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EXPANSION OF MILITARY JURISDICTION A “historic setback” for Colombia

In December 2012, the Congress adopted the constitutional reform that expands military criminal jurisdictionⁱ, pushed by the government of President Santosⁱⁱ. This document offers an analysis of the reform and the context in which it has been adopted.

As various UN bodies have pointed out, the expansion of military jurisdiction severely affects the administration of justice and violates the right of victims to truth, justice and reparation. It poses a serious risk to the already ingrained and widespread impunity and gives a permissive signal to the security forces, who are already responsible for crimes against humanity and war crimes, to continue violating human rights and international humanitarian law.

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;**
- **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 (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.**

State officials in Colombia have been and continue to be held responsible for numerous violations of human rights and international humanitarian law. In its November 2012 reportⁱⁱⁱ, **the Office of the Prosecutor of the International Criminal Court (ICC)** determined that acts constituting **crimes against humanity and war crimes have been committed by organs of the State.** These include, among other crimes, (extrajudicial executions or “false positives”), enforced disappearances, torture and cruel treatments and sexual violence. The Office of the Prosecutor of the ICC announced that from the publication of its report, the preliminary examination of the Situation in Colombia will focus on, among others, “follow-up on (...) relevant legislative developments”; proceedings relating to sexual crimes; and “false positive” cases.

Also, the United Nations High Commissioner for Human Rights (UNHCHR) informed in its latest report that **it “continued to receive reports of violations of the right to life and personal integrity” by the military** – including sexual violence – and by the National Police^{iv}. **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. Almost all of these crimes have gone unpunished. For instance, **UNHCHR warned about an “inadequate response to false positives”** and impunity for these crimes: *“Given the scope of the false positives crisis, too few of those responsible have been removed from service or prosecuted. High ranking officials linked to these human rights crimes remain in active service and continue to be promoted”*^v. **The extension of military criminal jurisdiction would have exactly the opposite effect to these recommendations.** As emphasized by eleven UN experts before its adoption, **this reform “send(s) the wrong signal to members of the Fuerza Pública of the consequences of committing human rights and international humanitarian law violations”**^{vi}.

UNHCHR recently reiterated concerns already expressed by a number of different organisations in relation to the constitutional reform to expand the jurisdiction of military courts^{vii}. It recalls that this *“violates the basic separation of powers needed for an independent judiciary”* and *“the right of access to justice of the victims and the right to a competent, independent and impartial judge are violated”* (§79). For UNHCHR, **this reform “reflects the lack of trust and respect between the different State institutions, which undermines the rule of law as well as the legitimacy of the State itself”**.

As highlighted by the eleven UN experts, **this reform “seriously undermine(s) 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)”**^{viii}, contrary to international standards on the issue. Moreover, as pointed out by the experts, while some crimes have been excluded from the jurisdiction of military or police courts, *“the proposed changes (...) 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”*^{ix}. 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^x 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^{xi}. The proposals have come at a time when more than 12,000 soldiers are being investigated by the ordinary justice system^{xii} 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^{xiii}. In this sense, UNHCHR expressed in its last report annual report on Colombia that it *“is seriously concerned by assertions by senior military officers”* which seek to discredit the ordinary justice system, including by linking it to the guerrilla^{xiv}.

PRESENTATION AND ANALYSIS OF THE DIFFERENT ASPECTS OF CONCERN RELATED TO THE REFORM

- **The reform of military jurisdiction establishes that the military justice system will in principle have the competence to hear cases of violations committed by members of the State security forces, while the ordinary justice system will only hear cases in exceptional circumstances.** This runs contrary to international standards which establish that all cases of human rights violations must be heard by the ordinary justice system^{xv}.
 - Moreover, according to the constitutional reform, *“crimes committed by members of the Security Forces during active service (...) will be heard by martial courts or military tribunals”* (art. 3), which *“will be*

composed of active or retired members of the Security Forces” – which means that their independence can not be guaranteed.

