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## Conseil des droits de l'homme

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### Rapport annuel du Haut-Commissaire des Nations Unies aux droits de l'homme et rapports du Haut-Commissariat et du Secrétaire général

## Rapport annuel du Haut-Commissaire des Nations Unies aux droits de l'homme

### Additif

### Rapport de la Haut-Commissaire des Nations Unies aux droits de l'homme sur la situation des droits de l'homme en Colombie\*

#### *Résumé*

Le présent rapport met en évidence les mesures positives adoptées par le Gouvernement colombien afin de promouvoir et de protéger les droits de l'homme en 2012, ainsi que les problèmes qu'il doit encore régler. Il propose des recommandations pour contribuer à améliorer la situation des droits de l'homme.

La Colombie est en mesure de bien mieux s'acquitter de ses obligations en matière de droits de l'homme et de devenir une société ouverte à tous, qui respecte les droits de tous les Colombiens. Il existe manifestement d'importants signes positifs, mais réaliser et pérenniser ces progrès passera par l'innovation et la persévérance et demandera la participation de tous les secteurs de la société, ainsi que des années d'efforts soutenus.

Le rapport est axé sur les domaines dans lesquels le Bureau du Haut-Commissariat aux droits de l'homme en Colombie œuvre pour faciliter le changement. Il examine la situation des droits de l'homme dans le pays en 2012 et en classe les différents aspects en trois catégories, selon qu'ils donnent des raisons d'espérer, sont à surveiller de près ou exigent une intervention rapide. Les aspects de la situation des droits de l'homme qui donnent des «raisons d'espérer» sont ceux dans lesquels le Gouvernement a reconnu ses obligations et pris des initiatives importantes en matière de politiques et/ou dans la pratique pour résoudre les problèmes existants. Traduire ces initiatives en changements concrets

\* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit est joint en annexe au résumé, et il est distribué en anglais et en espagnol seulement.

sera difficile, notamment en raison des droits acquis et obstacles structurels. Les «aspects à surveiller de près» sont ceux dans lesquels des mesures positives et négatives ont été prises. Par exemple, un problème avoir été pleinement ou partiellement reconnu sans que l'initiative prise pour permettre le changement requis soit adaptée. S'agissant des aspects réclamant une intervention urgente, le rapport met en lumière des problèmes graves relatifs aux droits de l'homme qui continuent d'être niés ou de ne pas être traités.

Chacun a des droits et des obligations au titre du droit des droits de l'homme. La responsabilité première incombe à l'État, car il doit non seulement respecter les droits de l'homme et réagir à toute violation de ces derniers, mais aussi protéger les individus contre les violations commises par des tiers et créer un environnement où tous les droits sont respectés. Tandis que les groupes armés, les propriétaires fonciers et les entreprises, par exemple, doivent tous respecter les droits de l'homme et répondre des violations qu'ils commettent, l'État doit lui, par ses politiques, programmes et lois, agir pour mettre un terme à ces violations et empêcher qu'elles ne se reproduisent.

## Annexe

[Anglais et français seulement]

### Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia

#### Contents

	<i>Paragraphs</i>	<i>Pages</i>
I. Context.....	1–4	4
II. Human rights situation.....	5–94	4
A. Reasons for hope.....	5–36	4
B. Caution and close attention needed.....	37–73	9
C. Problems that need urgent attention.....	74–94	14
III. Recommendations.....	95–97	18

## **I. Context**

1. Colombia is in a position to greatly improve its compliance with its human rights obligations and to become a fully inclusive society that respects the rights of all Colombians. Significant positive signs are visible, including the formal initiation in October of dialogue between the Government and the Revolutionary Armed Forces of Colombia–People’s Army (FARC-EP) for the termination of the conflict and the construction of a stable and lasting peace and the commencement of implementation of the 2011 Victims’ and Land Restitution Law.

2. Congress approved three constitutional reforms promoted by the Government. The Legal Framework for Peace is aimed at providing transitional justice mechanisms to facilitate future peace processes. Some human rights organizations criticized the reform as opening the door to impunity, while others saw it as a necessary step towards peace. The office of the United Nations High Commissioner for Human Rights in Colombia (OHCHR-Colombia) is focusing on the potential of the peace process to significantly transform the lives and prioritize the rights of the victims of the conflict. The reform of the military justice system was approved, despite strong criticism raised at the national and international levels, including by the United Nations High Commissioner for Human Rights. The justice sector reform was rejected by the President of Colombia, due to outrage from the population and inconsistencies with the original purpose.

3. Attacks and threats continued against human rights defenders and those involved in the land restitution programme. In many areas, the majority of these violations can be attributed to illegal armed groups that emerged after the demobilization of paramilitary organizations (post-demobilization groups).

4. Colombia is a middle-income country with high indices of inequality. Mineral exploitation is used as an engine for development, but there are significant problems with regard to respect for the right to informed prior consultation. More needs to be done to achieve the progressive realization of economic, social and cultural rights.

## **II. Human rights situation**

### **A. Reasons for hope**

#### **1. Peace process**

5. On 26 August, the Government and FARC-EP signed the General Agreement for the Termination of the Conflict and Construction of a Stable and Lasting Peace, establishing an agenda of priority issues: agrarian development; political participation; the end of the armed conflict; illicit drugs; and victims’ rights. A sixth point on implementation, verification and dispute resolution mechanisms linked to any final agreement was also included.

6. More so than any other development, the current peace process has the potential to transform Colombia in terms of its level of respect for and enjoyment of human rights. In the context of the ongoing armed conflict, human rights violations are committed daily, with a disproportionate impact on vulnerable or geographically isolated sectors of the population and on social actors, community leaders and human rights defenders. The list of violations is long: killings, disappearances, torture and other ill-treatment, use of landmines, forced displacement, sexual violence and exploitation, stigmatization, threats and intimidation, recruitment and use of children, limitations on freedom of movement and

circulation of food and medicines, violation of the rights to education, health, free assembly and opinion, persecution of medical personnel, limitations on humanitarian access, and the illegal use of civilian infrastructure.

