

Executive Summary

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** International Criminal Court, The Office of the Prosecutor, Situation in Colombia, Interim Report, November 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>, footnotes omitted]

1. The present interim report provides an overview of the Office of the Prosecutor's ("OTP" or "Office") preliminary examination of the Situation in Colombia. The report summarizes the analysis undertaken to date, including the Office's findings with respect to jurisdiction and admissibility, and outlines the key areas of continuing focus. It should be noted that the Office's interim reporting on preliminary examinations is generally presented under the rubric of the annual Report on Preliminary Examination Activities. The present, more detailed report is therefore exceptional in nature, in recognition of the high level of public interest generated by this examination. This interim report reaches no conclusion on whether an investigation should be opened: preliminary examination of the situation continues.

Jurisdiction

[...]

5. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified in the future, the Office determined that there is a reasonable basis to believe that from 1 November 2002 to date, at a minimum the following acts constituting crimes

against humanity have been committed by non-State actors, namely the FARC, ELN and paramilitary groups: murder under article 7(1)(a) of the Statute; forcible transfer of population under article 7(1)(d) of the Statute; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e) of the Statute; torture under article 7(1)(f) of the Statute; rape and other forms of sexual violence under article 7(1)(g) of the Statute. The required elements appear to be met for each group taken individually.

7. Because paramilitary armed groups demobilized as of 2006, they are not considered a party to the armed conflict during the period over which the ICC has jurisdiction over war crimes. Nonetheless, the Office continues to analyse whether so called ‘successor paramilitary groups’ or ‘new illegal armed groups’ could qualify as organised armed groups that are parties to the armed conflict or would satisfy the requirements of organisational policy for the purpose of crimes against humanity. The Government of Colombia refers to these groups as criminal bands (bandas criminales or BACRIM), and does not consider them as organized armed groups that are parties to the armed conflict.

8. State actors, in particular members of the Colombian army, have also allegedly deliberately killed thousands of civilians to bolster success rates in the context of the internal armed conflict and to obtain monetary profit from the State’s funds. Executed civilians were reported as guerrillas killed in combat after alterations of the crime scene. Allegedly, these killings, also known as ‘falsos positivos’ (false positives), started during the 1980s and occurred with greatest frequency from 2004 until 2008. The available information indicates that these killings were carried out by members of the armed forces, at times operating jointly with paramilitaries and civilians, as a part of an attack directed against civilians in different parts of Colombia. Killings were in some cases preceded by arbitrary detentions, torture and other forms of ill-treatment.

[...]

I. Introduction

25. The Republic of Colombia has experienced almost fifty years of violent conflict between government forces and rebel armed groups, as well as between such armed groups. The most significant actors include the so-called guerrilla armed groups the Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (“FARC”) and the Ejército de Liberación Nacional (“ELN”); paramilitary armed groups, sometimes referred to collectively as the Autodefensas Unidas de Colombia (“AUC”); and the national armed forces and the police.

26. The Office has received and gathered information on a large number of alleged crimes within the jurisdiction of the Court, including widespread acts of murder, rape and other forms of sexual violence, forcible transfer, severe deprivation of physical liberty or hostage taking, enforced disappearance, torture,

and the conscription, enlistment and use of child soldiers. The alleged victims of such crimes include human rights defenders, public officials, trade unionists, teachers as well as members of indigenous and Afro-Colombian communities. In carrying out its preliminary examination, the Office has also sought additional information from relevant States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources.

II. Jurisdiction

A. Alleged crimes against humanity

[...]

1. Alleged crimes against humanity committed by non-State actors

[...]

a. Contextual elements of crimes against humanity

Attack directed against any civilian population

38. The information available provides a reasonable basis to believe that large numbers of attacks have been carried out against the civilian population by FARC, ELN and paramilitary groups across different parts of Colombia[...]. The crimes have typically occurred in the context of efforts to exercise control over territories of strategic military and/or economic importance.

39. Specific categories of the civilian population have, in particular, formed the target of such attacks, including community leaders, indigenous persons and Afro-Colombians, in the form of mass killings, executions, sexual violence and forced displacement. Civilians have also been targeted based on their suspected or perceived affiliation with other armed groups or the State authorities; their suspected involvement in the narcotics industry; or for their refusal to cooperate with and/or opposition to particular armed groups. This includes human rights defenders, public officials, trade unionists, teachers and journalists.

