

## HUMAN RIGHTS WATCH

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Washington, D.C., October 25, 2012

Juan Manuel Santos  
President of the Republic of Colombia  
Casa de Nariño  
Bogotá, D.C., Colombia

Dear Mr. President:

I am writing to express my deep concern with the constitutional amendment your administration is currently promoting to expand the scope of military jurisdiction. The latest version of the proposed amendment<sup>1</sup> would result in serious human rights violations by the military—including extrajudicial executions, torture, and rape—being investigated and tried by the military justice system, in direct conflict with the jurisprudence by Colombia’s high courts and the Inter-American Court of Human Rights.<sup>2</sup> In our view, the amendment is unjustified. Its passage would virtually guarantee impunity for military atrocities. Furthermore, it would cause Colombia to fail to comply with human rights conditions for U.S. military aid, which require that all alleged human rights violations by the armed forces “are promptly referred to civilian jurisdiction for investigation and prosecution.”<sup>3</sup>

## I. The “Legal Insecurity” Myth

### i. *The 2006 Agreement Between the Ministry of Defense and Attorney General’s Office: A Scapegoat*

The central claim made by your administration to justify the amendment is that it is necessary to remedy the military’s “legal insecurity” (*inseguridad jurídica*). This “legal insecurity” has supposedly been generated by the baseless prosecution of military

<sup>1</sup> Texto aprobado en sexto debate del proyecto de acto legislativo no. 192/12-Camara-16/12-Senado “Por el cual se reforman los artículos 116, 152, y 221 de la Constitución política de Colombia.”

<sup>2</sup> See, for example, Colombian Constitutional Court, Sentence C-358/97; Colombian Superior Council of the Judicature, No. 110010102000200601121 00, Decision of August 14, 2006; Colombian Supreme Court, Case Number 26137, Decision of May 6, 2009; Inter-American Court of Human Rights, Case of Almonacid Arellano *et al/v.* Chile, Judgment of September 26, 2006, Inter-Am.Ct.H.R., Series C. No.154, para. 131; Case of the Rochela Massacre v. Colombia, Judgment of May 11, 2007, Inter-Am.Ct.H.R., Series C No. 163, para. 200; Case de Radilla Pacheco v. Mexico, Judgment of November 23, 2009, Inter-Am.Ct.H.R., Series C No. 209, paras. 272 and 274.

<sup>3</sup> Public Law 112-74, *U.S. Government Printing Service*, Section 7045(a)(2); and Joint Explanatory Statement (H.Rep 112-331), Sec 7045(1)



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members for human rights crimes. However, Human Rights Watch has asked for examples of unfounded prosecutions by civilian authorities during multiple meetings with senior Colombian government and military officials, and no one has been able to provide a single case to support the claim.

The “legal insecurity” myth is based on three fundamentally flawed claims. The first is that the military’s “legal security” (*seguridad jurídica*) has been eroded by a 2006 agreement signed between the Ministry of Defense and Attorney General’s Office.<sup>4</sup> The agreement provides that whenever apparent lawful combat killings or alleged extrajudicial executions occur during military operations, civilian justice authorities should conduct the inspection of the scene of the events and open the preliminary investigation. Under the agreement, if civilian prosecutors verify that those killed were lawfully killed in combat, they should send the case to the military justice system. If civilian prosecutors find evidence of an apparent human rights violation, they should continue to investigate the case. The creation of this policy was crucially important given the Colombian army’s history of executing civilians, dressing them up as members of irregular armed groups and reporting them as combatants killed in action. (These types of extrajudicial executions are commonly referred to as “false positives.”) As the Special Rapporteur on extrajudicial, summary or arbitrary executions noted in 2010, the policy “reduces opportunities for the military to cover up unlawful killings.”<sup>5</sup>

According to the “legal insecurity” myth, the 2006 agreement has caused military members to fear that if they lawfully kill combatants, they will be criminally investigated by civilian authorities. This purported fear is baseless. Civilian prosecutors do open preliminary investigations to verify reported lawful killings of combatants. But they can only link a military member to a criminal investigation if they have sufficient evidence that an extrajudicial execution—and not a legal combat killing—took place.

