions which already had other incentives and pressure for results, and produced a serious risk with proven consequences that was not monitored. The seriousness of this situation was recognized by the United Nations Special Rapporteur for Extrajudicial Executions who raised the need to suppress “any kind of incentive to the military for executions”.⁹⁶

Thus far there is no indication that Directive 029 (2005) has been repealed as requested by the U.N. Human Rights Committee in its report on Colombia, which clearly stated that “*the State party should take effective measures to discontinue any directive of the Ministry of Defence that can lead to serious violations of human rights, such as extrajudicial executions and fully comply with its obligation to assure that serious violations of human rights are impartially investigated by the regular justice system and that those responsible are punished*”.⁹⁷

The United Nations Special Rapporteur for Extrajudicial Executions made a similar demand in his Final Report on his visit to Colombia, stating that “*The Government should prohibit all incentives offered to members of the armed forces for combat killings. It should not permit any rewards for information to civilians without oversight and should audit discretionary funds for such rewards*”.⁹⁸

With the issuance of ministerial secret directive 029 (2005) several factors came together giving rise to the payment of rewards for performing extrajudicial executions. Warnings made for years by human rights organizations on the practice of the security forces of committing extrajudicial executions were ignored. This increased the risk that is inherently entailed in paying for deaths in combat. There was no political, economic, or legal oversight over the payment of such rewards and many military units saw in the pressure for results a stimulus for allowing extrajudicial executions or participating in them. The committee set up by ministerial directive 010 (2007) of the Ministry of Defence, was transitory in nature, because its mandate was for one year, even though there were serious indications that crimes were occurring on a large scale based on the reward policy. These measures were insufficient to halt the phenomenon of large scale crime

criminal actions, and political social, and economic impact and government policies”.

⁹⁶. Statements of Professor Philip Alston, Press release, Bogotá, 18 June 2009, available at <http://www.nacionesunidas.org.co/index.shtml?apc=i1-----&s=n&x=58590> (last accessed: 4 May 2012).

⁹⁷. *United Nations. Human Rights Committee.*

Consideration of reports by States parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Colombia. Document (A/HRC/14/24/Add.2. August 4 2010. Recommendation Num. 14.

⁹⁸. *UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston.* Addendum. Mission to Colombia, 31 March 2010. Doc. A/HRC/14/24/Add. 2 (Summary Page 2, First paragraph) *Ibidem.* Paragraph 91.

that was being committed with particular intensity with the implementation of the Democratic Security Policy and the establishment of a system for measuring the government's war policy in terms of litres of blood.

As a system for monitoring the granting of rewards, directive 029 created a "technical oversight committee" for its application. That committee was comprised of an adviser from the Ministry of Defence, a delegate of the General Command of the Armed Forces, the head of the administrative unit of the Office of Army Intelligence and its counterparts in the Navy, Air Force and Police, and an analyst from the Administrative Department of Security (DAS) and another from the CTI of the Office of Attorney General. It was supposed to meet at least once a month to evaluate the "carrying out and impact" of the directive. For these oversight meetings the government ordered that "the delegates of each force or agency shall provide information related to the leaders captured or killed in combat [...]" but it remained silent about the rest of the members of armed groups outside the law which comprised most of the cases of false positives.

There was no oversight over the policy and no adequate oversight by the Comptroller General of the Republic over the sums of money paid for the extrajudicial executions, as established by article four of Law 1097 (2006). Likewise, the Armed Forces presumably also established internal oversight mechanisms suitable for carrying out the reserved expenses, as provided for in article six of that law. For example, it was overlooked that the government, through the Ministry of Defence and through secret directive 029 secretly created a reserve expense in giving rewards for information that would make it possible to kill members of armed groups, which would later become illegal, because with the issuance of law 1097 (2007), its first article stipulated that "reserved expenses are those dispensed to finance activities of intelligence, counterintelligence, criminal investigation, and protection of witnesses and informants", but never for rewards for casualties in combat.⁹⁹ However, the ministerial directive operated at least until end of 2008. On 20 November 2007, the General Command of the Armed Forces issued permanent directive N° NR. 388 - 28, which sought "to privilege as measurement of operational results, group and individual demobilizations rather than captures, and the latter over deaths in combat". However, this measure had no practical utility because one year after it was issued, it became public knowledge that throughout 2008, the Armed Forces had committed extrajudicial killings. On the contrary, the campaign to publicize the policy of rewards in exchange for combat deaths was carried out effectively. Article 8 section d. of ministerial directive 029 charged the Technical Oversight Committee with the role of "guiding the publicizing of the rewards program and the procedures for providing information". The outreach campaign was so successful that it has been proven that extrajudicial executions have taken place in most of the departments of Colombia.

d. Undeniable Knowledge of Cases of Extrajudicial Executions

Given its seriousness and widespread nature, this phenomenon could not have been unknown by the most senior military commanders.

⁹⁹ Article 3 of secret ministerial directive 029 (2005) sets forth the "pricing criteria for payment of rewards for leaders of [armed organizations outside the law] and drug trafficking leaders"; it has a table of prices per head ranging from five billion pesos for a top commander to three million eight hundred fifty thousand pesos for an enlisted combatant.

According to statistics of the Human Rights Unit of the Office of the Attorney General of the Nation, after Ministerial Directive 029 (2005) was issued, the number of complaints against the security forces for extrajudicial executions rose from 73 in 2005, to 122 in 2006, and 245 in 2007.¹⁰⁰

Moreover, starting in 2003, the United Nations Office of the High Commissioner began to note in its reports an increase in cases of extrajudicial executions committed by the security forces.¹⁰¹ After 2005, the Office of the High Commissioner began to report cases of *false positives*: “Cases of extrajudicial executions of persons whose bodies were subsequently presented to the media as guerrillas or paramilitaries killed in combat were striking”.¹⁰² In 2006, the Office pointed out that it had observed “an increase in allegations of actions attributable to members of the security forces, and particularly the army. This was particularly the case in the Department of Antioquia, as well as in Chocó, Norte de Santander, and the Sierra Nevada de Santa Marta region. Most of these executions have been portrayed by the authorities as guerrilla casualties in the course of combat, after alterations of the crime scene. Many were wrongly investigated by the military criminal justice system. Cases were recorded in which the commanders themselves allegedly agreed to dress up the victims in guerrilla clothing in order to cover up the facts and simulate death in action [...] This type of conduct, its denial by certain authorities and the absence of any sanctions against the perpetrators raised the issue of the possible responsibility of senior officials”.¹⁰³

Indeed, the government and the military high command had to have been aware of the existence of a phenomenon of serious extrajudicial executions, because on 6 June 2007, the Ministry of Defence, through ministerial directive 010, instructed the armed forces to avoid killing protected persons and created a committee to monitor complaints on cases of extrajudicial executions. Likewise, directive NR. 300 28 gave the Chief of Joint Operations the task of overseeing the implementation of this directive, receiving, consolidating, analyzing, and evaluating the information on operational results supplied by the Command Force and Joint Organizations. However, despite these measures which suggested knowledge or suspicion of serious crimes, no move was made to investigate military officers for their presumed criminal responsibility.

e. The Career of Top Military Officers Supports the Assertion that they were Aware of What was Happening

The argument made many times by the Colombian government to the effect that executions were carried out by some isolated military men without the knowledge of their superiors is without basis when we examine the career of top military officers of that time. In particular, Generals Mario Montoya and Oscar Gonzalez Peña rose to leadership in the Army after being brigade and division commanders in Antioquia, the department where most of the extrajudicial executions reported in the study period were concentrated.

¹⁰⁰. “La directiva ministerial 029 de 2005”, *El Espectador*, 1 November 2008, p. 2A.

¹⁰¹. In its report on the human rights situation in Colombia during 2002, the Office of the High Commissioner also noted a change in the modalities of executions: “It should be noted that the practices of massacres continues, although the perpetrators of executions now seem to prefer those of an individual or selective nature. The complaints of these violations included executions and massacres attributed directly to the security forces”. See: UN document N° E/CN.4/2003/13 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia (referring to the situation in 2002), 24 February 2003, par. 45.

¹⁰². UN document N° E/CN.4/2005/10 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia (on the situation in 2002), 24 February 2003, par. 45.

¹⁰³. UN Document No. C/CN.R.4/2006/009 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia (referring to the situation in 2004) 28 February 2005, par. 86.

Indeed, General Mario Montoya had been Commander of the Fourth Brigade in Antioquia between 2001 and 2003 and later served as commander of the Seventh Division of the National Army (from March 2006 to November 2008). While he was leading the Fourth Brigade, General Montoya commanded the Operation Mariscal, Operation Orion and Operation Meteor, and Operations Marcial and Marcial Norte in eastern Antioquia. Extrajudicial executions were reported in all of them, and were widely denounced. As reported by CINEP, 18 extrajudicial executions were committed in Antioquia in 2002, and 24 in 2003. As noted above, the CINEP data probably represent an undercount. The Colombia-Europe-United States Coordination Database records 24 cases of victims of extrajudicial executions for the department of Antioquia in 2001, 51 victims in 2002, and 86 in 2003, the years when General Montoya commanded the Fourth Brigade.¹⁰⁴

Turning to General Oscar Gonzalez Peña, he took over command of the army after having led the Fourth Brigade (from December 2003 to July 2005) - having replaced General Montoya - and then served as commander of the Seventh Division (from August 2005 to October 2006). During that time period, Colombia-Europe-United States Coordination compiled complaints in Antioquia of 248 cases of extrajudicial executions committed by troops under his command. During his period in the Fourth Brigade, he was decorated for his *good operational results*. He was publicly criticized by organizations in Antioquia for the cases of extrajudicial executions while he was in that department.¹⁰⁵

While these are the most prominent cases, all the commanders of the National Army and the commanders of the Armed Forces during the period under examination were promoted after having commanded lower-level units, in many cases even during the period when we note that the number of executions rose considerably. Given the widespread nature of this criminal activity, the likelihood that these commanders had some knowledge or suspicion is quite high.

The fact that military officers such as General Montoya and Gonzalez Peña, possibly responsible by both action and omission in cases of extrajudicial executions while they were serving as brigade or division commanders, were able to rise to even the top command position in the army supports the claim that the top military leadership at the time had been directly involved in cases, knew of the executions, and in their position of power, concealed or failed to act to prevent the crimes that continued to be committed. This also raises a serious problem: rather than being investigated, the commanders involved were promoted, and being at the top of the army command enabled them to expand throughout the country the perpetuation and concealment of the criminal practice of *false positives*.

¹⁰⁴ CINEP Human Rights and socio-political Violence Database, Programa por la Paz (PPP), Deuda con la Humanidad 2: 23 años de falsos positivos (1988-2011), Bogotá, 2011, Table 1, p. 325.