7. To achieve peace it must be ensured that these violations will not be repeated by FARC-EP or by the State, that truth and justice are served and that victims have a much greater opportunity to participate in the political and economic benefits of Colombia. The peace process also provides a means to address structural problems, with a view to facilitating sustainable rural development, curbing poverty and inequality, and effectively and fully dealing with past human rights violations.

8. The peace process should produce a significant transformation in the daily lives of the victims and be designed to minimize the long-term risk of FARC-EP members re-engaging in armed activities or joining post-demobilization groups. Human rights violations by all parties need to be confronted boldly, creatively and adequately. The rights and dignity of the victims must be restored to facilitate a catalytic transformative moment and spare society years of continued scars and confrontation.

9. The peace process creates considerable and necessary challenges and will require vision, sacrifice and innovation by the parties to the conflict. Colombian society as a whole must rethink its positions, in the interest of positive national change. In particular, profound consideration of what is to be understood by “peace” will have to be undertaken for this opportunity to be fully seized. The views of those most affected are pivotal. Only by adequately taking victims’ rights into consideration can Colombia lay the foundation for sustainable change. Victims are the truest evaluators of any peace process and will base their views on whether the process transformed their lives for the better, whether they were able to escape from violence relating to political and economic exclusion, and whether there were institutional reforms that prevented further violations.

10. The State and society should take advantage of all the agenda points in the peace process to initiate or deepen the broader transformative agenda on the conditions that underlie and sustain the conflict. As opposed to avoiding addressing past violations through amnesties and other forms of impunity, which simply violate human rights obligations, the past should be used to positively transform Colombia. It is important to note that many possible solutions cut across topics and that a holistic approach that promotes greater levels of respect for all human rights for all Colombians should be a central and important goal.

11. The potential benefits of peace cannot be underestimated. It is to be hoped that a similar process will also eventually be initiated with the National Liberation Army (ELN).

12. OHCHR-Colombia is providing expert and comparative input to contribute to ensuring that any peace agreements are in line with international obligations.

## **2. Victims’ and Land Restitution Law**

13. The High Commissioner welcomes the implementation of the Victims’ and Land Restitution Law and its significant potential to recognize victims and promote social change. While there has been significant effort, changes in the attitudes and sensitivities of State actors and some victims are needed to transform the programme of assistance, to ensure that it becomes a rights-based programme of empowerment in practice.

14. The majority of victims live in conditions of vulnerability and have unsatisfied basic needs. One of the major challenges faced by the Unit for Assistance and Comprehensive Reparations for Victims (UARIV), established to coordinate the entities responsible for assistance and reparations for victims, is how to simplify its procedures, including those to obtain useful and reliable data on victims and to handle complaints timely and effectively. The projected massive number of potential programme beneficiaries makes this challenge

even more daunting and requires institutional mechanisms that can respond without negatively affecting human dignity. The quality of the processes and the experiences of the victims are as important as the assistance and material reparations delivered.

15. The High Commissioner is concerned about the lack of information and simple processes to facilitate the exercise of victims' rights. Some of the same mistakes from the previous registration of displaced persons are being repeated, including those highlighted by the Constitutional Court relating to the burden of proof and assumptions made during the assessment of victims' testimonies. There is a risk that violations other than displacement, such as rape or enforced disappearance and those violations committed by post-demobilization groups, will not be taken into account in practice. As the registry is the entry point to the assistance and reparation system, improvements are required. In addition to the administrative aims of the registry, the documentation, analysis and categorization of the victims are tools that can serve to support the construction of historical memory.

16. The High Commissioner reiterates that reparations should not be limited to economic compensation. Individual reparation plans should allow for the reconstruction of dignified lives and collective reparation plans should be aimed at rebuilding the social fabric of the affected communities. The law is only one of the crucial aspects in the process of profound societal transformation. This is a long but hopeful path.

17. OHCHR-Colombia, through its observation and advocacy, provides regular information and analysis to the Unit for Assistance and Comprehensive Reparations for Victims, working with it to overcome its many challenges. The office also works to raise awareness about the law and contributes to creating adequate institutional capacity.

### **3. Land restitution**

18. While technically the provisions for victims and land restitution are part of the same legislative act, the structures for implementation are distinct.

19. Colombia has one of the highest levels of inequality in rural land ownership,<sup>1</sup> and approximately 10 per cent of the country's population has been displaced by violence.<sup>2</sup> Thus, land restitution is one of the most important steps towards peace in Colombia.

20. The High Commissioner recognizes the significant efforts made to date by the Land Restitution Unit of the Ministry of Agriculture and Rural Development and the 24 land restitution judges and 15 magistrates appointed in 2012.

21. OHCHR-Colombia continues to record threats to and attacks on claimants and State authorities involved in land restitution processes. Improved security is needed and will require better coordination, as well as the strengthening of regional and national institutions and prosecutions of those undermining the process. The first two decisions in land restitution cases were handed down in October and December.<sup>3</sup> The High Commissioner welcomes this important milestone, which recognizes the Constitutional Court's broad interpretation of the concept of "armed conflict", and notes that a pro-victim and non-formalistic application of the law cannot be underestimated.

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<sup>1</sup> United Nations Development Programme-Colombia, *Colombia rural. Razones para la esperanza – Informe Nacional de Desarrollo Humano 2011*, p. 197.

