

Background

Over the years, the Constitutional Court has recognised that on one hand the Peace Community has repeatedly declared that a permanent relationship of complicity exists between paramilitary groups and the Seventeenth Brigade, whilst on the other hand public officials have stigmatised the Peace Community's members by publicly stating that they were working with the FARC. There has never been evidence to support this stigmatisation. Former President Santos rejected stigmatisation of the Peace Community in a public apology on 10 December 2013.

In December 2017 the Constitutional Court noted that since 2010 there had been “*a marked reduction in armed violence in the Urabá area*” and a clear de-escalation in attacks to the life and personal integrity of Community members, in light of which the “*understandable resentment*” felt by the Peace Community against the Colombian authorities was “*more difficult to justify every day*”. However, it recognised that the Peace Community remained at risk due to the activities of illegal armed groups in the region. Further, it highlighted that during that time there had been a failure to build minimum levels of trust and confidence between the Peace Community and state authorities, particularly members of the armed forces. The Court adopted various measures aimed at repairing that relationship, urging state representatives including members of the armed forces, and the Peace Community, to change their attitude towards each other.

It is in this context of recent violence against the Peace Community (including ongoing threats from paramilitary groups) that the Seventeenth Brigade brought its *tutela* action complaining against the Peace Community's publications on 27 September 2018. It argued that the publications were false and distorted and readers would form the mistaken belief that the armed forces were complicit in paramilitary activities. At first instance, the Peace Community was ordered to retract the publications or provide proof that what was said in them regarding the Seventeenth Brigade was true. The Peace Community did not do so and a warrant was issued for the arrest of the Peace Community's representative, Germán Graciano. There was international and national condemnation of this action and it is understood that the national court reconsidered it and the warrant was set aside or at least not executed.

The amicus curiae

The amicus curiae considered the wider potential “chilling effect” of the Colombian Constitutional Court's judgment T-342 of 2020 upon both the Peace Community and other vulnerable individuals or groups in the midst of post-conflict situations.

It also considered the recent report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor, titled ‘Final warning: death threats and killings of human rights defenders’ which stated that according to OHCHR recordings Latin America and the Caribbean “*consistently recorded the highest numbers of defenders killed*”, with Colombia's numbers (397) being the highest in the region. Moreover, in its 2019 report on the situation of human rights defenders and social leaders in Colombia, the Inter-American Commission of Human Rights stated that available information pointed towards a “*significant increase*” in acts of violence, an “*alarming increase*” in killings against human rights defenders, social and community leaders, and campesino, indigenous, and Afro-Colombian leaders, and that one of the highest homicide rates was in the Antioquia region. The Inter-American Commission of Human Rights expressed concern about “*the high levels of impunity related to investigations of crimes committed against them*”, which in turn increases the risk for defenders.

The *amicus curiae* took as its starting point the *amicus curiae* brief filed in the case by the former UN Special Rapporteur for Freedom of Opinion and Expression, Mr David Kaye, which dealt broadly with relevant norms and standards under international human rights law, specifically with regard to the rights to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights.

The *amici* expanded on those submissions and distilled the following principles from the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights:

- a. Once it is established that the right to freedom of expression is engaged, any interference must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society.
- b. For an interference to be necessary in a democratic society, it has to be necessary in the sense of corresponding to a pressing social need. The following factors are especially relevant in that regard:
 - i. There is a public interest in allowing for the expression of criticisms regarding the performance of public duties by public authorities.
 - ii. The information on internet social media does not have the same impact as broadcasted information.
 - iii. In states in actual or post-conflict situations, there is a public interest in allowing for the reporting of events as they happen, which will eventually enable the public to construe the past.
 - iv. Public authorities must tolerate higher levels of criticism because their actions are purportedly in the public interest, they have voluntarily exposed themselves to stricter scrutiny and they are more easily able to explain or account for events in which they take part.
 - v. The limits of acceptable criticism will be wider with regard to civil servants exercising their powers.
 - vi. The need for civil servants to enjoy public confidence must be balanced against the protection of remarks made in the context of an open discussion of matters of public concern, such as the involvement of state armed forces in grave human rights violations.
 - vii. The general interest in disclosure of information revealing questionable practices on the part of the armed forces is high.
 - viii. Defamatory statements are only actionable if made in relation to an identifiable individual or a vulnerable group.
 - ix. The Colombian army does not fall within a categorisation of group of vulnerable individuals.
 - x. In relation to vulnerable groups and individuals, the state should abstain from acting in a way that puts, directly or indirectly, such persons in a situation of risk or greater vulnerability for exercising or attempting to exercise their freedom of expression, and should not silence human rights defenders or community leaders.
 - xi. Human rights defenders are akin to public watchdogs. Those who encounter threats or situations of risk and report human rights violations should be

- given the necessary means to carry out their activities without their work being unnecessarily hindered, given that they work in the public interest.
- xii. Opinions and value judgments are not susceptible to proof.
 - xiii. The requirement to verify the truthfulness of facts depends on the circumstances of the case as they existed at the material time, including questions of urgency, the nature and degree of the defamation at hand and the extent to which the defendant can reasonably consider its sources to be reliable in respect of the allegations in question.
 - xiv. Vulnerable, impoverished communities posting or blogging on the internet do not have the same technical means as newspapers, television stations or other established forms of press. The scope of their duties and responsibilities to 'fact-check' must therefore be narrowed.
 - xv. Defendants should not be required to prove the truthfulness of allegations where there is an inequality of arms.
 - xvi. Allegations of criminality should not strictly require proof of a conviction or prosecution.
- c. The measure must also be proportionate to the legitimate aim pursued. In this regard, it is important to note that:
- i. Unnecessary or disproportionate sanctions may have a chilling effect.
 - ii. Criminal sanctions are generally held to be disproportionate *per se*.
 - iii. In specific cases of possible abuses or bad faith, civil remedies or alternatives such as corrections and apologies may be appropriate.
 - iv. The effect of measures must be understood in the context in which they occur. Where defamation legal actions are brought by high ranking state officials in relation to assertions made by human rights defenders concerning state responsibility for serious human rights violations, in the context of previous serious human rights violations at the hands of the state and an ongoing situation of general risk and lack of protection of human rights activists, these may foster intimidation and inhibition which places human rights defenders in a *de facto* situation of increased vulnerability and unduly curtail their freedom of expression. Courts should apply the most anxious scrutiny to measures adopted by states which are capable of having an intimidatory effect.

The amicus curiae was drafted by Kirsty Brimelow QC and Camila Zapata Besso of Doughty Street Chambers.