State or organizational policy

40. The attacks on the civilian population were not isolated or spontaneous acts of violence, but were committed pursuant to a policy developed by the leadership of each of the main non-State actors involved, namely the FARC, the ELN and the paramilitaries.

41. The FARC, and to a lesser extent the ELN, developed and focused their military operations on gaining

control and exercising power over parts of Colombian territory which they could expropriate for political and financial gain. Pursuant to this policy, the FARC and ELN launched widespread and systematic attacks against the civilian population with the aim of expropriating land and subsequently gaining political, economic and social control over the targeted territory. In addition, the FARC and the ELN are responsible for the largest number of hostage-takings, constituting severe deprivation of liberty, for the purposes of economic extortion and political pressure.

42. Paramilitary groups assisted the Colombian military in their fight against FARC and ELN. Acts of violence appear to have been an integral part of the strategy of paramilitary groups. [...] The policy to attack such civilians was reportedly designed to break any real or suspected links between civilians and the guerrilla. [...]

Widespread or systematic nature of the attack

45. According to the Government of Colombia's Presidential Human Rights Programme, the number of civilians killed over the period 2003-2010 amounts to 3,166, including killings of indigenous persons, trade unionists, teachers, local authorities and civilians killed in massacres. Non-governmental sources estimate that approximately 6,040 civilians have been killed in the context of the armed conflict from 2003 until 2009. A large number of murders related to the armed conflict have allegedly been committed against specific groups within the civilian population, including members of indigenous and Afro-Colombian communities. Between 2002 and 2010, at least 1,120 persons belonging to indigenous communities were allegedly killed while thousands were reportedly made victims of forced displacement as a result of the armed conflict. There are also credible allegations that trade unionists and members of local authorities have been the target of conflict-related killings based on actual or perceived political affiliation. According to official figures from the Colombian Government, at least 423 such persons were killed between 2003 and 2010. [...]

b. Underlying acts constituting crimes against humanity

[...]

1. Murder

53. Reportedly, the FARC, ELN and paramilitary groups have carried out a series of attacks against the civilian population, including a high number of killings of civilians. [...]

1.1. Murders of indigenous people and Afro-descendants

54. A large number of victims of killings by armed groups include indigenous and Afro-Colombian communities, mainly their leaders. Reportedly, armed groups kill members of these communities in order to intimidate the population and to provoke the displacement of individuals, families or groups and thus, gain

territorial control, or as retaliation for opposing their presence or for allowing the presence of other armed groups on their territories. Allegedly, the Coreguaje, Wiwa, Awá, Kankuamo and Embera-Katío communities have suffered from high murder rates. In the same manner, activists and community leaders are allegedly targeted for the reason that they are perceived as a challenge to the armed groups' authority. [...]

58. FARC and ELN have been identified as the main perpetrators of targeted killings of community leaders and activists. The FARC has allegedly killed members of Community Councils (Consejos Comunitarios) of Afro-Colombian communities in several parts of the country, including Chocó, Nariño, Cauca and Valle del Cauca departments, in an attempt to undermine their organizational structures. In January 2011, two members of Los Manglares Community Council were murdered in López de Micay (Cauca), allegedly by members of the FARC. Similarly, in February 2004, the ELN allegedly killed a teacher, and a peasant farmer in Remedios Municipality, Antioquia Department.

59. Paramilitary groups have also been attributed responsibility for high profile cases of murder of indigenous people and Afro-Colombians. For instance, on 5 May 2003 in the municipality of Tame, Arauca, paramilitary groups allegedly entered the indigenous reserves (resguardos) of Betoyes killed at least 3 members of the community and raped at least 3 girls. The community attributed responsibility to paramilitary groups acting in collusion with elements of the armed forces. In October 2003, paramilitaries reportedly killed three Kankuamo indigenous leaders in the Sierra Nevada de Santa María. Similarly, in April 2004, 11 persons, members of the Wayuu community, were allegedly killed by paramilitaries in Bahía Portete, La Guajira.

[...]

2. Forcible transfer of population

[...]