¹⁰⁵ On accusations of extrajudicial executions in Antioquia committed by troops under his command General Gonzalez Peña said that "the accusations are directly proportional to the success of the units. It's the way some supporters of subversion have of halting operations". "Le ofrezco excusas al país", *El Espectador*, 8 November 2008, available at <http://www.elespectador.com/impreso/judicial/articuloimpreso89076-le-ofrezco-excusas-al-pais> (last accessed: 6 May 2012).

II. Administration of justice for false positives: impunity of those most responsible

According to the Human Rights Unit of the Office of Attorney General of the Nation, 1579 investigations have been opened before it for cases of extrajudicial executions committed by members of the security forces since January 2000. Of all the investigations, 1405 cases (88.9%) are at the investigation stage, 45 with charges filed (2.8%), and 30 in trial (1.9%); a judgment has been rendered in only 16 cases (1%).¹⁰⁶ However, the vast majority of cases are at the preliminary stage of the process, and no alleged perpetrator has even been named.

In this report we are especially emphasizing the responsibility of the highest command levels and the need for investigations. While we recognize that there are investigations and cases open before the judicial system, our approach to the issue of the administration of justice in cases of *false positives* seeks to go beyond the statistics. We also recognize the huge amount of work involved in pursuing a large number of cases. However, our analysis seeks to clarify to what extent the reality of these processes entails the need to eliminate impunity for the phenomenon that Colombia suffered between 2002 and 2008 and against whom it was carried out.

As explained above, this study also seeks to shed light on whether Colombia is meeting the standards set by the ICC in the struggle against impunity. In this regard, as we noted, the ICC focuses on bringing to justice “those most responsible”. It should also be kept in mind that in the area of complementarity, the case law of the ICC has determined that:

- In order for a case to be declared inadmissible on the basis of complementarity, the investigations carried out by the national courts must refer to the same individual and to the same conduct for which they could be tried before the ICC.¹⁰⁷
- The first aspect that must be examined is whether these investigations (against those most responsible for the conducts for which they are liable under the ICC Statute) exist or not. This is not a matter of the capacity and will under article 17 of the Statute, since that is a second part of the analysis that must be made only if such investigations exist.¹⁰⁸

¹⁰⁶. Human Rights Unit of the Office of Attorney General of the Nation, Oficio N° UNDH-DIH 000669, 27 February 2012

¹⁰⁷. ICC, Document No. ICC-01/09-1/11-307, Prosecutor v. Ruto & Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Appeals chamber, 30 August 2011, available at <http://icc-cpi.int/NR/exeres/E8945F90-4E64-4352-9CDE-CD98208F25C.htm> (last accessed: 7 de mayo de 2012) (henceforth “Document No. ICC-01/09-1/11-307”), par. 1. While this judgment has to do with a case in which there was an arrest order against some individuals, the same principle should apply to situations that are under preliminary examination. Indeed, in this regard the ICC Office of Prosecutor has explained that when the test of complementarity is made at this initial stage the same thing is done in relation to those who could come under investigation should the Office of Prosecutor decide to open it. As we explain, given the policy of criminal action against those most responsible, this evaluation would be done in relation to those persons.

¹⁰⁸. ICC, Document No. ICC-01/09-1/11-307, *op.cit.*, par. 42.

A. Individual Investigations and Lack of Investigation of Patterns

As described above, there are now a significant number of cases underway. A summary analysis of the data presented by the Attorney General's Office regarding investigations and prosecutions underway, when compared with the information obtained on the unfolding of ongoing cases, makes it possible to conclude immediately that the events are always analysed as individual incidents isolated from one another rather than as system crimes or as part of a general policy. Therefore, as we shall see below, the only ones pursued are low-ranking soldiers while the highest-ranking commanders responsible for the crimes remain unpunished.

While the Attorney General's Office is obliged to open an investigation for each crime that occurs, it is crucial that the legal concept of related actions be used, given the repetitive nature of the criminal conduct that affected a large number of victims. Such a way of proceeding would allow for investigation into patterns, in order to establish the systematic nature of the violations, so as to be able to conduct investigations and initiate criminal proceedings on charges of crimes against humanity. Likewise, in a situation in which the judiciary is overwhelmed with the number of cases, a judicial approach to cases of *false positives* as what they were, namely an institutional practice, could even allow for better handling of the resources of the judiciary.

For example, the case of the highest ranking officer put on trial, Colonel Borja Aristizabal, who was commander of the Third Joint Task Force of Sucre and who confessed to more than 50 cases of *false positives*,¹⁰⁹ including the notorious cases of Tolviejo,¹¹⁰ is well known. Colonel Borja has received at least five guilty sentences, that is, at least five cases for similar acts committed by the force under him, have been tried. Another example is that of the 17 investigations opened by the cases of *false positives* in the municipality of Soacha, where the same brigade was involved.

While related actions have been invoked in a few cases, as a rule in these cases a small number of investigations into victims missing or killed at the same time or in a short period of time are combined.¹¹¹ That is, the approach to related actions is made exclusively from the characteristics of the crime base, and not based on the identity of patterns or from study of the circumstances of the chain of command which ordered, facilitated, or allowed the perpetration of the crimes themselves, committed by the same military unit, with identical patterns and a shared motivation.

When cases are handled in isolation, it is harder to propose investigations that can establish the circumstantial elements of crimes against humanity, analyzed above, including the existence of a plan or policy. We not aware of any case that has been investigated or tried for crimes against humanity as defined in international law. While this notion has indeed been mentioned in some cases and rulings, it is generally not used in its proper meaning.

¹⁰⁹ Luis Fernando Borja, el coronel que confesó 50 'falsos positivos', *El Tiempo*, 28 February 2012, available at http://www.eltiempo.com/justicia/coronel-del-ejercito-que-confeso-50-falsos-positivos_11242403-4 (last accessed: 7 May 2012).

¹¹⁰ Specialized Criminal Court of the Circuit of Sucre, Radicado N° 2011-00004-00, Plea bargaining sentence against Luis Fernando Borja Aristizabal, 23 June 2011.

¹¹¹ For example, the cases of Soacha, Tolviejo, of the girls and boys in Tame. However, the aspect of related actions is only partly underway. For example in the Soacha cases the cases of youths who had been taken from Soacha to the same location and killed the same day were brought together. But the cases of youths killed a few days later by the same brigade under the same conditions were not classified as related actions. .

Although procedures are carried out formally complying with the duty of the state to open investigations, they lack the depth needed to establish in court the seriousness of the phenomena or to get to the truth about who was behind this criminal practice.

The absence of comprehensive and cross-cutting investigations occurs not only in the cases of false positives. For some years the FIDH has noted the lack of will on the part of Colombian authorities to open cases on patterns so as to determine the structure that supported the commission of crimes and to identify the set of actors involved. The Inter-American Court of Human Rights has ruled in this regard, stating: “In complex cases, the obligation to investigate involves the obligation to direct the efforts of the state apparatus at unravelling the structures that allowed such violations, their causes, their beneficiaries and their consequences, and not only to uncover, prosecute and if appropriate, punish the immediate perpetrators [...] Thus, the determination on the perpetrators of extrajudicial execution [...] can only be effective if it is based on a comprehensive view of the events that takes into account the background and the context in which they occurred, and that seeks to disclose the structures of participation [...] As part of the obligation to investigate extrajudicial executions [...] state authorities should identify procedurally joint patterns of action and all those who in diverse ways were involved in such violations and their corresponding responsibilities. Knowledge of the scene and material circumstances of the crime is not enough. Knowledge of the power structures that allowed it, designed it, and carried it out intellectually and materially, and the persons or groups who were interested parties or would benefit from the crime (beneficiary) is also absolutely necessary. This may in turn, allow the generation of hypotheses and lines of investigation; analysis of classified or reserved documents, and an analysis of the crime scene, witnesses, and other evidence is also needed but without relying entirely on the effectiveness of technical mechanisms such as these, to dismantle the complexity of crime, since they may be insufficient. Consequently, it is not a matter solely of examining a crime in isolation, but as embedded in a context that provides the elements necessary for understanding its structure of operation”.¹¹²

In relation to the nature of the investigations and departing slightly from the issue under investigation for patterns, we would like to make some additional remarks that emerge from our investigation into the administration of justice in cases of *false positives*.

We note that as a rule in cases of false positives the accusation is generally homicide (either aggravated, or against a protected person).¹¹³ However, the accusation is not always forced disappearance of the victims, in cases in which the definition of that crime would be met, given the circumstances of the case. Cases in which torture, sexual violence, or arbitrary detention are investigated are even rarer, almost non-existent, even though there are indications that such crimes could have been committed. This is made difficult because the preliminary investigations usually are not of a complete nature and tend to display serious deficiencies.¹¹⁴

¹¹². Corte Interamericana de Derechos Humanos, *Caso Manuel Cepeda Vargas c. Colombia*, Sentencia de 26 de mayo de 2010, par. 188-119

¹¹³. Sometimes there are also accusations of (aggravated) conspiracy and forgery of government documents, depending on the circumstances of the act.

¹¹⁴. Interview with the Association for Alternative Social Development – MINGA, 27 April 2012, in possession of FIDH.

B. Impunity of Senior Military Commanders

The situation examined in the previous section inevitably leads to the lack of prosecution of those most responsible for extrajudicial executions. The facts are investigated individually, under the idea that they are isolated actions that do not affect the responsibility of the top military leadership. As noted, although criminal investigations for cases of extrajudicial executions are taking place throughout the country, those implicated in most of them are lower-ranking soldiers, and only very exceptionally have they entailed investigations of middle-rank officers. In February 2012, the Human Rights Unit of the Office of Attorney General reported that it is pursuing investigations for homicide attributed to state agents, against 2,624 soldiers, 629 non-commissioned officers and 427 officers.¹¹⁵ For this investigation, we also had in hand the list of cases presented by the Human Rights Unit of the Office of Attorney General of the Nation, and we were able to establish that most of the investigations are directed against soldiers; by way of exception, some are directed at corporals and sergeants (the latter are in the category of non-commissioned officers). Even more exceptional are investigations for such deeds against sub-lieutenants, lieutenants, captains, and majors; only one is against a colonel and as far as we know there is none against generals.

That is the case even though the tables themselves indicate that the members of the army investigated or accused charged often belonged to the same brigade or division, or were enrolled in the same battalion.¹¹⁶

As noted above, the very geographical distribution of executions makes it possible to determine the military units involved in the events. The Fourth (part of the Seventh Division), Second (part of the First Division) and Twenty-Ninth (part of the Third Division) Brigades of the National Army accounted for almost 40% of all extrajudicial executions between 2002 and 2008. Nevertheless, the commanders of these divisions have not been prosecuted or called to account for the extremely high number of cases of reported in their jurisdiction. On the contrary, many of them have been decorated and promoted for the supposed operational success of their military units.