The facts show that civilian prosecutors are *not* opening investigations against and prosecuting military personnel for lawful killings of combatants. The Ministry of Defense reports that since 2009, after the “false positives” scandal broke, the Colombian security forces have killed in combat 1,964 guerrillas and members of paramilitary successor groups (called Bacrim by the government).<sup>6</sup> If these reported

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<sup>4</sup> Ministry of Defense, “Mindefensa y Fiscalía firman acuerdo de Cooperación,” undated, <http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Paginas/PoliticaAsuntosInt/DDHH/Boletines/B2/noticiappal.htm> (accessed October 10, 2012).

<sup>5</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Visit to Colombia, A/HRC/14/24/Add.2, March 31, 2010, para 32.

<sup>6</sup> Figures from January 2009-September 2012. Ministry of Defense, “Información de criminalidad, resultados operacionales, afectación de las propias tropas y pie de fuerza,” undated, [http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/Descargas/estudios%20sectoriales/info\\_estadistica/Avance%20de%20la%20Politica%20de%20Defensa%20y%20Seguridad.pdf](http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/Descargas/estudios%20sectoriales/info_estadistica/Avance%20de%20la%20Politica%20de%20Defensa%20y%20Seguridad.pdf) (accessed October 9, 2012)

combat killings were leading to criminal investigations of military personnel, one would expect to find hundreds—if not thousands—of military members under investigation by the Attorney General’s Office for alleged extrajudicial executions committed since 2009. However, according to the Colombian Army, the Attorney General’s Office has just 22 open investigations into army members for alleged extrajudicial executions committed between 2009 and August 2012.<sup>7</sup> High-ranking officials from the army and Ministry of Defense told Human Rights Watch that they had no evidence that any of these 22 investigations were unfounded.<sup>8</sup> (The Human Rights Unit of the Attorney General’s Office reports that as of August 31, 2012, it was investigating 0 cases of alleged extrajudicial executions committed in 2012, 1 committed in 2011, 5 in 2010, and 13 in 2009, compared to 817 cases from 2007 and 2008—before the “false positives” scandal had come to light.<sup>9</sup>) As the UN Office of the High Commissioner for Human Rights’ representative to Colombia recently stated, “No soldier should go to jail for combating guerrillas in the framework of International Humanitarian Law. Our Office has not found any case in which this has happened.”<sup>10</sup>

In any case, it is worth noting that the 2006 agreement is not even currently being enforced. The agreement called for agents from the Technical Investigation Corps (CTI) of the Attorney General’s Office to inspect the scene of apparent lawful combat killings or alleged extrajudicial executions, and refer the preliminary investigation to civilian prosecutors. However, this year, Colombia created the System for Assistance with Criminal Investigations for the Military Forces, under which the National Police’s Directorate for Criminal Investigation (DIJIN) is charged with conducting the inspections of apparent lawful combat killings and sending them to civilian prosecutors. The DIJIN is under the authority of the Ministry of Defense, and its special units that conduct the inspections of reported combat killings are stationed within military bases. The Special Rapporteur on extrajudicial, summary or arbitrary executions has expressed concern over this new policy and “emphasiz[ed] the requirement that forensic examinations be undertaken in an independent manner, and observe[d] that the DIJIN may not comply with this criterion.”<sup>11</sup> A senior DIJIN

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<sup>7</sup> 13 investigations of alleged extrajudicial executions committed in 2009, 6 from 2010, 3 from 2011, and 0 from 2012. Human Rights Watch interview with senior army official, Bogotá, August 27, 2012.

<sup>8</sup> Human Rights Watch interview with senior army official, Bogotá, August 27, 2012; Human Rights Watch interview with senior Ministry of Defense official, Bogotá, August 27, 2012.

<sup>9</sup> The Human Rights Unit has not obtained a single conviction against a member of the military for alleged extrajudicial executions committed between 2009 and 2012.

<sup>10</sup> “Intervención del Señor Todd Howland, Representante en Colombia de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos en la Universidad Sergio Arboleda de Bogotá,” Todd Howland, Office of the High Commissioner for Human Rights’ representative to Colombia, August 30, 2012, <http://www.hchr.org.co/publico/pronunciamientos/ponencias/ponencias.php3?cod=144&cat=24> (accessed October 9, 2012).

