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# Dictating Justice: Human Rights and Military Courts in Latin America

Brett J. Kyle<sup>1</sup> and Andrew G. Reiter<sup>2</sup>

<sup>1</sup>University of Wisconsin–Madison, Madison, WI, USA

<sup>2</sup>Mount Holyoke College, South Hadley, MA, USA

## Abstract

Militaries throughout the world operate their own courts to prosecute military crimes, such as insubordination, that are not part of civilian legal codes. Latin American militaries traditionally have extended this hermetic justice system to cover all crimes committed by their personnel, allowing the institution to sit in judgment of its own actions and escape punishment for human rights violations. This parallel legal system erodes the principle of equality before the law, threatens civilian control of the military, and nurtures a culture of impunity. This article develops a theoretical model to explain the state of military court jurisdiction over military personnel for human rights violations in democracies. It then empirically tests this model on seventeen cases in Latin America. The article concludes that the variation in reform of military courts is a result of the relative balance between the extent of military autonomy and the strength of the civilian reform movement.

## Keywords

military courts, human rights, judicial reform, Latin America

Military courts serve an essential role within the larger context of a state's judicial system and armed forces. Militaries rely on regulations, laws, and codes of conduct distinct from those of the civilian world. Thus, they require their own mechanisms to enforce these codes and to prosecute violations of them. Military codes of justice are crucial for maintaining discipline and obedience to authority within the institution. In this context, institutional jurisdiction over military personnel is an accepted practice. Yet when agents of the state commit human rights violations, this parallel legal system

introduces challenges to the rule of law and allows for potential impunity.<sup>1</sup> Activists, lawyers, and politicians have championed civilian human rights trials when such violations occur; but in many cases, particularly in Latin America, military courts continue to shield members of the security forces from punishment.<sup>2</sup> The institution is able to sit in judgment of its own actions, even though it issued the original orders. Under these circumstances, justice is not served through the decision of an impartial third party, but rather it is dictated by the military itself. While it is true that civilian courts do not always hold members of the military accountable either, on average the likelihood of accountability in civilian courts greatly exceeds that of military courts, and scholars and practitioners recognize that the transfer of these cases to civilian courts is a necessary first step in holding human rights violators accountable.

In a case that clearly demonstrates the internal bias of military justice, a Colombian military court acquitted Lieutenant Colonel Rodrigo Quiñones and seven other soldiers from the Naval Intelligence Network No. 7 in 1994 for involvement in the killings of dozens of people in and around the city of Barrancabermeja. Conversely, a civilian court convicted two civilian employees of Network No. 7 for the same crimes on what the judge termed “irrefutable” evidence.<sup>3</sup> This scenario is typical for the region; military courts consistently acquit or render light sentences to members of the military for human rights violations.

The use of military courts to prosecute military personnel for human rights crimes violates international law. International legal norms and treaties obligate states to prosecute perpetrators of human rights violations, and the legal community does not view military courts as appropriate venues for such prosecutions.<sup>4</sup> In 1999, the Inter-American Court of Human Rights (IACtHR) rejected the use of military courts for the prosecution of human rights violations, citing article 7 of the American Convention, which requires that “anyone who is deprived of his liberty shall be entitled to recourse to a competent court” and that “this remedy may not be restricted or abolished.”<sup>5</sup> In the eyes of the IACtHR, not providing for a proper investigation and impartial prosecution of military personnel perpetrates a second injustice on the victims and survivors of state-sponsored atrocities. This challenge is distinct from the often more high-profile use of military justice against civilians for such crimes as treason or terrorism.

Military control over prosecution of its personnel when they are accused of human rights violations permits the institution to act with impunity. In addition, the misuse of military courts subverts the rule of law and undermines democracy.<sup>6</sup> For the rule of law to be meaningful, the law must bind *everyone*, particularly powerful state actors such as the military.<sup>7</sup> Differential treatment of state actors undermines answerability and enforcement—essential components of accountability.<sup>8</sup> To uphold the rule of law, a democratic state must “establish networks of responsibility and accountability that entail that all agents . . . are subject to appropriate, legally established controls of the lawfulness of their acts.”<sup>9</sup> The rule of law is vital to fulfilling the democratic promise of equality of treatment by and access to the state; and the furtherance of democratic values by the judicial branch is vital to the stability of democracy.<sup>10</sup>

In short, when military courts overstep their boundaries, victims do not receive justice, future human rights violations are not deterred, and the rule of law and democracy are weakened. The extensive literature on civil–military relations recognizes the importance of civilian oversight and control over the military, but few examine the legal realm explicitly.<sup>11</sup> Yet power in this arena represents a threat to civil–military relations, and scholars have argued that civilian control of the military can be achieved only when the “armed forces act within the rule of law” and when military personnel are “not granted special legal privileges by law or by actual practice.”<sup>12</sup> Therefore, this article sheds light on an issue of particular importance to civilian control of the military and fills a notable gap in the civil–military relations literature.

This article seeks to explain the variation in the jurisdiction of military courts over human rights violations committed by military personnel in contemporary Latin America—a region in which civil–military relations remain contentious, human rights violations are widespread, and military courts retain extensive jurisdiction in many cases. To explain this variation, we first highlight the salience of this issue today and develop typologies of the state of reform of military court jurisdiction for human rights cases. We then generate hypotheses for the conditions under which each state of reform is likely to occur, drawing on two key variables: the strength of military autonomy and the strength of civilian reformers. We apply this model to Latin America and demonstrate that it effectively explains the extent of military court jurisdiction for human rights violations in

the majority of Latin American democracies (ten of seventeen). In the subsequent section, we explain the factors that cause the outlier countries to deviate from the model, particularly noting the dramatic impact of internal security threats on the reach of military courts. Finally, we conclude the article with a summary of our findings and highlight the implications of these findings for continued reform in the region and for future research on civil–military relations and military justice.