61. Armed groups under the analysis, i.e. FARC, ELN and paramilitaries, have been identified as the main perpetrators of forced displacement in Colombia. The available information provides a reasonable basis to believe that these groups have caused displacement for various reasons, including the expansion of their strategic military presence, securing access routes, and establishing zones of political influence. Colombians are also forced to flee as a result of threats and attacks, including assassinations of community leaders, by armed groups which suspect them of supporting the other side. With regard to Afro-Colombian territories in particular, the UN independent expert on minority issues explained that these are strategically important for armed groups involved in narcotics production and trafficking, as well as in the context of newly emerging macroeconomic development plans, referred to as “megaprojects”. According to the expert, these projects have been implemented with brutal forced displacement, mass violence and selected killings. For example, in the case of the river basins of Curvarado and Jiguamiando, 3,000 Afro-Colombians were forcibly displaced from their collective territory by paramilitaries, narco-traffickers, and those seeking to acquire lands illegally

for plantations and cattle ranching. [...]

3. Imprisonment or other severe deprivation of physical liberty

[...]

69. FARC, ELN and paramilitary groups have resorted to imprisonment in order to obtain resources to finance their activities in relation to the internal armed conflict in Colombia, to assert their presence and authority in a particular area or to exert pressure over the Colombian State in order to exchange them for guerrilla prisoners held by the authorities.

70. Severe deprivation of liberty is reportedly committed through different methods, including abductions in multiple locations such as victims' residences, checkpoints or public places. While in captivity, victims are subjected to severe conditions, including long periods of detention, ill-treatment, deprivation of communication from the outside world, and placing of chains around their bodies.

[...]

73. Furthermore, paramilitary groups have been attributed responsibility for abductions and subsequent killings. For instance, in 2004, the disappearance of two persons in Puerto Libertador (Córdoba) was attributed to the Northern Bloc of AUC, in the course of an action in which 10 hostages were taken, including a former municipal counsellor (consejal), 8 of whom were subsequently killed. [...]

4. Torture

[...]

76. The UN received reports on acts of torture by members of armed groups, particularly by paramilitaries who resorted to torture and degrading or humiliating treatment, inter alia, in Antioquia, Cauca and Cesar. Since 2003, victims of the paramilitaries were described as usually being: (i) people accused of being linked to rebel armed groups; (ii) social leaders and public officials opposed to the paramilitary groups' social, economic and political expansion; (iii) rivals for control of businesses (drug trafficking, theft of fuel, etc.); and (iv) victims of "social cleansing." Some social groups appear particularly vulnerable to torture, such as women, children, youth, incarcerated persons, and lesbian, gay, bisexual and transgender persons, in particular in Antioquia. [...]

5. Rape and other forms of sexual violence

[...]

79. Targeted victims of sexual violence include women and girls who have been forcibly recruited; women whose relatives are members of armed groups or are viewed as having contacts with members of an opposing group; women obstructing forced recruitment of their sons and daughters, particularly by the FARC and the paramilitaries; women belonging to indigenous communities; men and women whose sexual orientation or gender identity is questioned; alleged carriers of sexually transmissible diseases such as HIV/AIDS; women members of human rights organizations and activists; women who refuse to obey instructions of the FARC.

80. Amnesty International identified the following motives behind the commission of sexual violence by armed groups: to sow terror within communities to ease military control; to force people to flee to facilitate acquisition of territory; to wreak revenge on adversaries; to accumulate trophies of war; to exploit victims as sexual slaves; to injure the “enemy’s honour”. [...]

2. Alleged crimes against humanity committed by State actors

[...]

a. Contextual elements of crimes against humanity

Attack directed against any civilian population

93. False positives cases — unlawful killings of civilians, staged by the security forces to look like lawful killings in combat of guerrillas or criminals — reportedly began during the 1980s. However, they began occurring with a disturbing frequency across Colombia from 2004. Executed civilians were reported as guerrillas killed in combat after alterations of the crime scene. The available information indicates that these killings were carried out by members of the armed forces, at times operating jointly with paramilitaries and civilians, as a part of an attack directed against civilians in different parts of Colombia. Killings were in some cases preceded by arbitrary detentions, torture and other forms of ill-treatment.

