

## International Fair Trial Standards and the Protection of Human Rights Defenders in Colombia

### Short-form report and recommendations following trial observation and meeting with Colombian public authorities, 14-21 November 2016

#### *The Killing, the Trial and the Harassment*

International Senior Lawyers Project ("ISLP") was concerned about the handling of a murder trial in Colombia. In March 2001, Jorge Dario Hoyos Morales, a trade unionist, was killed. It is alleged that he was murdered by Paramilitaries and Military Intelligence Members. Through the efforts of the Jose Alvear Restrepo Lawyers' Collective's ("CCAJAR") Lawyer Yessika Hoyos Morales (Jorge's daughter) and others, Mr Freddy Espitia-Espinosa has been identified as one of the suspected perpetrators, accused of ordering the killing. He now stands trial in Colombia (the "Trial") in the case of *Projecto OIT (International Labour Organisation) v. Freddy Francisco Espitia-Espinosa* being heard in Juzgado 10 Penal del Circuito Especializado, Bogota E.S.D.

This case is profoundly important both in its own right and also in the wider context of a history of violence against trade unionists (according to the International Trade Union Confederation this was one of 2832 murders of trade unionists between 1 January 1986 and 30 April 2010) and impunity for perpetrators of such violence.

An important and sensitive hearing in the Trial took place on 18 November 2016 in which Ms. Hoyos herself gave testimony as a witness (the "Hearing").

During her pursuit of justice for her father's killing Ms Hoyos has endured harassment over a period of many years. This pattern of harassment has intensified with the progress of her work on this and other cases. For example, Ms. Hoyos has received threatening telephone calls on her mobile, at her workplace and on her home landline. Ms Hoyos also has a young daughter and whilst the au pair and toddler were out, they were approached by a group of men and threatened. There are several other examples that fit within this pattern.

#### *Trial observation and meetings with Colombian public authorities*

In light of the importance of the Hearing and surrounding circumstances, ISLP sent an expert, Ms. Jacqueline Vallejo to independently monitor the Hearing at first-hand (i.e. she conducted a trial observation). In addition, Ms Vallejo assisted CCAJAR in follow-up with public authorities in Columbia in order to seek assurances about the integrity of the Trial and the proper investigation of the harassment of Ms. Hoyos. The mission was also intended to make the participants in the Trial, including the Judge, aware that they are under scrutiny, to highlight the international concern to ensure the fairness of the proceedings, and to give all parties a sense of international assistance and renewed confidence. This report is based on Ms Vallejo's observations.

#### *International attention and balanced media coverage make a difference*

In advance of Ms Vallejo's travel to Colombia in November 2016, ISLP contacted numerous relevant actors to raise awareness of issues around this case. This included communications with the UK FCO's Colombia desk, the UK Embassy in Bogota, UK MPs who have shown interest in issues relating to Colombia, members of the UK's All Party Parliamentary Human Rights group and NGOs active in Colombia.

In Colombia Ms Vallejo met with the Head of the Defensoría del Pueblo (i.e. the Ombudsman, Mr. Carlos Negret) and his Assistant (Mr. Mateo Gomez-Vasquez); the Vice President and Head of the Human Rights Department of the Ministry of Defence (Mr. Aníbal Fernández de Soto and Colonel Marco Castillo-Velasco); Advisors to the Presidential Counsel for Human Rights (Ms. Adriana Perez and Mr. Fernando Ibarra); the Specialised Prosecutor for the Office of the Deputy Attorney General (Ms. Maria Lorenza del Castillo Montero); Peace Brigades International (Ms. Kathryn Rukyan and Mr. Raul); and the National Police Directorate Human Rights (Colonel John Arango and Colonel Marta Herrera).

The institutional response to the request for meetings was positive. Authorities in general were open to the mission's visit (the Director of Unidad Nacional de Protección (National Protection Unit) couldn't meet with the mission for scheduling reasons). The response to the meetings suggests that international pressure makes a demonstrable difference when protecting human rights defenders; greater backing from the international community could be especially helpful to enable real progress in the context of the ongoing peace process. In order to increase such pressure, the development and implementation of a more regularised system of monitoring of the administration of justice in Colombia, encompassing a range of human rights field operations, is recommended.

