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Reestablishing the primacy of the military criminal jurisdiction in Colombia
Lawyers Without Borders Canada concerned for the fight against impunity

Quebec City, December 23, 2011 **–** Lawyers Without Borders Canada (LWBC) is concerned by the adoption, on December 13 of this year, by a significant margin in the House of Representatives of the Colombian Congress, of a legislative measure reestablishing the primacy of military tribunals ("*fuero militar*") for all criminal cases involving a member of the armed forces or of the national police, regardless of the type of charge levied against the accused.

This act is part of a sweeping reform of the justice system promoted by President Juan Manuel Santos. Upon completion of the fourth of eight parliamentary debates dedicated to the study of the omnibus bill 143/2011, the representatives voted by an overwhelming majority (105 to 7) in favor of a proposal seeking to amend article 221 of the Constitution of 1991. This section recognizes the jurisdiction of the military courts to hear any case regarding crimes attributed to soldiers or policemen upon finding that such individuals were acting within the scope of their mandate and that such acts were related to that mandate[1]. The amendment adds to it a paragraph which introduces the presumption of a connection between the alleged facts and the mandate of the public forces in all cases, and therefore the primacy of the military criminal jurisdiction.[2]

The result of the vote surprised no one, given that the majority of representatives elected in 2010 belong to political groups allied with President Santos. We expect that the President will ratify this legislative act of Congress as soon as the debate relating to the totality of the reform will come to an end, purportedly in March, 2012.

[1] Article 221 reads as follows: « *De los delitos cometidos por los miembros de la Fuerza Pública en servicio activo, y en relación con el mismo servicio, conocerán las cortes marciales o tribunales militares, con arreglo a las prescripciones del Código Penal Militar. […]* » (emphasis added)

[2] Article 12 of Bill 143/2011 on justice reform seeks to modify article 221 of the Constitution of 1991 as follows:
Artículo 221*. De los delitos cometidos por los miembros de la fuerza pública en servicio activo, y en relación con el mismo servicio, conocerán las Cortes Marciales o Tribunales Militares, con arreglo a las prescripciones del Código Penal Militar y Policial. Tales Cortes o Tribunales estarán integrados por miembros de la Fuerza Pública en servicio activo o en retiro.*
En todo caso, se presume la relación con el servicio en las operaciones y procedimientos de la Fuerza Pública. Cuando en estas situaciones haya lugar al ejercicio de la acción penal, la misma se adelantará por la Justicia Penal Militar y Policial. (emphasis added)

LWBC submits that this measure is likely to halt the significant advances registered in the past years in the fight against impunity in Colombia. Since its inception, the Colombian military justice system has had the tendency to interpret in a very liberal manner the scope of its jurisdiction. It thus sought to claim competence from the start over many cases dealing with allegations that had nothing to do with the mandate bestowed on soldiers or on the police. This prima facie jurisdiction of military tribunals has led to the emergence of a particularly benevolent jurisprudence in favor of soldiers and policemen accused of misdeeds which could qualify as war crimes or crimes against humanity, and of a culture of impunity which is also characterized by a high proportion of cases being dropped.

Nevertheless, the evolution of law in Colombia and abroad leaves no doubt as to the nature of military criminal justice as an exceptional recourse.

LWBC emphasizes that the international law applicable on the subject is today very clear. The United Nations' *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, adopted by the UN Human Rights Commission in 2005, indicates in a non-equivocal manner that "*[t]he jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations […]*".[3]

The international case law is just as clear on this topic. As such, the Inter-American Human Rights Commission ruled, in a decision of July 2008 condemning Colombia, that the military criminal jurisdiction, by its very nature, does not fulfill the criteria of independence and impartiality required of a court of justice by article 8(1) of the American Convention on Human Rights:

> [T]he military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. The decision-makers are not trained judges, and the Office of the Prosecutor General does not fulfill its accusatory role […].[4]

The Colombian Constitutional Court follows the same principle and has reiterated on numerous occasions[5] that 1) certain behaviours will always be considered outside of the scope of the military service, and 2) that, if in doubt as to which forum is more apt to hear the case, the regular courts should have priority.[6]

We would have thought that the Santos government would not seek to reignite a debate which was considered resolved by recent decisions that generally ruled in favour of recognizing the jurisdiction of regular courts.