94. The available information further indicates that these attacks were directed against particular categories of civilians, who resided in remote areas and were considered to belong to a marginalized sector of the population (unemployed persons, considered as indigents and drug addicts). In some instances, civilians appeared to have been targeted also due to their political, social and community activities. Victims would include social and community leaders, indigenous persons, others persons accused of being collaborators or members of guerrilla forces, minors, peasants and persons with disabilities. To locate their victims, the perpetrators would often use informants who were civilians, paramilitaries, police or military officers. Victims were reportedly approached by persons posing as recruiters with offers of employment and transportation to far away towns, where they were subsequently executed and reported as members of armed groups killed in

combat, with intelligence reports prepared to substantiate such affiliations.

State or organizational policy

95. There is a reasonable basis to believe that the acts described above were committed pursuant to a policy adopted at least at the level of certain brigades within the armed forces, constituting the existence of a State or organizational policy to commit such crimes. As Chambers of the Court have found, “a State policy does not need to have been conceived at the highest level of State machinery but may have been adopted by regional or local organs of the State. Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy.” The Office continues to analyse information on whether such a policy may extend to higher levels within the State apparatus. [...]

99. Factors that could have motivated the widespread commission of false positives killings appear to include pressure within military units to produce results and demonstrate that ground was being gained against guerrillas and criminals. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions observed, “[w]hile senior Government officials disputed this and emphasized that killing civilians does not increase security, it is clear that within the military, success was often equated with enemy ‘kill counts’ - the number of FARC members and others killed in combat”. His report goes on to explain that:

As security in Colombia began to improve from 2002, and as guerrillas retreated from populated areas, some military units found it more difficult to engage in combat. In such areas, some units were motivated to falsify combat kills. In other areas, the guerrillas were perceived by soldiers to be particularly dangerous and soldiers were reluctant to engage them in combat. It was “easier” to murder civilians. In still other areas, there are links between the military and drug traffickers and other organized criminal groups. Local military units do not want to engage in combat with the illegal groups with which they are cooperating, so killing civilians falsely alleged to be part of these groups make military units appear to be taking action.

100. In relation to allegations of responsibility at higher levels within the armed forces, the information available indicates that high officials of the army were aware of false positive killings prior to 2002, but failed to take appropriate measures to address the allegations. Indeed, allegations of false positive incidents were raised by the UN Office of the High Commissioner for Human Rights (OHCHR) in its annual reports addressing the human rights situation in Colombia in 2004, 2005, 2006 and 2007. In the annual report of 2005, the UN OHCHR indicated that there had been an increase in allegations of extrajudicial executions attributable to members of the security forces and that most of them were executions that had been “portrayed by the authorities as guerrilla casualties in the course of combat, after alteration of the crime scene. Many were wrongly investigated by the military criminal justice system. Some 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.” The UN OHCHR considered that “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.” In some instances the authorities reportedly downplayed such accusations. It has also been alleged that the military would sometimes open preliminary investigations immediately after a death in combat was reported in order to prevent future criminal investigations, rather than to establish the truth on the circumstances of the death. The lack of accountability for violators as well as the absence of effective control by army commanders or clear rules preventing and punishing these crimes could have contributed to the persistence of such practices. [...]

b. Underlying acts constituting crimes against humanity

[...]

1. Murder & Enforced disappearances

[...]

118. Allegations brought against Brigade 4 are illustrative of the general modus operandi in false positive cases: victims are often peasants or minors, abducted from their houses or arrested at checkpoints or in public places, or offered false offers of work; victims are then brought to an agreed location, killed and their civilian appearance removed by changing their clothes to military uniforms and by placing weapons and other military equipment next to them. [...]

120. [...] After the killings, Mobile Brigade 15 removed the identity papers of the victims and their civilian appearance by dressing them in camouflage attire and by placing weapons and other military equipment next to their bodies. Mobil Brigade 15 then presented the victims as members of armed groups, and later buried the victims in Ocaña, Norte de Santander. [...]

B. Alleged war crimes

123. The information available provides a reasonable basis to believe that conduct committed since 1 November 2009 in the context of a non-international armed conflict which continued in the territory of Colombia constitutes war crimes falling within the jurisdiction of the Court, including: murder under article 8(2)(c)(i) and attacking civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages pursuant to article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(c)(vi); and conscription, enlistment and use of child soldiers under article 8(2)(e)(vii) of the Statute. The information available provides a reasonable basis to believe that individuals belonging to each of the different State and non-State actors involved in the armed conflict in Colombia appear to bear responsibility for one or more of the above listed crimes.