### **Military Jurisdiction in Latin America**

The phenomenon of military courts operating beyond the scope of their mandate is consistent with the traditionally poor state of civil–military relations in Latin America. Militaries have been dominant political actors in many countries in the region, often violating norms of military abstention from political affairs since their founding.<sup>13</sup> Militaries persistently have encroached on civilian authority throughout the region's history, exercising veto power, maintaining a tutelary role in national politics, and even seizing control and ruling directly in the name of the national interest. Historically tasked with the duty to maintain domestic stability, not just to secure national borders, militaries in the region have been inward-looking, constabulary forces.<sup>14</sup> During the cold war, Latin American militaries ruled nearly every country in the region and relied on military courts as a key tool in their repression. The Southern Cone, in particular, witnessed extensively legalized authoritarian systems.<sup>15</sup> Similarly, the militaries of Central America and the Andean region used military courts to protect themselves from legal checks on their power when combating large guerrilla forces in civil wars.

The abuse of military courts, however, is not a relic of the cold war era. Rather, it continues to be an issue today across the region. Militaries still use their justice systems to provide themselves more leeway in combating a host of new security threats. Military courts continue to play a prominent role in the civil war in Colombia, and in Peru they often shield military action in combating drug trafficking and remnant guerrillas of the Shining Path. In the past few years, the Constitutional Court and the IACtHR have ruled against Peruvian laws granting the military jurisdiction in cases of human rights violations, but the military has ignored them; and lawmakers have now passed new legislation that grants military courts explicit power over the institution's actions.

Similarly, a civilian court charged members of the Bolivian military with homicide, grievous bodily harm, and assault in the suppression of street riots in 2003. The military, however, argued that civilian courts did not have jurisdiction, and the court soon transferred the case to a military tribunal, which acquitted the defendants of all charges.<sup>16</sup> Mexico currently has thirty thousand troops deployed to combat drug traffickers and organized crime, and there are more than one thousand civilian complaints each year over illegal searches, arbitrary arrests, torture, rape, and other abuses by the military; but the military justice system continues to protect armed forces personnel from prosecution.<sup>17</sup> In sum, this issue is still vital for the protection of human rights in the region today. Yet these cases do not characterize the entire region. Significant variation exists. In many countries, a measure of reform has occurred, with some even enacting comprehensive reforms to remove human rights crimes completely from the jurisdiction of military courts. Overall, there are five states of military court reform in the region:

*Complete reform:* Laws allow for civilian jurisdiction over members of the armed forces for human rights crimes, and there is consistent transfer of such cases to civilian courts.

*Incomplete reform:* The military abides by the laws that are changed regarding human rights crimes and cooperates with civilian rulings, but the laws are not comprehensive.

*Contentious reform:* Civilians push for reform of military court jurisdiction over human rights crimes, but the military actively attempts to overturn laws that are passed, obstructs investigations, and alters verdicts.

*Minor reform:* Reform efforts are negligible regarding military jurisdiction of human rights crimes and often take the form of court rulings while statutes remain unchanged, allowing the military to ignore civilian jurisprudence and to retain nearly full judicial control over its members.

*No reform:* The military tries its members for human rights crimes in its own courts, and the country's laws provide for such a practice.

In sum, considerable variation in the reach of the military justice system exists throughout the region. The following section explores the basis for this variation.

## **Theoretical Expectations for Reform**

Good civil–military relations are a delicate balance between civilian control of the military and separation of civilian and military spheres. The concept of “dedicated autonomy,” developed by Consuelo Cruz and Rut Diamint, best conveys the type of relationship between the military and civilian leadership that is conducive to mutually beneficial outcomes: “autonomy that allows the military discretionary decision-making authority and reserved zones of expertise and action, but harnesses its institutional prerogatives to the service of a higher order that it does not determine.”<sup>18</sup> In the post-transition period in Latin America, scholarship has focused on flash points of disagreement and conflict between militaries and political leaders as the two sides work toward more sustainable interactions.<sup>19</sup> Scholars identify budgetary prerogatives, mission reform, and human rights issues as particular points of contention. Thus, our theoretical assumptions suggest that where civilian authorities have won more of these disagreements and successfully subordinated the military to their control, civilians are better able to institute military judicial reforms as well. Where these civilian victories have not happened and the military still retains significant institutional autonomy, the military is better able to resist judicial reform efforts or to ignore them in practice if they are formally put into place. The extent of military jurisdiction over human rights crimes is partly dependent on the level of military autonomy. The pursuit of military judicial reform is not simply a technical undertaking but is an inherently political process, dependent on the strength and attention of civilian reformers.<sup>20</sup>

Civilian reformers are responsible for setting the agenda when it comes to changes in the military institution, and the presence of an active human rights movement is a necessary condition for getting the issue noticed. Scholarship on social movements highlights the importance of resource mobilization, arguing that to be most effective groups must be equipped with tangible resources (e.g., money and facilities) as well as intangible resources (e.g., organizing and legal skills).<sup>21</sup> Civilian reformers also must have access to the policy-making arena. The relative openness of the political environment determines the political opportunity structure in which reformers are able to operate and the level of success they are likely to achieve.<sup>22</sup> Dense networks of civilian reformers will be empowered by politically competitive systems, allowing them to raise

the issue of military court reform.

The role of military courts today is the result of a long struggle between the military on one hand and civilian advocates of reform on the other. The military wants to retain as many prerogatives as it can; therefore, it resists reform of military courts. Likewise, human rights activists want to bring important cases out of the military's jurisdiction and into civilian courts. The strength and intensity of each side vary considerably across states, and we hypothesize that the balance between the two sides ultimately determines the extent of reform. We therefore predict the following hypotheses:

*Hypothesis 1:* Where civilian reform movements are strong and the military is effectively subordinated to civilian control, there will be complete reform.

*Hypothesis 2:* Where civilian reformers hold a moderate advantage in power over their military counterparts, there will be incomplete reform.

*Hypothesis 3:* In cases where the two sides are relatively balanced, there will be contentious reform.

*Hypothesis 4:* Where the military holds a moderate advantage in power over its civilian counterparts, there will be minor reform.

