HUMAN RIGHTS WATCH

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Juan Manuel Santos
President of the Republic of Colombia
Casa de Nariño
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Dear Mr. President,

I am writing to express my deep concern with the "justice system reform" bill your administration is currently promoting that would expand the scope of military jurisdiction over cases of abuses by Colombian security forces. Article 11 of the bill would amend the constitution to provide that all acts committed by active security force members during operations are presumed to be "related to service," and therefore subject to military jurisdiction.[1] This article—which would result in cases of human rights violations by security forces being handled by the military justice system—directly violates jurisprudence by Colombia's high courts and the Inter-American Court of Human Rights, as well the views espoused by other relevant international human rights bodies. Its passage would dramatically reverse recent progress Colombia has made in providing accountability for military abuses. And by virtually guaranteeing impunity for human rights violations committed by the security forces, it could ultimately expose Colombia to investigations by the International Criminal Court, including of cases of "false positives."

The proposed justice system reform is contrary to the jurisprudence of Colombia's Constitutional Court (CC), Supreme Court (SC) and Superior Council of the Judicature (SCJ), which have repeatedly found that the military justice system should not handle cases of grave human rights violations. While article 221 of the Colombian constitution says that military jurisdiction should be applied to crimes committed by active members of the security forces that are "related to their service," multiple rulings and decisions by the CC, SC, and SCJ make clear that crimes against humanity, grave human rights violations, and other conducts "contrary to the constitutional function of the security forces" are never related to service, and thereby must always be investigated, prosecuted and judged by the civilian justice system.[2]

The justice system reform bill's position that all acts committed during military operations are presumed to be related to service contravenes this jurisprudence, because it would result in the military justice system

[1] Article 11, Justice System Reform, 143/2011 C, draft bill approved in third debate, December 2, 2011.
[2] See, for example, Colombian Constitutional Court, Sentence C-358/97; Colombian Constitutional Court, Sentence C-878/00; Colombian Constitutional Court, Sentence SU-1184/01; Colombian Superior Council of the Judicature, No. 110010102000200601121 00, Decision of August 14, 2006; Colombian Superior Council of the Judicature, No. 110010102000200900097 01 – 1134C, Decision of February 2009; Colombian Supreme Court, Case Number 26137, Decision of May 6, 2009.

opening the initial investigations into all alleged crimes committed by security forces during operations, including flagrant human rights violations. For example, under the proposed reform, the military justice system would automatically assume jurisdiction over cases of torture and rape against civilians committed by security forces during operations. The military justice system would also automatically open investigations into cases of "false positives"–when members of the army kill civilians, dress them up in camouflage and present them as members of illegal groups killed in combat–because the victims of the extrajudicial executions are reported as killed in action. The proposal blatantly contradicts the CC, SC and SCJ's repeated rulings and decisions that the application of military jurisdiction should be a clearly delimited exception to the general competence of civilian jurisdiction, and that in cases of doubt, civilian jurisdiction should apply.[3] As stated in a historic 1997 Constitutional Court ruling, "When there is doubt as to the competent jurisdiction, it should fall to the civilian justice system to handle the case. The relationship with an act of service must emerge clearly from the evidence in the case. Given that the military justice system constitutes the exception to the norm, it shall only have jurisdiction in cases in which it clearly appears that the exception to the principle of the natural judge should be applied."[4]

The reform proposal also contravenes the rulings and decisions of the Inter-American Court of Human Rights and Inter-American Commission on Human Rights, which have repeatedly stated that human rights violations should not be handled by the military justice system, and that the scope of military jurisdiction should be exceptional and restrictive.[5] In one recent example, the Inter-American Court held in the November 2009 judgment, Radilla Pacheco v. Mexico, that, "Regarding situations that violate the human rights of civilians, military jurisdiction cannot operate under any circumstance."[6] As stated in the Inter-American Court's May 2007 ruling, Rochela Massacre v. Colombia, this proscription of military jurisdiction applies to all stages of the proceedings, "The military criminal jurisdiction is not the competent jurisdiction to investigate and, if applicable, prosecute and punish the perpetrators of human rights violations."[7] In regards to Colombia in particular, the Inter-American Commission has stated that, "Colombian military criminal courts are not

