London, 17th August 2015

Honorables Magistrados y Magistrada

CORTE CONSTITUCIONAL DE COLOMBIA

M.P. MYRIAM ÁVILA ROLDÁN
E. S. D.

Asunto: Presentación de escrito de *amicus curiae*

Presentado por: Smita Shah, Paul Clark, Garden Court International, Garden Court Chambers and Jelia Sane, Doughty Street Chambers

Referencia: Intervención en el proceso No. D-10903

Norma revisada: Acto Legislativo 01 del 25 de junio de 2015 "por el cual se reforma el artículo 221 de la Constitución Política de Colombia"

Respetados Magistrados y Magistradas:

Yo, *Smita Shah,* identificada como aparece al pie de mi firma, representante de la organización *Garden Court International, Garden Court Chambers* y obrando en calidad de *amicus curiae*, respetuosamente presento la siguiente intervención en el proceso de constitucionalidad referenciado, presentando a continuación las consideraciones jurídicas que, desde nuestra respetuosa opinión, resultan relevantes para el estudio de la demanda en referencia por esta Honorable Corte.

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INTRODUCTION

1. This amicus curiae submission is respectfully presented to the Constitutional Court of Colombia in connection with the Court's examination of the Acto Legislativo no. 1 of 2015 which proposes to amend Article 221 of the Constitution of Colombia related to military justice reform[1]. Annex 1 contains details of the authors of this Amicus brief. Annex 2 contains a list of those who have endorsed the Amicus brief.

2. The Constitutional Court will be alive to the wider regional and international importance of reforms to military justice laws within Colombia, and the concomitant attention that they

[1] The Legislative Act no.1 of 2015 seeks to amend the existing Article 221 of the Constitution of Colombia, which reads as follows:

> *Military courts martial or tribunals shall take cognizance, in accordance with the provisions of the Military Penal Code, of crimes committed by members of the Public Forces in active service and in connection with that service.*

The amendment proposed is:

> *Courts martial or military tribunals shall have jurisdiction over punishable conduct committed by members of the Fuerza Publica in active service, and in relation with such service, in accordance with the norms of the Military Criminal Code. Such courts shall be comprised of active or retired members of the Fuerza Publica.*
>
> *International Humanitarian Law shall apply to the investigation and prosecution of punishable conduct committed by members of the Fuerza Publica during the course of an armed conflict or of hostilities that satisfy the objective criteria set out in IHL.*
>
> *Judges and prosecutors of the ordinary courts or military or police justice must be trained in IHL and have adequate knowledge thereof.*

will garner. This amicus curiae submission seeks to draw the Court's attention to specific relevant international and regional norms which, we hope, will assist the court in its deliberations in respect of the Acto Legislativo.

3. The overriding concern of this amicus curiae submission is that the amendment proposed will require the application of *only* international humanitarian law, i.e., the law of armed conflict (hereafter 'IHL'), and not applicable international human rights law, (hereafter 'IHRL') to the investigation and prosecution of punishable conduct by members of the Public Forces and police during the course of armed conflict or hostilities. This would be inimical to the current internationally acknowledged inter-relationship between IHL and IHRL.

4. The Amicus would therefore respectfully seek to highlight the inter-relationship between IHL and IHRL. In so doing, it will refer to relevant international jurisprudence, including from the European Court of Human Rights (hereafter 'ECtHR') with reference to non–international armed conflict (hereafter 'NIAC') The latter is particularly useful because the ECtHR has developed a substantial jurisprudence on a variety of non-international armed conflicts within it region.

5. The authors are guided by both regional and domestic practice regarding the submission of amici curiae briefs. Article 2(3) of the Rules of Procedure of the Inter-American Court of Human Rights states:

> *[…] the expression "amicus curiae" refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject matter of the proceeding by means of a document or an argument presented at a hearing.*

6. The Inter-American Court of Human Rights has highlighted the general value of amici curiae briefs: see, *inter alia*, the Court's judgment in *Kimel v Argentina* at paragraph 16:[2]

> *[…] the Court notes that amici curiae briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court.*

7. Hence, they may be submitted at any stage during proceedings before the final judgment in the case.

8. Furthermore, in accordance with the usual practice of the Court, amici curiae briefs may even address matters related to compliance with the judgment. On the other hand, the Court emphasizes that the issues submitted to its consideration are in the public interest

[2] I/A Court H.R., Caso Kimel Vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 2 de mayo de 2008 SerieC No. 177, paragraph 16, available at http://www.corteidh.or.cr/casos.cfm .

or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, amici curiae briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court."

