

## **Submission to the UN Committee on Enforced Disappearances in Advance of its Review on Colombia**

We write in advance of the United Nations Committee on Enforced Disappearances' ("the Committee") review of Colombia to highlight Human Rights Watch's concerns regarding the Agreement on the Victims of the Conflict ("the Agreement"), reached by the government and the Revolutionary Armed Forces of Colombia (FARC) guerrillas in December 2015.

Human Rights Watch is concerned that the victims' agreement – which will influence the prosecution of state agents involved in abuses – violates Colombia's obligations under the International Convention for the Protection of All Persons from Enforced Disappearance ("the Convention") and will further compound impunity for enforced disappearances committed in the country.

The agreement creates a new Special Jurisdiction for Peace, which will handle crimes that are "directly and indirectly related to the armed conflict," likely including many enforced disappearances. The new jurisdiction will apply the provisions of the Agreement detailed below.

### **Command responsibility (article 6, paragraphs 9 and 14 in the list of issues)**

Under the Convention, military commanders are criminally liable for enforced disappearances carried out by their subordinates if they had effective control of the subordinates, had knowledge about the commission of the crime or consciously disregarded information that clearly indicated that subordinates were committing the crime, and had the means to prevent the crime or ensure it was properly investigated.<sup>1</sup>

The definition of command responsibility included in the Agreement contains two phrases that could be interpreted in a manner inconsistent with the Convention.<sup>2</sup>

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<sup>1</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted September 23, 2005, ratified by Colombia on July 11, 2002, U.N. Doc. E/CN.4/2005/WG.22/WP.1/Rev.4 (2005), art. 6.

<sup>2</sup> Acuerdo sobre las Víctimas del Conflicto [Agreement on the Victims of the Conflict], December 15, 2015, [https://www.mesadeconversaciones.com.co/sites/default/files/24\\_08\\_2016acuerdofinalfinalfinal-1472094587.pdf](https://www.mesadeconversaciones.com.co/sites/default/files/24_08_2016acuerdofinalfinalfinal-1472094587.pdf) (accessed August 26, 2016), p. 137, para. 44. See also "Mindefensa y Minjusticia firmaron compromiso sobre justicia para agentes del Estado" [Guidelines on justice for state agents], *Ministerio de Defensa*, December 19, 2015, <http://cgfm.mil.co/-/mindefensa-y-minjusticia-firmaron-compromiso-sobre-justicia-para-agentes-del-estado> (accessed August 26, 2016), p. 7.

First, the agreement provides that liability on the basis of command responsibility requires “knowledge based on the information at their disposal before, during and after the realization the respective conduct.” This definition could require judicial authorities to prove that commanders had actual knowledge of human rights crimes by their subordinates. Proving that they consciously disregarded information which indicated that their subordinates had committed, or were about to commit, an enforced disappearance would not be sufficient

Second, the wording of the agreement is that liability also requires “the effective control of the respective conduct.” In context, the term “respective conduct” refers to the underlying crimes. While “effective... control” is an essential element of command responsibility, under the Convention, control refers to the activities which were concerned with the crime, not to the crime itself.

### **Punishment (article 7, paragraphs 14 in the list of issues)**

The Agreement on the Victims of the Conflict includes a range of sanctions, depending on whether (and when) those responsible confess their crimes, their participation, and the gravity of the crimes.<sup>3</sup>

The government has yet to fully define how state agents will be sanctioned, but it has stated that the sanctions will have the same duration and “nature” to those established for FARC members.<sup>4</sup>

Under the agreement, FARC perpetrators who confess promptly and fully to offenses will be exempt not only from prison or jail, but also from any “equivalent” form of detention.<sup>5</sup> Instead, they will be required to carry out “restorative and reparative” projects while being subject to modest “restraints to rights and liberties.” Such restraints of liberty are limited to those “necessary for [the] execution” of these restorative and reparative sanctions, and allow those sanctioned to carry out movements that are “compatible” with the fulfillment of the sanctions.<sup>6</sup> The government has explicitly provided that state agents could also be subject to “restraints to rights and liberties.”<sup>7</sup>

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<sup>3</sup> See Agreement on the Victims of the Conflict, page 40, para. 60; Guidelines on justice for state agents, para. 6.

<sup>4</sup> Agreement on the Victims of the Conflict, p. 40, para. 60; Guidelines on justice for state agents, paras. 3, 5.

<sup>5</sup> Agreement on the Victims of the Conflict, p. 40, para. 60.

<sup>6</sup> Agreement on the Victims of the Conflict, p. 40, para. 60; Agreement on the Victims of the Conflict, p. 152.

<sup>7</sup> Guidelines on justice for state agents, para 6.