*Hypothesis 5:* Where military autonomy is high and civilian pressure for reform is low, there will be no reform.

We model this interaction between the two variables and the expected impact on the state of military court jurisdiction in Figure 1.

### **Predicting Military Judicial Reform in Latin America**

To test the series of hypotheses, this section applies the model developed above to Latin America's seventeen democracies.<sup>23</sup> To measure the strength of civilian reformers, we use three variables. First, we examine the density of international nongovernmental organizations operating in the country (normalized over country population) as identified by the *Yearbook of International Organizations*.<sup>24</sup> This measure provides us with the general density of civil society in each case.<sup>25</sup> A greater number of human rights groups in the country will be able to agitate for reform, take cases of human rights violations through the judicial process, and draw attention to



the problems associated with military jurisdiction over investigation and prosecution of such crimes. The more groups that are advocating for human rights, the more reform pressure the government and the military face. In addition, where the human rights movement is particularly visible, international interest and support for them may translate into other states applying pressure directly on the government. Second, we note the competitiveness of participation in the political arena (in 2008), as identified by Polity IV's PARCOMP variable. This variable measures "the extent to which alternative preferences for policy and leadership can be pursued in the political arena."<sup>26</sup> Polity IV codes each country as repressed (1), suppressed (2), factional (3), transitional (4), or competitive (5).<sup>27</sup> The level of access to policy making is crucial in determining the likelihood for success in promoting reform, and this criterion provides us with an effective measure of the openness and competitiveness of the political arena. Where political institutions are relatively open, the political opportunity structure allows movements to operate effectively, and more reform should occur.

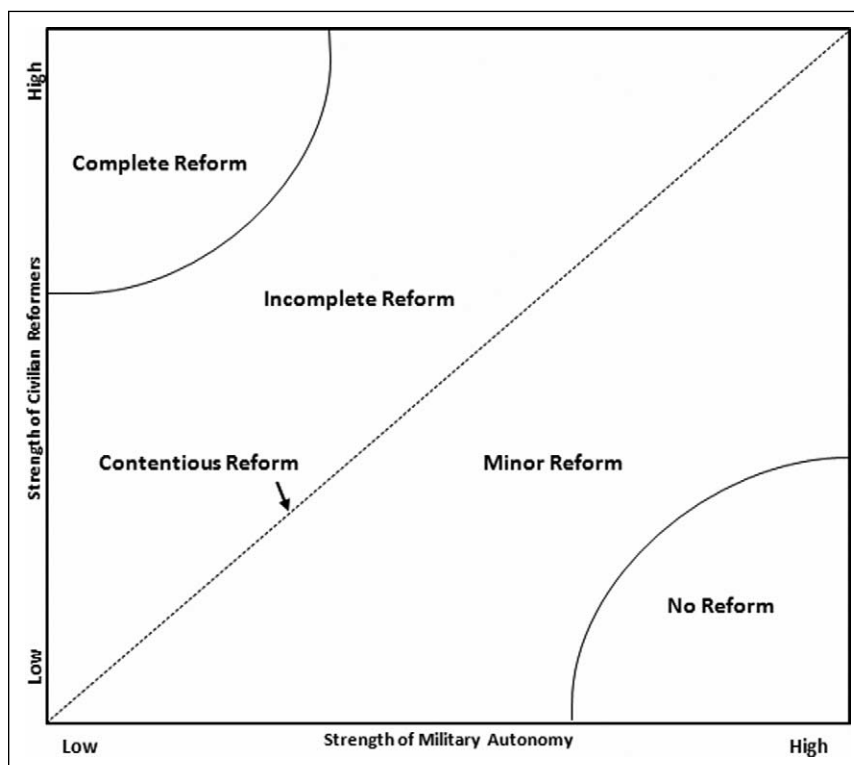


Figure 1. Balance of power and military judicial reform

Third, we include a measure for the quality of the rule of law as identified by the

World Bank.<sup>28</sup> The score ranges from –2.5 to 2.5, with higher scores indicating better governance.<sup>29</sup> Regardless of the strength of human rights movements and their political access, we are unlikely to see pushes for reform in cases where the civilian judicial system itself is weak. If a civilian court and a military court similarly acquit perpetrators of human rights violations, jurisdictional issues are relatively unimportant. In contrast, strong civilian judicial systems often push for reform indirectly via judgments. In some cases, civilian courts convict civilian government agents for human rights violations in similar or even the same operations as members of the armed forces who are acquitted by their own courts. This incongruence in verdicts raises awareness of the issue. More drastically, civilian judges may rule that the trial of a particular case in a military court is illegal. Such rulings speed up reform efforts by signaling to politicians that continued blatant disregard for the court on these issues will result in similar rulings that attract unwanted attention from foreign governments and from international and domestic human rights movements.

**Table 1. Strength of Civilian Reformers in Latin America**

Country	NGO density	Political competitiveness	Rule of law	Overall strength <sup>a</sup>
Argentina	Low	Medium	Medium	Medium
Bolivia	Medium	Low	Low	Low
Brazil	Low	Medium	Medium	Medium
Chile	High	High	High	High
Colombia	Low	Low	Medium	Low
Costa Rica	High	High	High	High
Dominican Republic	Medium	Medium	Medium	Medium
Ecuador	High	Low	Low	Low
El Salvador	High	Medium	Medium	Medium
Guatemala	Low	Medium	Low	Low
Honduras	Medium	Medium	Low	Medium
Mexico	Low	Medium	Medium	Medium
Nicaragua	High	Medium	Low	Medium
Panama	High	High	Medium	High
Paraguay	High	Medium	Low	Medium
Peru	Low	Medium	Low	Low
Uruguay	High	High	High	High