<sup>2</sup> According to the Unit for Assistance and Comprehensive Reparations for Victims, 4,699,276 of 5,744,230 victims were subject to forced displacement.

<sup>3</sup> Rulings of 16 October 2012, Second Civil Court of the Specialized Circuit for Land Restitution in Carmen de Bolívar, and 4 December 2012, First Civil Court of the Specialized Circuit for Land Restitution in Ibagué.

22. The High Commissioner underlines the importance of a rural development policy to ensure economic sustainability and access to markets for small and medium-sized producers in the context of the land restitution programme. Creating conditions for a dignified life with access to Government services is required.

23. OHCHR-Colombia helps to create awareness of the Victims' and Land Restitution Law through media campaigns, provides training and support for judges with regard to incorporating international human rights standards into their decisions, and monitors implementation, paying particular attention to whether victims can safely exercise their rights.

#### **4. Centre for Historical Memory**

24. The role of the Centre for Historical Memory is key to State efforts to ensure the right to truth and through truth contribute to non-repetition. Its well-researched reports have not yet realized their potential in terms of generating changes in public policies and public perceptions. OHCHR-Colombia and the Centre jointly organized a human rights day event. The office has also done some capacity-building work with the Centre. More effective use of the past is needed to transform Colombia.

#### **5. National Ombudsperson's Office**

25. The High Commissioner recognizes the role of the National Ombudsperson's Office in the defence and promotion of human rights. She notes in particular the contribution of the Early Warning System (SAT) analysts and community defenders, who work with very limited resources and assume great risks. The High Commissioner welcomes the incorporation of these officials into the staff of the National Ombudsperson's Office and emphasizes the need for national and regional authorities to take to action based on their work.

26. OHCHR-Colombia works on a daily basis with the Ombudsperson throughout the country, for example conducting joint missions, analysis and follow-up.

#### **6. Municipal ombudspersons**

27. OHCHR-Colombia recognizes the critical role of all municipal ombudspersons in guaranteeing and protecting the human rights of all Colombians, especially in communities with limited State presence. OHCHR-Colombia works on a daily basis with these officials and has initiated an online continuing education programme, as well as targeted in-situ training. There is a need to strengthen this institution cohesively so that it may fulfil its obligations under the Victims' and Land Restitution Law.

#### **7. National Conference on Human Rights**

28. The National Conference on Human Rights was held in December in Bogotá, following 25 departmental forums involving numerous local and national authorities and more than 12,000 human rights defenders and victims. OHCHR-Colombia provided support for this confidence-building process between the State and civil society and will be active in the processing of the conclusions to facilitate their mainstreaming into State policy and practice.

## **8. National System for Human Rights**

29. The National System for Human Rights<sup>4</sup> began functioning in 2012, with the purpose of coordinating the actions of public institutions at the national and regional levels, to produce measurable change.

30. One of the functions of the System is to monitor and facilitate the implementation of international commitments and obligations, including a rational prioritization of the over 700 recommendations formulated by United Nations treaty bodies and special procedures, the universal periodic review, the Inter-American system, and the High Commissioner for Human Rights.

31. The System is divided into six subsystems, which establish priorities for action and develop performance indicators. OHCHR-Colombia is helping in the establishment of clear objectives and compliance metrics. It is essential that all public institutions take this initiative seriously to maximize its potential positive impact.

## **9. Mass action in Cauca, and negotiation with indigenous communities**

32. In 2012, some indigenous communities denounced the intensification of the armed conflict and the negative impact this had on their rights and their daily lives. Demanding that the State and illegal armed groups respect their territorial authority, some—especially in the Department of Cauca—took mass action to remove armed actors from their territories. They removed barriers from police and military installations and physically carried soldiers to another location. They arrested and tried members of FARC-EP using traditional justice. Members of the State stigmatized the mass actions, creating a risk of their violent suppression.

33. In northern Cauca between July and November, OHCHR confirmed 27 targeted killings of indigenous community members and authorities. OHCHR-Colombia, the Special Rapporteur on the rights of indigenous peoples, the United Nations Resident Coordinator, the head of the Jesuit Order in Colombia and others joined forces to help to establish a climate of calm and dialogue.

34. After several weeks of discussions, the President travelled to Cauca to meet with a gathering of indigenous authorities from the region, where he apologized for the human rights violations they had suffered during the conflict, and put into place, under the leadership of the Minister of the Interior, a high-level process with the indigenous authorities to transform the lives of some of those most affected by the conflict.

35. Over a few months, indigenous authorities met with ministers, vice-ministers and high-level officials to discuss recognition of and respect for autonomy, property, territorial control and self-government, in addition to issues relating to prior consultation, health, education and communication. Although these are all recognized under international and domestic law and have been elaborated upon through Constitutional Court jurisprudence, much needs to be done to achieve recognition in practice. The process instituted a trust-building process with groups that have been perpetually marginalized. It contributed to Government officials' understanding and changes that were required, as well as to indigenous authorities' understanding of possibilities for collaboration that seemed unlikely before the mass actions.

36. The High Commissioner welcomes the agreements reached to date and expresses OHCHR-Colombia's continued commitment to help stimulate and facilitate the dialogue process. She also encourages all relevant actors to go further towards addressing remaining

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<sup>4</sup> Created by Decree No. 4100 of 2011, the System is led by an intersectoral commission on human rights, in which most Government institutions are represented.



concerns, and to use the lessons learned from this process to improve respect for indigenous rights and those most affected by the conflict.

## **B. Caution and close attention needed**

### **1. Human rights defenders**

37. OHCHR-Colombia continued to document cases of threats, surveillance, information thefts, sexual violence and homicides against human rights defenders. The majority of cases observed are attributable to post-demobilization groups. FARC-EP has also been accused of killings of and threats and other violations against human rights defenders. Defenders who work on extrajudicial execution cases have received threats from State actors. In high-conflict areas, defenders—in particular indigenous leaders—continue to be subject to accusations of being part of guerrilla groups, as well as to stigmatization and arbitrary detention. Judicial officials sometimes face pressure by members of the military to prosecute defenders and leaders.