9. In the Colombian context, the use of amicus briefs is contemplated by Art 13 of Decree No. 2067 of 4 September 1991:

> *El magistrado sustanciador podrá invitar a entidades públicas, a organizaciones privadas y a expertos en las materias relacionadas con el tema del proceso a presentar por escrito, que será público, su concepto sobre puntos relevantes para la elaboración del proyecto de fallo. La Corte podrá, por mayoría de sus asistentes, citarlos a la audiencia de que trata el artículo anterior. El plazo que señale, el magistrado sustanciador a los destinatarios de la invitación no interrumpe los términos fijados en este Decreto. El invitado deberá, al presentar un concepto, manifestar si se encuentra en conflicto de intereses*

10. The Constitutional Court upheld the provision and dismissed the claim of unconstitutionality in its Judgment C-513/92 of 10 September 1992. The Court developed guidance as to the factors material to determining whether to grant admission of amici curiae submissions. The factors militating in favour of acceptance include where the purpose of a brief is to provide evidence, information or opinion in cases of general public interest; where the aim of the brief is to illustrate and not to define or decide matters before the Court or to influence its final decision; and where the intervention is designed to be impartial. It was also noted that interventions assist in the aim of democratic participation provided for by the Colombian Constitution, thereby creating a presumption in favour of acceptance.

11. This brief has been prepared taking full account of the Constitutional Court's guidance. It begins by setting out the current position at international law as to whether IHRL applies during armed conflict (I). In a second part, it considers the specific nature of the relationship between IHL and IHRL (II). Third, it provides an illustration of the relevance and application of IHRL to armed conflict, by reference to some of the procedural requirements of the right to life.

I. APPLICATION OF IHRL TO ARMED CONFLICT

12. It is worth noting that the ideas that IHL[3] and IHRL[4] are distinct and mutually exclusive bodies of law, and that IHL could be applied 'exclusively', are necessarily dependent upon

[3] IHL is commonly referred to as the laws and custom of warfare, which encompass treaty law such as the Four Geneva Conventions, custom and state practice of warfare.

[4] IHRL is commonly considered to be the body of treaty and custom which encompass United Nation Human Rights treaties, provisions within the United Nations Charter and regional human rights

an absolute separation of peace from war.[5] The reality of modern day warfare is that there is fluidity in the conduct, location and nature of hostilities, and that there is, therefore, no longer a clear distinction between periods of peace and war in many armed conflicts around the world today.

A. Jurisprudence of the International Court of Justice

13. In its *Advisory Opinion on the Legality or Threat of Use of Nuclear Weapons* (8th July 1996),[6] the International Court of Justice (ICJ) was faced with an argument advanced by Malaysia, Salomon Islands and Egypt, as to the illegality of the use of nuclear weapons, that such use violated the right to life as per Article 6 of the United Nations International Covenant on Civil and Political Rights (1996, hereafter ICCPR).[7] The ICJ put beyond doubt the principle that the ICCPR – and IHRL more generally – applies at times of armed conflict.

14. In *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9th July 2004)[8], the Court addressed expressly the legal regimes applicable in armed conflict. Having confirmed the application of the Geneva Conventions, it went on to consider IHRL:

> *More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights.*

15. Around a year and a half later, the ICJ delivered its judgment in *Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)* (19th December 2005)[9], following the same approach. Having noted its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it held as follows (at 216):

> *both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.*

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mechanisms such as the Inter – American Court of Human Rights and Organisation of American States and the European Court of Human Rights and the Council of Europe.

5 It is worth noting that the origins of this idea – purportedly in classical international law – are highly questionable. As early as 1872, scholars argued that "there are natural human rights that are to be recognized in times of war as in peace- time", Johann Caspar Bluntschli, Das moderne Völkerrecht der civilisierten Staaten, 3rd ed., Beck, Nördlingen 1878, para. 529.