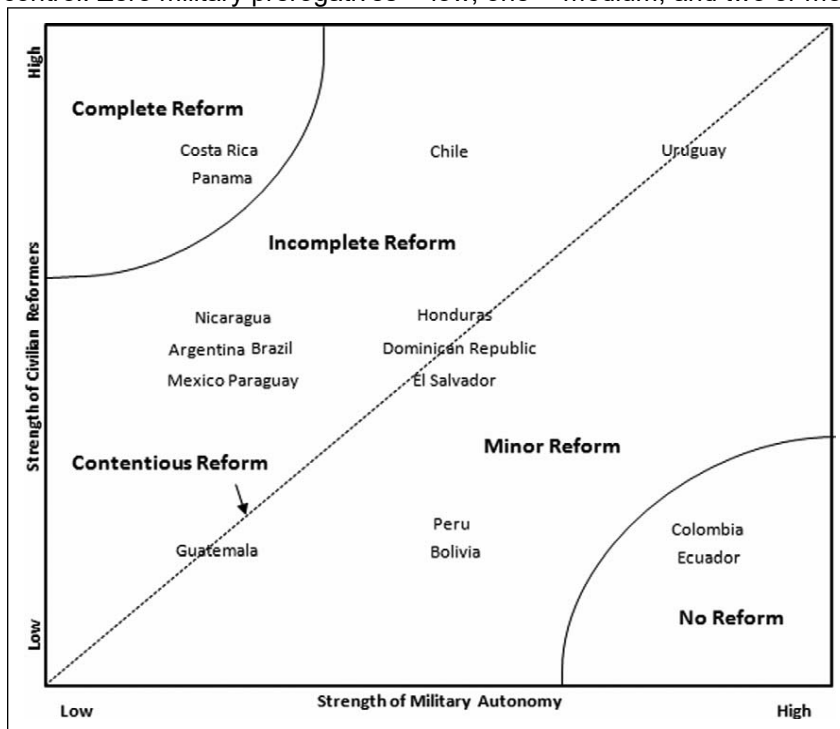
a. Composite classification based on aggregate low–medium–high scores for each variable, determined by the third into which the value falls. Where two or more of the variables are one value, that is the composite classification: low–low–medium = low. If balanced, so is the composite classification: low–medium–high = medium.

These three variables combine to provide a proxy for the strength of civilian reformers. Reform is more likely where the rule of law is strong, human rights groups are dense and active, and these actors operate in a system in which they can affect policy. We display the relative strength on these variables for all Latin American democracies, as well as our composite classifications, in Table 1. Actual scores for each country on each variable can be found in the endnotes accompanying the discussion of each variable above. Scholars have long noted the conservative values or authoritarian outlook of militaries because of their unique organizational features and the means by which they are professionalized.<sup>30</sup> In Latin America, militaries have resisted democracy, and the legal realm is often their last bastion of power in a democracy.<sup>31</sup> The stronger the military in relation to the government, the more likely and the more capable the military is to resist reform of military courts. To measure military autonomy, we use three variables that indicate the strength of the institution relative to the civilian leadership. First, we assess the military's budget as a percentage of the overall state budget.<sup>32</sup> Military budgets in the post-transition period have been a highly contentious issue, and this measure provides insight on the priority of the military institution in government. Second, we consider the number of military personnel per ten thousand members of the national population. The common practice of fielding a disproportionately high number of soldiers relative to the external threats present in the region contributes to the inward focus of militaries in Latin America.<sup>33</sup> Third, we examine specific military institutional prerogatives, namely the use of conscription, whether the minister of defense is active-duty military, and whether a member of the military or a civilian heads the general budget office of the defense ministry.<sup>34</sup> Taken together, these prerogatives indicate the relative control the military has over key decisions that affect its operation. Where the military budget is higher, there are more individuals in uniform, and the institution maintains important prerogatives, we are likely to see greater resistance to reform. We display the relative strength on these variables for all Latin American democracies, as well as our composite classifications, in Table 2. Actual scores for each country on each variable can be found in the endnotes accompanying the discussion of each variable above.

**Table 2. Strength of Military Autonomy in Latin America**

Country	Military budget	Military personnel	Military prerogatives	Overall strength <sup>a</sup>
Argentina	Medium	Low	Low	Low
Bolivia	Low	Medium	High	Medium
Brazil	Low	Low	Medium	Low
Chile	High	Medium	Low	Medium
Colombia	High	High	Medium	High
Costa Rica	Low	Low	Low	Low
Dominican Republic	Low	Medium	High	Medium
Ecuador	High	Medium	High	High
El Salvador	Low	Medium	High	Medium
Guatemala	Low	Low	High	Low
Honduras	Medium	Low	Medium	Medium
Mexico	Low	Low	High	Low
Nicaragua	Low	Low	Low	Low
Panama	Low	Medium	Low	Low
Paraguay	Low	Low	High	Low
Peru	Medium	Medium	Low	Medium
Uruguay	High	High	Low	High

a. Composite classification based on aggregate low–medium–high scores for each variable, determined by the third into which the value falls. Where two or more of the variables are one value, that is the composite classification: low–low–medium = low. If balanced, so is the composite classification: low–medium–high = medium. The prerogatives variable is judged based on the number of prerogatives under military control. Zero military prerogatives = low, one = medium, and two or more = high.



**Figure 2. Predicted military judicial reform in Latin American democracies**

Examining the results of Tables 1 and 2 in tandem provides a picture of the balance of power between forces in each country. Based on the state of this balance of power, our model predicts complete reform in Panama and Costa Rica; incomplete reform in Chile, Argentina, Nicaragua, Brazil, Mexico, and Paraguay; contentious reform in Uruguay, Honduras, Guatemala, El Salvador, and Dominican Republic; minor reform in Peru and Bolivia; and no reform in Colombia and Ecuador. We display these predictions in Figure 2. The following section empirically examines the state of reform in each country and reflects on the fit of our model to the region.

### **The State of Reform in Latin America**

To analyze the actual state of reform in Latin America, we draw on a variety of sources. We first examine national constitutions, along with relevant laws, to determine the jurisdictional rules in each country. To assess the behavior of the relevant actors concerning these laws, we then examine U.S. Department of State “Country Reports on Human Rights” for the past five years as well as any reports produced during that time by Human Rights Watch or Amnesty International for each country. We supplement this information with secondary academic sources, rulings by domestic and international courts, and news stories.