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3 Doc. NU E/CN.4/2005/102/Add.1 (February 8, 2005), online : <http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2005/102/Add.1> at principle 29. (emphasis added)

4 CIDH, Report n°43/08, Case 12.009 Merits (*Leydi Dayán Sánchez v Colombia*), July 23, 2008, at para. 77.

5 See decisions C-399 of 1995, C-358 of 1997 and C-1149 of 2011.

6 See for example Constitutional Court, *Sentencia de unificación* (SU)-1184/01, online : <http://co.vlex.com/vid/-43615548>.

When the Military Criminal Code, in force since 1999, was amended in 2010 by Law 1407, the legislator clarified what is meant by a "crime related to the military service" (*delito relacionado con el servicio*), and what is not. As such, the legislator stipulated that, in order for a crime to be associated with military service, such crime must flow directly from the military or police mandate (*deriven directamente de la función militar o policial*).[7] Moreover, in no circumstance could acts such as torture, crimes against humanity or violations of international humanitarian law, be connected to a legitimate military mandate since their commission would provoke a break in the functional connection between the agent and such mandate.[8]

Yet, by proposing a presumption of competence in the Constitution, the Colombian Congress removes the power of the Attorney General *(Fiscal General de la Nación)* to determine, through a preliminary investigation of the available evidence, in which category the alleged crime falls, and if it is advisable to send the case to the military jurisdiction as opposed to the regular courts.

Even though it is technically possible, pursuant to the new article 221 of the Constitution, that a military tribunal relinquish its jurisdiction in a case where, based on the available evidence, the tribunal decides that the acts imputed to the soldier or member of the police do not appear to have a connection with his or her mandate, this tribunal does not offer the guarantees of functional independence and impartiality required to rule on such a question.

Military judges are not professional judges and they define themselves, above all else, as soldiers. The military ethos prevalent in the armed forces can only influence these judges and allow them to hesitate before transferring a case involving one of their own to the regular courts, where they may assume that an adequate defense is problematic. The United Nations Special Rapporteur on extrajudicial, summary and arbitrary executions, Mr. Philip Alston, stated, on this topic, that one of the main obstacles to the effective prosecution of soldiers suspected of having participated in extrajudicial executions is precisely the refusal of military tribunals to voluntarily send these cases to the ordinary courts.[9]

LWBC insists on the importance of assessing the current debate in light of recent developments in the Colombian judicial sphere, where some have allowed a crack in the wall of impunity which normally protects the high level officials of the security forces who have been suspected for years of participating in the commission of gross violations against civilians.

The conviction, on June 9, 2010, of retired Colonel Luis Alfonso Plazas Vega to 30 years

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[7] Art. 2.

[8] Article 3 provides that: "*No obstante lo dispuesto en el artículo anterior, en ningún caso podrán relacionarse con el servicio los delitos de tortura, genocidio, desaparición forzada, de lesa humanidad o aquellos que atenten contra el Derecho Internacional Humanitario entendidos en los términos definidos en convenios y tratados internacionales ratificados por Colombia, ni las conductas que sean abiertamente contrarias a la función constitucional de la Fuerza Pública y que por su sola comisión rompan el nexo funcional del agente con el servicio".*

[9] Doc. NU A/HRC/14 /24/Add. 2 (March 31, 2010).

in prison for the forced disappearance of 11 employees during the army assault of the Courthouse in Bogotá in 1985, and the conviction dated November 26, 2009, of General Jaime Humberto Uscátegui to 40 years in prison for his participation in the Mapiripán massacre, both represent highly symbolic juridical advances which may have never occurred had they not been in the charge of the regular courts.

LWBC is concerned that the reestablishment of the primacy of the military jurisdiction in Colombia will limit, if not impede all together, the investigations currently taking place against thousands of members of the security forces suspected of being involved in the so-called scandal of the « *falsos positivos* », whereby officers and simple soldiers sought benefits meant for “deserving soldiers” by way of executing civilians and disguising them as enemies killed in combat.

Given that it is essential for the Colombian judicial system to respond to the thirst for justice and truth of the victims, LWBC hopes that the Colombian legislator will act wisely and propose, before the closing of the debates and the ratification of the bill by the executive branch, a wording for article 221 of the Constitution that will comply with the state of the law on the subject. In the alternative, LWBC will have no other option but to deplore a significant step back in the fight against impunity in Colombia.

Contact : Philippe Tremblay, Program Manager
418-907-2607
philippe.tremblay@asfcanada.ca