On 21st July 2014, the Swiss Federal Supreme Court dismissed the appeal of the widow of assassinated Colombian Sinaltrainal trade unionist and Nestlé-worker, Luciano Romero (pictured right). She had appealed the Cantonal Court’s decision to close an investigation into Nestlé’s responsibility for the murder of her husband. On 5th March 2012, the European Centre for Constitutional and Human Rights (ECCHR) and the Colombian trade union Sinaltrainal had submitted a criminal complaint in Switzerland against Nestlé and five of its top managers. The complaint accused the company and its managers of contributing through negligence to the death of Luciano Romero. It was argued that the accused had knowledge of the threats made against Romero, but failed in the duty to use the resources at their disposal to prevent his murder.

The Federal Supreme Court upheld the legal reasoning of the prosecutor’s office and the Cantonal Court that an investigation into the murder was statute-barred. The Supreme Court thereby departed from the Swiss Federal Council’s interpretation and copious literature on the subject, that corporate criminal responsibility presents a continuous offence which, hence, would not be statute-barred in the present case. It thus brought the proceedings to an end on formal grounds.

As a result, the real issue of Nestlé’s responsibility for the assassination of one of its workers remains unexamined. In light of the prevailing impunity in Colombia, Romero’s widow and the trade union Sinaltrainal had hoped that the responsibilities of the transnational company would have been seriously investigated in Switzerland and that justice would have been delivered. However, the Supreme Court’s decision exposes the necessity of introducing effective mechanisms in order to establish the responsibility of transnational companies, such as Nestlé, for human rights violations committed abroad.

The Federal Supreme Court’s restrictive interpretation shows that it is imperative to reform the statute of limitations with regard to corporate liability. Otherwise, companies with complex organisational structures will profit from long investigations – as has been demonstrated by Luciano Romero’s case. The result of the case illustrates that the Swiss justice system is not equipped to provide justice for the victims of grave human rights violations committed through corporations.

In view of the continuing attacks on trade unionists in Colombia, it would have been important to clarify the responsibility of a company in relation to its subsidiary companies. In conflict zones such as Colombia, Nestlé has a duty to guarantee the security of its workers and should not aggravate the dangerous situation faced by trade unionists. These duties follow from its guarantor and due diligence obligations that have been elaborated in international guidelines established by the United Nations and the OECD with respect to corporate human rights obligations. However, we see that the reality in Colombia is different, and trade unionists constantly suffer death threats and attacks. To date 15 Sinaltrainal trade unionists who had worked for Nestlé have been murdered. Most recently, in November 2013, a Nestlé worker was shot in Bugalagrande, Colombia, during a hunger strike that sought to promote respect for workers’ rights and the freedom of the Sinaltrainal trade union. In June 2014, there was an attempted assassination on the vice-president of the Bugalagrande section of the Sinaltrainal trade union. As in the case of Luciano Romero, the latest murder in November 2013 was also preceded by the Colombian management’s stigmatisation of trade unionists, which Nestlé’s Swiss headquarters failed to prevent. An adequate investigation in Switzerland might have prevented the continued repression of trade union organisation in Colombia.
Background and facts of the case
Luciano Romero was murdered by paramilitaries on 10th September 2005 in Valledupar in North Eastern Colombia. His body was found with 50 stab wounds. Before his death, Romero had worked for the Nestlé's Colombian subsidiary Cicolac for many years, and was a leader for the Colombian food industry's trade union Sinaltrainal. Colombia continues to be plagued by an armed conflict in which trade unionists and other groups are subject to systematic persecution. In the past three decades approximately 3,000 trade unionists have been assassinated. Luciano Romero had received frequent death threats after the local Nestlé management falsely branded him a guerrilla fighter. Cicolac allegedly did business with milk producers that had close ties with the paramilitaries or belonged to paramilitary groups themselves – a fact which in the meantime has been confirmed by Colombian courts. The former paramilitary commander Salvatore Mancuso has given evidence that Cicolac made payments to his units. The management at the Swiss company was continuously informed about the wrongdoing of its representatives in Colombia and about the repression and the threats against trade unionists.

The direct perpetrators of Romero's murder were convicted in Colombia in 2006 and 2007. Such convictions are rare in Colombia, a country with the world's highest rate of murders and intimidation of trade unionists. At the close of the proceedings in 2007, the Colombian court had called for a criminal investigation into the role of Nestlé's subsidiary Cicolac. However, no such investigation was carried out. Despite masses of indications of criminal liability, no prosecutor in Colombia or in Switzerland initiated an investigation. Colombian lawyers and trade unionists together with ECCHR took up the work on behalf of Luciano Romero's family and began investigating the circumstances of his murder.