We mentioned earlier Army generals Mario Montoya and Oscar Gonzalez Peña, who led units responsible for a high number of cases of *false positives*. We reiterate here what was stated there. General Montoya was not only not investigated for these deeds, but in fact was named Commander of the Armed Forces in 2006. In 2005 he himself recognized his successor at the Fourth Brigade, Commander Gonzalez Peña, as “the best commander of the country during his period as commander of the Fourth Brigade, because his unit was the one that reported the highest number of kills: 857.”¹¹⁷ In 2008 General Gonzalez Peña’s achievements earned him his promotion to Commanding General of the army, once again replacing General Montoya, a position in which he served until 2010.

In 2008 when General Gonzalez Peña rose to be Commanding General of the Army, the Minister of the Interior of Antioquia Jorge Mejia, protested, calling for the general to cooperate with the

¹¹⁵ Human Rights Unit of the Office of Attorney General of the Nation, Oficio N° UNDH-DIH 000669, 27 February 2012.

¹¹⁶ Tables in possession of the FIDH, which we are not presenting due to space, but which are available.

¹¹⁷ “Wikileaks: un cable revive el horror de la matanza de los ‘falsos positivos’ de Colombia”, *Foreign Policy in Focus*, 3 March 2011, translated and published by equinoxio.org, available at <http://equinoxio.org/destacado/wikileaks-un-cable-revive-el-horror-de-la-matanza-de-los-falsos-positivos-de-colombia-10706/> (last accessed: 7 May 2012).

justice system “to clarify at least a thousand cases of deaths of civilians throughout the country, 248 of which were reported in Antioquia between 15 December 2003 and 16 July 2005, while he led the fourth Brigade, and between 16 August 2005 and 17 October 2006, when he commanded the Seventh Army Division [...] at that time we presented our concern over the excessive demands for casualties from different troops as proof of effectiveness [...] we stated in writing that we were facing a serious humanitarian crisis caused partly by the demand for ‘positives,’ incentives, and the rewards program”.¹¹⁸

With regard to General Montoya, he resigned after the uproar triggered by the case of eleven youths of Soacha, although no formal investigation was initiated against him. On the contrary, in 2009 he was appointed as Colombia’s ambassador to the Dominican Republic.

Following the public notoriety of extrajudicial executions by members of the army after 2008, strong pressure was stirred up in national and international public opinion, and in October 2008 the Minister of Defence created a temporary commission to carry out an internal investigation to clarify what was happening in military garrisons.¹¹⁹ The purpose of that commission was not to pursue any criminal investigation or find evidence of possible criminal responsibility or even to identify those responsible. On the contrary, this commission was charged with carrying out an investigation of an administrative nature into allegations of forced disappearances and killings by members of the security forces in the jurisdictions of the Second and Seventh Army Divisions (to which the military units involved in the extrajudicial executions in Antioquia, Sucre and Santander belonged, including those of the young people in Soacha and Tolvujejo, which were the events that had become most publicly notorious). As part of its mandate, the commission was to include in its report “analysis of intelligence, the statement of the problem, the implementation and evaluation of operations and military missions about which complaints are raised, along with analysis of levels and sequence of the chain of command involved in operations and missions”.¹²⁰

The report produced by the commission made it clear that there were serious deficiencies in the handling of intelligence, in the justification of the expenses incurred out of the reserve expenditures fund, and the planning of operations.¹²¹ Thus, the commission was able to establish many irregularities which had undoubtedly facilitated perpetration of the executions. Among the commission’s findings, irregularities were detected with the military command structure, with respect to sources of information, in relation to systems for evaluating military procedures and with regard to the use of reserve funds.¹²² These findings include the following:

- ▲ The supporting documentation for the operations that gave rise to the supposed battles was questionable; it was never precise information on a legitimate military objective; it was never corroborated by military intelligence units. Sometimes the military units

¹¹⁸. “Nuevo comandante del Ejército deberá mostrar su compromiso con los DDHH”, *Cambio*, November 2008, available at http://www.cambio.com.co/paiscambio/802/4662259-pag-2_2.html (last accessed: 5 May 2012).

¹¹⁹. The commission is commonly known as the “Suarez Commission” because it was chaired by General Carlos Arturo Suarez Bustamante.

¹²⁰. Ministerio de Defensa Nacional, *Informe de la Comisión Transitoria constituida para investigar y recomendar medidas administrativas en relación con los casos de desapariciones y homicidios ocurridos en jurisdicción de la Segunda y la Séptima División del Ejército Nacional*, noviembre de 2008.

¹²¹. *Ibid.*

¹²². Ministerio de Defensa Nacional, *Informe de la Comisión Transitoria constituida para investigar y recomendar medidas administrativas en relación con los casos de desapariciones y homicidios ocurridos en jurisdicción de la Segunda y la Séptima División del Ejército Nacional*, noviembre de 2008.

that committed extrajudicial killings gave information on combat in areas where armed groups had little influence; at other times military units acted recklessly, because in the information that they presented to justify military action, the supposed enemy was quite capable of a military response, and yet they achieved the combat casualties they claimed.

- ▲ It was corroborated that there were no records of their information sources, the beneficiaries of the rewards, and mission orders, and if there were any, they were unreadable, because their identity could not be corroborated or were established after the fact.
- ▲ For example, in the inspection made of the Bomboná Battalion which is part of the Seventh Division, the report notes various irregularities in the handling of intelligence information: “We found no records of checking the information with technical and human intelligence [...] when documents in the file of sources and agencies were requested, we were told that they do not exist, they have never been done, and so the real and fictitious information sheets on the sources aren’t available, there is no record of the document assigning codes to informants, and there are no folders allowing for monitoring the production of the information provided, or its origin [...] the information is written in a personal agenda of the officer through the use of some codes without indicating their source; that is why there cannot be any clear oversight of the information, and that is the source of the information used for planning operations”.
- ▲ In connection with the use of the reserved expenses fund: “payment for information takes place for generalized information, and not for specific objectives in the unit’s area of responsibility”. The documents of legalization of the payments held at the battalion branch do not satisfy the requirements, on many of them the fingerprints are unreadable, and there are no copies of the ID cards supporting the payment”.

As a result of the report, 27 members of the military, including three generals of the Republic, were discharged for irregularities that came to light after the Soacha scandal was revealed.¹²³ It was just after this dismissal that the Army Commander General Mario Montoya resigned from his post. Nevertheless, despite the strong indications given by the commission’s report, suggesting serious structural faults which had led to serious crimes being committed, neither the 27 military men discharged nor General Mario Montoya, the top armed forces commander during the period when most of the cases of extrajudicial executions in the country took place, were linked to any criminal investigation for their presumed responsibility in what happened.

From all the foregoing, it can be concluded that no effective criminal investigations have been initiated against senior military officers, those who are most responsible for the crimes against humanity committed in Colombia. The ICC itself has stated that the mere absence of such cases is sufficient condition of admissibility, and hence there is no need to delve into concepts such as willingness or capability.¹²⁴ However, beyond the absence of actual court

¹²³ The following were discharged: Generals Roberto Pico Hernandez (Commander of the Seventh Brigade), José Joaquín Cortés (Commander of the Army’s Second Division) and Paulino Coronado (Commander of the Army’s 30th Brigade); Colonels Santiago Herrera Fajardo (former commander of Mobile Brigade 15), Juan Carlos Barrera Jurado (Commander of Brigade 14), Rubén Darío Castro Gómez (Commander of Mobile 15), Carlos Bohórques Botero, Néstor Gamero Piñeros, Wilson Castro Pinto and Ángel Alberto Acosta Vargas; Majors Carlos Alberto Rodríguez, José Simón Baquero, Oscar Mauricio Peralta and Nemesio López Díaz; and Captain Javier Alarcón.

¹²⁴ ICC Office of Prosecutor, Draft Policy Paper on Preliminary Examinations, The Hague, 4 October 2010, par.55 when the document cites the document Prosecutor v. Germain Katanga y Mathieu Ngudjo, *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-01/04-01/07-1497, 25 September 2009, par. 78.

processes, there are other indications that prompt serious doubts in the FIDH about the will of the Colombian government to ensure justice and to help bring to justice those most responsible for the extrajudicial executions. By way of example, the statements made the vice-president of the republic, Angelino Garzón in October 2011, in which he favoured amnesty for the military high command should be kept in mind.¹²⁵

Moreover, as we will see below, far from contributing to justice, the state facilitates the perpetuation of the impunity of the top military command with legal reforms, such as that of military criminal jurisdiction or the recently adopted reform of the legal framework for peace, which are explained in the next section.

C. Lack of Independence: The issue of the Military Criminal Courts

A major issue that has arisen is the assumption of investigations by the military criminal justice system. As far back as 2005, the Office of the High Commissioner for Human Rights was protesting: *“the identification of corpses by members of the army contributed to the rise in the number of these cases investigated by the military criminal justice system. Military jurisdiction almost systematically attempted to take on these investigations. On several occasions the Office of Attorney General forwarded cases to the military criminal courts or refrained from claiming jurisdiction”*¹²⁶

The way in which extrajudicial executions are carried out means that cases are assumed by the military criminal justice system from the outset. The *modus operandi* which we related above on the manner in which the portrayal or legalization of the casualty (in the jargon used by the military themselves) is carried out is aimed at concealing the act, destroying the evidence, and producing false evidence, all of which certainly seeks to obstruct or hinder an impartial investigation. This is compounded by the fact that it is the perpetrators and accomplices themselves who are presented as sole witnesses or main witnesses, which is part of the criminal design, for they are the ones who take the victims to a remote locality to execute them. It is also them who collect the first evidence from the crime scene (they photograph the victim dressed in combat dress, collect weapons, etc), they remove documentation (such as identity documents that could identify the victim, who is buried as “anonymous”), and they are the ones who notify the respective military unit of the *casualty*. Thus the event is presented as an episode in the context of the usual operations of the members of the security forces, and therefore the investigation is undertaken initially by the military criminal justice system. The story of the perpetrators that this was a “combatant” is generally not questioned in principle.

A CCEEU Observatory report says: “Leaving investigations of extrajudicial executions within the military criminal jurisdiction is part of a deliberate strategy to preserve the impunity of crimes committed by the security forces”. After each execution, the Army prepares an operations report in which the victims are reported as killed in combat. That report is supported with an operations order issued by the battalion commander or command [...] with jurisdiction in [the] municipalities. This procedure makes it possible to divert investigation and fosters having cases handled by military courts”.¹²⁷ The same report notes: “In some cases it is the ordinary courts,

¹²⁵. *El Espectador*, 4 October 2011 : « Piden perdonar a militares por violaciones a derechos humanos» <http://elespectador.co/noticias/judicial/articulo-303481-piden-perdonar-militares-violaciones-derechos-humanos>.