38. Serious obstacles to the right to freedom of expression and opinion persist in Colombia. The Foundation for Freedom of the Press (FLIP) recorded 66 threats against journalists through September.<sup>5</sup> A journalist died in November after being beaten by police agents in their vehicle during a demonstration in Sucre.

39. The High Commissioner lauds the work done by the National Protection Unit during its first year of existence. By August 2012, approximately 3,500 defenders had been granted protective measures (hard or soft), according to the Unit's records. Between December 2011 and August 2012, the Unit recorded 11 attacks against defenders with hard protection schemes, with no deaths reported. However, OHCHR-Colombia learned of one defender provided with soft measures who was killed.

40. According to Somos Defensores,<sup>6</sup> a non-governmental organization that documents attacks against Colombia and human rights defenders, 37 defenders, mostly rural activists and leaders, were killed between January and September. Of these, 36 had not requested protection measures, which may be due to the fact that the National Protection Unit is much better known and more effective in protecting defenders in urban rather than rural areas. Some measures, such as armoured vehicles not suitable for rural roads or daytime bodyguards who leave defenders unprotected at night, are not effective for defenders with low income or those living in rural areas. OHCHR-Colombia continues to observe delays in the implementation of protection measures, which increase the possibility of harm. Not all State actors have adequate access to protection mechanisms when threatened, including municipal ombudspersons and military members turning State's evidence. OHCHR-Colombia supports the work of the National Protection Unit, is in daily contact regarding defenders needing protection and is helping to design and implement measures with differential measures aimed at women, indigenous and Afro-descendant leaders—with an emphasis on rural areas.

41. The vast majority of investigations into crimes against human rights defenders are in the preliminary stages in the Attorney General's Office, partly because prosecutors with high caseloads tend to favour less complex cases. OHCHR-Colombia is working with the Attorney General's Office to generate more effective pattern analysis to improve success rates, which is essential to truly protecting defenders.

<sup>5</sup> See [www.flip.org.co/figures\\_list.html](http://www.flip.org.co/figures_list.html).

<sup>6</sup> See [www.somosdefensores.org](http://www.somosdefensores.org).

## 2. Violations of the right to life and personal integrity by security forces

### (a) Military

42. The High Commissioner has observed confusion concerning the relationship between the complementary and mutually reinforcing legal frameworks applicable in armed conflict (national, human rights and humanitarian law). The Ministry of Defence argues that “military errors” or non-intentional killing of civilians in the context of combat are “illegal but legitimate”.

43. While under national criminal law responsibility is individual and the issue of intent must be analysed, under international humanitarian and human rights law, responsibility for violations fall upon the State and, therefore, the existence of individual intent is not relevant.

44. A combatant cannot claim a violation of his or her right to life if he or she is killed in combat.

45. Under international humanitarian law, a killing must be necessary militarily, the use of force must be proportionate to the concrete military advantage foreseen, and all feasible precautions must be taken to minimize harm to civilians. If there is conflict between the frameworks, in the context of combat, international humanitarian law is the *lex specialis*.

46. The United Nations uses the term “extrajudicial, summary or arbitrary executions” to include a wide range of right-to-life violations, including but not limited to “false positives”. There is no shared technical definition of false positives. In 2012, OHCHR-Colombia received no reports of military killings having the purpose of increasing statistics.

47. Between January and October, OHCHR-Colombia continued to receive reports of violations of the right to life and personal integrity relating to excessive or improper use of force by the military. For example, on 7 October, army members entered a village centre in Patía, Cauca, and opened fire on a shop, killing a 13-year-old girl and three alleged guerrilla members, and wounding two other civilians in violation of international humanitarian law principles, including military necessity, precaution and non-reciprocity. In other cases, in order to cover up the execution, the military members involved said that the guerrilla members opened fire, thus undermining truth, accountability and prevention. Such was the case of a military member who shot at an Embera couple who were fishing in Pueblo Rico, Risaralda on 21 June. The woman, who was pregnant, died as a result. Similarly, in Tambo, Cauca, on 5 April, a member of the army opened fire on a bus, killing two civilians and injuring eight people. The High Commissioner is concerned that while in a number of cases there is evidence that a human rights violation has been committed, senior officials are often too willing to accept a different version of events that undermines internal and criminal investigations.

48. OHCHR-Colombia published a guide on the international legal protection of human rights in armed conflict in December and completed the implementation of a joint project with the Ministry of Defence to monitor 7 of the 15 internal measures introduced in 2008 to prevent extrajudicial executions. While progress has been made, significant challenges remain. Stakeholders have requested that the Ministry of Defence publish the project reports. The commitment of the Inspectorate General of the Armed Forces was key in the implementation of the project, including the design of an operational simulation exercise with a focus on human rights that is expected to be replicated in the future. OHCHR-Colombia remains committed to supporting the Ministry of Defence and the Armed Forces in strengthening their internal control, transparency and accountability measures.

49. In 2012, new allegations of sexual violence by military members continued to be received. For example, on 14 August in Bogotá, an Embera Chami girl was sexually abused by four members of the army, who were later dismissed. In Chaparral, Tolima, a woman reported being raped repeatedly and threatened by members of the army on 5 July.

50. The High Commissioner welcomes the conviction in September of the lieutenant who raped and killed a girl and then killed her two brothers in 2010 in Arauca. She also welcomes the investigation for false testimony against witnesses used by the defence. In the past decade, there have been relatively few convictions for sexual violence involving members of the security forces, considering the very high number of allegations that were received by the Attorney General's Office.