Four states in the region have experienced significant reform of military courts. Costa Rica, in establishing its 1949 constitution (article 12), formally disbanded its standing military, but retains the Public Force, under the Ministry of Public Security, to perform counternarcotics and border-security functions, as well as a special forces unit, the Special Intervention Unit, which operates under the Intelligence and Security Directorate. Both forces, however, are under the jurisdiction of the civilian court system for all civilian crimes, including human rights violations. Likewise, Panama has no regular military forces, and the civilian Ministry of Government and Justice and the civilian court system oversee the Panamanian National Police, National Air-Naval Service, and National Border Service.<sup>35</sup> In both cases, reform movements are strong, security forces are weak, and reform is complete: no parallel legal system exists. In Nicaragua, civilian reformers are moderately strong, but the military is firmly subordinated to civilian rule. In fact, the Nicaraguan military is noted for being uniquely

apolitical in the region. Since reforms in the early 1990s, military tribunals have had jurisdiction over only violations of military regulations and misdemeanors, and civilian courts try any common crimes, including human rights violations.<sup>36</sup> Finally, in Argentina, in August 2008, the Congress annulled the country's Code of Military Justice, which had been in place since 1984, and federal civilian courts now handle all cases.<sup>37</sup>

Two countries in the region fit the category of incomplete reform: Ecuador and Paraguay. In Ecuador, the new 2008 constitution provides for a unified judicial system, abolishing separate military and police judicial systems. All cases previously under the jurisdiction of military courts are now under the National Court of Justice. The military has not actively resisted these reform efforts. Yet civilian reform remains incomplete. The implementation of the changeover was delayed considerably while specialized judges could be trained and a budget established. To date, the court still has not tried a member of the military or police.<sup>38</sup> Similarly, the Paraguayan constitution (article 174) states that military tribunals may be used only for military crimes and that in the event of overlapping jurisdiction the civilian justice system takes priority. In practice, however, civilian leaders have not asserted this authority fully; there have been "killings by the police and the military, which the government investigated but rarely prosecuted."<sup>39</sup> The military has not fought the jurisdictional shift, yet reform is incomplete.

The contentious reform category includes those countries in which the military and civilians fight over jurisdiction. The military may actively work to overturn laws, obstruct the investigation and prosecution of cases against its members, or attempt to alter the verdict of cases. The Dominican Republic's new 2002 Code of Criminal Procedure places all human rights violations committed by the security forces under civilian jurisdiction, but the police continue to hinder investigations by not cooperating with prosecutors.<sup>40</sup> El Salvador has faced similar challenges with military domination of criminal investigations and a heavily politicized civilian justice system.<sup>41</sup> Despite "the redefinition of military jurisdiction as an exceptional procedure limited to dealing with purely military offences and misdemeanors" agreed to by parties to the peace accords ending the civil war and formal changes to the constitution giving military jurisdiction over military crimes alone (article 216), the military continues to avoid cooperation.<sup>42</sup> The military has fought to maintain the impunity granted to it by the 1993 amnesty law and

thwarts investigation efforts.<sup>43</sup>

In Guatemala, early post-civil-war success in diminishing military budgetary prerogatives and in replacing high-level commanders did not translate into meaningful accountability for military human rights abuses.<sup>44</sup> The new constitution prohibited the military from putting civilians on trial but still explicitly gave military tribunals jurisdiction over armed forces personnel in all circumstances (article 219). The military code was reformed to make it “inapplicable to members of the armed forces implicated in ordinary offences,” but even these formal efforts have subsequently come under attack.<sup>45</sup> Military officials have tried to recoup power over legal jurisdiction by proposing changes to the Code on Military Justice under the guise of broad modernization of the armed forces.<sup>46</sup>

In Honduras, the civilian judicial system, led by the human rights unit of the Attorney General’s Office, has jurisdiction over human rights violations committed by security forces, but its ability to carry out investigations, particularly after the 2009 military coup, has been severely restricted. In some cases, prosecutors have even received direct threats from members of the military.<sup>47</sup> In Colombia, numerous high court rulings, a new military penal code in 2000, and a subsequent presidential directive removed cases of genocide, torture, forced disappearance, and acts against humanity from military courts.<sup>48</sup> In reality, however, military courts still do not consistently transfer cases against members of the armed forces to civilian courts.<sup>49</sup> Uruguay has successfully pursued military reform in its post-transition period, improving civil–military relations considerably overall.<sup>50</sup> Nevertheless, while civilian courts routinely deal with human rights cases, at the Appellate Court and Supreme Court levels, two military judges are still added to any case in which a member of the military is involved.<sup>51</sup> By doing so, the military ensures its ability to directly control verdicts in cases concerning its members.

In Brazil, civilian reformers have not been strong enough or active enough to reform the system completely. The military police, who are reserve and auxiliary units of the regular military, patrol the streets, maintain public order, respond to crimes, and make arrests. Military courts judge the military police for most crimes they commit. Civilian reformers successfully pushed to amend the 1996 Military Criminal Code, which now mandates that civilian courts try any cases of intentional homicide of a civilian.