[3] See, for example, Colombian Constitutional Court, Sentence C-358/97; Colombian Constitutional Court, Sentence C-878/00; Colombian Superior Council of the Judicature, No. 11001010200020060112100, Decision of August 14, 2006; Colombian Superior Council of the Judicature, No. 11001010200020090009701 – 1134C, Decision of February 2009; Colombian Supreme Court, Case Number 21923, Decision of May 25, 2006; Colombian Supreme Court, Case Number 26137, Decision of May 6, 2009.

[4] Colombian Constitutional Court, Sentence C-358/97.

[5] See, for example, 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; Inter-American Commission on Human Rights, Admissibility Report No. 19/05. Petition 54/04, Valdemir Quispialaya Vilcapoma, Peru, February 25, 2005, para. 46. Admissibility Report N° 13/04. Petition 136/03, Eduardo Nicolás Cruz Sánchez *et al.*, Peru, February 27, 2004, para. 59. Admissibility Report N° 41/02. Petition 11,748, José del Carmen Álvarez Blanco *et al.* (Pueblo Bello), Colombia, October 9, 2002, para. 24; Third Report on the Human Rights Situation in Colombia (1999), p. 175; Second Report on the Human Rights Situation in Colombia (1993), p. 246; Report on the Human Rights Situation in Brazil (1997), pp. 40-42.

[6] Inter-American Court, Case de Radilla Pacheco v. Mexico, Judgment of November 23, 2009, Inter-Am.Ct.H.R., Series C No. 209, para. 274.

[7] Inter-American Court of Human Rights, Case of the Rochela Massacre v. Colombia, Judgment of May 11, 2007, Inter-Am.Ct.H.R., Series C No. 163, para. 200.

an appropriate forum for the examination, prosecution and punishment of human rights cases."[8]

The jurisprudence of Colombia's high courts and the Inter-American Court is consistent with the views of the UN and other international human rights bodies. In the draft principles on military justice adopted by the former United Nations Human Rights Commission, principle No. 9 states that, "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes."[9] This has also been the position of the European human rights bodies and the African Commission on Human and Peoples' Rights.[10] In regards to the crime of enforced 'disappearance,' it is also worth noting that article 9 of the Inter-American Convention on Forced Disappearances of Persons, which Colombia has ratified, provides that, "Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions."[11]

The very structure of the military justice system fundamentally inhibits it from independently and impartially administering justice for cases of human rights violations. The Inter-American Commission has repeatedly found that, "Given its nature and structure, military criminal justice system does not meet the standards of independence and impartiality set in article 8(1) of the American Convention… The military justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction…The military justice system does not form part of the judicial branch of the Colombian state. Rather, the jurisdiction is operated by the public security forces and, as such, falls within the executive branch."[12] Indeed, as established by article 221 of the Colombian Constitution, military courts are comprised of active or retired members of the security forces. The hierarchical nature of the military, an institution founded on a strict chain of command, clearly limits active or retired military officials' capacity to impartially judge members of their current or former ranks.

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[8] Inter-American Commission on Human Rights, Report No. 43/08, Case 12.009, Leydi Dayán Sánchez, Colombia, July 23, 2008, para. 77.

[9] United Nations Human Rights Commission, Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Draft Principles Governing the Administration of Justice Through Military Tribunals, E/CN.4/2006/58, January 13, 2006, principle no. 9.