51. The Special Representative of the Secretary-General on Sexual Violence in Conflict visited Colombia in May and met with representatives of a range of institutions. Among other issues, the Special Representative emphasized the need for the Ministry of Defence to revise its zero tolerance policy on sexual violence, as previously recommended by the High Commissioner, and the possibility of assistance from the Security Council Team of Experts on the Rule of Law and Sexual Violence in Conflict for the Unit for Assistance and Comprehensive Reparations for Victims.

(b) *National Police*

52. OHCHR-Colombia received new complaints of violations of the right to life and physical integrity, and other abuses by members of the police, including against children. For example, in Bogotá on 15 February, a male street child died of burns inflicted when police set fire to his mattress with gasoline. In Arauca on 1 April, an unarmed man was shot and killed by police after accidentally reversing his car into their motorcycles. In some cases, members of oversight institutions working on such cases were threatened.

53. In the case of the killing in 2011 of a young street artist, three police officers, a bus driver and a lawyer were arrested on charges of procedural fraud, falsification of documents, concealment and illegal carrying of arms, having altered the scene of the crime, sought to discredit the victim and convinced civilians to give false testimony. Problems related to cover-ups persist.

54. Excessive use of force was observed repeatedly in the management of public demonstrations by police units, including the Mobile Anti-Riot Squad (ESMAD).

55. The police have recognized the problems of the use of force and are prioritizing its regulation. In Bogotá, prompt and transparent disciplinary actions were exemplary and should be institutionalized across the country.

(c) *Intelligence*

56. In July, the Constitutional Court announced its approval of the Law on Intelligence and Counter-Intelligence. The Law represents a step forward in military and police intelligence reform and in ensuring that the civilian National Intelligence Directorate (DNI), which succeeded the discredited Department of National Security (DAS), does not adopt the criminal practices of its predecessor.

57. Considering the historical context and actions taken to date, the law and its pending regulations alone will not be sufficient to end the pursuit of illegitimate interests through the intelligence sector under the guise of national security. Sustained and systematic action by the executive, the judiciary, the new parliamentary oversight committee and the Procurator General, in conjunction with the intelligence services themselves and their internal controls, is necessary.

58. The DAS closure process continued in 2012. Some of its records were secured at the National Archive. They must be organized and reviewed for use in truth, justice and other accountability processes. The High Commissioner is concerned that approximately 5,000 former DAS employees were transferred to other Government departments with no vetting process.

### 3. Justice system

59. The High Commissioner recognizes the Attorney General's effort to introduce innovative strategies into the investigation of cases of serious human rights violations, prioritizing the prosecution of widespread and systematic practices and including the adoption of elements of prosecutorial strategies practiced in international tribunals.<sup>7</sup> OHCHR-Colombia is working with the prosecutors to minimize the potential risks of distorting the national criminal justice system when incorporating strategies designed for international criminal justice and not for a criminal system that must not only prioritize but also deter crime.

60. The High Commissioner again draws attention to the wide range of problems that have arisen in the implementation of the Justice and Peace Law (No. 975 of 2005) and the limited results achieved in both quantitative and qualitative terms. As at September 2012, out of thousands of possible defendants, only 14 people have been sentenced. The *Mampuján* case, which covers forced displacement of and homicides in three communities, was upheld in April 2011 by the Supreme Court, which also ordered financial compensation for more than 1,400 victims and collective reparations.

61. The main objective of the recently approved amendment to Law No. 975 was to limit the reach of judicial reparations and expedite legal proceedings. The formal legal changes have not yet had an impact on the dynamic of the special criminal proceedings that continue to stagnate. As a complement, the Government has announced that it will generate an additional truth-telling process under Law No. 1424 of 2010, applicable to demobilized paramilitary members who are not covered under Law No. 975.

### 4. Discrimination

62. OHCHR-Colombia recorded cases of discrimination based on race, ethnicity, gender, age, sexual orientation and disability. Some public officials publicly expressed intolerance and stigmatization of these groups without consequences. Intolerant and discriminatory reactions against even high-level officials living with permanent or temporary disabilities are a sign of deep social intolerance that needs to be addressed. On 2 March, a senior member of the Navy repeatedly made discriminatory comments with regard to lesbian, gay, bisexual and transgender (LGBT) persons in an interview, declaring that they were not welcome in the institution. No known corrective actions were taken. Other public officials have made public stands against discrimination and there are various initiatives in this regard. For example, the new Observatory on Racial Discrimination and against Racism released its first report on the mass media in August. The police strengthened dialogue and cooperation initiatives with various groups (indigenous, Afro-Colombian, LGBT and disabled). OHCHR-Colombia provided the police with support on these issues.

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<sup>7</sup> Attorney General's Office, Directive No. 0001, 4 October 2012, which dictates criteria for prioritization of situations and cases, and creates a new system for the criminal investigation and management of these situations and cases by the Attorney General's Office.

## 5. Prison system

63. The prison crisis remains of serious concern, due to acute overcrowding of 50 per cent above capacity<sup>8</sup> as well as the increase in the number of persons deprived of their liberty as a result of the overuse of custodial sentencing. In many parts of Colombia, the penitentiary system violates the rights of the almost 120,000 people currently incarcerated, and courts have recognized this lack of health care, food, recreation and sports, education and paid work, as well as the poor health conditions. Neither are there clear rehabilitation policies.

64. The Government has recognized the existence of the overcrowding crisis and the lack of a criminal policy to address structural problems. OHCHR-Colombia is contributing to the efforts of the Minister of Justice towards adopting a new criminal policy, but there is resistance from sectors of public opinion to using alternative and restorative mechanisms that can ameliorate overcrowding. More should be done to change perceptions relating to alternatives to penal sanction.