¹²⁶. UN Document No. C/CN/.R4/2006/009 *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia* (referring to the situation in 2004) 28 February 2005, par. 86.

¹²⁷. Observatorio CCEEU, *Ejecuciones extrajudiciales: el caso del oriente antioqueño*, March 2007, p.. 21.

through the Office of Attorney General of the Nation, which, even though the victim's relatives have filed a complaint on the events, sends the investigation to the military criminal court system, with no conflict over jurisdiction and before the preliminary investigations have been completed".¹²⁸

For obvious and incontrovertible reasons, military criminal justice is not the proper venue for doing justice in such investigations. Not only is it not endowed with the necessary independence and impartiality. Its function is to decide on offences against military laws, not serious violations of human rights and international humanitarian law.

The Special Rapporteur on Extrajudicial Executions drew attention to the erroneous assumption of military investigation in his 2010 report, in which he urged the Colombian state: "The civilian criminal justice system should have jurisdiction in all cases of alleged killings by security forces. Within a two-month period from the publication date of this report, the head of the military justice system should carry out an audit of all cases related to alleged extrajudicial executions still pending in the military courts and assure that they are quickly forwarded to the civil system. Disciplinary measures should be taken against judges who do not properly forward such cases".¹²⁹

The topic has been considered extensively by regional bodies for the protection of human rights. Thus, the Inter-American Court of Human Rights has established that "in a democratic state with the rule of law the military criminal justice system must be exceptional and restrictive in scope and be aimed at the protection of special legal interests linked to the functions that the law assigns to the military. Thus [...] it should only place military personnel on trial for the commission of crimes or offenses that by their very nature threaten legal assets specific to the military order".¹³⁰ The same court has also said that "when military criminal courts assume jurisdiction over a matter that should be tried by the ordinary courts, the right to the natural judge and, a fortiori, to due process, is affected, and that in turn, is intimately connected to the right to access to justice. That is so because it is reasonable to believe that officials in the military justice system do not have the impartiality and independence required by article 8.1 of the Inter-American Convention to investigate effectively and thoroughly human rights violations committed by the military".¹³¹ The same court has also stated that, "Likewise, and taking into account the nature of the crime and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate and, if appropriate, prosecute and punish those responsible for human rights violations, but rather the processing of those responsible should always be handled by the ordinary justice system".¹³²

On different occasions the Inter-American Commission on Human Rights has also spoken out on the appropriateness of military criminal courts, noting that "by its nature and structure, the military criminal justice system does not meet the standards of independence and impartiality required by article 8 (1) of the American Convention [...] The lack of suitability of the Colombian

¹²⁸ *Ibid.* p. 37.

¹²⁹ Rapporteur's Report, par. 8.

¹³⁰ Inter-American Court of Human Rights, *Caso Durand y Ugarte c. Perú*, Sentencia de 16 de agosto de 2000, Serie C No. 68, párrafo 117. Along the same lines see the judgments of the Inter-American Court in the following cases: *Caso Palamara Iribarn c. Chile*, de 22 de noviembre de 2005; *Caso Las Palmeras c. Colombia*, de 6 de diciembre de 2001; and *Caso Cantoral Benavides c. Perú* de 18 de agosto de 2000

¹³¹ *Ibid.* par. 125.

¹³² Inter-American Court of Human Rights, *Caso Radilla Pacheco c. México*, Sentencia del 23 de noviembre de 2009, párr. 273; *Caso Rosendo Cantú y otra c. México*, Sentencia del 31 de agosto de 2010, párr. 16.

military criminal courts for examining, ruling on, and sanctioning cases involving human rights violations already has been the object of a statement by the Commission: the military criminal justice system has several unique features that prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military jurisdiction cannot be even considered a true judicial system. The military justice system is not part of the judiciary of the Colombian state. This jurisdiction is operated by the forces of public security and, thus it is part of the executive branch. Those making decisions are not judges in the judiciary profession, and the Office of Attorney General does not play a prosecutorial role in the military justice system”.¹³³

The Inter-American Commission likewise stated that military tribunals “may not, however, be used to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts”.¹³⁴ This criterion has been reiterated in the universal system and the other regional systems of human rights protection. The United Nations Human Rights Committee,¹³⁵ the European Court of Human Rights,¹³⁶ and the African Commission on Human and Peoples’ Rights¹³⁷ have demarcated the natural scope of jurisdiction of the military criminal courts *ratione materiae* to strictly military offences committed by military personnel. Likewise, the draft principles on the administration of justice by military courts approved by the former United Nations Commission on Human Rights provides that: “the jurisdiction of military courts should be limited to offences committed within the strictly military domain by military personnel”.¹³⁸

We may point out that even the domestic case-law of the Constitutional Court, has been firm and constant in establishing the restrictive and exceptional nature of military criminal jurisdiction and in specifying as a requirement for jurisdiction the relationship to military service of the events under investigation. Likewise, the Colombian Constitutional Court has held that human rights violations may not from any standpoint be investigated by the military criminal courts, let alone when such violations are related to the conduct of military personnel and to an act performed while on duty. In this regard, it has been argued that the link between the criminal act and the related on-duty activity is broken when the offence acquires an unusual gravity, as is the case with so-called crimes against humanity. Concerning the possible clash of powers, the Court has noted that “in situations where there is doubt about which court system is competent try a particular case, the decision must fall to ordinary jurisdiction, because the grounds for the exception could not be fully proven”.¹³⁹

According to the Colombian legal system, such a collision of jurisdictions is resolved by the Superior Council of the Judiciary. In order to resolve the conflict of jurisdiction, it must be

¹³³. Inter-American Commission for Human Rights, Report N° 43/08, Caso 12.009 – *Fondo – Leydi Dayán Sanchés*, Colombia, 23 July 2008, par. 76-77.

¹³⁴. Organization of American States, Report on Terrorism and Human Rights, Document N° OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, par. 231.

¹³⁵. Cf. Observations and recommendations of the Human Rights Committee to: Colombia (Documento ONU N° CCPR/C/79/Add.2, 25 de septiembre de 1992, par. 5-6; El Salvador (Documento ONU CCPR/C/70/Add.34, 18 de abril de 1994, par. 5); Perú (Documento ONU CCPR/C/79/Add.8, 25 de septiembre de 1992, par. 8, CCPR/C/79/Add.67, 25 de julio de 1996, par. 12 y CCPR/CO/70/PER, de 15 de noviembre de 2000, par. 11); y Venezuela (Documento ONU N° CCPR/C/79/Add.13, 28 de diciembre de 1992, par. 7 y 10).

¹³⁶. European Court of Human Rights, *Case Ergin vs. Turquía*, Communication N° 47522/99, May 4, 2006; *Case Cyprus vs. Turkey*, Communication 25781/94, May 10, 2001; and *case Maszni vs. Romania*, Communication 59892/00, September 21, 2006

¹³⁷. African Commission of Human and Peoples’ Rights, Resolution on the right to a fair trial and legal Assistance in Africa, adopted 15 November 1999, in the 26th ordinary period of sessions of the Commission ; Judgment 15 November 1999, Communication N° 151/96 (Nigeria); 39/90 (Cameroun); y Judgment 31 October 1998, Communication N° 137/94, 139/94, 154/96 and 161/97 (Nigeria).

¹³⁸. Commission on Human Rights, *La administración de justicia por los tribunales militares - Informe presentado por el Relator Especial de la Subcomisión de Promoción y Protección de los Derechos Humanos, Emmanuel Decaux*, Documento ONU E/CN.4/2006/58, 13 January 2006.

¹³⁹. Constitutional Court, Ruling C-358 of 1997.

determined whether the criminal act is related to military service or not. In some cases, there have been irregularities in the analysis of the evidence on which the decision in question is based, resulting in favouring the official version. For example, in the *Oreste, Morales and Rupert Agudelo* case, testimonies from people close to the victims were ruled out, in view of their relationship with them, and higher priority was given to the testimonies of the military - presumably involved in what was done - and giving credibility to the presumably false operations orders.¹⁴⁰ Another case is that of the youths Alfredo Luis Botero Arias and Albeiro de Jesús Giraldo García, extrajudicially executed on 26 September 2003 as part of Operation Marcial Norte of the Jorge Eduardo Sanchez Rodriguez Battalion of the Fourth Brigade. In this case the Superior Council of the Judiciary granted jurisdiction to military criminal courts,¹⁴¹ but then the decision was overturned by an appeal for judicial protection, and it was referred to the ordinary courts.

Despite such clear directives both domestically and internationally, it would be natural for investigations to have completely ceased being processed in the military courts. This only compounds the seriousness and extent of the phenomenon of *false positives* and the notoriety of these cases throughout the country. Although, currently a large number of cases are being handled in the ordinary criminal courts, many cases are still being handled in the military criminal justice system. As of July 2011, over 400 cases of extrajudicial executions were being processed before the military criminal courts.¹⁴²

The United Nations High Commissioner for Human Rights noted in her 2010 report that there were 448 active cases involving extrajudicial executions before military courts,¹⁴³ apart from the hundreds of cases that have been filed away in that jurisdiction. In February 2012, the head of the Human Rights Unit of the Office of Attorney General of the Nation reported that among the cases in which a conflict of jurisdiction had been raised, 53 cases had been settled in favour of military justice and 642 cases in favour of the ordinary courts.¹⁴⁴ Cases handled before military courts invariably end in the termination and filing away of the investigation.

The initial assumption of the investigation by the military courts poses additional problems, even when the case is subsequently forwarded to the ordinary courts. Formal participation of victims “is utterly nil, not only because it is in military criminal jurisdiction which inherently leads to fear of the military, but because there is no formal investigation, and so victims do not have access to the court records”.¹⁴⁵

Even in cases in which the investigation is undertaken by the ordinary courts, the manipulation of the crime scene by those responsible is problematic and hampers the investigation. As noted above, in some cases it was the military themselves who photographed the victims after

¹⁴⁰ *Caso Oreste Morales y Ruperto Agudelo*, Acta N° 173 del 15 de diciembre de 2010, Sala Jurisdiccional Disciplinaria del Consejo Superior de la Judicatura, pág. 12.

¹⁴¹ Jurisdiccional Disciplinary Chamber of the Superior Council of the Judiciary. Bogotá, 30 July 2009. Reporting Judge Dr. Nancy Ángel Muller. Radicado No. 110010102000901257 00- del 14 de diciembre de 2009.

¹⁴² Letter of Human Rights Watch to President Santos. *El Espectador*. 12 de Diciembre de 2011. At : <http://www.elespectador.com/noticias/politica/articulo-316218-carta-de-human-right-watch-al-presidente-santos>

¹⁴³ UN Document N° A/HRC/16/22, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia* (regarding the situation in 2010), February 3, 2011, par. 26.