While cases of homicide against civilians are handled by civilian courts, the police and military police consistently work together to cover up their wrongdoings—manipulating evidence, coercing witnesses, and refusing to testify against one another.<sup>52</sup>

The region has two cases categorized as minor reform: Peru and Bolivia. There have been judicial rulings against military jurisdiction over human rights crimes as well as some initial talk of reform, but very little has changed on the ground. In Peru, despite rulings by the Constitutional Court and the IACtHR against Peruvian laws granting the military jurisdiction in cases of human rights violations, military courts continue to shield members of the armed forces for abuses committed in combating drug traffickers and guerrillas. Lawmakers have now passed new legislation that grants military courts explicit judicial power over military actions.<sup>53</sup> Similarly, in May 2004, Bolivia's Constitutional Court ruled that the military had to allow civilian courts to try cases of alleged military human rights abuses,<sup>54</sup> but no comprehensive legislation has yet been passed. In addition, the military maintains control over the investigatory stage of cases of its members and has outright refused to appear before any civilian prosecutors.<sup>55</sup>

Two cases in the region exhibit no reform. In Mexico, the military justice code allows for any crime committed by members of the military, including human rights violations, to be tried by military courts.<sup>56</sup> Human rights activists have heavily criticized the system for lax sentences and ignoring violations altogether, but there has been no measurable progress on reform.<sup>57</sup> Similarly, in Chile, military courts retain jurisdiction over military and police forces for human rights violations and still have jurisdiction even over civilians for certain crimes.<sup>58</sup>

### **Assessing the Model**

Overall, we find support for our hypotheses, as our model explains ten of seventeen cases in Latin America, and two other cases have only slightly overachieved from their predicted placement. Both cases in which we predicted significant reform—Costa Rica and Panama—have experienced significant reform. Neither has a full-fledged military, and both have strong reform movements that keep their remaining security forces in check. In addition, the model predicts that those cases in which the



forces are relatively balanced will experience contentious reform. We see that those countries in which the strength of each side is the same—Uruguay, Honduras, Dominican Republic, El Salvador, and Guatemala—have experienced contentious reform. In two cases—Bolivia and Peru—the model accurately predicts minor reform. The model also successfully predicts incomplete reform for Paraguay. Nevertheless, we find some outliers. Chile, Mexico, and Brazil have achieved less reform than predicted, while Colombia, Ecuador, Nicaragua, and Argentina have achieved more reform than expected. Table 3 displays the results of the application of our model to Latin America.

The slight overachievements in Argentina and Nicaragua are notable but not entirely unexpected. Argentina transitioned to democracy in 1983 and ended the rule of a brutal military regime. Yet full reform of the military justice system did not occur until a quarter century later in 2008. Time has allowed civilian reformers in the country gradually to chip away at military prerogatives despite the relative strength of the military. Nicaragua’s overachievement is the result of the unique political events following the Sandinista National Liberation Front’s (FSLN) loss of the 1990 election. The FSLN

**Table 3. Predicted versus Actual Level of Reform of Military Courts in Latin America**

Country	Civilian strength	Military strength	Predicted level of reform	Actual level of reform
Argentina	Medium	Low	Incomplete	<i>Complete</i>
Bolivia	Low	Medium	Minor	Minor
Brazil	Medium	Low	Incomplete	<i>Contentious</i>
Chile	High	Medium	Incomplete	<i>No</i>
Colombia	Low	High	No	<i>Contentious</i>
Costa Rica	High	Low	Complete	Complete
Dominican Republic	Medium	Medium	Contentious	Contentious
Ecuador	Low	High	No	<i>Incomplete</i>
El Salvador	Medium	Medium	Contentious	Contentious
Guatemala	Low	Low	Contentious	Contentious
Honduras	Medium	Medium	Contentious	Contentious
Mexico	Medium	Low	Incomplete	<i>No</i>
Nicaragua	Medium	Low	Incomplete	<i>Complete</i>
Panama	High	Low	Complete	Complete
Paraguay	Medium	Low	Incomplete	Incomplete
Peru	Low	Medium	Minor	Minor
Uruguay	High	High	Contentious	Contentious

*Note:* Outliers are in bold and italics.

subsequently signed the Protocol of Transition with incoming president Violeta Barrios de Chamorro and her Union of Opposition party. In the protocol, the new government pledged to respect the army's institutional integrity in return for its loyalty and professionalization. Thus, the partisan Sandinista People's Army began a process of reform that culminated in the retirement of General Daniel Ortega and the passing of a new Military Code in 1994.<sup>59</sup> The military has been uniquely apolitical in the time since.

Ecuador's overachievement is more dramatic. Based on the high autonomy of the military and the weak civilian reform movement, our model predicted no reform. Yet the new 2008 constitution represents a significant step in the reform process, making Ecuador a case of incomplete reform. We attribute this change to President Rafael Correa's widespread popular support and his ability to paint the military as a potential enemy of the state. Not renewing the U.S. lease of the Manta Air Base was a major component of his election platform. He has also purged the upper echelons of the military command, accused the institution of being in league with the CIA, and publicly claimed that he had found evidence of a "Honduran-like" coup conspiracy among its leaders. At this point, it is unlikely that the military would find much support among the population if it attempted to resist Correa's judicial reforms.

The underachievement we find in Chile is likely temporary. Following a 2005 IACtHR ruling and increasing civilian efforts to repeal the Chilean Copper Law, which had guaranteed the military 10 percent of the profit from copper sales, legislators presented two reform bills to the Chilean Congress in October 2009 that would restrict the jurisdiction of military courts solely to disciplinary offenses committed by military personnel.<sup>60</sup> As of May 2010, the proposed legislation is still under consideration by the Camara de Diputados, but if the bills pass Chile will move in line with our expectations or even exceed them as Argentina has.

The remaining three outliers are notable because of the dramatic impact internal security threats have had on military court jurisdiction. The underachievement in Brazil and Mexico is directly tied to the growth of organized crime and drug trafficking and the corruption among the regular police forces, which have forced the military in each country to become a key player in domestic policing. Along with this increased role has come an increased willingness on the part of politicians to give these forces a free hand

in how they combat internal threats. Reports of extrajudicial killings and the torture and abuse of prisoners in Brazil and Mexico are rampant, activating human rights organizations; yet full reform of military courts remains elusive. The strong civilian reform movement in Brazil's well-developed democracy has made changes to the laws, but Brazil's military is able to continue to obstruct any investigations into its wrongdoing. What few calls there have been for reform in Mexico have been ignored by the military.