On 5th March 2012, ECCHR and Sinaltrainal submitted a criminal complaint in Switzerland against Nestlé and five of its top managers, accusing them of contributing through negligence to the death of Luciano Romero. The criminal complaint set a legal precedent as it marked the first attempt to hold a Swiss company liable in Switzerland for a crime committed abroad. In 2003, article 102 was added to the Swiss Criminal Code that established the criminal liability of companies; however, the provision has rarely been applied. For the first time in Switzerland, this case posed the question of corporate criminal responsibility in cases of human rights violations.

The proceedings in Switzerland
The proceedings demonstrate that to date the Swiss judiciary has been unwilling to follow up on substantiated criminal accusations against corporations. Furthermore, Swiss law effectively makes it impossible for non-European victims of human rights violations committed by Swiss firms to enforce their rights in court.

On 1st May 2013, 14 months after the complaint was submitted, the office of public prosecution in the Swiss Canton of Waadt declined to open an investigation into the liability of Nestlé and its managers. No investigations were carried out since the criminal complaint was lodged in the German speaking Swiss canton of Zug. Instead, the case was passed over to authorities in the canton of Waadt, and rather than promptly initiating an investigation, the prosecution made use of various formalities to delay proceedings until they could declare that the matter had become statute-barred. The victim's widow, represented by Zurich lawyers Marcel Bosonnet and Florian Wick, had lodged her own criminal complaint and subsequently appealed against the decision of the Swiss authorities. This appeal was dismissed by the Cantonal Court in December 2013.

A new appeal was lodged against the Cantonal Court's decision before the Swiss Federal Supreme Court based on the court's failure to recognise that the statute of limitations does not begin to run with the commission of the crime itself. The corporation failed to take any action to remedy organisational deficiencies within the firm. Nestlé's liability in this case arises from these organisational deficiencies, and as a result the case cannot yet be statute-barred. In its decision the Cantonal Court failed to take into consideration the recent position paper of the Swiss Federal Council that supports the legal view put forward by ECCHR and Swiss lawyers Bosonnet and Wick.

In its decision of 21st July 2014, the Swiss Federal Supreme Court dismissed the Swiss widow’s appeal against the closing of the investigation into Romero's murder. The Federal Supreme Court upheld the prosecutor's office and the Cantonal Court's finding that the investigation was statute-barred, and departed from the Federal Council's interpretation that corporate responsibility is a continuing offence and therefore would not have been statute-barred in the present case. As a consequence, the real issue of Nestlé's responsibility for the assassination of one of its workers remains unexamined.

At least the Federal Supreme Court clearly defined the requirements for corporations. It stated that companies must provide inter alia 'a clear description and separation of competencies and responsibilities' as well...
One of the difficult realities of living in a country like Colombia is revealed by Camilo Insuasty-Obando as he recounts visiting his mother, a leading political campaigner, in prison...

One of many Saturdays in prison

Camilo Insuasty-Obando is an independent journalist and the son of Colombian political prisoner Liliany Obando. When he wrote this article, Liliany had been released from her prison cell at Buen Pastor Women’s prison and was finishing the remaining months of her sentence under house arrest. On 5th August 2014, Liliany was taken into custody again but has since returned to live at her home in Bogotá under house arrest. Her sentence is for the vague charge of ‘rebellion’, a charge that has been used to imprison thousands of unionists, student activists and human rights defenders. For updates concerning Liliany’s case, please visit the websites of Justice for Colombia or the International Network in Solidarity with the Political Prisoners.

I do not remember the exact day that I entered a prison, but I do remember with precision how that day transpired. That day would be the departure point from where we would begin, along with my family, to reach our freedom, our freedom, as only one of us was behind bars but we all would suffer the two faces of the prison, the outside and the inside.

That would be the first of many Saturdays where entering the prison to visit a family member would be more than a right, a real achievement. Being a family member of an inmate already puts you directly in the game that Inpec (National Institute of Prisons and Penitentiaries) wants to play – officers in blue uniforms that you have only seen on television. From this day forward we would have to learn to sort through every condition, every attack and every humiliation on the part of the prison guards. In reality the prison was their empire. They were the emperors and we, the enemy.

In the interminable queues that extend dozens of metres from the front gate of the prison, one encounters people, whether in inclement sun or rain, who have come from all parts of the city and some from other regions, people of different social classes, with different ways of seeing the world. It appeared that some live comfortable lives while others carry marks and scars that reveal their daily struggle for survival. An atmosphere of camaraderie and solidarity could be perceived in the entrance line such that differences between people do not then matter.

The only objective, as much for the rich as the poor, was to be able to enter. But as the corruption in this country is infused throughout all social spheres and spaces, the prison is not beyond that and the persons with the greater social status and economic resources clearly have privileges such as entering with a large quantity of food and utensils which surpass the limit of what is permitted to others. They enter more rapidly and without having to wait in line.

This day would be the first of many in which I would see how people were required to throw out the food that they brought for their family members. I would see how the guards were impeding the entry of persons coming from Antioquia, Valle, Tolima, Huila...