6 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996.

7 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 17. See Christopher J. Greenwood, "*Jus bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion", in: Laurence Boisson de Chazournes and Philippe Sands (eds.), International Law, the International Court of Justice and Nuclear Weapons, Cambridge University Press, Cambridge, 1999, p. 253.

8 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, International Court of Justice (ICJ), 19th December 2005.

9 *Case Concerning Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda),* I.C.J. Reports 2005, p. 168

B. State practice & the United Nations

16. United Nations Security Council Resolution 1483(2003) (concerning the situation in Iraq), sets out the basic principles of international law applicable to the occupation and reconstruction of Iraq. It required all "involved" to fulfil their obligations under international law, especially those according to the Geneva Conventions (para. 5), and requests the Secretary-General's Special Representative for Iraq to work for the promotion of human rights protection (para. 8 g).

17. This cumulative application of IHL and IHRL is equally apparent in the United Nations Secretary General's (hereafter UNSG) report to the Security Council, "On the Protection of Civilians in Armed Conflict",[10] in which the UNSG referred to IHL, IHRL, and refugee law as the "essential tools for the legal protection of civilians in armed conflicts".

C. The European Court of Human Rights

18. As a general principle the ECtHR has long recognised that the obligation of Contracting States to secure the rights and freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, hereafter 'ECHR')[11] to those within their jurisdiction [12] does not cease with the outbreak of hostilities. There is a large body of case law underpinning this point (some of which is examined in more detail below). The ECtHR has considered the application of the ECHR in a number of armed conflicts, including i) Turkish military operations in northern Cyprus in the 1970s; [13] ii) the armed conflict in the Chechen Republic of the Russian Federation;[14] and iii) British military operations in Iraq. [15]

19. The continued application of the ECHR in times of war was recently reaffirmed by the Grand Chamber in *Hassan v United Kingdom*,[16] a case brought by an Iraqi national, who complained *inter alia* that his brother's arrest and detention by British forces in Iraq in 2003 was in breach of Article 5 ECHR.

D. Opinio Juris

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10 UN Doc. S/1999/957

11 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, *as amended by Protocols Nos. 11 and 14*, 4 November 1950

12 Article 1 ECHR (obligation to respect human rights): "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"

13 See for example in *Cyprus v Turkey*, Judgment, 10 May 2001 (*inter alia* the Court found continuing violations of Article 2 in respect of the failure of the Turkish authorities to conduct effective investigations into alleged enforced disappearances of Greek-Cypriot citizens)

14 See for example *Isayeva v Russia*, Judgment, 24 February 2005 (violation of Article 2 in respect of the disproportionate use of force during the 1999-2000 military campaign).

15 See for example *Al Skeini and Others v United Kingdom, Judgment,* Grand Chamber, 7 July 2011 (violation of Article 2 owing to the failure to conduct an effective investigation into the deaths of Iraqi civilians killed during security operations)

16 *Hassan v United Kingdom*, Judgment (Merits), Grand Chamber, 16 September 2014.

20. IHRL is a set of common values that no state may revoke, even in times of war.[17] This current of opinion is reflected in the 'Turku Declaration',[18] which is the work of a group of experts who met privately for the purpose of considering, in a neutral forum, minimum humanitarian standards. We wish emphasise that many of its provisions have long been part of general international law, and moreover, it was drawn up by qualified specialists in order to meet a need acknowledged by the international community. It is, therefore, an important indicia of *opinio juris.*

21. The Declaration recognises that, in practice the distinction between war and peace is a 'grey zone'. As a consequence of this, the Turku Declaration makes clear that legal grey zones are to be filled by the cumulative application of human rights law and international humanitarian law.

II. NATURE OF THE RELATIONSHIP BETWEEN IHL & IHRL

22. The question arises, then, as to the specific nature of the relationship between IHL and IHRL.

A. The nature of '*lex specialis*'

23. In the *Advisory Opinion on the Legality or Threat of Use of Nuclear Weapons* the ICJ held that

> *In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.*

24. The ICJ held that Article 6 of the ICCPR (the right to life)[19] is a non-derogable right and that it therefore applies in armed conflict in addition to the application of the Geneva

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17 See, among many, Christian Tomuschat, "Obligations arising for States against their will", Recueil des Cours, No. 241, Vol. IV/1993, Nijhoff , The Hague, 1994, p. 195. It is also worth noting that a special edition of the ICRC Review is dedicated to the convergence of international humanitarian and human rights law.

