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EXTENSION OF MILITARY JURISDICTIONⁱ

Serious concerns over constitutional reform of the military criminal justice processⁱⁱ

The government of President Santos has been pushing for a constitutional amendment that seeks to expand military criminal jurisdiction,ⁱⁱⁱ that is about to be approved^{iv}. As recently highlighted by eleven UN human rights experts, *"should this reform be approved, it could seriously undermine the administration of justice for cases of alleged violations of human rights and international humanitarian law, including serious crimes, by military or police forces (Fuerza Pública)"*^v, contrary to international standards on the issue^{vi}. Moreover, as pointed out by the experts, while crimes of genocide, crimes against humanity and forced disappearances would be excluded from the jurisdiction of military or police courts, *"the proposed changes would expand the jurisdiction of these tribunals, giving them the power to investigate, process and decide on cases of other serious human rights violations, which should also be under the authority of the ordinary criminal justice system and courts"*^{vii}. Colombian and Latin American history has taught us that the military justice system is a tool to cover up human rights violations. As expressed by the Office in Colombia of the UN High Commissioner for Human Rights in Colombia^{viii} and the eleven UN experts, ***"such a reform would represent a historic setback in terms of progress achieved by the State of Colombia in the fight against impunity and the respect and guarantee of human rights"***.

According to the Minister of Defence, this reform would offer more legal security to State agents in the context of the armed conflict and actions against drug trafficking^{ix}. The proposals have come at a time when more than 12,000 soldiers are being investigated by the ordinary justice system^x and when some are being tried for gross human rights violations. Severe pressure is therefore being exerted by the military in favour of this extension of military jurisdiction^{xi}. **In mid October 2012, the reform had been passed in six out of eight debates^{xii}.**

It is important to highlight the following aspects of the proposed reform:

- **Although the authorities have made statements assuring that human rights violations would be tried by the regular courts, there are strong doubts about this^{xiii}.** Indeed, there are already difficulties regarding the so-called *"false positives"* for which military justice is claiming jurisdiction^{xiv}, with the argument that they should be considered to be acts committed in the course of legitimate operations. There are also reports of pressure and retaliation against military judges seeking to transfer cases to the ordinary justice system, and against military personnel involved in extrajudicial executions not to give their testimonies^{xv}.
- **The reform establishes a list of crimes that cannot be tried under the military justice system:** namely, crimes against humanity, genocide and forced disappearance. The reform therefore fails to mention other serious crimes such as war crimes, the recruitment and use of children, torture, cruel, inhuman or degrading treatment, extrajudicial execution, forced displacement and sexual violence - several of which appeared to be excluded in previous versions of the reform bill. **There are also doubts about the independence and impartiality of military justice during the identification of crimes:** there is a risk that crimes will be identified in such a way so that they do not fall under the jurisdiction of the ordinary courts.



- The proposed constitutional amendment establishes that **violations of international humanitarian law will be the exclusive competence of military courts. And even for crimes excluded from the jurisdiction of military courts, the jurisdiction of the ordinary judicial authorities would be limited.** Indeed, for the latter cases, the reform bill provides that “international humanitarian law shall always be applied”, and that a law will determine the rules of interpretation and application of international humanitarian law, and determine how to harmonize criminal law with international humanitarian law, based on the mistaken assumption that IHL would be more permissive than criminal law.
- The reform bill establishes that *“criminal charges brought against members of the state security forces on charges expressly excluded from the jurisdiction of the military criminal justice system under paragraph 2 of Article 3 of this piece of legislation and that are tried by the ordinary courts, will be heard by the military justice system”*. Therefore, **except for crimes against humanity, genocide and forced disappearance, all other human rights violations being investigated or prosecuted in the ordinary courts would pass to the military courts^{xvi}**. This would apply, for example, to crimes such as “false positives”.
- **Two criminal law bodies will be created, composed of members of the security forces, among others.**
 - o The **Tribunal of Criminal Justice Guarantees** (*Tribunal de Garantías Penales*) would have preferential powers to assume the functions of the supervising judge in any investigation or criminal proceeding against members of the state security forces, whether in the ordinary courts or the military courts. This means that this Tribunal will have powers to **evaluate in the first instance the strength of the case and decide on the freedom of the persons involved** - even before the merits of the case have been established. The Tribunal will also have the power to press charges, in such a way that it will be able to **decide on the evidence and the summons to court of the accused**.
 - o The **Technical Coordination Committee** (*Comisión técnica de coordinación*) “composed of representatives of the military courts and the ordinary criminal courts, supported by their respective governing judicial police bodies” **with investigative functions, responsible for deciding whether the crime is the responsibility of the civil or military courts**. The Disciplinary Board of the Supreme Judicial Council is currently the competent body to resolve disputes between the ordinary courts and the military justice system.
- The proposed amendment specifies that *“members of the state security forces will comply with pretrial custody in detention centres established for them, and in their absence, on the premises of the military unit to which they belong. They will comply with custodial sentences in prisons and detention centres established for members of the state security forces”^{xvii}*. This provision is contrary to the principle of equality and could favour the escape of convicted criminals and continued criminal activities from within these detention centres.
- **The reform creates a special jurisdiction for the police.** The reform bill provides that *“the ordinary law courts may create criminal police jurisdiction, and adopt a Police Criminal Code”*. It is of concern that, according to statements by the Minister of Defence and politicians^{xviii}, this will follow the same course as the reforms to military jurisdiction. The bill provides for the creation of **“a specific fund to finance the System for the Technical Defence of members of the security forces, in the manner that the law provides for this, under the dependence, guidance and coordination of the National Ministry of Defence”**. Currently, this defence is ensured by the Military Ombudsman (*Defensoría Militar* - DEMIL), a private entity whose board consists of five active Army generals. This entity violates the right of soldiers to defence and the right to have a trusted lawyer. It facilitates pressures on soldiers and promotes impunity for high-ranking military officers. It is therefore necessary that the DEMIL is reformed to ensure the rights of the accused, and not only in terms of



