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Regulation of the military criminal jurisdiction reform:

Legislation which consolidates and expands aspects for concern in the constitutional amendment.

At the end of March 2013, [the Colombian government presented to Congress a statutory bill to regulate the constitutional reform to military jurisdiction](#), in the presence of the Commander of the Armed Forces, Gen. Alejandro Navas, among others. The bill has been approved in three out of four debates and is about to be adopted (see El Espectador newspaper article in Spanish, [“Fuero militar a un debate de ser una realidad”](#), May 29, 2013). **This bill deepens and extends aspects for concern contained in the constitutional reform** (see [analysis of the constitutional reform](#)). It reverses the logic of international humanitarian law (IHL), converting it into a permissive instrument and protecting the state security forces (SSF) from justice, when the purpose of IHL is, by contrast, to set limits to war and to protect, in particular, civilians from its effects.

The bill expands the scope of SSF actions, establishing that almost all act committed by a member of the SSF will fall under IHL as defined by this law. It is important to consider the fact that the constitutional reform establishes that IHL would apply to all crimes committed by the SSF, under both the military justice and ordinary justice systems, including crimes expressly excluded from the military criminal justice system (crimes against humanity, genocide, forced disappearance, extrajudicial killings, sexual violence, torture and forced displacement). In addition, the initial version of the bill redefined the crime of extrajudicial execution in such a way that many “false positives” would no longer be considered as such.

We therefore ask the European Union, its Member States, Switzerland and Norway, to:

- **Publicly and urgently express their concern about the constitutional reform of military criminal jurisdiction and the statutory bill for its regulation, and call on the Colombian authorities to withdraw these provisions;**
- **Call upon the Colombian authorities to refrain from promoting and adopting reforms which could strengthen or lead to impunity in cases of violations of human rights and international humanitarian law, as well as reforms that undermine the independence of justice and the balance of powers;**
- **Call upon the Colombian authorities to implement the recommendations made by the different mechanisms of the United Nations in this regard, particularly in the latest report from the Office of the High Commissioner for Human Rights in Colombia (7 January 2013), in the Universal Periodic Review (2008) and by the Special Rapporteur on extrajudicial, summary or arbitrary executions in his latest report (May 15, 2012), in order to address impunity for crimes committed by State agents, and to comply with the right of victims to truth, justice, reparation and guarantees of non-repetition.**

ANALYSIS OF THE STATUTORY BILL

We present below the main points of concern over the bill regulating the military criminal reform which claims to “clarify” the provisions of international humanitarian law (IHL). These comments are based on the bill submitted by the Colombian government. According to press reports, some important changes have been made in recent debates. In these cases, we provide information about these changes in our analysis, specifying the source, as we did not have access to later versions of the bill. However, it should be remembered that provisions amended or withdrawn in some debates may resurface in the final document.

NB: unless otherwise indicated, the term "IHL" refers to the international standards of IHL. The term “rules” refers to international IHL norms, compiled by the ICRC in the document [Customary International Humanitarian Law, Volume 1, Rules](#).

1. The bill distorts IHL

The bill reverses the logic of IHL

- **IHL aims to protect people not directly participating in hostilities** by imposing limits on the action of armed actors (Common Article 3 to the Geneva Conventions and Additional [Protocol II to the Geneva Conventions of 1949 relating to the protection of victims of non-international armed conflicts](#) - PII), however, **the bill seeks to protect the state security forces (SSF) from justice** (Article 5 - legal security: “*The members of the state security forces (...) shall not be responsible for an alleged breach of duty which has not been established expressly and specifically in the Constitution or by law*”) (on this point see [column in Spanish by Gustavo Gallon, director of the Colombian Commission of Jurists, “Principio pro violador vs Principio pro persona”](#))
- **In the same way, the bill restricts the application of IHL to the SSF** (art. 14), although Protocol II applies to all persons affected by a non-international armed conflict (art. 2 PII)

The bill distorts the general principles of IHL, opening the door to greater impunity and a possible increase in breaches of IHL.

- **Principle of distinction:** the bill undermines the principle of distinction between civilians and combatants, because it expands the conditions under which civilians lose their protection and could, therefore, be considered to be involved in the conflict (see below).
- **Principle of proportionality:** the bill reduces the protection of civilians and civilian objects. It prohibits “*clearly excessive*” damage (art. 5 and 22.2); in contrast to IHL which prohibits acts that cause “*excessive*” damage (Rule 14 of IHL).
- **Principle of precaution** (for further details see table in annex):
 - **The bill includes aspects of this principle (art. 5, 22, 23, 24 and 25) but leaves several unaddressed.** Obligations to advise the civilian population; to select military objectives which cause the least destruction possible to the civilian population; to

not locate military objectives in the middle of the civilian population and to move the population away from military objectives, have not been included in the bill. This therefore means that failing to comply with these rules would have no consequences for the SSF.