¹⁴⁴ Human Rights Unit of the Office of Attorney General of the Nation, Oficio N° UNDH-DIH 000669, 27 February 2012.

¹⁴⁵ Corporación Colectivo de Abogados “Luis Carlos Pérez”, *Seguimiento de la Lucha contra la Impunidad y Negación de los Derechos de las Víctimas de los Crímenes de Lesa Humanidad de Ejecuciones Extrajudiciales en Norde de Santander, Colombia*, Bucaramanga, Junio de 2009, par. 6.

killing them, dressing them up, and placing weapons and other military gear next to them. In other cases, the victim's body was buried without first taking all steps necessary for properly identifying him. No fingerprints or dental imprints were taken. Nor was any anthropological forensic examination performed to establish sex, age, ethnicity, and body measurements. Moving the body hampers the procedures of examination and identification, since much of the technical evidence on the crime scene and the victim's body is lost. In most cases, no record the position of the corpse or the condition of the clothing was made¹⁴⁶. In practically no cases was evidence gathered on other violations, such as torture or sexual violence.

As pointed out recently by the then Representative of the Office in Colombia of the United Nations High Commissioner for Human Rights: "The first investigations of a potentially punishable act are fundamental for the entire judicial process. The initial proceedings determine the future course of the judicial process. To leave the review of possible violations of Human Rights Law and International Humanitarian Law first in the hands of a military institution could again open the door to all sorts of manipulations - as have taken place in the past, when the Office was able to observe in some cases of extrajudicial executions alterations of the crime scene, forgery of documents, and threats against military judges and military witnesses when they wanted to collaborate with the ordinary courts".¹⁴⁷

Additional observations regarding the issue of the independence of the military:

During the research carried out in order to draw up this report, we were made aware of the following concerns:

- ⤴ An extreme proximity and close collaboration has sometimes been observed between the competent sectional prosecution offices and the military unit that operates in the area in question. In some instances the prosecutor's offices operate inside military garrisons.
- ⤴ Moreover, it is likely that certain justice officials (ordinary court system) are officially members of the security forces. This is likely because in Colombia it is possible to reach officer rank in the armed forces reserve by taking courses. While this information could not be verified during our investigation, we are presenting some concerns in this regard.¹⁴⁸

Both situations pose obvious problems of independence, impartiality, and autonomy.

¹⁴⁶. Observatorio CCEEU, *Ejecuciones extrajudiciales: el caso del oriente antioqueño*, March 2007, p. 36.

¹⁴⁷. *Intervención del Representante de la Alta Comisionada de Naciones Unidas para los Derechos Humanos, Dr. Christian Salazar Volkman, durante la rueda de prensa del balance de derechos humanos y el anuncio de la salida de su cargo*, 7 December 2011.

¹⁴⁸. Information provided by Colectivo de Abogados José Alvear Restrepo. Cf.: Derecho de Petición al Fiscal General de la Nación de enero de 2012 y respectiva respuesta de la Dirección Nacional de Fiscalías, Radicado N° 201250000060131, Oficio N° DNF 06051, 14 March 2012.

MILITARY CRIMINAL JUSTICE REFORM¹⁴⁹

The foregoing becomes especially serious and is of singular concern given the reforms to military justice that the administration of President Santos has been proposing. In late 2011 the government proposed a reform whose effect would be to modify the functions of the judiciary and in that connection it was stated that: *“In any case, the relationship with military service is presumed in the operations and procedures of the security forces. When criminal prosecution action is appropriate in these situations, it shall be initiated by military and police criminal justice”*.¹⁵⁰

That modification was presented as a result of the pressure from military personnel that they be tried by the military criminal justice system, on the grounds that they do not have sufficient guarantees in the ordinary courts, and suggesting that only military judges have the specialized knowledge needed for trying violations of international humanitarian law in a country at war.¹⁵¹

Due to opposition from the national and international community this proposal was shelved. However, while the withdrawal of this proposal was being discussed, on March 16, 2012, the government presented a draft reform to the Constitution which is much more serious and extensive than the reform that was shelved, because it no longer modifies military jurisdiction but the entire military criminal justice system (devised by the Office of Military Technical Defence which is under the Ministry of Defence, including a prison jurisdiction, expansion of jurisdiction to establish a police jurisdiction, exclusion of the application of human rights standards for investigating the conduct of the military in the context of the armed conflict, harmonisation of applicable criminal law so that standards of international humanitarian law only apply to investigation of members of the security forces, and a restrictive statement, in the Constitution, of behaviours that would not be within competence of military courts limited to crimes against humanity and genocide and to others which would be defined narrowly in a future statutory law on military justice).

Moreover, the modification creates a judicial police corps under the security forces, a joint commission with participation of retired military officers to define who would be competent to investigate in cases in which doubt is cast on the jurisdiction of the military courts, and a Court of Guarantees, which would include members of the military and which acts as an additional body to oversee court proceedings in cases where members of the security forces are being investigated, and which allows them a new review of the legality and procedures under which they are being investigated.

In addition to the large number of investigations currently underway against members of the security forces, the preparation of legislative proposals is taking place in a situation of serious

¹⁴⁹ The information provided by the Organizations in the CCEEU Round Table on Extrajudicial Executions has been especially helpful in writing this part of the report. We thank in particular the Jose Alvear Restrepo Lawyers Collective, which supplied information needed for dealing with this topic in this report.

¹⁵⁰ Proyecto de Acto Legislativo N° 07 Senado, acumulado con los proyectos de acto legislativo N° 9 de 2011 Senado, 12 de 2011 Senado y 13 de 2011 Senado, por medio del cual se reforman artículos de la constitución política con relación a la administración de justicia y se dictan otras disposiciones

¹⁵¹ Cf. for example: “Oficiales de Reserva piden mantener fuero militar en reforma a la justicia”, *El Espectador*, 20 de octubre de 2011, available at <http://www.elespectador.com/noticias/politica/articulo-306613-oficiales-de-reserva-piden-mantener-fuero-militar-reforma-justic> (last accessed: 7 de mayo de 2012); “General Navas defiende el fuero militar para las tropas”, RCN La Radio, 17 November 2011, available at: <http://www.rcnradio.com/noticias/editor/general-alejandra-navas-defien-120676#> (last accessed: 7 May 2012).

stigmatization aimed at defenders of human rights in Colombia¹⁵² and the presumed need to legally protect military forces not only before tribunals and courts in Colombia, but also before international courts.¹⁵³ In a letter from the Corps of Generals and Admirals to President Santos, the president of that organization noted: “our valiant and unselfish military forces are surrendering the initiative in combat, not for lack of courage, for their valour has been tested on multiple occasions and in many situations; the fact is that that no one is willing to risk his life, to sacrifice his wealth and that of his family, when, after a battle with narcoterrorists, if he is still alive, has had to face in court the treachery and falsehoods of false or venal witnesses, and be subjected to accusations and trials of prosecutors and judges, some well-intentioned but lacking in the knowledge and training necessary to understand, investigate, and prosecute military operations, and indeed, infiltrated by the extreme left or pressured by national and international bodies of the same ilk, with clear political and economic motives, that turn us into victims of their contemptible mode of procedure”.¹⁵⁴

The basis for these reforms is the presumed legal insecurity felt by the military, which supposedly make it necessary to have legal devices such as military jurisdiction. In this sense, the presentation of reasons for the draft constitutional change on 16 March 2012 notes that “legal insecurity is a source of concern for members of the Armed Forces and the National Police”.¹⁵⁵

While it might be thought that military criminal judges could refer cases of serious human rights violations to the ordinary courts, the truth is that this possibility is unlikely for at least two reasons. First, “the same reasons that cast doubt on the impartiality and independence of the military authorities for prosecuting human rights violations also are present when it comes to deciding on the transfer of a case to the ordinary courts, and hence decisions on this matter are not trustworthy either”.¹⁵⁶ Second, military criminal justice officials who have forwarded cases to the ordinary courts have been persecuted and harassed. In this regard, the Office in Colombia of the United Nations High Commissioner of Human Rights expressed its concern in its report on the human rights situation in Colombia 2010, because “according to information received repeatedly, the discharges and transfers of some military criminal judges could be motivated by their collaboration with the ordinary courts”.¹⁵⁷ Likewise, the Inter-American Commission “has received information on acts of persecution against officials who comply with the duty to refer cases of human rights violations to the ordinary justice system”.¹⁵⁸

The modification is being proposed in a setting in which legal concepts of international law are being manipulated. Thus it states: “In no case shall the military criminal justice system try crimes against humanity, genocide, or crimes that are specifically, precisely and restrictively defined by a statutory law. Except for the foregoing crimes, breaches of international humanitarian law

¹⁵². Below we will study the accusations of “juridical war” and “judicial war”. See: “La guerra invisible: Los Derechos Humanos como arma de guerra y lucrativo negocio”, *Revista Fuerzas Armadas*, Edición 218, June 2011.

¹⁵³. “Evitarían que errores de justicia penal militar lleguen a cortes internacionales”, *El Espectador*, 13 March 2012, available at <http://www.elespectador.com/noticias/politica/articulo-332124-evitarian-errores-de-justicia-penal-militar-lleguen-cortes-inter> (last accessed: 7 de mayo de 2012).

¹⁵⁴. Letter of October 19, 2011, published by Reporters Without Borders, available at <http://www.periodismosinfronteras.com/carta-generales-almirantes-a-santos.html> (last accessed: 8 May 2012).

¹⁵⁵. Legislative Bill 192 (2012) Chamber, modifying articles 116, 152 and 221 of the Political Constitution of Colombia.

¹⁵⁶. Comisión Colombiana de Juristas. Informe de seguimiento a las recomendaciones del Relator Especial sobre Ejecuciones Extrajudiciales, Sumarias o Arbitrarias. Febrero 16, 2012. p. 23. Available at: http://www.coljuristas.org/documentos/libros_e_informes/inf_2012_n1.pdf.

¹⁵⁷. *Informe de la Oficina de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre la situación de derechos humanos en Colombia* (referente a la situación en 2010), Documento Nº A/HRC/16/22, par. 28.

¹⁵⁸. Inter-American Commission for Human Rights, Annual Report, OEA/Ser.L/V/II, March 7, 2011, section IV, Colombia, par. 31.

committed by members of the security forces shall be tried solely by courts martial or military courts”.¹⁵⁹

There is no doubt that the draft modification violates established basic principles on the restrictive nature of military criminal jurisdiction and its function limited to violations that affect legal assets of a military nature, as stated above. With regard to the creation of this special court of guarantees, it does not respect the principle of equality inasmuch as its purpose would be to create additional guarantees for the security forces for no legitimate reason and with no proof that it is needed. The information we had available in preparing this report shows that the sole purpose of such “guarantees” is to remove the military from the action of the ordinary justice system.