18 UNDoc.E/CN.4/Sub.2/1991/55.

19 Article 6 provides as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation

Conventions. This did not, of course, mean that killing during warfare was unlawful *per se*. It meant, rather, that even during hostilities it is prohibited to "arbitrarily" deprive someone of their life.

25. In the *Nuclear Weapons* Opinion, the ICJ addresses the specific nature of the relationship between IHL and IHRL. It is vital to emphasise that – in light of the above – its designation of IHL as *lex specialis* does not, and cannot, mean the disapplication of IHRL. It refers, rather, to a much more nuanced relationship, of which one aspect is that the meaning of "arbitrarily" is to be taken from IHL.

26. Taking the opportunity to develop its guidance further in this area, the ICJ held in *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* as follows:

> *[…] there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.*

27. It is clear that the *lex specialis* character of IHL is not being used to displace IHRL – it is, rather an indication that human rights norms should be interpreted in light of IHL.

28. In *Hassan v United Kingdom* (noted above at paragraph 18 of this amicus) the UK Government contended that the detailed procedural safeguards enshrined in Article 5 of the ECHR (the right to liberty) were extinguished by operation of humanitarian law as *lex specialis*, which – they contended – provided a comprehensive framework for the capture and detention of actual or suspected enemy combatants as prisoners of war or pending determination as to whether they were entitled to such status.[20]

29. While the Grand Chamber of the ECtHR concluded that Article 5 had not been breached on the facts of this particular case, the argument that the Convention was not applicable during active hostilities was rejected. However the ECHR could not be interpreted in a

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assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

[20] Specifically Article 2 common to all four 1949 Geneva Conventions; Articles 4(A), 5, 12, 21 and 118 of the Third Geneva Convention (1949); and Articles 42, 43, 78, 132 and 133 of the Fourth Geneva Convention (1949).

vacuum, but with regard to other rules of international law, including IHL. To that end, it was highly relevant that:

> *The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. The provisions in the Third and Fourth Geneva Conventions relating to internment, at issue in the present application, were designed to protect captured combatants and civilians who pose a security threat. The Court has already held that Article 2 of the Convention should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict" (see Varnava and Others v. Turkey [GC], nos. 16064/90, 1 6065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 185, ECHR 2009), and it considers that these observations apply equally in relation to Article 5' (at [102] emphasis added)*

30. Nonetheless, as the Grand Chamber made clear:

> *even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.' (at [104] emphasis added)*

31. The minority reached the same conclusion as regards the co-existence of both regimes, by reference to the ECHR's derogation clause.[21] It observed as follows:

> *The Convention applies equally in both peacetime and wartime. That is the whole point of the mechanism of derogation provided by Article 15 of the Convention. There would have been no reason to include this structural feature if, when war rages, the Convention's fundamental guarantees automa-tically became silent or*

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21 Article 15 ECHR (Derogation in times of public emergency):

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

> *were displaced in substance, by granting the Member States additional and unwritten grounds for limiting funda-mental rights based solely on other applicable norms of international law. Nothing in the wording of that provision, when taking its purpose into account, excludes its application when the Member States engage in armed conflict, either within the Convention's legal space or on the territory of a State not Party to the Convention.*[22]

32. It follows that the doctrine of *lex specialis* does not operate to automatically exclude the rights guaranteed by the Convention by reference to humanitarian law. However, in assessing the legality of a given operation, the detailed regime established under the 1949 Geneva Conventions, Additional Protocol I (1977) and Hague Conventions (1899 and 1907) implies that recourse to human rights norms to fill perceived gaps in protection is less likely to be necessary.

33. Whilst the United Nations Human Rights Committee[23] tends not to use the language of '*lex specialis*', there are important parallels between the approaches taken. In its *General Comment No. 31*, it explained that[24]

> *the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.*

34. Although there is much in common here with the approach of the ICJ, it is submitted that by referring to the notion of complementary law rather than *lex specialis*, a clear indication is given that there is no need to select one body of law over the other.