<sup>11</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Follow-up country recommendations: Colombia, A/HRC/20/22/Add.2, May 15, 2012, para 39.

official told Human Rights Watch that the DIJIN has conducted all of the inspections of reported combat deaths in 2012.<sup>12</sup>

ii. *The Supposed Efficiency of the Military Justice System*

The second flawed claim invoked by those who promote the “legal insecurity” myth is that civilian prosecutors are advancing slower than the military justice system would in investigating alleged military abuses. According to this theory, innocent military personnel are being arrested and incarcerated for long periods of time without having been convicted of a crime. It is true that of the approximately 1,800 army members incarcerated for alleged extrajudicial executions, many have not yet been convicted. But supporters of the amendment have failed to provide any evidence that the accusations against them are baseless.

It is not true that the military justice system would investigate and prosecute human rights cases in a more expedient fashion than civilian prosecutors, as Minister of Defense Juan Carlos Pinzón suggested when he stated that “without a doubt some excesses and dishonorable and criminal activities were committed. But if we had the military justice system working we’d already have all these people sentenced, the innocents on one side, and the guilty locked up.”<sup>13</sup> Civilian investigations and prosecutions of military abuses may be advancing slowly, but Colombia’s military justice system is an example of impunity—not accountability—for atrocities.

Furthermore, a major reason for civilian authorities’ slow progress in prosecuting military abuse cases has been the delay tactics employed by military defense lawyers. In May 2011, former Attorney General Viviane Morales sent a letter to the president of the Superior Council of the Judicature asking the body to take measures to rein in the use of such tactics in human rights cases, including the high-profile 2010 case in which an army lieutenant murdered three children in Arauca department after having raped one of the victims. Then-Attorney General Morales wrote that:

What is worrisome is that this situation is not the only case in which members of the public security forces linked to criminal cases have resorted to the repeated and systematic change of defense lawyers to delay the proceedings...[T]his practice has converted into a habit in the cases in which the Public Military Defense (DEMIL) has intervened...which has held up and delayed the prosecutions of cases known as ‘false positives.’<sup>14</sup>

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<sup>12</sup> Human Rights Watch interview with DIJIN official, Bogotá, August 31, 2012

<sup>13</sup> “‘El fuero devuelve tranquilidad a los militares,’ dice Álvaro Uribe,” *El Colombiano*, March 19, 2012, [http://www.elcolombiano.com/BancoConocimiento/E/el\\_fuero\\_devuelve\\_tranquilidad\\_a\\_los\\_militares\\_dice\\_alvaro\\_uribe/el\\_fuero\\_devuelve\\_tranquilidad\\_a\\_los\\_militares\\_dice\\_alvaro\\_uribe.asp](http://www.elcolombiano.com/BancoConocimiento/E/el_fuero_devuelve_tranquilidad_a_los_militares_dice_alvaro_uribe/el_fuero_devuelve_tranquilidad_a_los_militares_dice_alvaro_uribe.asp) (accessed October 3, 2012)

<sup>14</sup> See a copy of the letter in “Fiscalía, preocupada por dilación en procesos,” *Semana* magazine, May 31, 2011, <http://www.semana.com/nacion/fiscalia-preocupada-dilacion-procesos/157697-3.aspx>

As an example of this problem, one senior official from the Attorney General's Office told Human Rights Watch that a "false positive" case from Soacha had 936 hearings over the course of three years due to the delay tactics employed by military defense lawyers. Military defense lawyers have also engaged in irregular practices to affect the proceedings, such as "pos[ing] as officials of the Attorney General's Office, [and] intimidate[ing] several trial witnesses and family members of victims of alleged extrajudicial executions," according to the UN Office of the High Commissioner for Human Rights.<sup>15</sup>

Civilian prosecutors' high caseload is another obstacle to more expedient investigations and prosecutions of military members accused of human rights crimes. In 2011, your administration took action to address this problem by issuing a decree to increase the Attorney General's Office's personnel.<sup>16</sup> The Attorney General's Office subsequently passed an implementing resolution<sup>17</sup> and announced that it would add 41 new prosecutors to the Human Rights Unit who would exclusively handle cases of alleged extrajudicial executions attributed to state agents. However, according to a senior official from the Attorney General's Office, none of the 41 prosecutors have been appointed as of October 2012.<sup>18</sup> If Colombia wishes to accelerate human rights investigations of the military, ensuring the placement of these 41 prosecutors will be much more effective than sending the cases to the military justice system.