- **Aspects which were included have been nuanced, reducing their enforceability.**
- **Principle of humanity:** the bill establishes that *“superfluous injury or unnecessary suffering shall not be caused to people who have ceased to take part in the hostilities”* (Article 5.c). **This formulation is unclear and offers very little protection.** This contrasts with PII which establishes the obligation to protect the fundamental rights of people who have left the hostilities: *“Fundamental Guarantees: 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices”* (Art. 4 PII). **The bill therefore opens the door to the violation of fundamental rights of demobilized combatants, and of persons who have been captured or wounded.**

2. The bill expands the scope of action of the SSF:

- **It expands the range of groups that the SSF can act against:**
 - The definition of “armed group” (art. 8) is wider than in IHL, because of an absence of reference to the territorial control of these groups (art. 1 PII)
 - The initial bill included the opportunity for the President to order the use of force against *“certain groups”* (art. 8), which would open up almost infinite possibilities, whereas IHL only refers to armed groups (PII). According to information published in the press, this article has been modified in recent debates because of the criticism it has received (see [El Espectador article](#), mentioned above). However, there is still a possibility that this provision could be restored in the final version of the law.

These provisions allow for an increase in the militarization of the country. They are of serious concern, considering that the presence of legal and illegal armed actors in territories throughout the country is often accompanied by human rights violations and breaches of IHL. The Colombian state should officially recognize paramilitary groups (or *“Bacrim”*) as armed groups. These groups already meet international criteria of the definition of armed groups; therefore there is no need to expand the definition of IHL to enable the SSF to act against them. The recognition of *“Bacrim”* as an armed group would also allow the victims of their actions to be recognized as victims of the armed conflict and give them access to the mechanisms of the Victims and Land Restitution Law. To date the victims of these groups are not recognized as such, which leads to a violation of their rights to truth, justice and reparation.

- **The conditions have been extended under which civilians lose their protection and may therefore be attacked:** the definitions of *“legitimate target”* – *“legitimate target is understood as a person or persons belonging to armed groups that fulfill a function directly related to hostilities”* (Art. 10) - and *“direct participation in hostilities”* – *“those who perform acts that unequivocally have the potential to cause harm”* (Article 11) - are broader than under IHL, which establishes that civilians are to be protected against attack, *“unless and for such time as they take a direct part in hostilities”* (art. 13 PII). The Inter-American Commission on Human Rights (IACHR) has argued that the phrase *“direct participation in*

hostilities” means, in general, “acts which by their nature or purpose are intended to cause actual or material harm to enemy personnel” (IACHR, Third Report on human rights in Colombia in [ICRC, Customary International Humanitarian Law, Volume 1, Rules](#)) By removing intentionality and time limits, **the bill therefore undermines the principle of distinction between civilians and combatants.**

3. The bill defines a wide spectrum in which IHL – as defined under this law –would be applied to the state security forces (SSF)

The bill establishes that IHL will apply when the action “occurs in a context of hostilities” (Article 14). The “circumstances” foreseen as “evidence that the conduct occurred in the context of hostilities” are defined very broadly:

- The concepts of “armed group” and “legitimate target” have been expanded. As a result, they could cover most of the situations in which SSF members could be involved (see above point).
- The simple requirement of a “conviction that the subject was a legitimate target” expands the above even further. Thus, following the terms of the bill, acting on the “conviction” that a person is carrying out acts that have “the potential” to cause harm - that is to say, acting upon a purely hypothetical situation - could be permitted under this law.
- In addition to the execution of an action, the bill includes the planning, preparation and the “procedures immediately following” an action, which could include all the aspects of a SSF action.

4. The bill limits the responsibility of members of the SSF, favouring impunity

- **Responsibility of military and police commanders (art. 32):**
 - **The bill limits responsibility in events which take place “during hostilities”** in contrast with the law’s intended scope of application which also includes operations prior to and after hostilities have occurred. **There is thus a risk that the military and police commanders will be exempt from liability for crimes committed in the planning and preparation, or after the operation.**
 - The bill establishes responsibility in cases where “*The military or police commander fails to prevent or report the crime to the competent authorities, when he or she has the ability to prevent or report it, on a case by case basis*”. It contrasts with IHL which establishes the obligation to sanction these actions. For instance, the Rome Statute provides for such liability in cases where commanders or other superiors “*failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution*” (Article 28).
 - The bill limits the circumstances in which it would be considered that the commander “*should have known*” that his or her subordinates were about to commit crimes. It establishes that this occurs if the commander “*in the circumstances of the moment in question, had reliable information that warned him or her of the high likelihood of the commission of the crime*”. When, following internationally accepted practice it is enough that they had “*reason to know*” (Rule 153).

