THE HONORABLE FEDERAL SUPREME COURT JUSTICE GILMAR MENDES, RAPPORTEUR FOR THE ACTION FOR UNCONSTITUTIONAL REVIEW (ADI) Nº 5901

CONECTAS DIREITOS HUMANOS - ASSOCIAÇÃO DIREITOS HUMANOS EM REDE, non-profit association, qualifying as a Public Interest Organization for Civil Society, registered at CNPJ/MF nº. 04.706.954/0001-75, headquartered at Paulista Ave., 575, 19th floor, São Paulo – SP (Docs. 1, 2 e 3); the **ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC** at **YALE LAW SCHOOL** (Lowenstein Clinic or the Clinic), based at 127 Wall Street, New Haven, Connecticut, 06511, United States; **MASHA LISITSYNA**, based at 224 West 57 Street, New York, NY 10019; and **EUGENE R. FIDELL**, based at 127 Wall Street, New Haven, Connecticut, 06511, United States, duly represented by their lawyers, submit a brief and request acceptance as **AMICI CURIAE**, for the facts and reasons below:

I) ON THE SUBJECT MATTER OF THE ACTION

1. In summary, this Direct Action for Unconstitutionality Review (ADI, Ação Direta de Inconstitucionalidade), filed by the Socialism and Liberty Party (PSOL, Partido Socialismo e Liberdade) on February 2018, seeks a declaration of unconstitutionality of Law No. 13,491, of October 13, 2017, which amended article 9, item II, §§1 and 2 of the Brazilian Military Penal Code, corresponding to the jurisdiction over judgments of intentional killings committed by federal military personnel against civilians.

2. The plaintiff alleges that Law No. 13,491 (i) compromises the authority of the Jury Court, (ii) violates rules of impartial penal judgments, (iii) hinders the principle of equality before the law, (iv) undermines universal due legal process, and (v) contradicts international rules on human rights.

3. The Office for the General Counsel of the Federal Government has rejected the plaintiff's petition, arguing that the constitutional system of jurisdictions was not compromised. The Office argued that, as provided by Article 124 of the Brazilian Federal Constitution, "the Military Justice branch is responsible for processing and judging military offenses defined by law; therefore, once the military offenses are defined by law, the jurisdiction belongs to the Military Justice branch" (p. 27, motion 17131/2018). The Office added that "the merits of the bill that resulted in Law No. 13,491/17 were examined by the Subdepartment of Analysis and Monitoring of Government Policies of the Office of the President's Chief of Staff" (p. 28, motion 17131/2018).

4. Finally, the Federal Prosecution Office added an opinion stating its awareness of this Direct Action for Unconstitutionality Review and declaring its support for the plaintiff's petition that Law No. 13,491/2017 is unconstitutional. The Prosecution Office stated that the law contravened multiple constitutional precepts and violated human rights treaties ratified by Brazil.

5. The amici curiae accepted by the Honorable Rapporteur Justice in this case include the Brazilian Criminal Science Institute (IBCCRIM, Instituto Brasileiro de Ciências Criminais), the Military Prosecution Office, the Public Defender's Office of the State of Rio de Janeiro (DPE/RJ), and the Association of Judges of Rio Grande do Sul (AJURIS, Associação de Juízes do Rio Grande do Sul). The request to appraise the qualification of the International Bar Association's Human Rights Institute (IBAHRI) as amicus curiae is still pending.

II) ADMISSIBILITY AND INTERESTS OF THE AMICI CURIAE

6. Pursuant to Articles 7(2), Law No. 9,868/1999, and Art. 138 of the Civil Procedure Code, Law No. 13,105/2015, Conectas and the Lowenstein Clinic present this amicus brief to the Federal Supreme Court of Brazil in relation to Action for Unconstitutional Review No. 5901.

7. Reference to amicus curiae first appeared in Brazilian legislation in Laws No. 9,868/99 and 9,882/99, which describe the processing of Actions of Unconstitutionality Review and Actions Against the Violation of Constitutional Fundamental Rights, respectively. The intervention of third parties is described in Art. 138 of the Civil Procedure Code,[1] which acknowledges the importance of contributions from civil society to the Judiciary Branch on subjects of widespread effect and its role in assisting the Court with new arguments and information.

8. The legislative text and case law established that two factors govern the participation of civilian organizations as amicus curiae: (i) the relevance of the subject matter under discussion, regarding its social and political impact; and (ii) the representative capacity of the applicant and its substantial legitimacy.

9. As we shall now show, both requirements are present for the admission of the petitioners as amicus curiae in the case at hand.

