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 1, 2012

Honorable Juan Manuel Corzo, President of the Senate
Honorable Simón Gaviria, President of the Chamber of Representatives
Honorable Luis Fernando Velasco, President of the First Commission of the Senate

Dear Honorable Congressmen,

I am writing to express my serious concerns with the proposed constitutional amendment known as the "Legal Framework for Peace." The apparent aim of the bill, which has passed five of eight required Congressional debates, is to facilitate peace agreements with irregular armed groups such as the Revolutionary Armed Forces of Colombia (FARC). However, as currently drafted, it would open the door to impunity for egregious human rights abuses by guerrillas, paramilitaries, and the military.

The proposed reform would add an article to the Constitution that gives Congress, and subsequently justice officials, the power to drop prosecutions and suspend sentences against members of irregular armed groups and state agents who are responsible for atrocities.[1] Specifically, the amendment would make it possible for the Attorney General's Office to limit its prosecutions to the "most responsible" for crimes against humanity and war crimes. Consequently, others who were closely involved in the planning, execution, and cover up of the same crimes—but not deemed to be the "most responsible"—could avoid prosecution. Moreover, the reform could ultimately empower justice officials to exempt entire cases involving the most serious human rights violations from criminal investigation and prosecution by excluding abuses that do not involve individuals classified as "most responsible." In addition, it would give Congress the authority to suspend prison sentences against any guerrilla, paramilitary or military member convicted of heinous crimes, including those "most responsible" for crimes against humanity.[2]

[1] While the most recently approved version of the bill says that the new article will be "transitory," it does not provide any time limit for how long it will be in force. A new version of the bill proposed for the sixth congressional debate—which has not yet been approved—gives Congress a four year time limit to pass legislation starting from the moment the executive branch presents it with "the first bill that authorizes dropping prosecutions or the suspension of sentences."

[2] The only conditions the bill places on which guerrillas and paramilitaries can benefit from the transitional justice measures—including suspended sentences and dropped prosecutions—are that the individual must 1) have demobilized individually or in the context of a peace agreement and 2) not have continued committing crimes once he demobilized. The bill provides that before the government signs a peace

Colombia's armed conflict has led to countless abuses, and it is perfectly legitimate for its justice system to prioritize cases involving the worst crimes and most culpable individuals. But this transitional justice reform goes far beyond prioritizing certain cases. It would allow Colombian authorities to completely abandon prosecutions and suspend sentences in cases of serious abuses, in direct contradiction with Colombia's obligations under international law. Indeed, by shielding individuals from criminal responsibility for crimes within the jurisdiction of the International Criminal Court (ICC), the amendment could expose Colombia to investigations by the international judicial body.[3]

In order to ensure that the bill is consistent with Colombia's obligations under international law, it will be necessary to address the following three fundamental problems with the current draft.

I. The reform would allow individuals responsible for atrocities—and perhaps even entire cases of serious abuses—to avoid criminal investigation and prosecution.

The constitutional amendment would empower Congress to authorize justice officials to drop criminal investigations and prosecutions against guerrillas, paramilitaries, and military personnel responsible for crimes against humanity, war crimes, and other serious abuses. The reform would provide that Congress, under the initiative of the government, can "through law determine the criteria for selection that will permit focusing efforts on the criminal investigation of those *most* responsible for crimes that acquire the connotation of crimes against humanity or war crimes… *and authorize dropping criminal judicial persecution of the cases that are not selected*" (emphasis added).[4]

This provision allows for two interpretations. Both would make it possible for justice officials to limit their prosecutions of atrocities to the individuals who meet Congress' criteria of "most responsible."

The first interpretation is that justice officials would investigate *all* crimes against humanity and war crimes, but only prosecute the "most responsible" individual for each case. Congress would establish through law criteria for selecting which individuals involved in atrocities fit the category of "most responsible" and give justice officials the green light to abandon prosecutions against everyone else implicated in the same case who do not meet the criteria. For example, Congress could pass a law defining "most responsible" as the national or local guerrilla, paramilitary, and military leaders who were involved in atrocities. The same law could authorize justice officials to

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agreement with an illegal armed group, the group must first release all hostages. There are no restrictions as to which members of the security forces are eligible for transitional justice measures.

[3] 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…"

[4] The version of the bill proposed for the sixth congressional debate changed the provision to "…and authorize the *conditioned* dropping of criminal judicial persecution of *all* the cases that are not selected"(emphasis added). The bill does not stipulate what types of conditions would be required.

drop investigations and prosecutions against all the other individuals who planned, participated in, or covered up the same crimes.

