

HUMAN RIGHTS WATCH

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Washington D.C., February 9, 2012

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

Dear Mr. President,

I am writing once again to make a final appeal to you to withdraw your government's proposed amendment of article 221 of the Colombian constitution, which would give the military justice system initial control over investigations of abuses by the Colombian security forces. In a previous letter, which we sent to you on December 12, 2011,ⁱ I provided a detailed explanation of why we oppose the proposed constitutional amendment. I subsequently received a letterⁱⁱ from your Minister of Justice, Juan Carlos Esguerra, which he claimed would address our "unfounded" concerns. In light of the minister's response, I would like to take this opportunity to clarify our position.

The proposed reform would amend the constitution to provide that all crimes committed by security force members during operations and procedures are presumed to be "related to service" and therefore subject to military jurisdiction. In his letter, Minister of Justice Esguerra concedes our point that, under this presumption, the military justice system would open the initial investigations into cases of alleged human rights violations committed by the security forces during operations and procedures. (Your Minister of Defense, Juan Carlos Pinzón, has also acknowledged this point.ⁱⁱⁱ)

In his letter, Minister of Justice Esguerra stresses that the constitutional amendment would not undermine or modify article 3 of Colombia's military criminal code, which provides that torture, enforced disappearances, crimes against humanity and violations of international humanitarian law are never related to service, and therefore must be subject to civilian jurisdiction. While this is true (and our letter did not suggest otherwise), it is a moot point given the fundamental problem that under the amendment, the military justice system would automatically open the initial investigations into cases of military abuses that article 3 excludes from military jurisdiction, such as torture and extrajudicial executions. It would then be up to military justice authorities to enforce article 3 and transfer the cases to civilian prosecutors.

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While Minister of Justice Esguerra insists that abuse cases will be transferred to civilian prosecutors, his letter does not provide any evidence to refute our view—based on reports by the Inter-American Commission on Human Rights and United Nations^{iv}—that the military justice system in Colombia lacks the necessary independence, impartiality, and therefore credibility to promptly transfer human rights cases to civilian jurisdiction. Nor does he refute the argument that in practice, they have a poor record in doing so. (For example, the U.S. State Department reported in 2010 on the decreased rate of transfer of such cases to civilian jurisdiction.^v) We understand that this is precisely one of the reasons why your government recently appointed a special commission to help overhaul the military justice system.

Minister of Justice Esguerra also argues that our view on military jurisdiction “ignore[s] the necessity for matters related to military operations to be handled, at least in the beginning and until the rupture with the functional link [with the act of service] is produced, by those who have specialized knowledge about [the operations.]”^{vi} Legal cases requiring high levels of specialized knowledge such as those related to medical responsibility and financial crimes are not subjected to special jurisdictions and simply rely on expert witnesses, and there is no reason why the same should not be true for alleged abuses by members of the security forces such as extrajudicial killings, rape, and torture.


In the concluding paragraphs of his letter, Minister of Justice Esguerra argues that Colombia is not concerned about being investigated by the International Criminal Court (ICC) because the country has “a suitable military justice system with the capacity and complete disposition to carry out investigations and prosecutions against members of the security forces and bring them to justice when they are criminally responsible.”^{vii} By claiming that the ICC will not intervene in Colombia because of the capacity of its *military* justice system to investigate, prosecute and punish security force members, Minister of Justice Esguerra is suggesting that crimes against humanity and war crimes will indeed be tried under military jurisdiction. (As you know, the ICC only has jurisdiction over crimes against humanity, war crimes, the crime of genocide and the crime of aggression.)

We would also like to reiterate that the amendment could lead to the transfer of human rights cases—including those related to false positives—from civilian jurisdiction back to the military justice system. That is because security force members who have come under investigation for human rights violations will be able to argue that the law most favorable to them should be applied and that therefore they have the right to be investigated by the military justice system, including for cases that occurred prior to the reform’s enactment. Indeed, they might even cite Minister of Justice Esguerra’s assertion that cases related to military operations should be initially handled by the military justice system because it offers the necessary expertise and “specialized knowledge” about military affairs.

Along with your Minister of Justice, your Minister of Defense and Minister of Interior, Germán Vargas Lleras, have all insisted that the proposed constitutional amendment is not intended to promote impunity. Whatever intentions the government may have in its efforts to give the military justice system initial control over investigations, it is clear that if approved, the amendment would have precisely that effect.

Mr. President, we believe that your administration has an historic opportunity to strengthen human rights and the rule of law in Colombia. As you know, we have publicly acknowledged the important steps that you have already made in that direction. However, we firmly believe that this reform would represent a major setback for Colombia and seriously undermine the credibility of your government's commitment to pursuing these aims.

Sincerely,



José Miguel Vivanco
Human Rights Watch

CC: Angelino Garzón, Vice-President of the Republic of Colombia

CC: Juan Carlos Esguerra, Minister of Justice and Law

CC: Germán Vargas Lleras, Minister of Interior

CC: Viviane Morales, Attorney General

CC: Juan Carlos Pinzón, Minister of Defense

CC: Sergio Jaramillo, National Security Advisor

CC: María Ángela Holguín, Minister of Foreign Affairs

CC: Gabriel Silva, Ambassador of Colombia to the United States

ⁱ Letter from José Miguel Vivanco, Human Rights Watch, to Juan Manuel Santos, President of the Republic of Colombia, December 12, 2011.

ⁱⁱ Letter from Juan Carlos Esguerra, Minister of Justice and Law of Colombia, to José Miguel Vivanco of Human Rights Watch, December 16, 2011.

ⁱⁱⁱ "Mindefensa insiste en la necesidad de tener un marco jurídico para la fuerza pública," *Semana* magazine, November 24, 2011, <http://www.semana.com/nacion/mindefensa-insiste-necesidad-tener-marco-juridico-para-fuerza-publica/168008-3.aspx> (accessed December 20, 2011); "Marco especial para juzgar uniformados no busca impunidad: Mindefensa," *El Tiempo*, October 5, 2011, <http://m.eltiempo.com/politica/buscan-incluir-fuero-militar-en-reforma-de-la-justicia/10503144> (accessed December 20, 2011).

^{iv} 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; 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; 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;

^v US State Department, "Memorandum of Justification Concerning Human Rights Conditions with Respect to Assistance for the Colombian Armed Forces," September 2010, pp. 31.

^{vi} Letter from Juan Carlos Esguerra, December 16, 2011.

^{vii} Letter from Juan Carlos Esguerra, December 16, 2011.