- The constitutional reform establishes that **violations of international humanitarian law** – except for crimes expressly excluded - **will be the exclusive competence of military courts** (art. 3).
- **The reform grants preferential and superior powers to the military justice system over the ordinary justice system.**
 - **The reform will be applied retroactively.** Thus, it is established that *“the Attorney General's Office, in coordination with the military justice system, will have a period of up to one year to identify all the criminal proceedings being brought against members of the security forces”,* and to transfer them to the military criminal justice system, **except for “crimes unrelated to service”,** or *“crimes expressly excluded from the military jurisdiction”* (art. 4). Therefore, except for the latest (*on this aspect, see concerns expressed below*), **all other cases involving human rights and international humanitarian law (IHL) violations under investigation or on trial in the ordinary justice system could pass over to military jurisdiction^{xvi}.** UNHCHR expressed *“serious concern”* about the fact this situation, which *“would amount to a serious violation of the right to an appropriate judge and a violation of the principle of due process and the right of access to justice”*.
 - **The reform creates a Tribunal of Criminal Justice Guarantees (Tribunal de Garantías Penales) with preferential power over the ordinary justice system.**
 - The **Tribunal of Criminal Justice Guarantees (Tribunal de Garantías Penales)** (art. 1) will 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.**
 - The **Tribunal of Criminal Justice Guarantees will be 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 Tribunal of Criminal Justice Guarantees will be composed of 8 judges, 4 of whom will be retired judges, which **does not allow for the necessary independence and impartiality to be guaranteed.**
- **Although some crimes have been expressly excluded from the military jurisdiction and although the authorities have made statements assuring that human rights violations would be tried by the regular courts, there are strong doubts about this^{xvii}.**
 - **The reform establishes a list of crimes that cannot be tried under the military justice system:** namely, crimes against humanity, genocide, forced disappearance, extrajudicial executions, sexual violence, torture and forced displacement (art. 3).
 - **The reform therefore fails to mention other serious crimes** such as war crimes, the recruitment and use of children, cruel, inhuman or degrading treatment which, according to the reform, will fall within the competence of military jurisdiction.

- On the other hand, since the reform grants the military justice system *a priori* jurisdiction over crimes committed by the security forces, this implies that **military justice will be responsible for identifying the crimes and determining whether a case should be heard by the regular courts or not. Therefore, there is a serious risk that crimes will be identified in such a way so that they do not fall under the jurisdiction of the ordinary courts** as military justice lacks of the necessary independence and impartiality.
- **Even for crimes excluded from the jurisdiction of military courts, the jurisdiction of the ordinary judicial authorities will be limited.** Indeed, for the latter cases, the reform 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”* (art. 3). It is important to note that there has recently been a tendency in Colombia on the part of the authorities to broadly and erroneously interpret IHL to justify the killing of civilians in the context of the armed conflict. In light of this, the UNHCHR highlighted the basic principles of IHL in its recent report.
 - **Reality contrasts with statements made by Colombian authorities.** As underlined by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions there are already difficulties regarding the so-called ***“false positives” for which military justice is claiming jurisdiction***^{xviii} - 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^{xix}. UNHCHR highlights in its latest annual report on Colombia **the denial or attempts to cover up incidents or to distort the truth in cases of violations perpetrated by members of the Army and the National Police.** It also reports **threats against individuals, human rights defenders and State control mechanisms who work on these cases.**
- The reform specifies that *“members of the state security forces will comply with pre-trial 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”*^{xx} (art. 3). 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 offers the possibility to create 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”* (art. 3). It is of concern that, according to statements by the Minister of Defence and politicians^{xxi}, this will follow the same course as the reforms to military jurisdiction.
- The reform 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 National Defence”.** Currently, this defence is ensured by the Military Ombudsman (*Defensoría Militar* - DEMIL)^{xxii}, 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.

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- ⁱ Reform promulgated on 27 December 2012. [View the different drafts and different stages of the reform process \(website of the Colombian House of Representatives – in Spanish\)](#).
- ⁱⁱ 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](#))
- ⁱⁱⁱ Office of the Prosecutor of the International Criminal Court (ICC), Interim report on its “preliminary examination” of the Situation in Colombia, November 2012
- ^{iv} Report of the United Nations High Commissioner for Human Rights (UNHCHR) on the situation of human rights in Colombia in 2011, A/HRC/22/17/Add.3, January 7, 2013
- ^v Ibid.
- ^{vi} [UNHCHR, Colombia: UN experts call on the authorities to reconsider the constitutional reform of military criminal Justice, 22 October 2012](#)
- ^{vii} UNHCHR, report 2012, prec.
- ^{viii} [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](#)
- ^{ix} UNHCHR press release on the experts’ communiqué (Prec.)
- ^x See, among others, [El Tiempo, UN Office recommends maintaining military courts “as they are”, December 19, 2011 – In Spanish](#)
- ^{xi} See, for example, [El Espectador, Congressional support for the Armed Forces guarantees results in fight against FARC, June 7, 2012 - In Spanish](#)
- ^{xii} [El Tiempo, There are more than 12,000 soldiers facing justice, May 26, 2012](#)- In Spanish
- ^{xiii} [Letter from the Corps of Generals and Admirals to President Santos, Bogota DC, October 19, 2011 – In Spanish](#)
- ^{xiv} UNHCHR, report 2012, prec.
- ^{xv} See note ix
- ^{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} 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
- ^{xviii} 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
- ^{xix} At January 13, 2012, 486 cases of extrajudicial killings by government agents remained in the military justice system (ibid.)
- ^{xx} 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](#)
- ^{xxi} 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
- ^{xxii} On this subject, and other aspects of the reform, 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