Contextual elements of war crimes

124. The application of article 8 of the Rome Statute requires the existence of an armed conflict. “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

125. “An armed conflict not of an international character is characterized by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a State territory.” Thus, in order to distinguish a non-international armed conflict from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the armed confrontation must reach (1) a minimum level of intensity, and (2) the parties involved in the conflict must show a minimum level of organization.

126. Intensity may be shown by factual indicators such as the scale, seriousness and increase of the attacks; type of operations; the mobilisation and distribution of weapons; length of time of combat operations; geographical expansion as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.

127. As to the requirement of organization, a number of factors to be assessed include: the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment is available; the ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. Organized armed groups must have a sufficient degree of organization, in order to enable them to carry out protracted armed violence.

128. During the time period over which the Court has jurisdiction over war crimes, i.e. since 1 November 2009, an armed conflict of a non-international character has been taking place in the territory of Colombia between armed groups, i.e. FARC and ELN, and the Government of Colombia. Both the FARC and the ELN exhibit a sufficient degree of organization, and have engaged in sustained military hostilities against the Colombian government of sufficient intensity to meet the threshold requirements for the existence of a non-international armed conflict. The persistence of a non-international armed conflict in the territory of Colombia was acknowledged in the 2011 Victim’s Law and by Colombian President Santos on 6 May 2011. The existence of a non-international armed conflict has also been confirmed by observers such as the International Committee of the Red Cross.

129. Due to the AUC’s demobilization as of 2006, they are not considered a party to the armed conflict during the period over which the ICC has jurisdiction over war crimes.

130. However, new groups emerged in various parts of the country after the demobilization process of paramilitary groups began. According to the UN OHCHR, well-known paramilitary leaders are, or have been,

behind these successor paramilitary groups or new illegal armed groups. Some of these groups are headed by former middle-ranking cadres from previous paramilitary groups such as the AUC while a number of low-level demobilized members operate in areas which were once zones of influence of the paramilitaries. These groups are said to also maintain links with demobilized paramilitary leaders who have accepted the terms of Law 975/2005. In 2010, the military was authorized to support the police in its combat against six of these groups: Los Paisas, Los Urabepos, Popular Revolutionary Anti-terrorist Army of Colombia (ERPAC), Renacer, Los Rastrojos and Los Machos.

131. As previously noted, the issue of whether new illegal armed groups would qualify as organized armed groups that are parties to the armed conflict, remains the subject of further analysis by the Office. This is a required contextual element for their commission of war crimes within the Court's subject-matter jurisdiction. The Government of Colombia's position is that they are not organized armed groups, as they lack an established hierarchical structure or chain of command, do not exercise territorial control, and do not conduct sustained and concerted military operations.

1. Alleged war crimes committed by non-State Actors

[...]

a. Murder pursuant to article 8(2)(c)(i) and attacking civilians pursuant to article 8(2)(e)(i)

133. In the context of article 8(2)(c)(i), murder refers to the intentional killing of one or more protected persons without lawful justification. The elements of the crime of murder in non-international armed conflicts were drawn without difference to those of "wilful killing" in an international armed conflict. Following the elements of the latter, international case law and the main commentaries of the Rome Statute, the objective elements of murder would comprise those acts or omissions causing death of persons taking no active part in hostilities and that are contrary to treaty or customary law.

b. Cruel treatment and torture pursuant to article 8(2)(c)(i) and outrages upon personal dignity pursuant to article 8(2)(c)(ii)

135. The objective element of the war crime of cruel treatment involves the perpetrator inflicting severe physical or mental pain or suffering upon one or more persons who were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in hostilities. The objective element of the war crime of torture involves the perpetrator inflicting severe physical or mental pain or suffering upon one or more persons who were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in hostilities, for the purposes of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

136. The objective element of the crime of outrages upon personal dignity involves the perpetrator humiliating, degrading or otherwise violating the dignity of one or more persons who were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in hostilities. The objective element further requires that the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity. [...]

c. Taking of hostages pursuant to article 8(2)(c)(iii)

138. The objective element of the war crime of taking hostages involves the perpetrator seizing, detaining, or otherwise holding hostage one or more persons after having threatened to kill, injure or continuing to detain such person or persons. Such person or persons must have been either hors de combat, civilians, or medical or religious personnel taking no active part in the hostilities. In addition, the perpetrator must have intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.

