

HUMAN RIGHTS WATCH

1630 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009
Tel: 202-612-4321
Fax: 202-612-4333
Email: hrwdc@hrw.org

Americas Division

José Miguel Vivanco, Executive Director
Daniel Wilkinson, Deputy Director
Tamara Taraciuk, Researcher
Nik Steinberg, Researcher
Max Schoening, Researcher
Stephanie Morin, Researcher
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Washington D.C., May 7, 2012

Juan Carlos Esguerra
Minister of Justice and Law
Ministry of Justice and Law
Bogotá D.C., Colombia

Dear Minister Esguerra,

I am writing in response to your May 3 letter¹ regarding our criticisms of the proposed constitutional amendment known as the “Legal Framework for Peace.”² I would like to take this opportunity to address the main points in your letter and explain, once again, why it is so crucially important that President Juan Manuel Santos and his coalition in Congress correct the bill’s fundamental flaws.

I.

In your letter, you state that “the intention of the government and Congress, of course, has not been to open spaces of impunity for serious human rights violations committed by guerrillas, paramilitaries, or state agents.” Yet, by empowering Colombian authorities to exempt guerrillas, paramilitaries and military personnel from criminal responsibility for atrocities, the outcome of the amendment would be to facilitate *de jure*—constitutionally based—impunity for human rights violators.

Indeed, your letter does not contain a single argument refuting our assertion that the bill would allow individuals responsible for atrocities—and perhaps even countless cases of crimes against humanity—to avoid criminal investigation and prosecution. Nevertheless, you state that “contrary to what [José Miguel Vivanco] suggests, it would be precisely the massacres, forced ‘disappearances’ and rapes, among other crimes, that would be criminally persecuted.” We would therefore like to reiterate that the amendment could allow prosecutors to completely abandon criminal investigations into entire cases of crimes against humanity, war crimes and other atrocities simply because their perpetrators are not classified as “most responsible.” The other possibility is that, in a best case scenario, justice officials would investigate all atrocities, but exclusively prosecute the “most responsible” individual for each case. Either way, there is no

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¹ Letter from Juan Carlos Esguerra, Minister of Justice and Law of Colombia, to José Miguel Vivanco of Human Rights Watch, May 3, 2012.

² Letter from José Miguel Vivanco of Human Rights Watch to Juan Carlos Esguerra, Minister of Justice and Law of Colombia, May 1, 2012.

room for doubt that the reform would make it possible for the Attorney General's Office to limit its prosecutions of atrocities to individuals deemed "most responsible" and let off the hook everyone else involved in the planning, execution, and cover up of the worst crimes in Colombia.³

Your letter also does not contain a single argument to refute our assertion that the amendment would empower Congress to *suspend prison sentences* against any guerrilla, paramilitary, or military member responsible for the worst abuses—including those deemed "most responsible." The letter thereby confirms our fear that the amendment would allow Congress to guarantee that the "most responsible" individuals who are convicted as a result of the reform do not spend a day in prison, and thus convert even the limited number of prosecutions into nothing more than a parody of justice.

II.

Your letter highlights the Justice and Peace Law's deficient results as a justification for the amendment ("only seven sentences" nearly seven years after the law was passed). We share your view that the Justice and Peace Law has largely failed to ensure justice for paramilitaries' crimes, and have stated as much in multiple Human Rights Watch reports.

But let's be clear: Colombia's options are not the Justice and Peace Law or the "Legal Framework for Peace." As we said in our letter, Colombia could prioritize prosecutions of cases involving the worst crimes and most responsible individuals. Under such a strategy, justice officials would concentrate their time and resources on resolving a set of important cases, while still upholding their commitment to criminally investigate other atrocities. That way Colombia could avoid the mistakes of the Justice and Peace Law, while not completely abandoning prosecutions of individuals responsible for crimes against humanity and war crimes, as the current proposal would allow for.

III.

Furthermore, you claim that in order to effectively satisfy the rights of victims of state agents, transitional justice measures must be applied to such actors. We do not understand the logic of this argument given that the two main transitional justice measures authorized by the amendment are 1) to shield perpetrators of atrocities from prosecution and 2) to release them from jail. These measures would deny victims of their fundamental right to justice—not protect it.

³ The most updated text of the proposed amendment provides that Congress, under the initiative of the government, can, "authorize the conditioned dropping of criminal judicial persecution of all the cases that are not selected." The amendment does not stipulate what types of conditions would be required. (The contribution to truth, reparations for victims, and non-repetition of serious abuses could be potential requirements, according to the "list of modifications" section of the proposal for the sixth Congressional debate.) Informe de ponencia para segundo debate (segunda vuelta) al proyecto de acto legislativo No. 14 de 2011 Senado – 094 de 2011 Cámara, April 24, 2012.