[10] See, for example, the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (1999); African Commission on Human & Peoples' Rights, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa," DOC/OS(XXX)247, 2001 which provides that "[t]he only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel." This position is reaffirmed in jurisprudence such as *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 and 229/99, (African Commission on Human and Peoples' Rights 2003); *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, (African Commission on Human and Peoples' Rights 2000). The European Court has also been critical of the use of military tribunals for the prosecution of offences other than those strictly of a military nature, in cases involving civilians, and even where the subject matter may be a matter properly assigned to a military tribunal has been repeatedly critical of the lack of independence of military tribunals. See jurisprudence of the Court in e.g. Findlay v. The United Kingdom (110/1995/616/706) Judgment February 25, 1997; Incal v. Turkey, Judgment of June 9, 1998, ECHR Reports 1998-IV,;*Ergin v Turkey* (47533/99) (2008) 47 EHRR 36.

[11] Inter-American Convention on Forced Disappearances of Persons, 33 I.L.M. 1429 (1994), entered into force March 28, 1996, ratified by Colombia on April 1, 2005, article 9.

[12] See, for example, Inter-American Commission on Human Rights Report No. 43/08, Case 12.009, Leydi Dayán Sánchez, Colombia, July 23, 2008, paras. 76 and 77. Report No. 63/01, Case 11.710, Carlos Manuel Prada Gonzalez and Evelio Antonio Bolaño Castro, Colombia, April 6, 2001, para. 41. Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia (1999), pp. 175 to 186.

In practice, Colombia's military justice system has long failed to hold perpetrators of human rights violations accountable. This is evidenced by the military courts' glaring lack of results in obtaining convictions against those responsible for cases of 'false positives'. Not only have military justice authorities failed to deliver justice for these cases, but they have also reportedly closed files without conducting a proper investigation into the allegations. According to the UN High Commissioner for Human Rights' 2010 report on the situation of human rights in Colombia, "An unknown number of cases [of extrajudicial killings] in the military justice may have been closed without taking appropriate judicial action."[13] The Inter-American Commission also noted in its 2010 report that in Colombia, "Military judges issue archiving and nolli prosequi decisions in cases of human rights violations."[14]

Your Defense Minister has defended the justice system reform bill by insisting that military courts will transfer cases of human rights violations to civilian courts once evidence arises demonstrating that a human rights violation has occurred. However, for the same reasons that the military justice system cannot be relied on to investigate and try cases of human rights violations, they also cannot be expected to transfer the cases to civilian jurisdiction in a timely manner that allows for an adequate criminal investigation.

Military judges lack the independence and impartiality to decide whether an alleged crime constitutes a human rights violation and duly transfer the case to civilian authorities when necessary. Moreover, the ability of military judges to make these decisions in an impartial manner is further undermined by a history of pressure and threats against military judges who have transferred abuse cases to civilian jurisdiction. For example, in its 2010 report, the Inter-American Commission said that in Colombia, it had, "Received information on acts of persecution against officials who comply with their duty to transfer cases on human rights violations to the ordinary courts."[15] The Office of the UN High Commissioner for Human Rights' 2010 report on Colombia also stated that, "Information received indicates that the transfer and dismissal of some military judges may be related to their collaboration with the ordinary system."[16] The pressure that military judges can face when deciding on whether or not to transfer an investigation to civilian jurisdiction is illustrated by the case of former military judge Alexánder Cortés, who was removed from his post after having transferred cases of false positives to civilian jurisdiction, and subsequently fled the country because of threats on this life. In a July 2010 interview with Semana magazine, Cortés described living in the same military brigade as one of the officials he was supposed to investigate, "Right in front of my room lived one of the officials that I had to investigate, and who was implicated in false positives, ties to paramilitaries, and drug-trafficking."[17]

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[13] UN High Commissioner for Human Rights, Report of the UN High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/16/22, February 3, 2011, para 26.
[14] Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II, March 7, 2011, Chapter IV Colombia, para. 31.
[15] Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II, March 7, 2011, Chapter IV Colombia, para. 30.
[16] UN High Commissioner for Human Rights, Report of the UN High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/16/22, February 3, 2011, para. 28.
[17] "Capitán nunca juzgará a coronel," Semana magazine, July 17, 2010, http://www.semana.com/nacion/capitan-nunca-juzgara-coronel/141923-3.aspx (accessed December 6, 2011).