35. Professor Marco Sassòli and Laura Loson argue that the proper approach to mediating the relationship between IHL and IHRL is "by reference to the principle '*lex specialis derogat legi general'*", i.e., that the rule should be chosen which is more appropriate to the context.[25]

36. As Sassòli and Loson point out, even the '*lex specialis*' paradigm does not necessarily result in IHL prevailing over IHRL: "The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it determines which rule prevails over another in a particular situation." The other branch of law, the *lex*

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22 Partially dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva at [8].

23 The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties, see also http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx

24 Entitled The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting)CCPR/C/21/Rev.1/Add.13 (26 May 2004), at 11.

25 Marco Sassòli & Laura Loson, "The legal relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non international armed conflict" (2008) 90 Intl Rev Red Cross 600.

generalis,

> *still remains in the background. It must be taken into account when interpreting the lex specialis; to the extent possible, an interpretation of the lex specialis that creates a conflict with the lex generalis must be avoided, and, instead, an attempt to harmonize the two norms made.*

37. For example, for the international standards of detention one should look at the human rights rules, which may be more up to date and elaborated. With regard to the prohibition on torture, it is IHRL that provides the relevant definition of torture. In terms of the right to life, plainly killing is not unlawful in armed conflict – but nor is the right to life an absolute right in IHRL. In this situation the international humanitarian rules on distinction between military and civilian objectives may clarify the concept of arbitrary killing under human rights conventions during conflicts.

B. Application to non-international armed conflict

38. Having considered the general norms which govern the application of both IHL and IHRL to armed conflict, this section focuses upon non-international armed conflict, which is pertinent to the context within which the proposed Constitutional Amendment is likely to apply, such in circumstances of militarised policing and military operations outside the conduct of hostilities. It is acknowledged that the norms regulating internal armed conflicts or non-international armed conflict are often much less developed. Consequently:

> *the rationale that makes resort to humanitarian law as lex specialis appealing - that its rules have greater specificity - is missing in internal armed conflicts. While the humanitarian law of international armed conflicts is copious and painstakingly detailed, the humanitarian law of internal conflicts is quite spare and seldom specific. In most internal conflicts, the only applicable treaty is Common Article 3 of the Geneva Conventions 1949, a legal regime consisting of 263 words* [26]

39. In respect of protecting the right to life for example, the content of Common Article 3 (found within each of the Four Geneva Conventions of 1949 and their Additional protocols of 1977[27]) is worth noting. Common Article 3 is applicable to an armed conflict not of an international nature occurring within the territory of a High Contracting party to the Convention. It stipulates that

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[26] *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya,* W. Abresch, European Journal of International Law, Vol 16. No. 4, 741-767, at p. 747.

[27] Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field,1949, Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949, Geneva Convention (III) on Prisoners of War, 1949, Genevan Convention (IV) on Civilians, 1049, Additional protocol (I) to the genevan Conventions, 1977, and Additional Protocol (II) to the Genevan Conventions, 1977.

> *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture […] (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

40. This is supplemented by Additional Protocol II (1977), which expands on the guarantees for the humane treatment of persons not taking part in the hostilities.[28] Additional Protocol II provides that civilians shall not be targeted and enjoy 'general protection against the dangers arising from military operations'. [29]

41. There is a broad consensus that Common Article 3 and Protocol II fail to effectively regulate many of the aspects of internal armed conflicts.[30] Consistent with the principle of *lex specialis*, these weaknesses in IHL as applicable to NIACs invite a greater reliance on human rights norms.

42. Turning again to the case law of the ECtHR, to date, the Court has assessed the conduct of hostilities in three internal conflicts- between the United Kingdom and the IRA, Turkey and the PKK, and Russia and the separatists in Chechnya. In each case, the respective Governments denied the existence of an internal armed conflict, characterizing the events as terrorism or banditry. This stance is by no means uncommon and clearly has no bearing on the prospective applicability of the laws of war. Nonetheless,

> *[…] the ECtHRs jurisprudence on the conduct of hostilities is so interesting and important precisely because it has unfolded in the context of unofficially acknowledged armed conflicts […] [it] has the potential to induce greater compliance, because it applies the same rules to fights with common criminals, bandits and terrorists, as to fights with rebels, insurgents and liberation movements*
>
> *[…]*