II.A ON THE LEGITIMACY OF THE PETITIONER AND THE EXPERT COLLABORATORS

10. Conectas Direitos Humanos is a non-profit and non-economic civilian association, founded in September 2001, with the aim of strengthening and promoting respect for human rights in Brazil and the Southern Hemisphere; to this end, it is devoted to human rights education,

[1] BRASIL. Código de Processo Civil, art. 138: "O juiz ou o relator, considerando a relevância da matéria, a especificidade do tema objeto da demanda ou a repercussão social da controvérsia, poderá, por decisão irrecorrível, de ofício ou a requerimento das partes ou de quem pretenda manifestar-se, solicitar ou admitir a participação de pessoa natural ou jurídica, órgão ou entidade especializada, com representatividade adequada, no prazo de 15 (quinze) dias de sua intimação".

strategic advocacy and the promotion of dialog among civil society, universities, and international agencies involved in the defense of these rights.

11. Regarding the institutional purposes of the association, the following is a verbatim transcription of item VI, paragraph 1 of Article 3 and paragraph 1, sub-item "g" of the association's bylaws:

> Article 3 - The ASSOCIATION shall be governed pursuant to Law No. 9,790/99 and its purpose shall be to promote, support, monitor, and assess human rights projects in a national and international level, particularly:
>
> (...)
>
> VI – promotion and defense of human rights in a judicial setting.
>
> Paragraph 1 - In order to achieve its institutional goals, the ASSOCIATION may employ all legally allowed means, especially to: (...)
>
> g) Promoting judicial actions seeking to consolidate human rights.

12. Internationally, Conectas Direitos Humanos has consultative status with the United Nations Economic and Social Council (since 2006) and observer status with the African Commission on Human and People's Rights (since 2009), in addition to undertaking its customary work with the inter-American human rights system and the United Nations Human Rights Council's special procedures. Nationally, the entity is an active member of civilian councils that monitor the application of public policies involving human rights, such as the National Human Rights Council and the National Committee to Prevent and Punish Torture.

13. Conectas's mission is to promote the implementation of human rights and fight against inequality in order to obtain a fair, free, and democratic society. In performing its institutional purposes, the organization develops actions connected to the protection of rights, social and environmental development, and the strengthening of the democratic space, in Brazil and in the world.

14. Among the causes in which the petitioner is a participant before this Honorable Court, we may mention the following on subjects of public safety and criminal justice: Action Against the Violation of Constitutional Fundamental Rights ADPF No. 635, discussing the levels of violence and police brutality in the State of Rio de Janeiro, with Rapporteur Justice Edson Fachin; Action for Unconstitutionality Review ADI No. 5032, discussing the jurisdiction of the Military Justice branch in judging cases related to atypical military activities, with Rapporteur Justice Marco Aurélio; Action for Unconstitutionality Review ADI No. 3112, which involves the Disarmament Statute, with Rapporteur Justice Edson Fachin; Action Against the Violation of Constitutional Fundamental Rights ADPF No. 442, which refers to the decriminalization of abortions, with Rapporteur Justice Rosa Weber; Action for Unconstitutionality Review ADI No. 5708, on the decriminalization of cannabis for medical use, with Rapporteur Justice Rosa Weber; Special Appeal RE No. 635.659 on the decriminalization of drug possession for personal consumption, with Rapporteur Justice Gilmar Mendes; and Proposal for Binding Precedent PSV No. 125, which discusses the proportionality of heinousness of the offense described in §4 of art. 33 of Law No. 11,343/06.

15. In this action, Conectas has the technical support of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Masha Lisitsyna and Eugene R. Fidell, international experts on the subject discussed in this action.

16. The Allard K. Lowenstein International Human Rights Clinic is a Yale Law School course providing first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic has prepared briefs and other submissions for the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the African Court and Commission on Human and Peoples' Rights, the European Court of Human Rights, various bodies of the United Nations, and national courts, including courts within the United States and other countries in the Americas. The Clinic has a longstanding commitment to the protection of the right of access to justice, including fair trial and due process, and has a significant interest in the resolution of this case. The

Lowenstein Clinic wishes to thank Dianne Lake, Jake Murphy and Jessica Tueller for their contributions to the preparation of this brief.

17. Masha Lisitsyna, a former Yale World Fellow, is a human rights lawyer with more than 25 years of experience in advancing prevention, accountability, and reparations for torture. She specializes in litigation before U.N. treaty bodies and is a co-author of a Toolkit for Drafting Complaints to the UN Human Rights Committee and UN Committee against Torture. She is also a co-author (with Adriana Garcia and Ana-Elena Fierro Ferraez) of the Guide on Reparations for human rights violations: international and domestic judicial decisions (in Spanish) published in 2019 by CIDE University and the Federal Administrative Court of Mexico and of the book Who Polices the Police?: The Role of Independent Agencies in Criminal Investigations of State Agents (2021) (co-author with Ian Scott). She holds a law degree from Kyrgyz-Russian Academy of Education.