***The importance of national campaigns and wider balanced media attention should not be forgotten***

Notwithstanding the efforts of CCAJAR, ISLP and others, there was a serious lack of media coverage in this case. Efforts to address this should be wary of avoiding the encouragement of unconstructive media coverage. As part of this, Ms Vallejo considered that increased attention or campaigning work in the Colombian national scene about this case as well as other significant human rights concerns would be beneficial. This is because so many important issues within the national realm are yet to be resolved, and the people of Colombia must play the central role in doing so.

***Delays in the court system seriously undermine examinations of human rights complaints***

The current Colombian judicial procedure for the examination of complaints alleging violations and infringements of human rights, is wholly unsatisfactory and the system, as is, is presently very unlikely to prove the most effective way of safeguarding a fair trial. In particular, Ms Vallejo observed an unjustifiable and mostly unnecessary inordinate amount of delay in the system. Cases take years before they reach the hearing stage and when they do, it is then considered 'normal' for all cases to have several and lengthy adjournments between each hearing. Thus it is not uncommon for trials in Colombia to take anything between 15 and 20 years before a decision is reached and they are completed. In the attendant case, thus far it has been going 16 years, from the date of the offence and first allegation to the date when Ms Vallejo attended Court. At this stage the case is still half-way through. After solely one day's sitting on the 18 November 2016 the case was then adjourned again, not to the following day, week, or month, but to 15 March 2017. At that time, there will be a three-day hearing and it is envisaged seven prosecution witnesses will give evidence. Such long adjournments result in a current trial process that is piecemeal, evidentially fragmented and, in this case, with no end in sight.

In the longer term, it is recommended that the court system should be reviewed, with a view to improvements likely to include reducing the delays in bringing cases to court, appointing more judges, and minimising the opportunities and risk for intimidation of all persons at least whilst at court and engaged in hearings.

***Judges must be independent and seen to be independent***

Colombia does not have a jury system thus it is for the judges to determine innocence or guilt. This makes it even more vital for the establishment of confidence in the legal system that the judges are independent and be seen to be independent from those in control of the executive power. The existence

of a court system that is able to act independently and impartially is fundamental to human rights and an essential pre-condition for a fair trial. Judicial independence is demonstrated through properly reasoned decisions which are justified in law and by properly adduced evidence.

An initial concern about the independence of the court system was raised in this case when Ms Vallejo was informed shortly before the Hearing that it would not go ahead in 2016 but would be adjourned to a date sometime in the new year. The reason provided for the proposed adjournment was that prosecution counsel was being replaced and the newly instructed counsel required time to prepare. The change was not due to an unforeseen circumstance such as ill-health, or other emergency, but choice. It is unclear how or why this choice was made, and ultimately the decision was reversed and the original counsel was retained, but nonetheless it raised a concern about possible political influences and the ramifications of delays.

Another concern raised by Ms Vallejo, given how important it is that judicial reasoning is based on properly adduced evidence, was the apparent acceptance by the Judge at the Hearing of hearsay evidence, not based on direct knowledge, and of opinion evidence without the obvious application of admissibility criteria (e.g. for expert evidence). Having said that, Ms Vallejo observed that the Judge ensured in most respects that the Trial complied with procedural norms despite the trial's length and complexity.

#### ***Weak sentencing should not be allowed to become a back door to impunity***

There is no capital punishment in Colombia and the maximum penalty for crimes is 20 years in prison. In cases such as the one observed, the maximum sentence imposed is about 8 years, due to the influence of amnesty-like provisions in Colombia's 'Justice and Peace Act'. Although the complexity of the Colombian context should be respected, inadequate sentences and related issues should not be allowed to undermine the credibility of its criminal justice system.

#### ***Can Colombian public authorities do more to protect human rights defenders?***

Ms Vallejo met with numerous Colombian authorities detailed above. Ms Vallejo was encouraged to think that they wanted to implement change as they said as much and insisted that these relations and dialogue "must continue". For example, Mr. Carlos Negret, Head of Public Defence in Bogota (Defensoria del Pueblo), suggested that they are open to human rights-based approaches and continued dialogue with national and international actors, such as CCAJAR and ISLP.