139. The FARC and ELN have been identified as the main perpetrators of hostage-taking in the context of the internal armed conflict in Colombia. The information reviewed indicates that these armed groups have taken civilians and individuals hors de combat as hostages regularly since 1 November 2009 in order to exchange them for guerrilla prisoners held by the Colombian authorities or for ransom.

140. The taking of hostages has involved abductions in multiple locations including victims' residences, check points or public places or by detaining members of the armed forces after an armed clash and placing them in the condition of hostages. While in captivity, hostages are often submitted to cruel treatment and outrages upon personal dignity. In June 2010, in Tadó, Chocó, ELN members took three road workers hostage. Similarly, in July 2010, four human rights defenders were kidnapped by members of the ELN in Teorama (Norte de Santander) and were released a few days later. In September 2011 in Tumaco, Nariño, the assistant to the mayor was kidnapped by the FARC and released on 29 October 2011. A 61-year-old member of the community was also kidnapped along with the assistant to the mayor, but was released after a few hours. Reportedly, FARC and ELN commanders have received a standing order to kill hostages before allowing a military rescue. For instance, in January 2010, during an armed confrontation with the armed forces, the FARC killed four members of security forces who had been held in captivity for between 12 and 14 years. [...]

e. Conscription, enlisting and using children to participate actively in hostilities pursuant to article 8(2)(e)(vii)

[...]

145. FARC and ELN have been identified as the main perpetrators of enlistment, conscription and use of child soldiers, in the context of the internal armed conflict in Colombia. The information reviewed indicates

that these armed groups have engaged in enlisting and conscripting persons under the age of 15 years, as well as using them to actively participate in hostilities. [...]

147. The FARC and ELN reportedly enlist children by using different methods, including the dissemination of political propaganda at schools and in public places, or the offer of salaries, meals and protection. Children are also conscripted following direct and indirect threats as well as by forcing the local population to gather in public places of municipalities to conduct a census and prepare the recruitment of children over the age of eight years old. In 2010, the FARC convened a community meeting in Antioquia to obtain a headcount of children. It also announced that children above the age of 8 would be recruited. In one typical use of children to participate in hostilities, a child was used by the FARC to carry out an attack against a police station using explosives. The explosives were attached to the child and activated as he approached the police station, killing him instantly.

DISCUSSION

I. Classification of the situation and applicable law

1. (Paras 7, 25, 45, 94, 123-129)

a. When does a non-international armed conflict exist? Which conditions must be fulfilled for a situation to be classified as a non-international armed conflict? Are they fulfilled in this case? (GC I-IV, Art. 3; P II, Art. 1)

b. Is it sufficient that one non-state armed group fulfills the threshold of application of Article 3 common to the Geneva Conventions or Protocol II to automatically consider that all armed groups are parties to the conflict? Or should we assess the existence of an armed conflict in respect to each individual armed group?

c. Once a non-international armed conflict exists, are only acts committed by parties governed by IHL or every act linked to the conflict? May persons belonging to an armed group which is not sufficiently organized, or those not belonging to any armed group commit war crimes in a non-international armed conflict?

d. Once the requisite level of intensity has been reached, until when does IHL apply? What happens if the level of intensity and the rebel group's degree of organization drop below that threshold?

2. (Paras 7, 25, 45, 94, 123-129)

a. Do all armed groups cited in the Report fulfill the conditions for the application of Protocol II? Is there one single armed conflict in Colombia or several? Who are the parties to this/these conflict(s)?

b. Does the emergence of new paramilitary group which may not have an organized structure affect the classification of the conflict? Are members of such a group bound by IHL? By international criminal law?

c. What is the law applicable in Colombia? Is it only Common Article 3 or does Additional Protocol II apply as

well? What about Customary International Law? Does the number of casualties mentioned [para.45] constitute a factor in classifying the situation?