18. Eugene R. Fidell is an Adjunct Professor at New York University Law School and a Senior Research Scholar at Yale Law School. He has taught military justice at both of those institutions and at Harvard Law School and American University's Washington College of Law. He served as a judge advocate in the U.S. Coast Guard and has been both a prosecutor and defense counsel in courts-martial. His books include Military Justice: A Very Short Introduction (Oxford University Press 2016) and Military Justice: Cases and Materials (Carolina Academic Press 3d ed. 2020) (co-author). He has served as president of the National Institute of Military Justice and chair of the Committee on Military Justice of the International Society for Military Law and the Law of War and has participated in expert consultations on military justice convened by the Office of the UN High Commissioner for Human Rights.[2]

19. In view of the actions explained above, and because this is a public interest dispute, the law requires that the petitioners' be admitted as amicus curiae in the present Action for Unconstitutional Review.

[2] The participation as *amicus curiae* of a Clinic or Scholar affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

II.B) Relevancy of the matter and social repercussions

20. Law 13,491 (October 2017) amends the Military Penal Code and provides that intentional killings of civilians by federal military personnel will be tried by military courts. As a result, the civilian police no longer have the power to conduct investigations into federal military officials who kill civilians in the course of peace operations and actions to guarantee law and order, among other subsidiary activities. The investigation and trial of these crimes—which were previously conducted by civilian authorities and in civilian court—are now left in the hands of the military.

21. The implementation of this law conflicts with basic principles of justice and with Brazil's obligations under international law. Two cases, in particular, have made this conflict clear: the paradigmatic case of the shooting and killing of musician Evaldo Rosa and recycling collector Luciano Macedo,[3] in which ten soldiers who were present when the army fired into Rosa's mistakenly identified car were arrested but later released by the Superior Military Tribunal,[4] and the case of the Salgueiro killings, in which the investigations undertaken by the military have been criticized for ignoring evidence connecting military members to the killings of eight people during a joint police and military raid.[5]

22. The complaint filed by the Public Defender's Office of the State of Rio de Janeiro regarding the case of the Salgueiro killings in Sao Goncalo, which took place in the context of the Guarantee of Law-and-Order Operation, noted that investigations were undertaken within the framework of the Military Justice, the ineffectiveness of which has been widely reported:

> On November 11th, 2017, shooters opened fire on at least 11 people at the Salgueiro Complex, in Sao Goncalo, metropolitan region of Rio de

[3] *Exclusive: the disastrous Army Operation that led to the death of Evaldo Rosa.* Avaliable (only in Portuguese) at: https://apublica.org/2020/04/exclusivo-a-desastrosa-operacao-do-exercito-que-levou-a-morte-de-evaldo-rosa/. Last access on Feb. 19, 2021.
[4] IACHR. *Situation of human rights in Brazil* (12 February 2021) OEA/Ser.L/V/II Doc. 9 [339-40].
[5] *Killings in Sao Goncalo: documents reveal that investigators ignore evidence that links murders to military.* Available only in Portuguese at: https://epoca.globo.com/rio/chacina-em-sao-goncalo-documentos-revelam-que-investigadores-ignoraram-provas-que-ligam-assassinatos-militares-24889542.

> Janeiro. Eight people died and one was seriously injured on that day of the joint operation between the Civil Police and the Army, which had already been working under a Guarantee of Law-and-Order Decree (GLO) since July. Almost immediately, reports of witnesses and survivors who indicated possible involvement of the Army's special forces in the deaths came to light. They all coincided in saying that the shots had been fired from the forest, where men with black helmets and laser-sighted weapons were hiding. Two inquiries were then opened, one by the Public Prosecution's Office of the State of Rio and another by the Military Prosecution's Office, to ascertain what happened. And both ended up being archived.[6]

23. The Salgueiro case illustrates the problems caused by the lack of an independent authority with total jurisdiction over such cases, from the beginning of the investigation, for evidence collection, determination of precautionary measures, and trial.[7,8,9]

24. In 2018, A Pública[10] documented that there had been suspected connections between the army and at least 32 deaths since 2010, but many were not even registered in the records of the Army's Command or the Public Prosecution's Office. When a military officer does not immediately take responsibility for a shooting, the investigation is often halted due to the civil judicial police's lack of jurisdiction to independently investigate the case.