Indeed, military authorities have a very poor record when it comes to promptly transferring alleged cases of human rights violations to civilian jurisdiction. The UN Special Rapporteur on Extrajudicial Executions reported in 2010 that in Colombia, "The most significant obstacle to effective prosecution of extrajudicial executions by members of the security forces are the continuing jurisdictional conflicts between [military and civilian justice] systems and the failure of military judges to transfer cases to the civilian justice system."[18] To the same effect, both the Office of the UN High Commissioner for Human Rights and US State Department reported on the decline in the number of cases of extrajudicial executions that were transferred from military jurisdiction to civilian jurisdiction in 2010.[19] (The investigation and prosecution by civilian authorities of members of the armed forces credibly alleged to have committed human rights violations has been a requirement under the US State Department's human rights certification process to release military aid to Colombia.) As of July 2011, more than 400 cases of alleged extrajudicial executions remained under military jurisdiction.

In sum, by increasing the power of military judges to determine the competent jurisdiction for crimes committed by security forces, the reform would significantly reduce the likelihood that civilian authorities investigate and prosecute cases of human rights violations. This is especially true given that the reform does not establish any effective controls to ensure that military judges will immediately transfer such cases to the civilian justice system. And even if the human rights cases were eventually transferred to civilian authorities, as the Defense Minister says will happen, their initial investigation by military authorities would result in unnecessary delays, wasting valuable time that should be used by civilian prosecutors to collect evidence during the initial stage of the investigation. Meanwhile, the perpetrators remain at large.

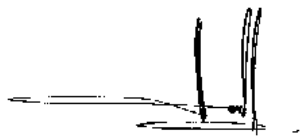
We assume that you took many of the points made in this letter into account when as Defense Minister, you promoted the transfer of cases of false positives to civilian jurisdiction. The transfer of cases to civilian jurisdiction signaled to the security forces that they would be held accountable for their actions and would not continue to enjoy the impunity afforded by the military justice system. The initiative played a crucial role in consolidating a dramatic reduction in reported cases of extrajudicial executions since 2008. However, this progress is precarious, and there continued to be reported cases of extrajudicial killings attributed to state agents in 2010 and 2011. Weakening accountability mechanisms for the security forces at this crucial juncture could trigger a relapse to the widespread practice of extrajudicial executions that occurred over the past decade.

We are especially concerned that article 11 of the justice system reform bill could instigate the transfer of thousands of human rights cases that are already in civilian jurisdiction back to the military justice system. Following progress made by civilian authorities in prosecuting false positives and other military abuses in recent years, the transfer of cases to military jurisdiction would greatly diminish Colombia's ability to fulfill its international obligations to investigate and punish human rights violations. Ultimately, the transfer of thousands of

[18] UN Commission on Human Rights, 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. 37.
[19] UN High Commissioner for Human Rights, Report of the UN High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/16/22, February 3, 2011, para. 28; US State Department, "Memorandum of Justification Concerning Human Rights Conditions with Respect to Assistance for the Colombian Armed Forces," September 2010, pp. 31.

military abuse cases back to military jurisdiction could 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 further investigations by the International Criminal Court, including of false positives.

In a November 2011 speech, you said that the only way for Colombian security forces to achieve peace and security is through "adherence to the rule of law." While we've been encouraged to date by your government's vowed commitment to the rule of law, passage of article 11 of the justice system reform bill would directly undermine this commitment. By expanding the scope of military jurisdiction and decreasing the likelihood that civilian authorities investigate and try cases of human rights violations, the reform would represent a very serious blow to accountability in Colombia.



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CC: Juan Carlos Esguerra, Minister of Justice and Law
CC: Juan Carlos Pinzón, Minister of Defense
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