Your letter also asserts that “the possibility of including state agents in transitional justice processes does not mean that they will not be investigated, or that the instruments designed for the other [armed] actors will also be applied to them.” Yet, the only plausible reason to include state agents in the reform is to allow them to benefit from dropped prosecutions and suspended sentences. If Colombia wants to apply other types of transitional justice measures to state agents—such as truth commissions—there would be absolutely no need to include them in this bill. The Victims and Land Restitution Law, for example, offers financial compensation and other reparations to victims of state agents, and did not require passing a constitutional amendment.

IV.

Your letter quotes two excerpts from Human Rights Watch reports and claims that “the constitutional amendment bill takes into account Human Rights Watch’s suggestions with the spirit of clarifying the events that occurred in the armed conflict and establishing responsibility for them.” A basic review of the cited documents would reveal that the excerpts were taken out of context from reports that advocate for Colombia to ensure justice for paramilitaries’ crimes.⁴ The reports in no way endorse or legitimize the government’s current initiative to exempt perpetrators of serious abuses from criminal responsibility.

For example, you write that, “in 2008 [Human Rights Watch] suggested that [Colombia] concentrate on the most serious crimes and the most responsible and explore ‘command responsibility, and other forms of participation in planning and execution of the crimes.’” Our recommendation to investigate individuals for their command responsibility is a product of Colombia’s historical failure to hold accountable individuals with high-level responsibility for atrocities. It is perfectly legitimate and reasonable to prioritize criminal investigations of such individuals. But we have never recommended that Colombia solely prosecute high-ranking perpetrators to the exclusion of all other responsible parties. Such a recommendation, like the proposed amendment, would directly contradict international human rights law.

V.

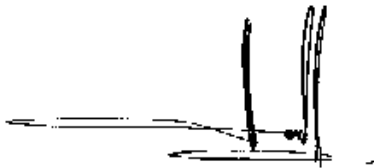
Finally, you assert that including the “selection” of cases—which refers to the practice of exempting certain cases from prosecution—in Colombia’s transitional justice strategy is “in compliance with [Colombia’s] international obligations derived from the Rome Statute and other instruments.” In regard to Colombia’s obligations under the Rome Statute, I would like to reiterate that the “Legal Framework for Peace,” as currently drafted, could expose Colombia to investigations by the International Criminal Court (ICC). The bill gives a constitutional basis to future laws that would exempt from prosecution individuals responsible for crimes against humanity and war crimes. And as we asserted in our first letter, where national law is structured in

⁴ Human Rights Watch, *Smoke and Mirrors: Colombia’s demobilization of paramilitary groups*, August 1, 2005, <http://www.hrw.org/reports/2005/07/31/smoke-and-mirrors-o>; Human Rights Watch, *Breaking the Grip: Obstacles to Justice for Paramilitary Mafias in Colombia*, October 16, 2008, <http://www.hrw.org/reports/2008/10/16/breaking-grip-o>.

a way that it is intended to shield some individuals from their criminal responsibility for the most serious crimes, the ICC could investigate, prosecute and try them on the basis that the state cannot or is unwilling genuinely to prosecute those responsible for these abuses.⁵

In closing, let me reiterate that, in order to ensure accountability for abuses committed by Colombia's armed actors, we fully support designing a strategy to prioritize important cases. But the "Legal Framework for Peace" is *not* an attempt to let prosecutors focus initially on certain cases, and then turn to the others later. On the contrary, the amendment would allow Congress to exempt from prosecution individuals responsible for crimes against humanity—and ensure that even the "most responsible" for the worst crimes do not spend a day in prison. By allowing human rights abusers to escape justice under the protection of the Constitution, it would irreversibly undermine the rule of law and expose Colombia to action by international tribunals.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Vivanco', with a horizontal line drawn underneath.

José Miguel Vivanco
Human Rights Watch

CC: Juan Manuel Santos, President of the Republic of Colombia
CC: Angelino Garzón, Vice-President of the Republic of Colombia
CC: María Ángela Holguín, Minister of Foreign Affairs
CC: Eduardo Montealegre, Attorney General
CC: Sergio Jaramillo, National Security Advisor
CC: Juan Manuel Corzo, President of the Senate
CC: Simón Gaviria, President of the Chamber of Representatives
CC: Luis Fernando Velasco, President of the First Commission of the Senate
CC: Roy Barreras, Senator of the Republic of Colombia

⁵ Rome Statute, art. 17(1)(a). The article provides that "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute, art. 17(2)(a). The article provides that "In order to determine unwillingness in a particular case, the Court shall consider...whether one or more of the following exist, as applicable: ... the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court..."