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[6] EL PAÍS, Chacina no Rio que pôs o Exército sob suspeita teve investigações arquivadas, 2019. Available only in Portuguese at https://brasil.elpais.com/brasil/2019/04/17/politica/1555513598_215678.html.
[7] Extra, Armed Forces change version on operation with seven deaths in São Gonçalo, 2021. Available only in Portuguese at https://extra.globo.com/casos-de-policia/forcas-armadas-mudam-versao-sobre-operacao-com-sete-mortes-em-sao-goncalo-22065586.html
[8] Globo, Investigation involving military officers from the Army does not evolve in the state of Rio, 2018. Available only in Portuguese at https://oglobo.globo.com/rio/investigacao-que-envolve-militares-do-exercito-nao-anda-no-estado-do-rio-22409017
[9] Época, THE LAYERS OF IMPUNITY THAT SPARE MILITARY OFFICERS FROM ACCOUNTABILITY FOR SLAUGHTER IN SÃO GONÇALO, 2021. Available in Portuguese at https://epoca.globo.com/rio/as-camadas-de-impunidade-que-poupam-militares-de-responsabilizacao-por-chacina-em-sao-goncalo-2-24889538
[10] A Pública, Army is accused of killing innocent people in public security operations. 2018. Available only in Portuguese at https://apublica.org/2018/10/exercito-e-acusado-de-matar-inocentes-em-operacoes-de-seguranca-publica/#Link1.

III) Argument: Intentional Killings of Civilians by Military Personnel Must Be Tried in Ordinary, Civilian Courts.

25. The contribution of the petitioner and the subscribing experts intends to offer this Supreme Court of Justice a retrospective view of the evolution of international standards regarding impartial justice, especially concerning human rights violations. As this intervention shows, international human rights law and jurisprudence make clear that jurisdiction over the investigation of crimes against life committed by military personnel against civilians cannot be transferred to military courts; therefore, Law 13,491 should be declared unconstitutional.

26. Law 13,491 violates Brazil's international and regional human rights obligations by permitting judges and investigative bodies that are not insulated from the military hierarchy to prosecute human rights violations committed by federal military personnel, crimes that are beyond the scope of military competence. The right of access to judicial recourse, which includes the right to a fair trial before an independent and impartial tribunal and the interlinked procedural obligation to investigate the events that resulted in violations, is fundamental to international human rights law. Human rights bodies have found that military tribunals and investigative bodies lack the independence and impartiality to guarantee the right of fair trial and thereby impede access to justice and facilitate impunity for human rights abuses.

27. Human rights bodies have found that human rights violations, specifically including intentional killing, torture and forced disappearance, among other abuses, are beyond the competence of military tribunals. International and regional human rights standards dictate that military jurisdiction, if it exists, should be exercised only over strictly military offenses committed by active members of the military. Human rights violations, particularly those relating to the bodily integrity of civilians, are inherently outside the scope of "tasks characteristic of the military forces" and so must be processed only by ordinary civilian courts.

28. The principles underlying these standards dictate that the jurisdiction of military courts must be limited to disciplining military members for infractions strictly related to their military status; military courts would, otherwise, undermine the rule of law, the competencies of

ordinary courts, and the independence of the judiciary. In light of Brazil's constitutional obligation to comply with international and regional human rights law, Law 13,491 must be found unconstitutional.

III.A. The Brazilian Military Justice System Is Not Independent or Impartial, Because Judges Are Not Insulated from the Military Hierarchy, Which Contributes to Impunity for Rights Violations.

29. International and regional human rights treaties guarantee the right of access to justice, which includes the rights to fair trial, effective investigation, and effective remedy for violations of human rights. The International Covenant on Civil and Political Rights (ICCPR),[11] the American Convention on Human Rights (ACHR),[12] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[13] and the Inter-American Convention to Prevent and Punish Torture,[14] all of which Brazil has ratified,[15] guarantee this right. So, too, do other important international human rights instruments, including the American Declaration on the Rights and Duties of Man,[16] European Convention on Human Rights (ECHR),[17] and the African Charter on Human and Peoples' Rights (Banjul Charter).[18]

30. The right of access to justice requires that courts, including military courts,[19] be independent and impartial.[20] ACHR article 8(1), for example, provides: "Every person has the

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[11] International Covenant on Civil and Political Rights (ICCPR), Articles 2(3) and 14.
[12] American Convention on Human Rights (ACHR), Articles 1(1), 8, and 25(1).
[13] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 12 and 14.
[14] Inter-American Convention to Prevent and Punish Torture, Article 8.
[15] UN Treaty Body Database. *Ratification Status for Brazil*. Available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=24&Lang=EN>. IACHR. *B-32: American Convention on Human Rights*. Available at <https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>.
[16] American Declaration on the Rights and Duties of Man (American Declaration), Article XVIII.
[17] European Convention on Human Rights (ECHR), Article 6.
[18] African (Banjul) Charter on Human and Peoples' Rights, Article 7.
[19] ICCPR, Article 14. Human Rights Committee (HRC). *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial (General Comment No. 32)* (23 August 2007) UN Doc. CCPR/C/GC/32 [22]. ACHPR. Resolution on the Right to a Fair Trial and Legal Aid in Africa (2001). [L(b)].
[20] EUGENE R. FIDELL ET AL., MILITARY JUSTICE: CASES AND MATERIALS 515 (3d ed. 2020) ("Democratic countries take as a given that persons who perform judicial functions will be independent and impartial.... [J]udicial independence is one of the key factors that contributes to (or, if compromised, detracts from) public confidence in the administration of justice. . ..").

