

A look at enforced displacement: criminal prosecutions, organized power structures and land restitution in the Colombian context.

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EXECUTIVE SUMMARY

In May 2013, Lawyers without Borders Canada (“LWBC”) published the report “Criminal prosecution of enforced displacement in Colombia: Final report on the observation of the proceedings 2011-01799” (“*Persecución Penal del Delito de Desplazamiento Forzado en Colombia: Informe final de Observación del Proceso 2011-01799*”). This report focused on the principle of complementarity of the Rome Statute and analyzed the emblematic prosecution of 21 individuals who were allegedly responsible *inter alia* of enforced displacement and invasion of the collective territories of the Afro-descendant communities of Curvaradó y Jiguamiandó in the North West of Colombia.

The displacement of these communities began with the incursion by armed actors who forced them to leave their land, and continued with the arrival of companies interested in the plantation of palm oil for the development of agro-industrial projects in the region.

While the first report was published before the conclusion of the criminal proceedings, LWBC has continued to analyze the criminal prosecution of enforced displacement, with a special interest in the developments in this case.

In October 2014, the Criminal Court No. 5 of the Specialized Circuit of Medellín (*Juzgado Quinto Penal del Circuito Especializado de Medellín*) convicted 14 individuals *inter alia* for the crime of enforced displacement. This is a historic judgement which reveals the existence of a complex structure made up of different actors who were involved in the commission of enforced displacement at different points in time.

Furthermore, the judgement highlights the damage caused to communities and their territories; as well as the important efforts of the Afro-descendant communities of Curvaradó and Jiguamiandó, and the accompanying organization the Interchurch Commission of Justice and Peace (*Comisión Intereclesial de Justicia y Paz*) in the search for justice and the defense of the territory.

It is, however, important to remember that the struggle of the communities does not end with this legal decision. There still remains several challenges in terms of justice, truth, reparation and guarantees of non-repetition. On the one hand, several parallel criminal investigations remain open in relation to these acts, and on the other, the communities of Curvaradó and Jiguamiandó have not been able to return to their territory, remaining in a situation of extreme vulnerability.

In this sense, this case reminds us of the great challenges that still remain in Colombia regarding enforced displacement, both in respect of criminal investigations and the land restitution processes and the return of the affected communities.

In Colombia, enforced displacement continues to occur on a massive scale, creating a large numbers of victims, and the perpetrators of this crime continue to largely go unpunished. The urgency of this situation is evidenced by the the Office of the Prosecutor of the ICC prioritizing enforced displacement as part of its preliminary examination in Colombia.

In addition to the deficit in criminal prosecution, enforced displacement is often takes the form of very sophisticated criminal conduct. Often neither the causes nor responsibilities are clear, and they are hidden in complex organized structures that assure impunity and the continuation of the criminal conduct.

In light of this situation, LWBC, together with the Interchurch Commission of Justice and Peace, Nicolás Arana, Magíster in Law, and the Research Group on Prisons, Criminal Policy and Civil Security of the University Los Andes (*Grupo de Investigación en Prisiones, Política Criminal y Seguridad Ciudadana*) undertook a joint investigation on criminal prosecutions of enforced displacement in accordance with national and international standards. This investigation was also influenced by the important experiences of the case of the communities of Curvaradó and Jiguamiandó.

The chapters in this report form a joint analysis with a common focus on providing technical, legal and academic tools to advance the criminal prosecution of enforced displacement, particularly in cases of macro-criminality. The ultimate aim is to contribute to ending impunity and ensuring the protection of the rights of victims of this crime.

The emphasis is placed on those who have control over the criminal conduct, or those who may be considered among those *most responsible* for the commission of serious crimes such as enforced displacement in Colombia.

In this investigation, priority is given to the theory of indirect perpetration by control over an organization (*autoría mediata por dominio de organización*) which may in the Colombian context provide a link between those who commit enforced displacement as material perpetrators and those who, being far away from the conduct, ensure the execution of the crime. Furthermore, this theory has been advanced in Colombia as well as in other countries in Latin America, and also in International Criminal Court.

Another related focus of the report is to achieve a greater articulation between criminal prosecutions of enforced displacement and land restitution processes. The importance of both processes is understood as means to ensure the rights of victims of enforced displacement to justice, as well as to reparation and non-repetition.

This report is divided in six chapters and is set out in the following manner.

The first chapter examines *the context of the phenomenon of enforced displacement in Colombia*. This chapter highlights the deficit in criminal prosecutions and identifies the strategies and policies which are designed to prioritize criminal investigations in cases of enforced displacement. Reference is also made to rulings and judgements by national and international courts, as well as observations by the Office of the Prosecutor of the ICC in relation to this crime.

The second chapter analyses *the legal dimensions of enforced displacement in Colombia* from the perspective of International Human Rights Law, International Humanitarian Law, International Criminal Law and Colombian criminal and constitutional law.

The following chapter *indirect perpetration by control over an organization* offers a theoretical framework based on the works by the German professor Claus Roxin. This chapter identifies the crucial elements of this mode of criminal responsibility – the existence of an organized power structure and the control over this structure - and how to apply them to crimes with similar characteristics to enforced displacement. This chapter is complemented with a comparative study on the interpretation and application of this mode of criminal responsibility in Colombia, other countries in Latin America and the ICC.

The next chapter *indirect perpetration by control over an organization: the case of enforced displacement of the communities of Curvaradó and Jiguamiandó* applies this mode of criminal responsibility to the conduct constituting enforced displacement in the legal judgement of this emblematic case. This chapter begins with a historical analysis of the Afro-descendant communities, with a special emphasis on the communities of Curvaradó and Jiguamiandó, their enforced displacement and their current situation. This exercise serves as a guide for the application of indirect perpetration by control over an organization in cases of enforced displacement.

The fifth chapter *the disarticulation between criminal prosecutions and land restitution processes* examines land restitution processes in cases that often amount to acts of enforced displacement. In these cases, the evidence indicates that judges do not always order the Attorney General's Office (*Fiscalía General de la Nación*) to investigate.

Finally, the report offers a series of conclusions and recommendations that include: the judgement in the case of the enforced displacement of the communities of Curvaradó and Jiguamiandó represents an advance in the identification of those "*most responsible*" and shows the limits of criminal law; this judgement should serve to prioritize the investigation and sanction of those responsible for their enforced displacement, provide real and effective measures for the protection of the members of the displaced communities and ensure their immediate return to their land.

Furthermore, the report concludes that the legal definition of the crime of enforced displacement is not a problem *per se* and that the theories of criminal responsibility in organized power structures, such as indirect perpetration by control over an organization, may be applied in cases of enforced displacement. On the other hand, the lack of criminal prosecutions impacts negatively

on material restitution and guarantees of non-repetition, and may also generate arbitrary acts against affected victims and communities.

LWBC reiterates that the violation of the rights of victims of enforced displacement constitutes a violation of the Colombian state's international obligations. In this respect, the recognition of this population's rights, together with the duty to investigate and sanction those most responsible for this crime, remains a priority for Colombia and the Office of the Prosecutor of the ICC in relation to the preliminary examination. Furthermore, this situation should awaken the solidarity and accompaniment of the international community.