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28 Part II (Humane treatment), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 1977

29 Article 13 Additional Protocol II (1977)

30 *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya,* W. Abresch, European Journal of International Law, Vol 16. No. 4, 741-767, at p. 748; *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, K. Watkin, American Journal of International Law, Vol. 98, No. 1 (Jan., 2004), pp. 1-34; The means and methods of warfare in internal conflict have been described as being 'at the "vanishing point" of international humanitarian law', see *'At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts'*, 45 *German YIL* (2002) 115, 116

'There is no place for great optimism regarding what, for example, the ECtHR might achieve in Chechnya, but given that Russia at least accepts that the ECHR is a relevant source of law, its direct and application to the conduct of hostilities must be considered a promising strategy' [31]

III. AN ILLUSTRATION: THE RIGHT TO LIFE

43. The application of various aspects of IHRL, including the right to liberty, for example, is illustrated by the case law already cited in this amicus curiae submission. A further crucial contribution of IHRL (in the context of the jurisprudence of the ECtHR) is to the regulation of internal conflicts relates to its application of the procedural component of the right to life. This section provides an illustration of the relationship between IHRL and IHL by reference to judgments of the ECtHR.

44. According to the Court's settled case-law, the positive obligation to protect the right to life necessarily implies that there should be some form of effective investigation when individuals have been killed as a result of the use of force, including in the context of armed conflict.[32]

45. The ECtHR has developed a number of principles to be followed for an investigation to comply with the requirements of the Convention. It is submitted that this system of accountability has much to offer in terms of controlling the use of force in NIACs, particularly when compared to the still evolving framework provided by humanitarian law.

46. The Court has emphasised that state authorities must act *propio motu (initiate its own investigations)* 'once the matter has come to their attention'. It is not necessary for the next of the kin of the deceased to lodge a formal complaint, nor can they be expected to take responsibility for the conduct of any investigative procedures.[33]

47. For the investigation to be effective, it must be guided by the following standards:

    a. The investigation must be capable of 'ascertaining the circumstances in which the incident took place and of leading to a determination of whether the force used in such cases was or was not justified in the circumstances'.

    b. Reasonable steps must be taken to secure key evidence (for example eye witness testimony, forensic evidence and, where appropriate, an autopsy). A requirement of promptness and reasonable expedition is implicit in this context.

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31 *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya,* W. Abresch, European Journal of International Law, Vol 16. No. 4, 741-767, at pp. 757 and 750.

32 *McCann v UK, Varnava and Ors v Turkey*, 18 September 2009, Grand Chamber; *Isayeva v Russia* 24 February 2005, *Abuyeva and Others v Russia* 2 December 2010, *Kadirova and Others v Russia* 27 March 2012

33 *İlhan v. Turkey*, no. 22277/93, 27 June 2000, para. 63, ECHR 2000-VII; *Rantsev v. Cyprus* and Russia, no. 25965/04, 7 January 2010, para. 232; *Al-Skeini and Others v. United Kingdom*, no. 55721/07, 7 July 2011, para. 165

c. The persons responsible for the conduct of the investigation must be independent rom those involved in the impugned use of force.

d. The investigation must be capable of facilitating the identification and punishment of the alleged perpetrators and be subjected to a 'sufficient element of public scrutiny….to secure accountability in practice as well as in theory'

e. Finally, it must make provision for the involvement of the family of the deceased insofar as this is necessary 'to safeguard [their] legitimate interests'.[34]

48. This strict scrutiny of the use of force is not restricted to the actions of those agents of the state who were directly involved but extends to '*all the surrounding circumstances, including such matters as the planning and control of the actions under examination'*. IHRL plugs the gap in IHL regarding the manner of investigation and procedural safeguards. Importantly IHRL, as demonstrated by the rich case law of the ECtHR provides for the rights of victims and their families to accountability, reparations and justice.

IV. CONCLUSION

49. A domestic court such as the Constitutional Court of Colombia and her lower tribunals are in a unique position to evaluate both IHL and IHRL. Indeed this amicus curiae submission considers that they must examine both when considering the actions of the Public Forces and Police in armed conflict scenarios. Both IHL and IHRL are sources of important international legal obligations promulgated by the community of nations globally and accepted by the state of Colombia. They apply not only to the Government, the Public Forces, the police but crucially to courts' adjudication of such matters[35].