right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."[21] Similarly, ICCPR article 14(1) provides, in part, "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[22] ECHR article 6(1) and Banjul Charter article 7(1) also guarantee the right to an independent and impartial tribunal.[23]

31. Independence and impartiality are related but distinct concepts.[24] For a court to be deemed independent, it must satisfy the consideration of several factors. The Inter-American Commission on Human Rights (Inter-American Commission) has grouped the factors considered in its own jurisprudence and the jurisprudence of the Inter-American Court of Human Rights (Inter-American Court) into institutional and functional dimensions:

> In the case of the institutional dimension, one of the main factors to be considered is the degree of independence that the judicial branch, as a system, has with respect to the other branches of government so that sufficient guarantees are in place to protect the judicial institution from abuses or unreasonable restrictions on the part of the other branches of government or State institutions. Addressing this aspect of independence, the United Nations Human Rights Committee pointed out, for example, that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.

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[21] ACHR, Article 8(1).
[22] ICCPR, Article 14(1).
[23] ECHR, Article 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."). Banjul Charter, Article 7(1) ("the right to be tried within a reasonable time by an impartial court or tribunal").
[24] IACtHR. *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of 5 August 2008. Series C No. 182 [55].

> In the case of the functional dimension or individual exercise of judicial functions, one has to examine whether justice operators have the guarantees of independence that will enable them to freely discharge their functions within the institutions of justice in cases they are to decide, prosecute or defend. This dimension involves more than just the procedures and qualifications for the appointment of judges. It also involves the guarantees of their security of tenure until the mandatory retirement age or the expiration of their term of office, where such exists, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[25]

32. The Human Rights Committee (HRC),[26] the international body established by the ICCPR to interpret its provisions and monitor implementation, and the European Court of Human Rights (ECtHR)[27] have interpreted independence similarly.

33. For a court to be considered impartial, it must both be and appear to be without bias. The Inter-American Court has explained that "impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality."[28] Similarly, the HRC has required that

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[25] IACHR. *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas (Guarantees for the independence of justice operators)* (2013) OEA/Ser.L/V/II, Doc. 44 [26-27].
[26] HRC. *General Comment No. 32*. [19].
[27] European Court of Human Rights (ECtHR). *Findlay v. United Kingdom*. Judgment of 25 February 1997. Application No. 22107/93 [73]. ECtHR. *Incal v. Turkey*. Judgment of 9 June 1998. Application No. 41/1997/825/1031 [65]. ECtHR. *Ciraklar v. Turkey*. Judgment of 28 October 1998. Application No. 70/1997/854/1061 [38]. ECtHR. *Sahiner v. Turkey*. Judgment of 25 September 2001. Application No. 29279/95 [35]. ECtHR. *Cooper v. United Kingdom*. Judgment of 16 December 2003. Application No. 44843/99 [104]. ECtHR. *Martin v. United Kingdom*. Judgment of 24 October 2006. Application No. 40426/98 [41]. ECtHR. *Morris v. United Kindgom*. Judgment of 26 February 2002. Application No. 38784/97 [58].
[28] IACtHR. *Apitz Barbera v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs Judgment of August 5, 2008. [56].

> [f]irst, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.[29]

34. The ECtHR, similarly, described its test for impartiality as follows: "First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."[30]

1. Brazilian military investigators are not competent to investigate human rights violations.

35. The international human rights guarantee to an independent and impartial trial gives effect to the general obligation to effectively investigate allegations of human rights violations. The UN Human Rights Committee has held that a failure by a State party to investigate allegations of violations can amount to a separate breach of ICCPR Article 2(3).[31] The obligation to investigate human rights violations, establish the truth, and thereby hold perpetrators accountable is integral to providing an effective remedy and is a fundamental aspect of States' duty to guarantee human rights.[32]

36. The Inter-American Court established in Pueblo Bello Massacre v. Colombia that, in cases of gross human rights violations, States have "the obligation to initiate, ex officio and immediately, a genuine, impartial and effective investigation, which is not undertaken as a mere