The other interpretation is that Congress would first establish a category of "most responsible" perpetrators, and then justice officials would exclusively prosecute that group of individuals for the cases in which they were involved. Consequently, no matter how serious an abuse is, it would only be criminally investigated if it implicated someone classified as "most responsible." This is the interpretation put forth by the sponsor of the "Legal Framework for Peace" bill in the Chamber of Representatives, Carlos Edward Osorio. On April 24, Representative Osorio asserted in his proposal for the sixth Congressional debate that one of the purposes of the amendment is to "guarantee that it is possible to drop criminal persecution of *all* the crimes committed due to the armed conflict by those who are not considered under the law to be the most responsible" (emphasis in original).[5] Therefore, cases of massacres, forced "disappearances," rapes and other atrocities that are not traceable to the "most responsible" individuals could completely avoid prosecution.

The amendment is at direct odds with Colombia's obligation under international law to investigate, prosecute, and punish those individuals who share responsibility for crimes against humanity and other grave international human rights and humanitarian law violations. The Inter-American Court of Human Rights has established this obligation in multiple rulings, which are authoritative and binding on Colombia.[6] The International Covenant on Civil and Political Rights (ICCPR) also establishes the right to an effective remedy for violations of rights protected there under. As explained by the Human Rights Committee, the United Nations body of experts that monitors compliance with the ICCPR, under article 2(3) of the ICCPR, a state has duties to investigate and bring to justice those responsible for violations of rights.[7] To limit prosecutions to those deemed 'most responsible' would purposely create a significant impunity gap, whereby many who bear responsibility for the most serious of crimes would enjoy statutory immunity.

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[5] Informe de ponencia para segundo debate (segunda vuleta) al proyecto de acto legislativo No. 14 de 2011 Senado – 094 de 2011 Cámara, April 24, 2012, 7, "Pliego modificatorio para segundo debate de segunda vuelta."

[6] See, for example, Inter-American Court of Human Rights, Case of Velásquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-Am.Ct.H.R, Series C. No. 4, para. 166; Case of Loayza-Tamayo v. Peru, Judgment of November 27, 1998, Inter-Am.Ct.H.R., Series C. No. 42, paras. 169, 170; Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, Judgment of September 1, 2010, Inter-Am.Ct.H.R., Series C. No. 217, para. 158; Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Judgment of November 24, 2010, Inter-Am.Ct.H.R., Series C. No. 219, paras. 137, 140.

[7] UN Human Rights Committee, "Nature of the General Legal Obligation on States Parties to the Covenant," General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras. 18, 15. The UN Updated Principles to Combat Impunity, which constitute authoritative guidelines representing prevailing trends in international law and practice and reflect the best practice of states, provides that, "states shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in some respect of the perpetrators, particularly by ensuring that those responsible for serious crimes under international law are prosecuted, tried, and duly punished." UN Principles to Combat Impunity, adopted February 8, 2005, E/CN.4/2005/102/Add.1, principle 19.

The attempt to inappropriately limit the scope of criminal investigations and prosecutions of perpetrators of crimes against humanity and war crimes may be an ill-conceived attempt to mirror the operational policy of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). Colombia is a party to the Rome Statute of the ICC, and, as you know, the OTP focuses its investigations and prosecutions on those who bear the greatest responsibility for crimes within its jurisdiction. That policy is not based on the scope of the obligation under international law as to who should face criminal prosecution for the most serious crimes; rather it reflects the nature of the court as an international tribunal which is complementary to, not replacing, national criminal justice systems. The policy is premised on the basis that states retain primary responsibility for trying all individuals who share responsibility for the most serious crimes, not merely those deemed "most responsible." Therefore any attempt to limit national jurisdictions' obligations to prosecute only a few individuals 'most responsible' is misguided. On the contrary, where national law is structured in 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 individuals on the basis that the state cannot or is unwilling genuinely to prosecute those responsible for these abuses.

While the bill states that "extrajudicial" instruments can satisfy Colombia's obligation to investigate, this is clearly not the case for serious violations. That is because "extrajudicial" investigations would not allow Colombia to meet its international obligation to *prosecute* serious abuses. The Inter-American Court has clearly established this obligation, stating that "The obligation pursuant to international law to prosecute… the perpetrators of human rights violations, stems from the obligation to guarantee rights enshrined in Article 1(1) of the American Convention."[8] The obligation to prosecute the most serious crimes also arguably is recognized in the Rome Statute, whose preamble states, "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their *effective prosecution must be ensured*" (emphasis added). [9]

In order to meet its obligation to prosecute those responsible for serious human rights violations, Colombia must conduct *criminal* investigations into such cases. The Inter-American Court has established the need for criminal investigations in repeated rulings, stating that "The investigation into events must be conducted…in order to pursue, capture, prosecute, and convict all the material and immaterial authors, particularly when state agents are or could be involved."[10] "Extrajudicial"

[8] See, for example, Inter-American Court of Human Rights, Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Judgment of November 24, 2010, Inter-Am.Ct.H.R., Series C. No. 219, para. 140. In cases from Colombia, the U.N. Human Rights Committee has also repeatedly held that, "The State party has a duty…to criminally prosecute, try and punish those deemed responsible for [violations of human rights]."[8] UN Human Rights Committee, Decision: Bautista v. Colombia, CCPR/C/55/D/563/1993 November 13, 1995, para. 8.6; Decision: Arhuacos v. Colombia, CCPR/C/60/D612/1995, August 19, 1997, para. 8.8.