iii. *The Supposed Lack of "Specialized Knowledge" in the Civilian Justice System*

The third equally flawed claim behind the "legal insecurity" myth is that civilian prosecutors should not handle military abuse cases because, unlike military justice authorities, they do not have the "specialized knowledge" to do so. It is unclear why military justice authorities would have more expertise about rape, torture, and extrajudicial executions of civilians. In any case, crimes requiring high levels of specialized knowledge such as those related to medical responsibility and financial crimes are not handled by special jurisdictions and simply rely on expert witnesses when necessary. There is no reason why the same should not be true for alleged abuses by members of the security forces. However, if the knowledge level of civilian judicial authorities is of concern, this could easily be fixed by increasing their training with regard to international humanitarian and human rights law.

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<sup>15</sup> Report of the UN High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/19/21/Add.3, January 31, 2012, Appendix 5d.

<sup>16</sup> Decree 2248 de 2011 *Through which the staff of the Attorney General's Office is modified*, Diario Oficial No. 48.114, <http://www.avancejuridico.com/actualidad/documentosoficiales/2011/48114/d2248011.html>

<sup>17</sup> Fiscalía General de la Nación, Resolución No. 0-2116, August 12, 2011.

<sup>18</sup> Human Rights Watch telephone interview with senior Attorney General's Office official, October 5, 2012.

iv. *The Position of Minister of Defense Juan Manuel Santos Versus the Current Position of President Juan Manuel Santos*

What is perhaps most striking about your administration's use of the "legal insecurity" claim to support the amendment is that as defense minister, you made the exact opposite argument when taking measures to prevent extrajudicial executions. In a 2007 directive, you ordered the military to ensure that in all cases of apparent lawful combat killings and alleged extrajudicial executions, the judicial police—and not the military justice system—collect the evidence and send it to civilian prosecutors so they can open a preliminary investigation.<sup>19</sup> You stated in the directive that the presence of judicial police at the scene of the events "*guarantees the legal security*" (emphasis added) of all the military's actions. The directive also accurately describes how "the Constitutional Court and Superior Council of the Judicature have repeatedly found that the competence of the Military Justice System is restrictive and exceptional, and that it should only investigate and handle crimes related to service, which are understood as...*those derived directly from the exercise of the military or police function assigned by the Constitution*" (emphasis added). The proposed constitutional amendment would directly violate this jurisprudence by sending to military jurisdiction cases of extrajudicial executions, torture, rape and other human rights crimes that have no link to the military's constitutional mandate.

The big question is why you have changed your position on this important issue. Since you helped to establish civilian jurisdiction over human rights crimes when defense minister, accountability for alleged extrajudicial executions by the military has increased, and the number of new reported cases has declined dramatically. As of August 2012, the Human Rights Unit of the Attorney General's Office was investigating 1,727 cases of alleged extrajudicial executions committed by state agents (mostly by the army between 2004 and 2008) involving nearly 3,000 victims, and had obtained convictions for 159 cases. There is no evidence that the convictions were unfounded. In fact, the defendants accepted the charges in more than 40 percent of the convictions for these cases.<sup>20</sup> All of the evidence shows that military members are not being investigated and prosecuted for lawfully killing guerrillas during combat; they are being brought to justice for having murdered civilians.

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<sup>19</sup> Permanent Directive No. 19/2007 from Juan Manuel Santos C., Minister of Defense, to Freddy Padilla de Leon, Commander of the Military Forces and Luz Marina Gil Garcia, Executive Director of the Military Justice System, November 2, 2007, available from [http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Documentos\\_Home2/dir\\_19\\_07.pdf](http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Documentos_Home2/dir_19_07.pdf) (accessed October 9, 2012).

<sup>20</sup> As of August 31, 2012, the Human Rights Unit of the Attorney General's Office had obtained 229 convictions for 159 cases of extrajudicial executions, and 94 of the convictions were the result of plea bargains in which the defendants accepted the charges.