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[29] HRC. *General Comment No. 32*. [21].
[30] ECtHR. *Findlay v. United Kingdom*. [73]. ECtHR. *Incal v. Turkey*. [65]. ECtHR. *Ciraklar v. Turkey*. [38]. ECtHR. *Sahiner v. Turkey*. [36]. ECtHR.*Cooper v. United Kingdom*. [104]. ECtHR. *Martin v. United Kingdom*. [41]. ECtHR. Morris v. United Kingdom. [58].
[31] UN Human Rights Committee, General Comment No. 31. The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13.
[32] International Commission of Jurists. *Military jurisdiction and international law: Vol. 1.* (2004) [33-39].

formality predestined to be ineffective."[33] In La Rochela Massacre v. Colombia, the Court found that the State had violated the American Convention on Human Rights by, among other failures, not adequately investigating the alleged human rights violations. The Court emphasized that such a failure fosters impunity.

> The Court has established in this Judgment that the domestic proceedings conducted in the present case have not constituted effective recourse to ensure true access to justice for the surviving victims and the next of kin declared to be victims; this requires proceedings within a reasonable time, the factual clarification of the events, the investigation and punishment of the perpetrators and reparation of the violations. For this reason, the Court held the State responsible for violating Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof.
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> The Court established such violation, inter alia, because of the lack of due diligence in conducting the investigation, the threats to judges, witnesses and relatives, the obstacles and hindrances caused to the investigation, as well as the unjustified delays in the proceedings, all of which has provided partial impunity in this case.
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> The Court repeats that the State is obliged to combat this situation by resorting to all available means, as impunity fosters the chronic repetition of human rights violations and renders victims and their relatives, who have a right to know the truth concerning the events, completely defenseless. The acknowledgment and exercise of the right to know the truth in a specific situation constitutes a means of reparation. Therefore, in the instant case, the right to know the truth gives rise to the victims' expectations, which the State must satisfy.[34]

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[33] IACtHR. *Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of 31 January 2006. Series C No. 140 [143].
[34] IACtHR. *Case of the Rochela Massacre v. Colombia*. Merits, Reparations, and Costs. Judgment of May 11, 2007. [287-289].

37. The Inter-American Court has held that military courts do not have jurisdiction to investigate alleged perpetrators of human rights violations. In Radilla Pacheco v. Mexico, the Court stated that, "taking into account the nature of the crime and the legal rights infringed, the military justice system is not the competent jurisdiction to investigate and, where appropriate, prosecute and punish the perpetrators of human rights violations. The prosecution of those responsible must always fall to the ordinary civilian justice system." (emphasis added)[35] The Court further found, in Favela Nova Brasilia v Brazil, that independence and impartiality of the bodies undertaking investigations require that those bodies have no institutional or hierarchical relationship with the parties involved in the allegations.[36]

38. The European Court of Human Rights has similarly affirmed that the procedural obligation to conduct an independent investigation requires that there be no hierarchical or institutional connection between those investigating and the alleged perpetrators. In Case of Al-Skeini and Others v. The United Kingdom, the Court explained:

> For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the

[35] IACtHR. *Radilla Pacheco v. Mexico*. Judgment of 23 November 2009 [273].
[36] IACtHR. *Favela Nova Brasília v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 16 February 2017. Series C No. 333 [185, 187].

investigation or its results to secure accountability in practice as well as in theory.[37]

39. The Inter-American Court has repeatedly affirmed States' obligations to genuinely and impartially investigate alleged human rights violations. The Court has explained that the human rights obligations of states require that investigations into alleged perpetrators of human rights violations be undertaken by an independent and impartial body with no institutional or hierarchical relationship with the parties involved in the allegations. The ECtHR's jurisprudence similarly emphasizes States' obligations under international law to ensure effective, independent investigations conducted by authorities without any hierarchical or institutional connections to the alleged perpetrators under investigation. Brazilian military investigators are therefore not competent to investigate human rights violations committed by Brazilian military personnel.

2. Because their judges generally are active-duty members of the military, Brazilian military courts are not impartial.

40. International and regional bodies have called the impartiality of military courts into question where courts are composed of active-duty military personnel, even where such courts also include civilian judges. In Herzog v. Brazil, the Inter-American Commission observed that when "judges in the military judicial system are generally active-duty members of the Army," as is the case in Brazil, this "means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context."[38] The ECtHR and the African Commission on Human and Peoples' Rights have determined that

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[37] *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011. [167].