Aside from the issues of a legal nature in terms of international law involved in this reform of military jurisdiction, it must be insisted that it constitutes yet another sign of the intention of the Colombian government to perpetuate the situation of impunity prevailing among the senior military, who are those most responsible for the crimes against humanity committed in Colombia.

Similarly worrisome is the draft law known as “legal framework for peace” currently being discussed in the second round in Congress. Among the modifications provided for in this draft law is the inclusion of an article in the constitution (called transitory) to establish instruments of transitional justice to give “differentiated treatment to each of the various parties that have participated in hostilities”. Thus the Congress, at the initiative of the government, will have to establish criteria for prioritizing and selecting cases in the administration of criminal justice as acts “inherent in the administration of transitional justice”. This measure allows Congress to “authorize waiver of criminal prosecution or suspension of the execution of penalty” in cases that are so selected.

This reform would of course affect the criminal proceedings against the military responsible for committing extrajudicial executions. In this regard, it is worrisome that the Colombian state, even in cases of international crimes, can decide not to prosecute criminally those who are not selected or to suspend the execution of penalties. It would be also a failure to comply with Colombia’s international obligations, a refusal to abide by the legal doctrine of the Inter-American Court with regard to amnesties, and in violation of its obligations as a state party to the ICC. These measures may have very serious consequences on the right of victims to have access to justice.¹⁶⁰

These modifications adopted by the government of Colombia seriously impede justice and in that sense are combined with the facts set forth below.

D. Obstruction of Justice

In addition to the structural problems that we presented in the foregoing sections, we have identified a number of problems hindered access to justice through the cases of extrajudicial executions.

¹⁵⁹ Legislative Bill 192 (2012) Chamber, modifying articles 116, 152, and 221 of the Political Constitution of Colombia.

¹⁶⁰ See comments on the draft law, « marco jurídico para la paz », Comisión Colombiana de Juristas.

1. Pressure on court personnel, lawyers, and human rights organisations

In many cases pressure has been brought to bear or threats have been issued against some of these actors. Most of intimidation are made publicly and openly, even through public statements, the press, publications, and other material available on the internet.¹⁶¹

For example, the NGO Corporación Jurídica Libertad, which works on cases of extrajudicial executions in Antioquia, has repeatedly been subject to acts of intimidation and persecution, including stigmatization by the security forces, intelligence actions, mail interception, disparagement of its work, and fabricated legal cases.¹⁶² Army General Oscar Gonzalez Peña, who had previously commanded military units in Antioquia, declared: “the allegations are directly proportional to the success of the units. It is the way some supporters of subversion have of halting operations”.¹⁶³

The army has even begun to spread the notion of “juridical warfare”. This term (which until recently appeared in the army’s glossary)¹⁶⁴ is defined as “Complaint filed against members of the security forces for what appear to be criminal acts, utilizing the testimony of people aligned with groups that generate violence”. It continues: “Process of creating a propitious legal framework for their purposes and infiltrating the judicial and disciplinary process in order to protect subversion and attack the security forces”.

Based on this premise, which claims that a judicial process is being infiltrated, the legitimacy of any witness who testifies against the security forces is called into question.¹⁶⁵ The idea of “juridical warfare” is used particularly to attack human rights organizations under the accusation that they constitute the legal arm of the subversive groups. The notion of “legal warfare” has also led to the creation of the concept of “juridical warfare”, defined as the fabrication of “false charges and accusations against members of the security forces [...] It means attacking the military jurisdictionally in order to demobilize them, have them discharged, or at least ‘immobilize them’ for a long time”.¹⁶⁶

Such ideas spread daily through public statements and media seek to intimidate directly organizations that present accusations of the violations committed by the military, including extrajudicial executions, and that stand by victims in cases in the justice system. They also tend to mobilize public opinion in this direction, creating a real climate of intimidation and vilification.

Judges and prosecutors have also been subjected to threats and intimidation. This is a situation that affects not only those working on the cases of *false positives*, but extends to those who are aware of serious human rights violations. Thus, in her 2011 report, the United Nations Special

¹⁶¹. In the Tame case, there has been a video spread on the internet that sought to manipulate public opinion and to undermine the reputation of Humanidad Vigente, which represents the victims in that case.

¹⁶². Interview with “Corporación Jurídica Libertad”, 26 April de 2012, in possession of FIDH.

¹⁶³. “Le ofrezco excusas al país”, *El Espectador*, 8 de noviembre de 2008, available at <http://www.elespectador.com/impreso/judicial/articuloimpreso89076-le-ofrezco-excusas-al-pais> (Last accessed: 6 May 2012).

¹⁶⁴. The expression was withdrawn from the Army’s web page after criticism of its use on that official page by journalist Laura Gil 16 December 2011 in her column in *El Tiempo*. See <http://www.eltiempo.com/archivo/documento/CMS-10916036>.

¹⁶⁵. Laura Gil, “Guerra Jurídica”, newspaper *El Tiempo*, available at <http://m.eltiempo.com/opinion/columnistas/lauragil/un-concepto-inquietante/10916036> (last accessed: 8 May 2012).

¹⁶⁶. “La guerra invisible: Los Derechos Humanos como arma de guerra y lucrativo negocio”, *Revista Fuerzas Armadas*, Edición 218, June 2011, p. 53.

Rapporteur on the Independence of Judges and Lawyers expressed “her concern over the facts that those who have been administrators of justice – judges and prosecutors – and several lawyers, have shown her. “Situations like the lack of a procedure for ordering the removal from office of a judge or a prosecutor, and the threats and intimidations issued in retaliation for decisions taken in the course of their duties, especially when cases are serious and sensitive, such as those having to do with emblematic situations of serious human rights violations”.¹⁶⁷

One judge has even been murdered, namely Judge Gloria Constanza Gaona of the Specialized Criminal Court of the Saravena circuit, who handled the case of the boys and girls of Tame.¹⁶⁸ Judge Gaona¹⁶⁹ was killed in March 2011, allegedly at the hands of the military.¹⁷⁰

2. Threats against witnesses and victims

This has been noted again by the Special Rapporteur on Extrajudicial Executions: “When the family members discover what happened and take steps to attempt to see that justice is done, for example, reporting the case to the authorities or telling the press about it, they are often intimidated or threatened and some of them have been killed”.¹⁷¹ She adds: “witnesses fear not only the alleged perpetrators, but also - especially in the more rural and remote areas - government officials such as the local attorney general or prosecutor, whom witnesses suspect of cooperating with the alleged perpetrators or of succumbing to their influence”.¹⁷²

A 2010 report of the Foundation for Education and Development (FEDES) also reported “the mothers of the disappeared young people [from Soacha] have been continually subjected to a systematic harassment with the sole and unmistakable purpose of discouraging this noble struggle”. It has been established that ‘a total of 11 threats have been received by families who have presented complaints of the *false positives*, plus those made against the ombudsman of Soacha...’¹⁷³ The visibility attained by the Soacha cases has helped halt the threats.¹⁷⁴ However, not all cases become so important.

¹⁶⁷ ONU, *Report of the Special Rapporteur on independence of judges and lawyers, Gabriela Knaul, Addendum Summary of information, including individual cases, transmitted to Governments and replies received*, A/HRC/17/30/Add.1, 19 May 2011, par. 288.

¹⁶⁸ The case of the boys and girls of Tame is not a case of false positives because it is about rape of minor girls and the extrajudicial execution of one of them, and the extrajudicial execution of two other boys also minors, by a member of the army (sub-lieutenant belonging to Mobile Brigade No. 5, Eighth Army Division). In this case there was no simulation of combat or accusation that the victims were guerrilla members. We are treating it in this report because it is a case which has a number of the hindrances to justice typical of the cases in which the military are accused of human rights violations and extrajudicial execution.

¹⁶⁹ Days before the murder, the judge had reacted to many delaying tactics of the Military Defense lawyers, refusing to postpone hearings and having notarized copies sent for disciplinary procedures against two lawyers to the Superior Council of the Judiciary. In the case they had also raised questions about the role of Military Defense. (DEMIL). Interview with Olga Silva, member of Humanidad Vigente, 26 April 2012, in possession of FIDH.

¹⁷⁰ “Asesinada una jueza colombiana que investiga muerte de tres niños”, *ElPeriodico.com*, 22 March 2011, available at <http://www.elperiodico.com/es/noticias/internacional/asesinada-una-jueza-colombiana-que-investigaba-muerte-tres-ninos/950106.shtml> (last accessed: 8 May 2012). See also: Humanidad Vigente y Comité Permanente por la Defensa de los Derechos Humanos-Arauca repudian y rechazan asesinato de jueza en Saravena, Arauca, 22 March de 2011, available at http://www.humanidadvigente.net/index.php?option=com_content&view=article&id=217:accion-urgente-amenazas-contra-familiares-de-victimas-y-defensores-de-ddhh&catid=7:ddhh&Itemid=10 (last accessed: 8 May 2012); Observatorio para la Protección de los Derechos Humanos, “Asesinato de la jueza Gloria Constanza Gaona y actos de intimidación contra miembros de Humanidad Vigente”, Ref. COL / 004 / 0311 / OBS 051, available at <http://www.fidh.org/Asesinato-de-la-jueza-Gloria> (last accessed: 8 May 2012).

¹⁷¹ Rapporteur’s Report, *op. cit.*, par. 11.

¹⁷² *Ibid.* par. 87.

¹⁷³ Fundación para la Educación y el Desarrollo (FEDES), *Soacha: La Punta del Iceberg – Falsos Positivos e Impunidad*, 2010, pág. 76.

¹⁷⁴ Interview with the Association for Alternative Social Development MINGA, 27 April 2012, in the possession of the FIDH.

In a hearing where we were present, Colonel Borja, who has admitted responsibility for false positives and has stated that various members of the force that he commanded were involved, in giving testimony as a witness, said: "I want to say one thing [I said] several times to the Office of the Prosecutor [...] I have also received threats to keep me from making these statements".¹⁷⁵ Another example we can cite is the case of the girls and boys of Tame, in which many acts of intimidation and threats to witnesses, victims, and victims representatives have occurred.¹⁷⁶

These are merely some examples, since intimidation and threats are common in trials for human rights violations against members of the security forces. The purpose of actions to discredit and stigmatize those who present complaints of crimes committed by members of the army is also to intimidate victims and witnesses.

3. Excessive delay of cases, delaying tactics and loss of evidence

The information provided by the Attorney-General's Office shows that although investigations are underway, they are not advancing quickly, and most of them remain at the preliminary stage of the investigation for years. The statistics figures obtained from Human Rights Unit of that office indicate that 88.9% of the cases for executions committed since 2000¹⁷⁷ (i.e. that some of them were committed over ten years ago) are at the investigation stage. For example, the preliminary testimony has not been taken in a false positive case in Sumapaz, Cundinamarca in 2006, even though there is clear evidence on the alleged perpetrators (one of the victims survived).¹⁷⁸

The reasons why cases are delayed are many and varied. It is partly because the investigations are carried out without taking into account the context in which the executions occurred, without establishing logical lines of investigation, and without considering the patterns that characterize the extrajudicial executions.¹⁷⁹ The consequence is that in practice the facts of one case are investigated separately, maintaining the territorial jurisdiction of prosecutors, so multiple investigations are opened for a single case and take place in parallel, and often valuable information is not passed from one case to the other.