[9] Rome Statute, preamble.

[10] See, for example, Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, Judgment of January 31, 2006, Inter-Am.Ct.H.R., Series C. No. 140, para. 143; Case of the Rochela Massacre v. Colombia, Judgment of May 11, 2007, Inter-Am.Ct.H.R., Series C. No. 163, para. 148. According to the Inter-

inquiries would fail to meet this requirement because, by their very nature, they are not aimed at, "captur[ing], prosecut[ing], and convict[ing]" all responsible parties.

The Inter-American Court has found that truth commissions in particular cannot be a substitute for criminal investigations of serious human rights violations. As it recently held in a ruling against Brazil, "The activities and information that this Commission will eventually obtain do not substitute the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures."[11]

II. The reform would allow Congress to suspend sentences against individuals responsible for atrocities.

Congress would be able to suspend sentences against guerrillas, paramilitaries, and military members convicted of any level of responsibility for crimes against humanity, war crimes and other serious human rights violations. The bill provides that Congress "can through law…establish the cases in which the suspension of the execution of the punishment will proceed." The bill does not contain any restrictions as to who the suspension of the sentences can be applied to. Thus, even those considered "most responsible" could receive the benefit. Congress would, for example, have the authority to ensure that top guerrilla commanders responsible for atrocities such as alias "Timochenko" or alias "Iván Márquez" do not spend a day in jail.

Colombia has a legal obligation under international law to provide punishments for human rights violations that are proportionate to the gravity of the crimes. As the Inter-American Court has found, "There is an international legal framework which establishes that the punishments established for crimes involving acts that constitute serious human rights violations must be appropriate to their gravity."[12] The UN Convention against Torture, for example, notes that crimes under the convention should be "punishable by appropriate penalties which take into account their grave nature."[13] Similarly, the Rome Statute of the ICC provides that in determining a sentence, the Court shall "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."[14]

American Court, the U.N. Human Rights Committee has also "considered in its constant jurisprudence that the criminal investigation and the ensuing prosecution are corrective measures that are necessary for violations of human rights." Inter-American Court of Human Rights, Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Judgment of November 24, 2010, Inter-Am.Ct.H.R., Series C. No. 219, para. 141.

[11] Inter-American Court of Human Rights, Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Judgment of November 24, 2010, Inter-Am.Ct.H.R., Series C. No. 219, para. 297.

[12] Inter-American Court of Human Rights, Case of Manuel Cepeda v. Colombia, Judgment of May 26, 2010, Inter-Am.Ct.H.R., Series C. No. 213, para. 150.

[13] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by Colombia on Dec. 8, 1987, art. 4(2).

[14] Rome Statute, art. 78.

III. The reform would allow for transitional justice benefits to apply to members of the state security forces.

The constitutional amendment would allow for members of the security forces to benefit from dropped prosecutions and suspended sentences. The first paragraph of the bill states that legislation can authorize a differential treatment "for each one of the different parties that have participated in the hostilities." Colombia's security forces are party to the country's conflict, and would consequently be eligible for special benefits. Indeed, the bill's exposition of motives explicitly states that the purpose of the clause is to "authorize the future creation of transitional justice instruments that include state agents."[15]

The application of transitional justice measures to state agents would represent a serious—and unnecessary—blow to accountability in Colombia. It is understandable for Colombia to offer certain incentives, such as sentence reductions, to members of irregular armed groups in order to induce them to lay down their weapons and demobilize (so long as individuals responsible for atrocities are prosecuted and punished with sentences proportionate to the gravity of their crimes—conditions that are not guaranteed under the proposed amendment). But this same logic does not apply to members of Colombia's security forces.

Honorable members of Congress: the proposed transitional justice reform directly contradicts international law, would facilitate widespread impunity for heinous crimes, and could expose Colombia to investigation by the ICC. We therefore respectfully urge you to uphold your commitment to the rule of law and modify the bill to address the three key problems outlined in this letter.

Sincerely,

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: Federico Renjifo, Minister of Interior
CC: María Ángela Holguín, Minister of Foreign Affairs
CC: Juan Carlos Esguerra, Minister of Justice and Law
CC: Eduardo Montealegre, Attorney General
CC: Sergio Jaramillo, National Security Advisor

[15] Informe de ponencia para segundo debate (segunda vuleta) al proyecto de acto legislativo No. 14 de 2011 Senado – 094 de 2011 Cámara, April 24, 2012, 8a, "Resumen del Articulado."