[38] IACHR, Report No. 71/15, Case 12.879, Merits, Vladimir Herzog and others v. Brazil. October 28, 2015. [176]. (Quoting IACHR, Report No. 2/06, Case 12.130, Merits, Miguel Orlando Muñoz Guzmán v. Mexico. February 28, 2006. [83-84].)

the independence and impartiality of military tribunals remains questionable even when they are partially composed of civilian judges.[39]

41. Because Brazilian military court judges generally are active-duty members of the military, Brazilian military courts are not impartial. Lower military courts, Conselhos de Justiça Militar, are each composed of four active-duty members of the military and one civilian judge.[40] As for the Superior Military Tribunal, the Brazilian Constitution requires that the majority of the judges be active-duty military personnel:

> The Superior Military Tribunal shall be composed of fifteen Ministers with life tenure, appointed by the President of the Republic after approval of their nominations by the Federal Senate, with three from admirals of the Navy, four from generals of the Army, three from generals of the Air Force, all in active service and in the highest career rank, and with five from among civilians.[41]

42. Currently, the Superior Military Tribunal is composed of four Army Generals (General-do-Exército or Gen Ex), three Fleet Admirals (Almirante-de-Esquadra or Alte-Esq), three Lieutenant Brigadiers of the Air Force (Tenente-Brigadeiro-do-Ar or Ten Brig Ar), and five civilian judges.[42]

43. The presence of active-duty military members on Brazilian military courts has already led to results, in the Rosa and Macedo case mentioned above, that made the Inter-American Commission doubt the impartiality of these courts:

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[39] ECtHR. *Incal v. Turkey*. [66]. ECtHR. *Ciraklar v. Turkey*. [37]. ECtHR. *Gerger v. Turkey*. Judgment of 8 July 1999. Application No. 24919/94 [12]. ECtHR. *Karatas v. Turkey*. Judgment of 8 July 1999. Application No. 23168/94 [12]. ECtHR. *Sahiner v. Turkey*. [38]. ACHPR. *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (1999). [14]. ACHPR. *Law Office of Ghazi Suleiman v. Sudan* (2003). [63].
[40] Código de Organização Judiciária e Processo Militar (Code of Judicial Organization and Military Procedure). Decree No. 14.450. (30 October 1920). [14-15].
[41] Federal Constitution of Brazil (1988), Article 123.
[42] Superior Tribunal Militar. *Composição da Corte*. (Superior Military Court. Composition of the Court). Available at <https://www.stm.jus.br/o-stm-stm/composicao-corte-2> (last visited 30 March 2021).

> [O]n April 7, 2019, . . . the vehicle carrying musician Evaldo Rosa dos Santos, a man of African descent, accompanied by friends and family members, was hit by 83 shots fired by an army detachment in Guadalupe, in the northern part of Rio de Janeiro. Apart from Evaldo, Luciano Macedo, a man who collected material for recycling, was also killed, when he tried to help those inside the vehicle.
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> At the time, the Army issued a note that the military had faced "an attack already under way" and had responded to shots fired by criminals on board the vehicle. The findings of experts, testimony and even videos recorded by locals living nearby showed that in fact the vehicle's occupants had been a family on their way to a baby shower. Later, the Army claimed that its first note had been issued on the basis of "initial information transmitted by a patrol" and that there had been a "mix-up" with another vehicle which had indeed been involved in the criminal attack. Initially, soldiers present during the action were detained. However, on May 23, 2019, they were released by the Higher Military Court (STM). Apart from the completely disproportionate use of force which killed Evalso [sic] and Luciano and the race and class bias possibly underlying the operation, the Army also even attempted to justify what happened. The case therefore reinforces the Commission's doubts about the ability of military courts to judge the conduct of their peers impartially.[43]

44. This case is an example of efforts by active-duty members of the military on the Supreme Military Tribunal to ensure impunity for fellow military personnel. It demonstrates why these courts should not have jurisdiction over human rights violations. Such jurisdiction magnifies the already "devastating" consequences of institutional violence by fostering both a culture of "impunity surrounding human rights violations perpetrated by State agents" and "an environment of mistrust of State institutions," with an attendant "lack of security."[44] As the Inter-American

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[43] IACHR. *Situation of human rights in Brazil* (12 February 2021) OEA/Ser.L/V/II Doc. 9 [339-40].
[44] *Id.* [324].

Commission concluded: "[M]ilitary jurisdiction . . . poses serious problems with ensuring impartial and independent administration of justice."[45]

III.B. Brazil's Military Court System Lacks Jurisdiction over Intentional Killings of Civilians by Military Personnel Because Military Courts Have a Limited and Exceptional Jurisdiction That Does Not Include the Prosecution of Human Rights Violations.