## II. The Proposed Constitutional Amendment: A Blow to the Rule of Law

### *i. Cases of Extrajudicial Executions, Sexual Violence, and Torture Would Go to the Military Justice System*

The latest version of the proposed amendment would add a paragraph to article 221 of the Constitution establishing that military courts “exclusively handle” all violations of international humanitarian law by the security forces, except for crimes against humanity, genocide, and forced disappearances. Consequently, the military justice system would investigate, prosecute, and judge all other types of violations, including extrajudicial executions, torture and rape. Having the military investigate its own abuses would virtually guarantee impunity. As we have expressed to you before, Colombia’s military justice system lacks the necessary independence, impartiality—and therefore credibility—to hold the military accountable for its abuses.<sup>21</sup>

With regard to the exclusion of crimes against humanity from military jurisdiction, it is important to note that in keeping with international law, and as recently confirmed by the criminal chamber of Colombia’s Supreme Court,<sup>22</sup> extrajudicial executions, rapes, and other military abuses can only be prosecuted as crimes against humanity if they are part of a *widespread* or *systematic* attack against the civilian population, *with knowledge* of the attack, and *pursuant to or in furtherance of a state or organizational policy*.<sup>23</sup> In the words of Colombia’s Attorney General Eduardo Montealegre, “The crime against humanity is not every grave violation of human rights. The [Rome] Statute of the International Criminal Court says that they have to be systematic or widespread attacks against the civilian population.”<sup>24</sup> Therefore, if the amendment is enacted, in order to bring prosecutions in civilian courts, prosecutors will need to be able to establish in each case that the victim of rape, torture, or an extrajudicial execution was violated as part of a widespread or systematic attack by the military against the civilian population, committed knowingly and pursuant to or in furtherance of a policy.

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<sup>21</sup> See Letter from José Miguel Vivanco, Human Rights Watch, to Juan Manuel Santos, President of the Republic of Colombia, December 12, 2011; Inter-American Commission on Human Rights Report No. 43/08, Case 12.009, Leydi Dayán Sánchez, Colombia, July 23, 2008, paras. 76 and 77.

<sup>22</sup> Criminal Chamber of the Colombian Supreme Court, Case Number 34180, Decision of May 23, 2012.

<sup>23</sup> Article 7(1) of the Rome Statute provides that “crimes against humanity” are cases of murder, torture, rape, and other serious abuses “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”. Article 7(2)a provides that “‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

<sup>24</sup> “Fiscal General: ‘Puede ocurrir que ningún guerrillero pague cárcel’”, *Semana* magazine, September 8, 2012, <http://www.semana.com/nacion/fiscal-general-puede-ocurrir-ningun-guerrillero-pague-carcel/184261-3.aspx> (accessed October 10, 2012).

The proposed amendment does not specify which authority would decide whether a reported human rights crime constitutes a crime against humanity, and therefore must be handled by civilian authorities. One likely option is the mixed commission composed partly of military justice system personnel that the amendment would create to “intervene” when “doubt exists” as to the competent jurisdiction. While the latest version of the bill says that the nature of the commission’s intervention will be defined in a future law, the initial versions of the bill stated that it would verify the facts of cases and decide whether they are referred to the military or civilian justice systems. Any form of intervention by a commission containing military justice system personnel in the investigation of an alleged human rights crime would represent a major setback as compared to Colombia’s current policy and jurisprudence, which provides that in cases of doubt, civilian authorities should take initial control over investigations of alleged human rights violations.

In the same regard, it is worth noting that the amendment would also create a “Penal Guarantees Tribunal” of a similar civilian-military composition<sup>25</sup> that would have the power to determine the legality of all investigations and prosecutions of members of the security forces accused of *any* crime. As stated by 11 United Nations experts in their open letter to your government, the creation of the tribunal would “make allegations harder to prove... violate the principle of equality in relation to access to justice...thus undermining the rule of law. This situation risks generating a climate of impunity.”<sup>26</sup>

*ii. The Transfer of Cases from the Civilian Justice System to Military Jurisdiction*