65. The High Commissioner continues to work with the Government and civil society towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

## 6. Enforced disappearance

66. Of the total number of persons registered as disappeared or missing in the National Registry of Disappeared Persons (75,345, as at 30 September 2012), it is estimated that 18,527 cases fit the national definition of enforced disappearance. The Government indicated that during 2012, 5,965 persons were reported as disappeared or missing and 113 of these cases are presumed to be enforced disappearances.

67. In the light of the high number of cases of enforced disappearances, the High Commissioner welcomes the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, and invites the Government to accept the competence of the Committee to receive and examine individual communications and inter-State complaints.

68. The efforts of the Government of Colombia to address enforced disappearances have been insufficient. The legal and institutional framework in Colombia to deal with the phenomenon of enforced disappearance is complex; the actions of the institutions are not coordinated and the institutional conflicts that exist over competences, protagonism and leadership undermine the respect for victims' rights.

69. OHCHR-Colombia is working with the Commission for the Search of Disappeared Persons to rethink its coordination and operation so that joint efforts achieve concrete results that allow the identification and discovery of disappeared persons, as well as the unification of the different registries. The High Commissioner is concerned about the delay in issuing the regulations for implementing Law No. 1408 of 2010, which would facilitate, inter alia, the administration of genetic profile data banks.

70. Criminal investigation efforts have also been insufficient, given the dimension and impact of this human rights violation in the country: the Attorney General's Office reports a total of 27,382 active criminal investigations of enforced disappearance. The specialized unit for enforced disappearance, created in 2010, has obtained 46 convictions.

<sup>8</sup> According to the National Penitentiary and Prison Agency (INPEC), in October, 114,284 persons were in prison (105,660 men and 8,624 women; 34,631 in pretrial detention and 79,653 convicted).

## 7. Economic, social and cultural rights

71. While Colombia is a middle-income country, it continues to be one of the most unequal in Latin America and the world. OHCHR-Colombia is committed to helping the Government develop concrete measures to assess whether recent increases in Government budgets, the work done by the Department for Social Prosperity, and the spending of royalties (for example, on its initiatives to combat extreme poverty) actually facilitate compliance with its human rights obligations to progressively realize economic, social and cultural rights for all Colombians, bearing in mind how corruption undermines such rights.

72. OHCHR-Colombia has increased its efforts to monitor and facilitate improvement in the realization of economic, social and cultural rights and is advocating with the Government and the private sector for a shared understanding that respect for such rights promotes development and reduces insecurity.

73. Health is a fundamental right that must be guaranteed by the State, which holds primary responsibility for ensuring timely and adequate access to health services. While recognizing that this right exists, the Colombian system has significant problems that affect fulfilment. Corruption, negligence and mismanagement, even though publicly exposed by Government officials, continue to exacerbate the lack of timely attention, suitable and sufficient personnel, adequate sanitary facilities and equipment, and lack of medicines and supplies. This situation is even worse in rural and remote communities. Despite legislative and emergency measures to address these difficulties, even greater efforts are needed to overcome the system's profound problems.

## C. Problems that need urgent attention

### 1. Inadequate response to false positives

74. Given the scope of the false positives crisis, too few of those responsible have been removed from service or prosecuted. High ranking officials linked to these human rights crimes remain in active service and continue to be promoted.

75. The Attorney General's Office has accumulated complaints, including 4,716 victims of homicide presumably perpetrated by members of the security forces, many of these false positive-type executions.<sup>9</sup> Of all homicide investigations, only 30 per cent report procedural activity. Of these active cases, the great majority have not passed the preliminary criminal investigation stage: over 60 per cent (about 1,000) of the active cases are in the preliminary exploration phase (which precedes the formal investigation stage); and 294 cases had reached the trial/sentencing phase by August 2012. Given the nature of these crimes by State actors, as time passes, the capacity to establish criminal responsibility in these cases fades and impunity becomes systemic.

76. The November interim report on the preliminary examination undertaken by the Office of the Prosecutor of the International Criminal Court indicated that State action on these cases was insufficient. OHCHR-Colombia is working with the Attorney General's Office on case mapping and linkage procedures, contextual analysis, and interdisciplinary criminal investigation methods oriented to identifying those perpetrators with the greatest responsibility.

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<sup>9</sup> Extrajudicial executions are generally prosecuted nationally as "aggravated murder" (*homicidio agravado*) or "killing of a protected person" (*homicidio en persona protegida*). The total number of victims in murder cases is not equivalent to the total number of extrajudicial executions. Statistics of the Attorney General's Office reflect the possible commission of a crime and the criminal investigations against members of the security forces.

77. OHCHR-Colombia monitored the status of the cases regarding the alleged extrajudicial executions that were studied by the transitory commission of the Ministry of Defence created in October 2008 to examine cases of alleged disappearances in Bogotá and extrajudicial executions in north-eastern Colombia.<sup>10</sup> The commission did not establish criminal or disciplinary responsibilities, but rapidly found sufficient administrative and operational irregularities to lead to the dismissal of 27 high-ranking military officers.<sup>11</sup>

78. The Commission reviewed the deaths of 79 victims. OHCHR matched the Commission cases with investigations reported by the Attorney General's Office and was able to establish the procedural state of affairs in cases involving only 39 of the victims. The remaining 40 cases correspond to unidentified bodies that do not appear to be under current investigation. By August 2012, of the cases relating to the 39 matched victims, only 3 had reached a criminal conviction, 8 were in the trial phase, and 28 were in the preliminary exploration phase. If so few convictions were obtained in high-profile cases where the State has already admitted wrongdoing, the challenge of obtaining convictions in lesser-known cases is even greater.