The Colombian government has repeatedly stated that these sanctions would last five to eight years.<sup>8</sup> However, Human Rights Watch has shown that provisions in the agreement would appear to allow those responsible for serious offenses to be released from any restrictions on their liberty in an even shorter time.<sup>9</sup>

Moreover, a provision in the Agreement allows the Special Jurisdiction for Peace to impose two-to-five year sentences for those who did not have a “decisive participation in worst and representative acts.”<sup>10</sup> While an August 2016 agreement apparently provides that enforced disappearances will be considered a “worst and representative act,” many of those responsible for enforced disappearances could benefit from this provision if they argue that they did not have a “decisive participation” in such crimes.<sup>11</sup> The agreement does not define the term “decisive participation.”

Human Rights Watch submits that the sanctions regime included in the agreement for confessed perpetrators violates Colombia’s obligations under the Convention to make the offense of enforced disappearances punishable by appropriate penalties which take into account “its extreme seriousness.”<sup>12</sup>

While the Convention provides that states may establish mitigating circumstances, including for those who make it possible to identify cases of enforced disappearances,<sup>13</sup> the Committee has repeatedly recommended that mitigating circumstances should in no way lead to a lack of appropriate punishment.<sup>14</sup> In addition, the Committee has noted that short prison sentences or punishment that does not involve deprivation of liberty are inconsistent with the Convention.<sup>15</sup>

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<sup>8</sup> E.g. Comunicado conjunto # 60 sobre el Acuerdo de creación de una Jurisdicción Especial para la Paz [Joint Communiqué # 60 regarding the Agreement for the creation of a Special Jurisdiction for Peace], September 23, 2015, <https://www.mesadeconversaciones.com.co/sites/default/files/comunicado-conjunto-60-ingles-1443452175.pdf> (accessed August 26, 2016).

<sup>9</sup> Human Rights Watch, *Human Rights Watch Analysis of Colombia-FARC Agreement*, December 22, 2015, [https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement#\\_edn8](https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement#_edn8)

<sup>10</sup> Agreement on the Victims of the Conflict, p. 40, para. 60.

<sup>11</sup> Acuerdo Especial [Special Agreement], [https://www.mesadeconversaciones.com.co/sites/default/files/24\\_08\\_2016acuerdofinalfinalfinal-1472094587.pdf](https://www.mesadeconversaciones.com.co/sites/default/files/24_08_2016acuerdofinalfinalfinal-1472094587.pdf), August 19, 2016, Anexo 1: Ley de amnistía, indulto y tratamientos penales especiales [Annex 1: Law of Amnesty, pardon, and Special Criminal Rules], p. 271.

<sup>12</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 7(1).

<sup>13</sup> International Convention for the Protection of All Persons from Enforced Disappearances, art. 7(2)(a).

<sup>14</sup> UN Committee on Enforced Disappearances, “Concluding observations on the report submitted by Armenia under article 29, paragraph 1, of the Convention, Armenia,” UN Doc. CED/C/ARM/CO/1, March 13, 2015,

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<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/050/21/PDF/G1505021.pdf?OpenElement>, para. 12; UN Committee on Enforced Disappearances, “Concluding observations on the report submitted by Germany under article 29, paragraph 1, of the Convention, Germany”, UN Doc. CED/C/DEU/CO/1, April 10, 2014, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsthL2pclw9FXHSvE0vLXkyDu12%2fCJklaTXjc5pJIXnlyEFJ53HPaSDc8PPTqwPqNy4NME%2b7Ni89fKfPEZixjp1ZBI9s2KYKBdKapW%2btbEacv>, para. 9.

<sup>15</sup> UN Committee on Enforced Disappearances, “Concluding observations on the report submitted by Uruguay under article 29, paragraph 1, of the Convention, adopted by the Committee at its fourth session (8–19 April 2013)” UN Doc. CED/C/URY/CO/1, May 8, 2013, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuFnc2A8f8GATXIp53u%2fxz%2bMAI%2bG6TlajBrq0e1tpPuj%2fj%2fSjycLjuwOl9aT55T%2byu3p9i%2fAvE0PK%2fGSaNYLbSNzuEA31FQOTBaxREopbNYv>, para. 12; UN Committee on Enforced Disappearances, “Concluding observations on the report submitted by the Netherlands under article 29, paragraph 1, of the Convention,” UN Doc. CED/C/NLD/CO/1, April 10, 2014, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoty1z4QeTyULnU0rP1uXWq8mRy5NpdnrdqGOKMi%2fkByLBDhPkiC85kpMbGBexYazLrL6202Ts0Rulo0rZI5cb1R%2fgqeV3lgTt9FFd5%2bAeM>, para. 17.