Along with affecting possible future human rights crimes, the constitutional amendment would most likely also lead to the transfer to military jurisdiction of cases of past human rights violations currently under investigation or at the trial stage in the civilian justice system. There are two powerful arguments defense lawyers could make before judges in order to secure such a transfer. First, they could present an *a contrario sensu* interpretation—commonly applied by Colombian judges—of transitory article 4 of the amendment. Transitory article 4 of the amendment provides that “The criminal cases against members of the security forces for crimes expressly *excluded* from the military justice system in the second paragraph of article 3 of this constitutional amendment [genocide, crimes against humanity, and forced disappearance] and that are in the civilian justice system, will *continue* there” (emphasis added). According to this transitory norm, cases of genocide, crimes against humanity or enforced disappearance that are currently in the civilian justice system will remain there. Therefore, *a contrario sensu*, it can be

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<sup>25</sup> The “Penal Guarantees Tribunal” would be composed of six magistrates, three of which would be retired members of the security forces.

<sup>26</sup> Open letter from Special Procedures mandate-holders of the Human Rights Council to the Government and representatives of the Congress of the Republic of Colombia, October 22, 2012, see <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12683&LangID=E>

reasonably understood that cases of all other violations of international humanitarian law currently handed by the civilian justice system (such as torture, rapes or extrajudicial executions that do not meet the criteria of a crime against humanity) will *not* continue in the civilian justice system, but rather be transferred to the military justice system.

Second, security force members who are under investigation or stand trial for human rights violations will be able to argue that the law most favorable to them should be applied retroactively (*principio de favorabilidad*) and that therefore they have the right to be investigated, prosecuted and judged by military justice authorities. Indeed, they could even cite the new position of the Colombian government that military members' "legal security" will only be guaranteed by the military justice system.

### *iii. False Positives*

Despite Minister of Defense Juan Carlos Pinzón's claim to the contrary,<sup>27</sup> passage of the amendment would likely lead to "false positives" cases currently under investigation or at trial in the civilian justice system being transferred to military jurisdiction. Military personnel accused of false positives could argue that their case should be transferred to military jurisdiction, because in the worst case scenario, the alleged extrajudicial execution was an isolated crime, rather than part of a widespread or systematic attack against the civilian population, with knowledge of the attack and pursuant to or in furtherance of a policy. To do so, they could cite the Colombian government, which held before the United Nations that the false positives phenomenon "was not widespread, and that where such unlawful killings occurred they were isolated instances."<sup>28</sup> They could also cite the decisions of Colombian justice authorities, which have generally not classified cases of false positives as crimes against humanity, according to a high-ranking official from the Attorney General's Office and dozens of judicial rulings reviewed by Human Rights Watch.<sup>29</sup> Furthermore, false positives have often been prosecuted as "homicides of protected persons," which is defined by the Colombian penal code as "caus[ing] the death of a protected person due to and in the course of the armed conflict, *according to the International Conventions on Humanitarian Law ratified by Colombia*" (emphasis added). As a crime defined as a violation of international humanitarian law, "homicides of protected persons" would be investigated and prosecuted by the military justice system under the amendment, which provides that all international humanitarian law violations be exclusively handled by military courts.

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<sup>27</sup> "Aprobado en quinto debate reforma al fuero penal militar," Caracol radio, September 26, 2012, <http://www.caracol.com.co/noticias/actualidad/aprobado-en-quinto-debate-reforma-al-fuero-penal-militar/20120926/nota/1768649.aspx> (accessed October 10, 2012).

<sup>28</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Follow-up country recommendations: Colombia, A/HRC/20/22/Add.2, May 15, 2012, para 8.

<sup>29</sup> Human Rights Watch telephone interview with senior Attorney General's Office official, October 5, 2012.

Minister of Defense Pinzón has tried to dismiss concerns over the transfer of false positives cases to military jurisdiction by arguing that the crimes are not “related to service.”<sup>30</sup> This argument is based on the current jurisprudence of Colombia’s high courts, which provides that grave human rights violations and other conducts “contrary to the constitutional function of the security forces” are never related to service, and therefore must be handled by the civilian justice system.<sup>31</sup> However, the exact purpose of the amendment is to nullify this jurisprudence by adding a paragraph to article 221 of the Constitution that provides that violations of international humanitarian law by the security forces should be “exclusively handled” by the military justice system. If passed, Colombia’s new Constitution—and not the jurisprudence based on the old, un-amended version of the Constitution—would be the basis for determining which crimes by the security forces are “related to service” and thereby subject to military jurisdiction.