## 2. Constitutional reform of military jurisdiction

79. The constitutional reform to expand the jurisdiction of military courts violates the basic separation of powers needed for an independent judiciary. Regional human rights courts, in particular the Inter-American Court of Human Rights in cases related to Colombia, have stated that in a democratic State under the rule of law, military courts must have a restrictive and exceptional scope, linked to the legitimate functions assigned to the armed forces by law. The military justice system must be used only to try crimes or offences that by their very nature affect legal interests that pertain directly to the military. When military courts assume jurisdiction over a matter that should be heard by civilian courts, the right of access to justice of the victims and the right to a competent, independent and impartial judge are violated. Recent history, the current context, international experience, and jurisprudence all favour limiting, not expanding, the scope of military jurisdiction. In an open letter sent to the Government in October, 11 United Nations Special Rapporteurs and Independent Experts said that such a reform "could seriously undermine the administration of justice".<sup>12</sup> The High Commissioner considers that this reform would gravely set back previous efforts by the Government of Colombia to ensure that human rights violations are duly investigated and perpetrators held to account.

80. The reform to the jurisdiction of military courts reflects the lack of trust and respect between the different State institutions, which undermines the rule of law as well as the legitimacy of the State itself. One of the arguments presented by sectors that promote the reform is the need to shield members of the military from unfair prosecution. Implicit in this argument is the misconception that soldiers and officers are being accused or jailed for legitimately killing combatants or for carrying out their constitutional duty. The request to the Ministry of Defence for information about cases where military members had been convicted for performing their constitutional duty has gone unanswered.

81. OHCHR-Colombia has reviewed criminal complaints and cases against military personnel, as reported by the Attorney General's Office. These cases are varied and the majority correspond to offenses, such as theft, drug trafficking, and assault and battery, that have no connection to combat. Only a small fraction of these complaints/cases relate to

<sup>10</sup> Ministry of Defence, resolution No. 4342, 3 October 2008.

<sup>11</sup> See the report of the transitory commission (2008).

<sup>12</sup> OHCHR, "Colombia: UN experts call on the authorities to reconsider the constitutional reform of military criminal justice", press release, 22 October 2012. Available from [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12684&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12684&LangID=E).

criminal responsibility for crimes relating to legitimate military operations—certainly not sufficient to support the need for a constitutional reform. Among the remaining cases are those relating to false positives involving, for example, killings that took place in a fabricated operation or cover-ups. Important questions for the justice system are whether these killings were committed though recklessness or intentionally and under whose orders, issues that are regularly addressed by ordinary jurisdictions. Extrajudicial execution cases merit impartial and independent investigation, with full due process guarantees.

82. The High Commissioner is seriously concerned by assertions by senior military officers that members of the Attorney General's Office and judiciary are "infiltrated" guerrilla members or leftists using their powers to politically persecute members of the Armed Forces.

83. It is, moreover, of serious concern that the constitutional reform could also lead to military courts taking over cases that are currently being investigated by the Attorney General's Office, in particular those involving alleged false positives. This situation would amount to a serious violation of the right to an appropriate judge and, a fortiori, a violation of the principle of due process and the right of access to justice.

84. With regard to the clause included in the constitutional reform to create a legal representation system under the Ministry of Defence for members of the security forces, the High Commissioner considers that the right to independent legal advice of one's own choosing should be guaranteed by strengthening the existing defence service offered by the National Ombudsperson's Office, in order to avoid subordinating the individual's defence to institutional and hierarchical interests. In this regard, the High Commissioner takes note of the decision in October, imposing lifelong exclusion from service as a lawyer,<sup>13</sup> against a military defence lawyer who had threatened and intimidated military witnesses and falsified evidence with regard to extrajudicial executions in collusion with accused officers and active army members.

### **3. Guerrilla groups: impact on civilians**

85. As in previous years, FARC-EP and ELN continued to systematically disregard international humanitarian and human rights law. Selected killings and rapes were recorded. Many of the killings of indigenous leaders and authorities in the north of Cauca point to FARC-EP involvement and its practice of imposing social order. Its capacity to intimidate unravels the social fabric. The placing of mines and improvised explosive devices near educational, health and police facilities continued to affect the full range of rights of those affected. Official statistics<sup>14</sup> show a 39 per cent increase in civilian deaths as a result of mines and a much higher increase in acts of sabotage. Attacks on Government-owned entities such as electric towers and pipelines are considered "legitimate" objectives by these groups, but mainly or disproportionately affect the civilian population and constitute, for example, violations of the rights to health, education and work.

### **4. Post-demobilization groups**

86. Post-demobilization groups are identified by all sectors as one of the greatest threats to public order and as responsible for the largest number of killings, rape, sexual exploitation, physical and psychological violence, forced displacement, extortion, harassment and threats. Their coercive presence and activities continue to devastate community life. OHCHR-Colombia registered threats against human rights defenders, including those claiming their rights to land restitution and return, attributed to these

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<sup>13</sup> Jurisdictional Disciplinary Chamber of the Norte de Santander Council of the Judiciary.

<sup>14</sup> Compiled under the Presidential Human Rights Programme.



groups. Inadequate official investigation has made it impossible to clarify or put an end to these threats, reinforcing a permanent sense of insecurity.

87. The capacity of these armed groups to corrupt and intimidate greatly weakened the State's response in many rural and marginalized urban areas and affected local authorities, military, police and criminal justice sectors. Action by local civilian authorities against these groups is scarce, and preventive action, including social, situational and community measures, has not been developed, severely limiting the State's capacity to gain rights holders' trust and turn political promises of transparency and good governance into practice. On 13 September a 14-year-old girl was killed after having unsuccessfully sought protection against these groups from the Colombian Family Welfare Institute (ICBF), the police, the Procurator General's Office, an inter-institutional mechanism to prevent sexual violence, and the National Ombudsperson's Office.