50. In the specificities of the Colombian context, both IHL and IHRL have much to offer. When evaluating the conduct of members of the Public Forces and the police, there are obvious applications of both areas of law – *necessarily including IHRL* - in respect of militarised policing by member of the Public Forces, when considering the actions of the police when confronting armed criminal gangs, and avoiding scandals such as the 'Falsos positivos' of recent times.[36] Full recognition and application of IHRL within the context of armed conflict would ensure that members of both the Public forces and the police are aware of permitted conduct, and preserve the chain of command. A secondary result, would be to bolster public confidence in both bodies. Where conduct has fallen foul of both IHL and

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[34] See generally, European Court of Human Rights *Bazorkina v. Russia at [117-119] and the cases cited therein; Aslakhanova and Others v Russia at 121*

[35] Colombia is party to all Four Geneva Conventions, both Additional Protocols of 1977 and a raft of United Nations Human Rights treaties - see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=37&Lang=EN and is a member of the organisation of American States and regional human rights treaties therein.

[36] http://www.semana.com/buscador?query=falsos%20positivos%20practica%20vieja%20ejercito , http://www.bbc.co.uk/news/world-latin-america-32280039 , http://news.bbc.co.uk/1/hi/world/americas/8038399.stm , https://www.hrw.org/news/2015/06/24/colombia-top-brass-linked-extrajudicial-executions

IHRL, IHRL in particular offer redress to victims and an opportunity for the Public Forces to re-calibrate their behaviour. Such an opportunity would be lost without the application of IHRL to such matters. As suggested in this amicus, IHL has neither the sophistication, nor the wealth jurisprudence of as an interpretive aid to procure such benefits.

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ANNEX 1 WHO THE AMICI ARE

The Amici are:

1. Smita Shah, Barrister of Garden Court Chambers. Smita is a specialist in international human rights and humanitarian law. She was a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University in 2011 and holds a Masters in Human Rights from the Institute of Commonwealth Studies, University of London and an LLM in International and Comparative Law from Columbia University, New York. She has worked in a number of countries including Palestine, South East Turkey, Colombia and Nigeria on issues concerning international human rights and humanitarian law.

2. Paul Clark, Barrister of Garden Court Chambers, Paul has extensive experience of public international law and international criminal practice, including cases before the International Criminal Court, the Special Court for Sierra Leone and the International Criminal Tribunal for the Former Yugoslavia. His practice in both international and domestic courts is focused upon human rights and social justice in the criminal justice process.

3. Jelia Sane, Pupil Barrister of Doughty Street Chambers. Jelia has held legal roles in the Appeals Chamber of the International Criminal Court, the Office of the International Co-Prosecutor of the Extraordinary Chambers in Courts of Cambodia, and the Centre for Justice and International Law in Argentina where she took part in strategic litigation before the Inter-American Court of Human Rights. She has a strong interest in Colombia, having worked in Bogotá as a legal adviser for the Fundación Comité de Solidaridad con los Presos Políticos.

ANNEX 2 ENDORSING THE AMICUS

The Amicus is further endorsed by the following:

Stephen Grosz, QC (Hon), Solicitor, Chair of the Human Rights Committee of the Law Society of England and Wales.

Kirsty Brimelow QC, Barrister, Chair of the Bar Human Rights Committee of England and Wales

Joe Egan, Deputy Vice President of the Law Society of England and Wales

Tony Fisher, Solicitor, Council Member of the Law Society of England and Wales;

Robert Bourns, Solicitor, Council Member of the Law Society of England and Wales.

Sue Willman, Solicitor, Vice Chair, Colombia Caravana Internacional de Juristas.

Mark Cunningham QC, Barrister.

Jeffrey Forrest, Solicitor, Council Member of the Law Society, Director of Colombia Caravana Internacional de Juristas.

Professor Sara Chandler, Vice President of the Federation of European Bar Associations, Chair of Colombia Caravana Internacional de Juristas, Council Member of the Law Society of England and Wales.