The meeting with National Police's Directorate Human Rights (Colonel John Arango and Colonel Marta Herrera) was particularly encouraging. As soon as he was informed of the threats and intimidation Ms. Hoyos had suffered, Colonel Arango immediately provided both his personal and work mobile numbers. Colonel Arango stated they should be contacted at any stage if any problem at all arose and that these contact details ensured that contact was made directly with him. He also ordered that police patrols should be immediately put in place at Ms Hoyos and Mrs. Gutierrez home addresses and that, if they required, he would assign that both Ms. Hoyos and Mrs. Gutiérrez be accompanied at the Hearing at all times by police armed guard.

Despite this positivity, Ms Vallejo remained concerned about whether or not the level of active commitment and related action necessary to realise human rights in this sphere is present within all Colombian public authorities. Ms Vallejo emphasised coming out of the meetings the importance of proactive practical work and follow up needed to ensure that everything appropriate is being done to protect human rights defenders and to preserve the space in which they do their work. Again, proper scrutiny, accountability, and media attention, both nationally and internationally, would help to ensure that all parties fulfil their responsibilities diligently and effectively.

***Measures to secure the best evidence of witnesses free from fear and intimidation should be improved***

Thought should be given to the manner of obtaining evidence and proximity of the accused to witnesses. The one-day long hearing attended by Ms Vallejo took place in Court 10. The courtroom was extremely small. Ms. Hoyos was sworn in around 11 am and she commenced her evidence. Save for a 10-minute break at midday and the luncheon adjournment there were no other breaks during her evidence. The person accused of complicity in her father's murder, Mr. Espitia-Espinosa, was also given an opportunity to ask Ms. Hoyos questions directly. She completed her evidence around 5 pm. Throughout all this time, Ms. Hoyos sat in very close proximity to Mr. Espinosa-Espetia, within touching distance and only separated by a desk, and in full public and his view. The witness was also not kept in a witness room, separate to the Court, before giving evidence, which would have reduced the risk for intimidation. The accused was not handcuffed, and was remanded in custody not on bail, neither was he restrained by a custodian. (Throughout the entire day, Ms Vallejo saw numerous others in handcuffs being escorted around the court by custodians.) Instead throughout the day, he was free to access all public areas and during the proceedings was sat alongside his counsel in the well of the Court or stood in the public gallery or in the hallway, with his supporters. The public gallery consisted of eight seats, within touching distance, and immediately behind where the Accused was sat with his representative. Ms Vallejo noted that none of this could have been very conducive in providing the best evidence. In particular, the close proximity to the accused must have been extremely difficult for Ms Hoyos given it is alleged he ordered the murder of her father and is also alleged to be behind the threats and intimidation she has experienced. Ms Vallejo recommended that witness care and assistance should be reviewed and improved.

**Contextual conclusion**

The observations and recommendations in this report should be understood in the context of a period of change and flux in Colombia. Colombian government (President Juan Manuel Santos) and the leftist Farc rebels (leader Rodrigo Londoño known as Timochenko) recently signed and ratified a revised peace agreement to end more than 50 years of conflict. The accord was hailed by some as 'the start of the construction of peace,' whilst critics of the peace deal wanted to see further revisions before it was signed, maintaining that the most crucial points remain unresolved and or have been disregarded, including eligibility for public office of those convicted of war crimes. However, despite the bilateral and definitive ceasefire between the national army and the FARC guerilla, this has not been translated into a reduction in the risk for human rights defenders. According to CCAJAR's press records 70 defenders were killed in 2016. More effective measures should be introduced to protect them.

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CCAJAR is based in Bogotá, Columbia and was founded in 1990. It provides legal representation and counsel to victims of human rights violations in emblematic Colombian cases both within the Columbian justice system and before the Inter-American System's human rights mechanisms.

**Ms. Vallejo** is a practicing Barrister at Garden Court Chambers in London. During 19 years of practice has specialised in all aspects of criminal defence work, at all levels including defending for all manner of offences. She is specialised in representing Spanish speaking clients from all over the world, including Spain and South America.