¹⁷⁵. Colonel Luis Fernando Borja Aristizabal, in lawsuit against Major Orlando Arturo Céspedes Escalona, for cases of 11 false positives in Toluviéjo, First Specialized Criminal Court of Bogotá, hearing 24 April 2012..

¹⁷⁶. Humanidad Vigente, Amenazan a familia y abogados de las víctimas del caso de los niños de Tame, 24 March 2011, http://www.humanidadvigente.net/index.php?option=com_content&view=article&id=213:amenazan-a-familia-y-abogados-de-las-victimas-del-caso-de-los-ninos-de-tame&catid=26:comunicados&Itemid=34 (last accessed: 8 May 2012); Humanidad Vigente, Interrogatorios ilegales intimidan a comunidad rural de Tame, 23 de febrero de 2011, available at http://www.humanidadvigente.net/index.php?option=com_content&view=article&id=200:interrogatorios-ilegales-y-falsos-testimonios-intimidan-a-comunidad-rural-de-tame&catid=26:comunicados&Itemid=34 (last accessed: 8 May 2012); Observatorio para la Protección de los Derechos Humanos, "Asesinato de la jueza Gloria Constanza Gaona y actos de intimidación contra miembros de Humanidad Vigente", Ref. COL / 004 / 0311 / OBS 051, available at <http://www.fidh.org/Asesinato-de-la-jueza-Gloria> (last accessed: 8 May 2012)

¹⁷⁷. This statistic does not include cases being handled in military criminal courts.

¹⁷⁸. The alleged perpetrator already has already been found guilty for a number of extrajudicial executions committed in the position that he subsequently occupied. It is Colonel Luis Fernando Borja Aristizabal. On the Sumapaz case, see: "Sobreviviente de 'falso positivo' relata su experiencia", *El Tiempo*, 5 May 2012, available at http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-11728441.html (last accessed: 9 May 2012).

¹⁷⁹. The Inter-American Court of Human Rights has stressed the importance of carrying out proper investigations that can lead to clarifying the facts within a reasonable time period, for which it is necessary that "the process take into account the complexity of the facts, the context in which they occurred and the patterns that explain their commission, avoiding omissions in gathering evidence and in following out the logical lines of investigation", *Caso de la Masacre de la Rochela c. Colombia*, Judgment 11 May 2007, par. 158.

In the case of Soacha, for example, seventeen different investigations were opened (for the execution of 17 victims) starting in 2008.¹⁸⁰ Despite the international pressure that has been brought to bear on this case and the high visibility and coverage it has had, five years later only two sentences have been issued,¹⁸¹ and they are still not final.

Delays are sometimes caused by disputes over the territorial jurisdiction of judges. For example, in cases of *false positives*, typically the victim was disappeared in one locality and executed in another, which is where then the body is later found. In principle, then, two jurisdictions could hear the case. There have been cases in which the resolution of this dispute or situation of clashing territorial jurisdiction lasts as long as a year.¹⁸² There are also delays in the transfer of case records from the military courts to the ordinary courts. By way of example, in the case of Oreste de Jesus Morales and Ruperto Agudelo Ciro (eastern Antioquia) in connection with the execution of these two peasants in March 2003, the case was initially handled in military court and was shelved in 2005. The case was reactivated starting in December 2009 at the request of the civil party in the ordinary courts, which posed a situation of dispute over jurisdiction, leading to many motions and a resolution between December 2009 and September 2011 (i.e. almost two years). The end result was the recognition of competence to military criminal jurisdiction, which then proceeded to regard the investigation of the lieutenant colonel implicated as closed on April 27, 2011.

The lawyers we interviewed for this report also indicated as a reason for delay and obstruction of the proceedings the often abrupt changing of the prosecutors in charge of them.

Attorneys and judicial system employees likewise agree that the change of the court system¹⁸³, the aim of which was to speed up cases, has in reality led many more delays.¹⁸⁴ This is partly because since it is a new process, the rules are interpreted for the first time or situations not envisioned in the Code of Procedure arise, thereby leading to many conflicts. It has also been said that this system is not suited to the Colombian legal tradition, and particularly, the legal context of a country at war with a limited allocation of resources to the judicial system.¹⁸⁵

One of the sources of excessive delaying tactics commonly mentioned is the Office of Military Defence, better known as “DEMIL”. DEMIL is an organization that takes on the defence of military men in cases in which they are accused of violations of human rights and international humanitarian law. Its action is typically to use measures of procedural delay to prevent cases from proceeding in the ordinary and normal fashion.¹⁸⁶ DEMIL is a private organization with strong ties to the Armed Forces (e.g., its members include active or retired military men and

¹⁸⁰ Some of them were brought together as related acts.

¹⁸¹ The first was issued in June 2011, by the Third Criminal Court of the Specialized circuit of Bucaramanga, against eight military men, including an Army lieutenant and a colonel, for the disappearance and death of two victims; the second was issued in March 2012, by a Specialized Judge in Bogota, against another eight military men, including a lieutenant, who were found guilty of the murder of a victim. See: “Primera condena por ‘falsos positivos’ de Soacha”, *Semana*, 3 de junio de 2011, available at <http://www.semana.com/nacion/primera-condena-falsos-positivos-soacha/157863-3.aspx> (last accessed: 9 May 2012); “Condenados otros seis militares por ‘falsos positivos’ de Soacha”, *El Tiempo*, 30 March de 2012, available at http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-11465421.html (last accessed: 9 May 2012).

¹⁸² Interview with the Association for Alternative Social Development MINGA, 27 April 2012, in the possession of FIDH.

¹⁸³ In 2005, there was a reform of the criminal procedure system, moving from an investigatory system to an adversarial system, which was imported from English-speaking countries with a common law tradition..

¹⁸⁴ This is compounded by the fact that currently two systems are operating in parallel (the old system and the new adversarial system) according to the date when the deed was done

¹⁸⁵ Interview with the Association for Alternative Social Development MINGA, 27 April 2012, in the possession of FIDH.

¹⁸⁶ Interview with the José Alvear Restrepo lawyers Collective, 27 April 2012, in the possession of FIDH.

it is headquartered in military units).¹⁸⁷ DEMIL seeks to prevent the search for the truth, even pressuring defendants and witnesses not to tell what they know, especially when it involves evidence on the responsibility of those at the top. Thus their action serves a twofold purpose: 1) delaying and keeping cases from moving forward; and 2) protecting those most responsible, through pressures to prevent the disclosure of information that would make it possible to go up the chain of command.¹⁸⁸

Tactics for delaying are said to include, for example, abusively requesting suspension and postponement of hearings, attorneys of defendants not showing up for hearings (causing the postponement of that court proceeding), or repeated and excessive change of defence counsel,¹⁸⁹ including resigning in the midst of hearings,¹⁹⁰ and improper and abusive lodging of appeals.¹⁹¹

In instances of abusive use of appeals to hinder justice, the actions of judges to halt or punish such delaying tactics becomes especially important. While these are isolated cases, we were able to learn that in some cases, the judges have sent copies to the Higher Council of the Judiciary for disciplinary proceedings.¹⁹² However, we were unable to verify whether these proceedings have been initiated and/or have led to effective sanctions.¹⁹³

There are also strong indications of the use that the Office of Military Defence (DEMIL) has used state resources to tie up court cases. For example, in the case of girls and boys of Tame, members of DEMIL posed as employees of the Office of the Ombudsman, and went to where the events took place in Army helicopters and accompanied by members of Mobile Brigade No. 5, in order to identify witnesses, allegedly so as to then intimidate them.¹⁹⁴

In another case, there is simply no explanation for the delay of a court in advancing to the next stage of proceedings, that is, unexplainable delays also take place.

When too much time passes by, not only is the right to a speedy and effective remedy within a reasonable time violated, but evidence is also lost. For example: certain witnesses may not be located any more, or their memory may have changed with the passage of time. In some of the cases in Soacha, the whereabouts of a key witness who saw the victims in the hands of the military before they were killed have been lost.¹⁹⁵ Moreover, since these are war zones, often the population was displaced, and that has an impact on the possibility of finding witnesses.¹⁹⁶

¹⁸⁷. See, for example: "Abrimos Investigación por el caso de la Defensoría Militar": Navas", *El Tiempo*, available at <http://m.eltiempo.com/justicia/general-alejandra-navas-habla-de-la-defensoria-militar/9114028> (last accessed: 8 May 2012).

¹⁸⁸. *Ibid.*

¹⁸⁹. Each new defence attorney who takes the case requests time to become familiar with the court record, which leads to further delays.

¹⁹⁰. For example, in the case of the girls and boys at Tame. Interview with Humanidad Vigente, 26 April 2012, in the possession of the FIDH.

¹⁹¹. *Ibid.* Also: Interview with the Association for Alternative Social Development MINGA, 27 April 2012, in the possession of the FIDH.

¹⁹². Interview with Humanidad Vigente, 26 April 2012, in the possession of the FIDH.

¹⁹³. We have references to only one case in which the lawyers were directly sanctioned, one of the cases of Soacha, filing N° 2008-0032, in which when the deceitful intention of the lawyers was proven, copies were sent to the Superior Council of the Judiciary and they were fined. Interview with the Association for Alternative Social Development MINGA, 27 April 2012, in the possession of the FIDH.

¹⁹⁴. Humanidad Vigente, Interrogatorios ilegales intimidan a comunidad rural de Tame, 23 February 2011, available at http://www.humanidadvigente.net/index.php?option=com_content&view=article&id=200:interrogatorios-ilegales-y-falsos-testimonios-intimidan-a-comunidad-rural-de-tame&catid=26:comunicados&Itemid=34 (last accessed: 8 May 2012).

¹⁹⁵. According to the information we gathered, the witness had not been able to be found by the Office of Attorney General. It is not clear whether here trail had been lost or whether she has been disappeared or been murdered. Interview with the Association for Alternative Social Development MINGA, 27 April 2012, in the possession of the FIDH.

¹⁹⁶. Interview with "Corporación Jurídica Libertad", 25 April 2012, in possession of FIDH.

4. No investigation of offences against the administration of Justice: lack of incentives to uncover and speak the truth

During a hearing that we had the opportunity to attend, one of the witnesses declared:¹⁹⁷ “Well, there may be buying of statements [...] I can’t say for sure [...] presumably because offers were made to me and these are guys who don’t have anything, right now they don’t have anything, but they did know what was going on, they did know. I don’t know why they changed the statement [...] I’ve received offers of money from Major Céspedes¹⁹⁸ [...] to change my story”.