- **The responsibility of military or civilian commanders:** the definition of command responsibility (art. 33) included in the initial bill incorporated several conditions dramatically **limiting cases in which superiors could be held responsible for breaches of IHL**. Indeed, according to these provisions, they would only have been held responsible in cases where it was proved “*beyond all reasonable doubt*” that they were leading an “*illegal hierarchical structure*” and that “*the unit acts completely and structurally outside the law*”, which excludes crimes committed by members of the SSF not belonging to these structures. This conditionality generated strong criticism (see in particular the [statements of liberal Colombian Congressman, Guillermo Rivera Flórez](#)) which led to its removal in recent debates (see El Espectador article, cited above). However, this provision could be included again during the adoption of the final version of the law. In addition, responsibility is only contemplated if the commander ordered the action to be carried out, leaving aside responsibility in cases of omission or tolerance of breaches of IHL, that is to say, in the absence of action on their part to prevent, suppress or report these actions. This provision facilitates impunity for commanders.
- **Due Obedience and exemption from responsibility: The bill reverses the logic of international standards.** Whereas international law establishes that complying with orders from superiors does not exempt military personnel from responsibility, other than in exceptional circumstances (see Article 33 of the Rome Statute for example), the bill provides for a “*lack of responsibility when orders from superiors are being followed*” other than in exceptional circumstances (art. 36), thereby converting the lack of responsibility into the basic principle. The inclusion of a list of crimes for which due obedience will be excluded - which more or less corresponds to the list of crimes excluded from military justice in the constitutional reform - raises fears that due obedience is not to be excluded for other crimes, including war crimes and the recruitment of child soldiers for example.
- **Responsibility for damage to civilians or civilian objects: the bill exempts from responsibility:**
 - superiors who order an attack to be launched when the planning stage fulfills the duty of verification and the principles of distinction, proportionality and precaution as defined by this law
 - people who comply with this order when their action fulfills the duty of verification and the principles of distinction, proportionality and precaution as defined by this law

These provisions (Article 38 B) are problematic since the principles to which they refer have been distorted (see above). Furthermore, in the case of commanders, the provisions could imply exemption from responsibility with regards to the obligation to suspend or cancel an attack planned in advance, if it becomes apparent that this attack will cause damage to civilians or civilian objects, in cases where the planning of the attack complies with these principles.

5. Military criminal jurisdiction: the rule; ordinary justice system: the exception.

The bill further limits the circumstances in which the crimes would fall under the jurisdiction of the ordinary courts.

- The bill reconfirms that **breaches of IHL** - as understood by this law – **“will be the exclusive competence of Military Criminal Jurisdiction”**, already established under the constitutional reform of military criminal jurisdiction, (Article 45), **other than in exceptional circumstances**, that is to say:
 - o expressly excluded crimes (crimes against humanity, genocide, forced disappearance, extrajudicial executions, sexual violence, torture and forced displacement) - on this point see the reservations expressed in our [analysis of the constitutional reform](#)
 - o actions *“that have no immediate and direct relation to service”* (Art. 45). However, the bill limits the effects of this provision by also establishing that *“the occurrence of a crime or a violation of the duties of a member of the Armed Forces does not, in itself, break their relationship with the service”* (art. 46)

It is important to recall that, in accordance with the constitutional reform, military justice will be responsible for establishing the preliminary charges and the qualification of crimes. There is therefore a high risk that crimes will be qualified so as to avoid falling under the jurisdiction of the ordinary courts.

- The bill also establishes that *“the mere absence of information about the circumstances of time, manner and place of the action will not, in and of themselves, lead to a doubt about jurisdiction”* (art. 47). **It is therefore highly probable that in case of doubt about the qualification of the crime, the case will remain under military jurisdiction.**

The bill also limits the scope of action of the ordinary justice system.

- It is important to remember that the **constitutional reform to military criminal law imposes the application of IHL**, as defined by this law - **by the ordinary courts** in cases involving members of the SSF. **This situation is problematic, particularly because of the numerous problems the bill could cause, since it would promote impunity for the crimes committed.**
- The bill includes a definition of crimes excluded from the competence of the military justice system. **Elements have been introduced to the definition of the crime of extrajudicial execution which restrict its meaning.** In practice, it may be that only some *“false positives”* would fall under the jurisdiction of the ordinary courts. Indeed, an extrajudicial execution would only be considered as such if *“the public servant (...) killed a person after having dominated them and left them completely defenseless for this specific purpose”* (art. 43). As recalled by the United Nations High Commissioner for Human Rights (OHCHR) in its [latest annual report on Colombia](#) (January 7, 2013), *“the United Nations uses the term “extrajudicial, summary or arbitrary executions” to include a wide range of right-to-life violations, including but not limited to “false positives”*”. At the end of May, it was announced in the press that legislators intend to amend this provision so as to ensure that all cases of extrajudicial execution fall under the ordinary justice system (see the El Espectador newspaper article, in Spanish, [“reforma a fuero militar dejará claro qué es un ‘falso positivo’”](#), May 23, 2013). However, we have no information that this change has been made during the latest debates on the matter.

The provisions relating to the composition and functioning of the military criminal justice system demonstrate its lack of impartiality and independence

In addition to the fact that **members of the SSF on active duty** - other than commanders - can exercise functions in the military criminal justice system (art. 49), the bill provides that *“military or police criminal justice will be administered (...) by a Special Administrative Unit”*, the **Executive Board** of which may be composed of *“the General Commander of the Armed Forces and the Director of the National Police”* (art. 52). This board will therefore lack independence.

Finally, it is important to add that the bill also provides for the possibility that *“for security reasons”* **the headquarters of the offices of the military or police criminal justice system can be located inside military and police units** (Article 63), which also affects their independence, as well as representing an obstacle to victims who wish to report crimes committed against them by the SSF.