3. (Paras 7, 25, 45, 94, 123-129)

- a. Are the FARC, ELN and paramilitary groups parties to the Geneva Conventions? Are they bound by IHL? Does IHL explicitly contain rules directly applicable to armed groups? Which obligations are binding for armed groups in non-international armed conflicts? What is the importance of customary IHL in terms of the law of non-international armed conflicts? Is customary IHL the same for armed groups and states?
- b. Why are armed groups bound by the IHL of non-international armed conflicts?

II. War crimes and crimes against humanity

4. Which acts reported in paras 38-120 as crimes against humanity are also war crimes ? What additional conditions must be fulfilled ? Which conditions analyzed by the Office of the Prosecutor do not matter for war crimes?

III. Classification of persons

5. [para.39] Under what conditions may a person be considered a “combatant” under IHL? Does such a category of persons exist in non-international armed conflicts? Do civilians who take part in hostilities become combatants? Do civilians who are affiliated with armed groups become combatants? Would affiliation as such amount to direct participation in hostilities? What if the affiliation means that they are part of the political branch of an armed group? (GC IV, Art. 5; P I, Art. 51(3); P II, Art. 13(3); ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)

IV. Conduct of hostilities

6. (Paras 39,40, 99) What is the definition of a civilian population? For the purpose of crimes against humanity under international criminal law? In IHL? For the purpose of war crimes in international criminal law? May the civilian population be lawfully targeted under IHL? If there are some combatants amongst it? (P I, Art. 50) Does the same definition apply in the context of a non-international armed conflict?

V. Forced Displacement [para.61]

7. Does the forced displacement of civilians constitute a violation of IHL? Does it make a difference if the population fled because of direct threats or as a result of the hostilities? (P II, Art.17; CIHL, Rule 129) How are the displaced persons protected by IHL? (P II, Art.17; CIHL, Rule 131)

8. Is there a difference in protection offered by IHL to displaced persons in international armed conflicts and non-international armed conflicts? (GC IV Arts. 49 and 147; P I, Art.85(4)(a)) Does it make a difference in classifying the act as a war crime?

VI. Detention

9. (Paras 69-73) What is the status of the persons detained by the FARC, ELN and paramilitary groups? May they be detained without trial until the end of the hostilities? Do they have the right to be visited by the ICRC? How should they be treated? (GC I-IV, common Art. 3; P II, Arts. 4 and 5)

VII. Hostage Taking

10. (Paras 138-140) Is the taking of hostages prohibited under the IHL of international armed conflicts? Under the IHL of non-international armed conflicts? Does IHL define what amounts to the taking of hostages? Are paramilitary groups bound by the obligation not to take hostages? Is it a war crime? Must there be a nexus between the hostage-taking and the armed conflict? (GC I-IV, Common Article 3; GC IV, Art. 34 and 147; P I, Art. 75(2)(c); P II, Art. 4(2)(c); CIHL, Rule 96)

11. (Paras 138-140) Is every detention by an armed group a case of hostage-taking? Which additional conditions must be fulfilled to turn detention by an armed group into the taking of hostages ?

VIII. Protection of children

12. (Paras 140-147) How are children protected by IHL? What are the relevant provisions about the prohibition of the recruitment of children in armed conflicts? Is their protection different in international and non-international armed conflicts? What is the age threshold used for child soldiers? How has the Optional Protocol of the Convention on the Rights of the Child affected that threshold? How are children to be treated upon capture? (P I, Arts. 77-78; P II, Art.4; CIHL, Rules 135-137, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict)

13. (Paras 140-147)

a. Is it lawful to allow children to voluntarily join military forces under IHL? Does your answer depend on the activity carried out by the child? Does it change for armed groups? Does IHL differentiate between children who willingly took up weapons and those who have been forced to do so? (P I, Art. 77(2) and (3); P II, Art. 4(3)(c) and (d); ICC Statute, Arts 8(2)(b)(xxvi) and 8(2)(e)(vii))

b. Should children who are recruited following political propaganda in schools and public places be considered to have voluntarily joined the armed groups? What about children who join the armed groups following promises that they would be fed and paid?

(Paras 140-147) May children be targeted when they directly participate in hostilities? How should they be treated upon capture? How do you understand the contradiction between affording children special protection and at the same time allowing the targeting of children taking direct part in hostilities?

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