financial resources. However, the proposed reform does not meet the necessary requirements of independence.

As emphasized by the eleven UN experts, if approved, this amendment would “*send the wrong signal to members of the Fuerza Pública of the consequences of committing human rights and international humanitarian law violations*”.

State officials in Colombia have been and continue to be held responsible for numerous violations of human rights and international humanitarian law – including, among other crimes, extrajudicial executions, torture, enforced disappearances and rape. Many of these crimes have been documented and continue to cause concern in the various United Nations mechanisms and the Inter-American Human Rights System, who have made recommendations to investigate, prosecute, punish and ensure the non-repetition of these crimes. The extension of military criminal jurisdiction would have exactly the opposite effect to these recommendations.

We therefore ask the European Union, its Member States, Switzerland and Norway, to urgently reiterate their concern about this reform and to call upon the Colombian authorities to revoke these provisions and to refrain from promoting and adopting reforms to strengthen and/or lead to impunity for violations of human rights and international humanitarian law, as well as reforms that undermine the independence of justice and the balance of powers.

The EU, its Member States, Switzerland and Norway, should call upon the Colombian authorities to implement the recommendations that have been 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, 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.

ⁱ Comments on the draft amendment are based on the version of the text adopted at the sixth debate, on October 16, 2012. [View the different drafts and different stages of the reform process \(website of the Colombian House of Representatives – in Spanish\)](#).

ⁱⁱ On this subject see Corporation for Judicial Liberty (*Corporación Jurídica Libertad* - CJL), Many questions, ulterior motives or fallacious justifications? Amendments to the justice and peace law, the legal framework for peace and the strengthening of military criminal jurisdiction, April 23, 2012 – In Spanish

ⁱⁱⁱ The initial version of the reform bill clearly stated: “It will be presumed that all cases are related to the service operations and procedures of the security forces. When these situations lead to criminal proceedings, these will be handled by the Military and Police Criminal Justice System”. ([Draft Legislative Act No. 07 of 2011 of Senate – In Spanish](#))

^{iv} Although the proposed extension of military jurisdiction initially contained in the proposed justice reform was removed from it, it was later included in the current proposal to reform the military code (See [Statements by the Minister of Justice in *El Espectador*: Military jurisdiction will not be included in the Justice Reform, February 18, 2012 – In Spanish](#))

^v [Office of the United Nations High Commissioner for Human Rights, Colombia: UN experts call on the authorities to reconsider the constitutional reform of military criminal justice, October 22, 2012](#)

^{vi} On the exclusion of military jurisdiction for human rights violations and international humanitarian law, see Report of the United Nations High Commissioner for Human Rights (OHCHR) on the situation of human rights in Colombia in 2011, A / HRC / 19/21/Add.3, January 31, 2012 (§ 35)

^{vii} OHCHR press release on the experts’ communiqué (Prec.)

^{viii} See, among others, [El Tiempo, UN Office recommends maintaining military courts “as they are”, December 19, 2011 – In Spanish](#)

^{ix} See, for example, [El Espectador, Congressional support for the Armed Forces guarantees results in fight against FARC, June 7, 2012 - In Spanish](#)

^x [El Tiempo, There are more than 12,000 soldiers facing justice, May 26, 2012- In Spanish](#)

^{xi} [Letter from the Corps of Generals and Admirals to President Santos, Bogota DC, October 19, 2011 – In Spanish](#)

^{xii} See [website of the Colombian House of Representatives – In Spanish](#).

^{xiii} In this regard see Colombian Commission of Jurists (*Comisión Colombiana de Juristas* - CCJ), Congress should refrain from extending military criminal jurisdiction, December 12, 2011 – In Spanish

^{xiv} Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Follow the recommendations to Colombia, May 15, 2012, A/HRC/20/22/Add.2



^{xv} At January 13, 2012, 486 cases of extrajudicial killings by government agents remained in the military justice system (ibid.)

^{xvi} For more information on this issue see CCJ, Military criminal justice will try human rights violations that are already being investigated in the regular courts, October 19, 2012 – in Spanish

^{xvii} On this point, see [El Espectador, On this point, see The Spectator, Military Justice Reform is approved with special prisons for soldiers, June 6, 2012 – In Spanish](#)

^{xviii} See for example declarations by the Minister of Defence ([El Tiempo, Commission creating legal guarantees for the military is announced, November 24, 2011](#)) and [Senator Aguilar states, “With this Legislative Act morality will give moral support to our police and soldiers”, June 8, 2012](#) – both articles in Spanish