At that hearing, in fact, the simple course of the statements by the witnesses aroused suspicion about possible influences on their statements. This is just one example of the many indications that we have been able to gather on possible cases of false testimony and other crimes against the administration of justice.

A report on killings in eastern Antioquia states: “As the investigations unfold some witnesses show up claiming to know that victims belonged to guerrilla organizations”. This practice helps add more weight to the story of the military implicated in the deed. In some cases, persons who act as witnesses do not even live in the area, and have never lived there, and they simply state that the victims belonged to some guerrilla group without offering any further details”.¹⁹⁹

Despite clear signs of an overwhelming number of acts that clearly incline toward impeding the judicial process and seriously undermine the administration of justice, we are not aware of any cases in which copies have been checked in order to investigate infractions such as false testimony or cover up.²⁰⁰ This also shows that the justice system is not necessarily willing to clarify the truth of the facts, nor are there sufficient incentives and that, ultimately, cases are aimed at examining a partial or fabricated truth.

E. Other observations

We offer here two additional comments that aroused our concern while carrying out this study.

(a) Participation of victims in criminal proceedings

In 2005, criminal procedure in Colombia was reformed so as to move from an investigative system (known as the procedure of Law 900 of 2002) to an oral interrogation system (commonly known in Colombia as the procedure of law 906 of 2004). In addition to the delays caused by the new system, which as we pointed out above, almost all the interviews we conducted with lawyers and victims organizations spoke of the negative impact of this reform on the rights of participation of victims. While the purpose of this study is not to examine this reform, we think it is important to point it out because of its impact on how cases unfold and on access to justice by the families of the victims.

¹⁹⁷ Colonel Luis Fernando Borja Aristizabal, in court case against Major Orlando Arturo Céspedes Escalona, for cases of 11 false positives in Toluviejo, First Specialized Criminal Court of Bogotá, hearing 24 April 2012.

¹⁹⁸ Defendant in case in which the witness gave testimony.

¹⁹⁹ CCEEU Observatory, *Ejecuciones extrajudiciales: el caso del oriente antioqueño*, March 2007, par. 37.

²⁰⁰ See Title XVI of the Colombian Criminal Code: Crimes Against Effective and Proper Administration of Justice.

The new system introduces an adversarial system, and the victim ceases to be an active subject in the proceeding as he was in the previous system. “The position of victims was reduced to playing a role as observers where they are excluded from the court proceedings inasmuch as it is not to initiate the event of reparation; they are solely allowed to have an economic claim and they are restricted from the pursuit of the truth, justice, and real reparation”. While victims have certain procedural prerogatives and may²⁰¹ be represented in cases, their participation has been relegated to a secondary level. For example, they no longer have the right to question witnesses directly in the hearings, but can only suggest questions to the prosecutor. In the course of the hearings we observed that often prosecutors, overwhelmed by the task of pursuing such a large number of cases, are not proactive in questioning. That is why the presence and right to speak of the victims - as they had it under the previous procedure - becomes especially important.

Given the high level of crime in Colombia, the tradition of victims participating, and the systems of representation that supported it under the former procedural system, the victims were able to support and assist the investigation and trials in a way that they can no longer do. As a result, in terms of the role of the victim, far from accelerating the process, the reform has a negative impact on the quantity and quality of evidence, and on the time taken by the various procedural stages.

(b) Holding military men found guilty in military garrisons: what commitment to justice?

Finally, we wish to point to something, that although it is not in itself related to the unfolding of legal procedures, does affect the Colombian state’s commitment to justice.

All the military convicted of extrajudicial executions, without exception, are serving their sentences in military garrisons. This is so even though they have been found guilty of violating the ordinary law. The degree to which they are really “prisoners” is difficult to verify. Cases have been known in which convicted military remain in active service, that is, they remain on payroll, continue in line scale for promotion, and keep contributing to their pension. That is, they are not discharged from military service.

Thus, for example, after the embarrassing incidents disclosed in the media in April 2011 reporting that the military “prisoners” at Tolemaida military garrison came and went as they pleased from that prison - sometimes even spending holidays in other cities - they had business deals inside and outside the prison, and did not live in cells but in cabins which their superiors had had built for them, it became known that of the 269 officers, non-commissioned officers, and soldiers serving time there for homicides, massacres, torture, and kidnapping, 179 remained on active duty in the Army, even though in many cases they had been in prison for a number of years, and most had convictions ranging up to 40 years in prison. That is, they were never discharged from the service, were receiving salaries while in prison, and receiving benefits such as the ability to pay into pension plans. Some even had been pensioned while serving their sentence, and others had been promoted in rank while they were “in prison”.²⁰²

While being held in military garrisons, they are still going about in a setting where codes of military rank are still in effect. Accordingly, it is not surprising that there should be a “pact of

²⁰¹. That is, that victims have the right but not the obligation to be represented and to be present in sessions.

²⁰². *Tolemaida Resort*. In : *Semana*. Saturday 2 April 2011 <http://www.semana.com/noticias-nacion/tolemaida-resort/154427.aspx>

silence” in which the low-ranking military men are coerced to “protect” their superiors, and to obey orders even when it means changing their story or giving false testimony, and obfuscating the search for the truth.

The victims, family members of innocent civilians who were despicably used to “justify” operational casualties, experience this kind of detention and life in the barracks of soldiers put on trial with their superiors as a brutal assault on the notion of justice, which undoubtedly causes a double victimization.

Conclusions

In this report we have exposed the widespread and systematic character of the phenomenon of *false positives* in Colombia between 2002 and 2008. This criminal conduct was driven by the political context of the time in which the Army was required to show positive results in the battle against insurgent groups, and hence a system of incentives and rewards was set up. Without sufficient oversight, that system lent itself to many terrible abuses that led to more than 3,000 innocent civilians being killed so as to then be presented as *killed in combat*. *False positives* became a business by which some profited economically and members of the army obtained benefits, depending to their rank, in terms of leaves, congratulations, promotion, and so forth. The expansion of the phenomenon throughout Colombia and the identity of patterns of a complex organised mode of crime lead us to conclude that these acts were supported by the top Army commanders, who indeed had risen in the ranks after serving in military units that had carried out these kinds of extrajudicial executions. They failed to carry out their proper responsibility of oversight, and so are liable in the light of international criminal law.

This report likewise presented an analysis of the behaviour of the Colombian judicial system toward this phenomenon. From the standpoint of international criminal law, we also observed structural failings. Given how widespread and systematic these situations were, we observed that the investigations and court cases were mostly carried out in isolation, thereby failing to deal with the phenomenon as a crime against humanity and to point higher up the chain of command. That is compounded by intimidation and harassment faced by court personnel, human rights organizations, victims and witnesses. Foot-dragging, excessive delays, and the inability of the system to handle this type of case are also commonplace.

Therefore, the FIDH and the CCEEU Working Group on Extrajudicial Executions urge the Colombian State to:

- Investigate, prosecute and punish those at the highest levels who are intellectually responsible for extrajudicial executions, and not just those materially responsible;
- Take adequate measures to guarantee the non-repetition of these crimes against Humanity;
- Take the necessary measures to protect court personnel, human rights organizations, victims and witnesses against all types of harassment, attacks and reprisals;
- Do not adopt any reforms that amplify military jurisdiction to judge human rights violations committed by the National Security Forces.

Furthermore, given the circumstances, and in the light of the principles of the ICC, in particular the principle of complementarity, as it has been interpreted in its legal doctrine, we believe that the cases on which an ICC investigation should focus - that is, the top leadership responsible for crimes against humanity - are not under investigation or prosecution in Colombia. Thus, the case would be fully admissible before the ICC.

Therefore, the FIDH and the CCEEU Working Group on Extrajudicial Executions urge the ICC to open an investigation on Colombia and within it to consider the case of *false positives*. We also take this opportunity to alert the ICC on the need to consider, in dealing with this issue and others related to cases pursued in Colombia, not only the information received from the Colombian Government, but also other sources, given the involvement of portions of the state apparatus in the perpetration mass crimes, which makes its information not very reliable. This concern is based on an examination of the sources cited by the ICC in its December 2011 report.

Establishing the facts – Investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society – Training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

Mobilising the international community – Permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting – Mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.



CCEEU. The Coordination Colombia - Europe - United States (CCEEU) is a network of 233 social and human rights organizations in Colombia that conduct advocacy activities at the national and international levels and promote policies and measures for the protection of human rights and the end of impunity.

The Working Table on extrajudicial executions is part of CCEEU and is composed of 20 organizations that monitor the situation and the representation of victims in criminal proceedings for extrajudicial executions. It focuses on registration, systematization, analysis and implementation of litigation strategies at the national and international levels to overcome impunity regarding extrajudicial executions in Colombia.

The Working Table on Extrajudicial Executions is composed of: Observatorio de Derechos Humanos de la CCEEU,

Corporación Social para la Asesoría y Capacitación Comunitaria (COSPACC), Asociación para la Promoción Social Alternativa (MINGA), Comisión Intereclesial de Justicia y Paz, Corporación Jurídica Libertad, Corporación Jurídica Yira Castro, Banco de datos del CINEP, Corporación Sembrar, Comité de Solidaridad con los Presos Políticos (CSPP), Centro Cristiano para Justicia, Paz y Acción no Violenta - Justapaz, Corporación Claretiana Norman Pérez Bello, Corporación para la Defensa y Promoción de los Derechos Humanos - Corporación Reiniciar, Colectivo de Abogados José Alvear Restrepo (CAJAR), Centro Alternativo de Investigación y Protección de los Derechos Fundamentales en Colombia (CINPRODEC), Corporación de Desarrollo Regional (CDR), Colectivo de Abogados Luis Carlos Pérez, Colectivo Socio-jurídico Orlando Fals-Borda, Grupo Interdisciplinario por los Derechos Humanos (GIDH) and Humanidad Vigente, accompanied by Peace Brigades International.

FIDH - International Federation for Human Rights

17, passage de la Main-d'Or - 75011 Paris - France
CCP Paris: 76 76 Z
Tel: (33-1) 43 55 25 18 / Fax: (33-1) 43 55 18 80
www.fidh.org

Director of the publication: Souhayr Belhassen
Editor: Antoine Bernard
Author: Mariana Pena
Coordination: Jimena Reyes, Karine Bonneau
Translation: Phillip Berryman
Design: Vasily Zaitsev

FIDH represents **164** human rights organisations on **5** continents



of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest,

ABOUT FIDH

- FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

- A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

- A universal movement

FIDH was established in 1922, and today unites 164 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

- An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

fidh

International Federation for Human Rights

Find information concerning FIDH 164 member organisations on www.fidh.org