#### *iv. The International Criminal Court*

Passage of the amendment could also have serious implications for Colombia with regard to the International Criminal Court (ICC). The ICC is monitoring the situation in Colombia and has jurisdiction over crimes against humanity committed in Colombia since November 2002 and for war crimes committed from November 2009 onwards. The ICC has a mandate to open an investigation if Colombia is unwilling or unable genuinely to prosecute war crimes or crimes against humanity. The investigation of military abuse cases by the military justice system would seriously undermine the independence and impartiality of the proceedings, and if the proceedings are inconsistent with an intent to bring those responsible to justice could, in turn, expose Colombia to an investigation by the ICC, including of false positives.<sup>32</sup>

Independently of whether or not Colombian justice authorities find false positives to be crimes against humanity, the ICC would ultimately make its own determination about such crimes committed after November 2002. In this regard, it is important to note that the UN Human Rights Committee has expressed concern over “the

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<sup>30</sup> Minister of Defense Pinzón is reported to have made this claim during congressional debate over the version of the bill proposed for its sixth congressional debate. See *Presentación informe de Ponencia para sexto debate al proyecto de Acto Legislativo No. 16 de 2012 Senado, 192 de 2012 Cámara, “Por el cual se reforman los artículos 116, 152, y 221 de la Constitución Política de Colombia”*.

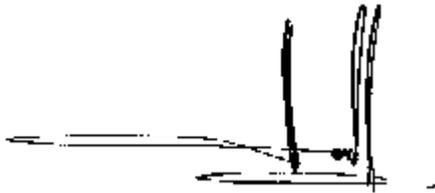
<sup>31</sup> See, for example, Colombian Constitutional Court, Sentence C-358/97; Colombian Superior Council of the Judicature, No. 110010102000200601121 00, Decision of August 14, 2006; Colombian Supreme Court, Case Number 26137, Decision of May 6, 2009.

<sup>32</sup> Article 17 of the Rome Statute provides that, “In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable... The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

widespread pattern”<sup>33</sup> of false positives, and the UN High Commissioner for Human Rights is reported as stating that the scale of the cases could indicate that they were “systematic and widespread.”<sup>34</sup> The Office of the Prosecutor of the ICC has also announced that it is gathering information about the proceedings on allegations of false positives.<sup>35</sup>

Colombia’s military is not afflicted with “legal insecurity.” If military members fear prosecution for lawfully killing combatants, then the Ministry of Defense should review its training programs in order to correct this misperception. And if your administration is concerned with accelerating investigations of military abuses, it should strengthen the civilian justice system. But it would be a mistake to deliver an unprecedented blow to the rule of law in order to fix a problem that does not exist.

Sincerely,



José Miguel Vivanco  
Human Rights Watch

CC: Angelino Garzón, Vice-President of Colombia  
CC: Fernando Carrillo, Minister of Interior  
CC: Ruth Stella Correa, Minister of Justice and Law  
CC: Juan Carlos Pinzón, Minister of Defense  
CC: María Ángela Holguín, Minister of Foreign Affairs  
CC: Eduardo Montealegre, Attorney General  
CC: Sergio Jaramillo, National Security Advisor  
CC: Carlos Urrutia, Ambassador to the United States  
CC: Roy Barreras, President of the Senate  
CC: Karime Mota, President of the First Commission of the Senate

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<sup>33</sup> United Nations Human Rights Committee, Consideration of the reports submitted by States parties under article 40 of the Covenant, CCPR/C/COL/CO/6, August 4, 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/441/27/PDF/G1044127.pdf?OpenElement> (accessed October 11, 2012), para 14.

<sup>34</sup> “U.N. says Colombian military executing civilians,” CNN, November 1, 2008, [http://articles.cnn.com/2008-11-01/world/colombia.UN\\_1\\_colombian-military-units-security-forces-human-rights?\\_s=PM:WORLD](http://articles.cnn.com/2008-11-01/world/colombia.UN_1_colombian-military-units-security-forces-human-rights?_s=PM:WORLD)

<sup>35</sup> The Office of the Prosecutor of the International Criminal Court, “Report on Preliminary Examination activities,” December 13, 2011, para. 82.