Colombia is the most interesting outlier; despite facing an even greater internal threat than Brazil and Mexico, the country has seen far *more* reform than predicted. Traditionally, the military in Colombia has had extraordinary freedom to combat the numerous guerrilla groups fighting the state. The country spent much of the 1957–90 period under a state of siege, and the armed forces had complete immunity when committing homicide during investigations of serious crimes (decree 0070, January 20, 1978).<sup>61</sup> The 1991 constitution reaffirmed the jurisdiction of military tribunals over crimes committed by the armed forces (article 221) and explicitly gave soldiers immunity for violations that were the result of obeying orders from a superior (article 91). In 1995, a constitutional reform explicitly stated that military courts would be composed of active or retired members of the state's armed forces.<sup>62</sup>

Yet in 2000, a new Military Penal Code, which denied commanders the power to judge subordinates and disallowed cases of torture, genocide, and forced disappearance to be tried in military courts, was passed. This act, coupled with a strong presidential directive shortly thereafter, has led to the transfer of many sensitive cases out of military tribunals, although the transfer of all such cases is not yet consistent.<sup>63</sup>

This shift can be explained by the ascent of conservative president Andre's Pastrana in 1998 and the subsequent rule of right-wing president Álvaro Uribe from 2002 to the present, which created a unique nexus between the military and the political elite. The military, once discredited as ineffective in combating the guerrillas and corrupted by drugs, has risen dramatically in stature and received significant levels of funding and support in recent years. In turn, the military has allowed for more formal restrictions on its power, and the number of human rights violations attributed to its forces has declined dramatically. In part, this was necessary to obtain military aid from the United States, which jumped from just \$87 million in 1997 to an average of over

\$600 million annually from 2003 to the present. The number of professional soldiers has nearly tripled since 2002, and there is now a police or military presence in all of the state's 1,098 municipalities for probably the first time in history.<sup>64</sup>

## **Conclusion**

In the process of deepening democracy in Latin America, scholars and activists have rightly focused on improving judicial systems, reforming the rule of law, and improving civil–military relations. Despite the fact that the legal realm is a key flash point in civil–military relations and the continued existence of a parallel legal system undermines the rule of law, reform of military courts has largely been ignored. Furthermore, where military courts retain jurisdiction over members of the armed forces for human rights violations, these violations typically occur at higher levels, suggesting that reform of these courts may play a crucial role in improving human rights in the region.

Our analysis of the state of reform of military courts in Latin America reveals two crucial findings. First, we contend that reform can be understood by examining the comparative strength of civilian reformers and military autonomy in each country. Where the two sides are relatively balanced, we see a state of contention where laws are improved, but the military resists full cooperation with them. Where the military is stronger, depending on the degree, we see only minor reform or no reform at all. Where civilian reformers have the upper hand, reform occurs to varying degrees depending on the extent of the advantage.

Second, the several cases that do not align with our model demand increased attention from scholars and activists. With the exception of Argentina, our cases of overachievement are at risk of backsliding. The reform efforts in Colombia appear to be merely a condition of increased military power in other areas, suggesting that if these were to diminish, the military—which remains extremely strong compared to civilian reformers—would reclaim jurisdiction over its forces in its own courts. Ecuador's reforms are recent and have occurred in the midst of Correa's rise to power on a tide of popularity. Should this diminish in the future, the military may very well reclaim powers it has lost since 2008 and perhaps even intervene directly in politics as it did in the 2000

coup. Our model does not suggest a permanence to the current state of reform in Ecuador. Likewise, Nicaragua has the potential to see a reversal. No recent events suggest the military is seizing more power, but conflict between parties has escalated in recent years under the presidency of former Sandinista leader Ortega. Thus, the potential exists for the military to become partisan once again. If so, the current balance of power suggests that reversal of military court reform could occur.

Those cases that have underachieved in our model, excluding Chile, are confronting significant internal security threats. In the face of these threats, we have witnessed the military seize more institutional power in Brazil and Mexico than predicted. Taken in the context of the broader use of military tribunals in the United States in the war on terror, it provides further necessity for scholars and practitioners to examine and protect against the encroachment of military judicial power where security threats exist. In addition, while Peru fits our model, the presence of a significant internal security threat, in the form of the Shining Path guerrillas and various drug syndicates, suggests that it will continue to be a problematic case in the region and may even deteriorate further. Accordingly, human rights activists should focus on this key issue of military court reform in these three cases, as well as in Colombia.

## Notes

1. We use the term *human rights violations* to refer to the subset of civil and political rights commonly referred to as physical integrity rights, which include extrajudicial murder, disappearance, torture, and political imprisonment. See David L. Cingranelli and David L. Richards, "Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights," *International Studies Quarterly* 43 (1999): 407–18.
2. There is a large debate over whether the use of military courts to try members of the military for ordinary civilian crimes is a threat to civil–military relations. See, e.g., the International Society of Military Law and the Law of War, "Recueils of the Seminar on Military Jurisdiction" (Rhodes, Greece, October 10–14, 2001). There is a consensus, however, that military jurisdiction over its personnel when accused of human rights violations is a threat to civil–military relations and that such proceedings do not satisfy

the requirement for effective judicial remedy. See, e.g., Federico Andreu-Guzma'n, ed., *Military Jurisdiction and International Law* (Geneva: International Commission of Jurists, 2004), 11–13 and 20–26.

3. Human Rights Watch, *War without Quarter: Colombia and International Humanitarian Law* (New York: Human Rights Watch, 1998), 57.

4. See Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review* 78 (1990): 449–514.

5. Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, August 16, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 89 (2001), par. 96.

6. Ignacio Sa'nchez-Cuenca provides a basic framework for the rule of law, which he defines as *compliance* with the law when it is "general, public, prospective, clear, consistent, per- formable, and stable." See Ignacio Sa'nchez-Cuenca, "Power, Rules, and Compliance," in *Democracy and the Rule of Law*, ed. Jose' Mar'ia Maravall and Adam Przeworski (New York: Cambridge University Press, 2003), 69. Sa'nchez-Cuenca adds the essential eighth element—compliance—to the seven basic elements of the rule of law outlined in Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969).