88. The police and the Attorney General's Office have designed an integrated strategy aimed at the arrest and prosecution of members of post-demobilization groups that has led to a number of important arrests and convictions. However, this has not as yet significantly reduced the number of violations committed by these groups or had an impact on the illegal activities they control. The official strategy has correctly targeted both central and peripheral criminal structures, attempting to address the need to capture both ringleaders and local actors.<sup>15</sup> The Attorney General's Office stated its intention to concentrate on human rights-related crimes and corruption practices by these groups. It also announced that it is initiating specific follow-up on victimization of social actors by these groups.

89. The High Commissioner notes that the Operational Advisory Group mechanism, established to provide military support to the police against these groups if required, was never activated prior to its dissolution. This puts into question the need for the proposed law giving the military direct authority to combat post-demobilization groups. Possible military intervention in citizen security functions is of serious concern given the risks of human rights violations.

## **5. Right to consultation**

90. The armed conflict has weakened the social structure and cultural integrity of the indigenous, Afro-Colombian, Raizal, Palenquero and Roma peoples in Colombia. Today, megaprojects and mineral exploitation present additional risks.

91. Decisions relating to the use and exploitation of natural resources are normally taken without respecting the right to prior consultation and without respect for the traditional authorities and procedures, nor in accordance with the specific cultural context.

92. OHCHR-Colombia has carried out a broad participatory process with more than 3,300 rights holders to collect their visions, expectations and recommendations on the right to consultation, with a view to achieving free, prior and informed consent. Not a single best practice was identified. Lack of coordination among the Ministry of the Interior, the Ministry of Mines and Energy and the Ministry of Environment and Sustainable Development, and confusion as to the role and responsibility of the business sector were widespread. OHCHR-Colombia is working with the Government to develop differential protocols; it is also, with the different ethnic and minority groups, working with Government and companies to build understanding and confidence. The Government has recognized its obligation to fulfil this constitutionally recognized right.

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<sup>15</sup> The National Police reports that 2,556 persons had been captured by October. Of these, 1,015 have been indicted.

93. The High Commissioner draws attention to the negative impact that the change of land use, provoked by extractive industries, has on the social structure of communities. It contributes to the loss of traditional knowledge and the substantial deterioration of their organizational, decision-making, and self-governance capabilities. If this situation persists, heightened social conflict will tend to spread and become even more difficult to address.

94. The High Commissioner notes that the right of Indigenous, Afro-descendant and other ethnic minority groups to participate in the issues, projects and activities that affect them is recognized in national law and jurisprudence. In practice, it needs to be realized through consultative processes, understood as spaces where communities can influence decisions in accordance with their own vision, practices and economic, social and cultural development priorities and strategies. If this process is not carried out appropriately, in accordance with a mutually agreed protocol, the final decision can be challenged in court as illegitimate. In the case of groups at risk of extinction, the right to prior consultation constitutes not only a right to participation but also a veto mechanism to guarantee their survival.

### **III. Recommendations**

95. **The High Commissioner reiterates her call to respect all human rights of all Colombians.**

96. **The High Commissioner recalls all her previous recommendations and those from the entire human rights system, and encourages the Government to reinforce its new system to select for implementation a number of international recommendations based on real capacity; to create indicators of progress; and to report on incremental implementation.**

97. **The High Commissioner also:**

(a) **Exhorts the State and the Revolutionary Armed Forces of Colombia-People's Army (FARC-EP) to confront past violations directly and fully in the peace process through innovative restorative justice mechanisms that maximize societal transformation and address historic inequalities, preventing repetition and a return to armed groups through the promotion of mass long-term employment benefiting and empowering those communities most affected by the conflict;**

(b) **Exhorts the Ministry of the Interior to apply a differential approach in the process of regulating the exercise of indigenous authority, and calls upon the State to carry out prior consultation not as a formality but based on protocols created with each ethnic community to ensure the fulfilment of their rights;**

(c) **Encourages the State to design a system to monitor the use of its regular budget and royalties to comply with its obligations for the progressive realization of economic, social and cultural rights as a means to address long-standing rights issues, such as equal access to health, education and employment opportunities;**

(d) **Encourages the State to guarantee the sustainability of the land restitution process;**

(e) **Calls upon the National Protection Unit to improve its access to and impact in rural areas, and to take urgent measures to protect human rights defenders, including journalists, indigenous leaders and people involved in land restitution processes;**

(f) Urges the State to resolve the multiplicity of procedures and institutional conflicts that currently exist in the search for and identification of missing persons, which constitute an obstacle to the realization of victims' rights;

(g) Urges the State to take all needed measures to stop all threats designed to undermine investigations of military and police members for human rights violations. The Government should reinforce an understanding that human rights violations have been and are being committed and that, while different in scope and nature to those committed a few years ago, all violations require both legal and structural responses;

(h) Urges the Ministry of Justice and Law to adopt and direct a criminal policy plan to overcome the prison crisis;

(i) Urges the State to take comprehensive and effective action against post-demobilization groups, to understand their political and economic origins and their links to State agents, and to strengthen the State's internal control mechanisms;

(j) Calls upon the Government to give an in-depth public accounting of why and how the Department of National Security (DAS) was closed and to invite the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to assist in intelligence sector reform processes;

(k) Urges, given the ongoing nature of the crime of enforced disappearance, the construction of mechanisms to facilitate coordination and proper distribution of competences among institutions in order to guarantee victims' rights to participate in the proceedings and to receive information on their cases. Moreover, the unification of the information regarding alleged victims and the issuing of the regulatory framework for Law No. 1408 are urgently needed.

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