7. Guillermo O'Donnell, "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion," in *The (Un)Rule of Law and the Underprivileged in Latin America*, ed. Juan E. Me'ndez, Guillermo O'Donnell, and Paulo Se'rgio Pinheiro (Notre Dame, IN: University of Notre Dame Press, 1999), 303–37.

8. Joe Foweraker and Roman Krznaric, "The Uneven Performance of Third Wave Democracies: Electoral Politics and the Imperfect Rule of Law in Latin America," *Latin American Politics and Society* 44, 3 (2002): 29–63.

9. O'Donnell, "Polyarchies and the (Un)Rule of Law," 318.

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11. For an excellent review of the literature on "civil–military challenges," see Douglas Bland, "A Unified Theory of Civil–Military Relations," *Armed Forces & Society* 26 (1999): 7–26. While few scholars examine the role of military courts explicitly, a notable exception

is David Pion-Berlin, "Informal Civil Military Relations in Latin America: Why Politicians and Soldiers Choose Unofficial Venues," *Armed Forces & Society* 36 (2009): 526–44.

12. Harold Trinkunas, "Crafting Civilian Control in Emerging Democracies: Argentina and Venezuela," *Journal of Interamerican Studies and World Affairs* 42, 3 (2000): 77–109; Samuel Fitch, *The Armed Forces and Democracy in Latin America* (Baltimore: Johns Hopkins University Press, 1998).

13. Brian Loveman and Thomas Davis, Jr., eds., *The Politics of Anti-politics: The Military in Latin America* (Wilmington, DE: Scholarly Resources, 1997).

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23. Defined as those with "Polity Scores" of 6 or higher (on the –10 to 10 scale) in 2008. We exclude nondemocracies to allow for better comparison among cases. Civil–

military relations behave much differently in these settings: either civilian courts are not independent and complicit in shielding the military, or separate systems exist and we would not predict reform under any circumstances. Haiti (5) and Venezuela (5) are classified as anocracies, while Cuba (-7) is classified as a fully institutionalized autocracy. See Monty Marshall and Keith Jagers, "Polity IV Project: Political Regime Characteristics and Transitions 1800–2008," 2009, <http://www.systemicpeace.org/polity/polity4.htm>.

24. Union of International Associations, *Yearbook of International Organizations* (Munich: De Gruyter Saur, 2009). This includes all confirmed, active NGOs operating in the country. Populations are from the UN Department of Economic and Social Affairs. See United Nations Department of Economic and Social Affairs (Population Division). 2009. "World Population Prospects: The 2008 Revision Population Database." Available at: <http://esa.un.org/unpp/index.asp?panel=1>.

25. NGOs per 100,000 in population for the region are as follows: Argentina (9.65), Bolivia (15.95), Brazil (2.35), Chile (17.14), Colombia (5.75), Costa Rica (38.99), Dominican Republic (12.81), Ecuador (17.52), El Salvador (18.32), Guatemala (9.93), Honduras (14.05), Mexico (3.55), Nicaragua (18.28), Panama (37.80), Paraguay (19.37), Peru (8.42), and Uruguay (58.69).

26. Monty Marshall and Keith Jagers, "Polity IV Project: Political Regime Characteristics and Transitions, 1800–2008, Dataset Users' Manual," 2009, 25, <http://www.systemic-peace.org/inscr/inscr.htm>.

27. PARCOMP scores for the region are as follows: Argentina (4), Bolivia (3), Brazil (4), Chile (5), Colombia (3), Costa Rica (5), Dominican Republic (4), Ecuador (3), El Salvador (4), Guatemala (4), Honduras (4), Mexico (4), Nicaragua (4), Panama (5), Paraguay (4), Peru (4), and Uruguay (5).

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29. Rule of law scores for the region are as follows: Argentina (-0.61), Bolivia (-1.12), Brazil (-0.30), Chile (1.25), Colombia (-0.50), Costa Rica (0.44), Dominican Republic (-0.60), Ecuador (-1.23), El Salvador (-0.63), Guatemala (-1.10), Honduras (-0.89), Mexico (-0.64), Nicaragua (-0.86), Panama (-0.20), Paraguay (-1.03),



Peru (-0.74), and Uruguay (0.50).

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33. RESDAL, *Comparative Atlas*, 98. Personnel for Costa Rica and Panama are calculated estimates based on personnel figures per 1,000 population available from *World Military Expenditures and Arms Transfers (WMEAT) 1995-2005*, 29th ed. (Washington, DC: Central Intelligence Agency, 2005). The number of military personnel per ten thousand members of the national population for the region is as follows: Argentina (18), Bolivia (43), Brazil (17), Chile (42), Colombia (66), Costa Rica (20), Dominican Republic (45), Ecuador (27), El Salvador (23), Guatemala (10), Honduras (14), Mexico (23), Nicaragua (17), Panama (38), Paraguay (19), Peru (30), and Uruguay (74).

34. See RESDAL, *Comparative Atlas*, 99, 81, for conscription and budget office information. Military versus civilian defense minister information is from each country's Ministry of Defense Web site (all accessed March 23, 2010). The following countries

have conscription: Bolivia, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Mexico, and Paraguay. The following countries have active-duty military ministers of defense: Dominican Republic, El Salvador, Guatemala, and Mexico. In Peru, an active-duty member of the military can be the minister of defense, but civilians have held the post since 2006. The following countries have active-duty military heads of the military budget office: Bolivia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, and Paraguay.

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### **Bios**

Brett J. Kyle is a PhD candidate in political science at the University of Wisconsin–Madison. He has published on Latin American politics in the *Washington Report on the Hemisphere*, and his research focuses on democratic consolidation and military politics.

Andrew G. Reiter is assistant professor of politics at Mount Holyoke College. He is the coauthor of *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010) as well as numerous articles appearing in journals such as *Human Rights Quarterly* and *Journal of Peace Research*. His research focuses on conflict resolution and accountability for human rights violations.