45. Democratic control over military forces limits military jurisdiction to the "principle of speciality," relegating to military courts only the protection of exclusively military legal assets. This rule is well consolidated in the constitutional interpretation of the Federal Supreme Court:

> The characterization of a military offense as a result of the application of the ratione personae criterion provided in art. 9, II, "a" of the Military Penal Code should be understood in light of the key difference between ordinary offenses and improper military offenses: the legal asset under protection. Therefore, the demonstration of an offense to legal assets pertaining to the Armed Forces is a necessary element to constitute the special type of crime (and, therefore, to establish the jurisdiction of the Federal Military Courts). Hence the convergence of understanding, in Supreme Court precedents, that crimes committed outside of the military environment or with results that do not affect military institutions shall be judged by ordinary courts.[46]

46. In other words, the law cannot simply make all crimes military in nature, for that would disproportionately extend beyond constitutional limits. The petitioner and the collaborating experts provide their contribution supporting the unconstitutionality of the absolute expansion of Military Justice due to their understanding that, even though Military Justice incorporates general

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[45] *Id.* [337].
[46] HC 117.254, rapporteur justice Teori Zavascki, j. 09-30-2014, 2nd Panel, Electronic Justice Gazette of 10-15-2014 (emphasis added).

rules of due legal process, it cannot have exclusive control over the investigation of severe human rights violations, as will be better explained below.

1. International and regional human rights standards limit the scope of military jurisdiction to crimes of a purely military nature committed by military personnel.

47. International and regional human rights bodies have consistently held that military jurisdiction should be limited and exceptional, exercised only over strictly military offenses and active members of the military.

48. The foremost international standards on military jurisdiction are in the 2006 Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles), a result of years of research and consultation among international experts, jurists, military personnel, and non-governmental organizations on the requirements that international law imposes on military justice. The Decaux Principles have been invoked as authoritative by bodies such as the Human Rights Committee and the European Court of Human Rights.[47] The Decaux Principles affirm that the jurisdiction of military courts should be exceptional and limited in scope. Principle 8 states: "The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status."[48] Although the principles do not define what constitutes a strictly military offence, the commentary indicates that military jurisdiction must "apply only to the requirements of military service."[49]

49. In 2018, with the encouragement and participation of the U.N. Special Rapporteur on the independence of judges and lawyers, legal experts convened at Yale Law School in the

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[47] *See* UN Human Rights Committee. *Kholodova v. Russian Federation (2012)* UN Doc. CCPR/106/D/1548/2007; ECtHR, *Ergin v. Turkey*, Judgment of 4 May 2006, Application No. 47533/99; and ECtHR *Maszni v. Romania*, Judgment of 21 September 2006, Application No. 59892/00.
[48] U.N. Commission on Human Rights, Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Draft Principles Governing the Administration of Justice Through Military Tribunal (Decaux Principles), U.N. Doc. E/CN.4/2006/58 (13 January 2006), Principle 8.
[49] *Id.* [29]

United States to revisit and update the Decaux Principles. The amended Decaux Principles, known as "The Yale Draft," reaffirmed the limited authority of military courts. Principle 3, on the "functional authority of military courts," provides that where states have both civilian and military courts, "the civilian court has primary jurisdiction over all criminal offenses committed by persons subject to military jurisdiction," with a narrow exception for cases directly and substantially related to "the maintenance of military discipline."[50]

50. The Yale Draft also further clarified the scope of the offenses that may be subject to military jurisdiction. Principle 3 states that the "purpose" of military courts is to "contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice." Criminal offenses should be tried by military courts only if those crimes have a "direct and substantial connection with that purpose": for example, where the "offence is committed by one member of the armed forces against another or is alleged to have been committed in a defense establishment or in relation to military property."[51] Ordinary offenses committed by military personnel must fall to the jurisdiction of ordinary courts.[52]

51. The U.N. Human Rights Committee has repeatedly concluded that military jurisdiction that expands beyond the prosecution of purely military-related offenses violates the right of access to justice protected under the ICCPR. In Kholodova v. Russian Federation, the Human Rights Committee affirmed that military criminal jurisdictions should have a restrictive and exceptional scope. The Human Rights Committee determined that the trial of members of the military before a military tribunal for the assassination of a journalist was inappropriate because the crime was "manifestly and uncontestably" not part of their "official duties."[53] In Kholodova, the Committee further specified that citation of the State's law alone was not a sufficient

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[50] Decaux Principles Workshop: The Yale Draft (Yale Draft) (June 2018) Principle 3, available at <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>.
[51] *Id.*
[52] *See also* Principle 29 of the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, which also reiterates that military jurisdiction "must be restricted solely to specifically military offences committed by military personnel." E/CN.4/2005/102/ADD.1 (8 February 2005).
[53] UN Human Rights Committee. *Kholodova v. Russian Federation (2012*). [10.5].

explanation "as to why military justice was the appropriate jurisdiction to try military personnel accused of this grave crime."[54] The Committee cited the Decaux Principles in its reasoning.

52. Similarly, in several of the Human Rights Committee's Concluding Observations, the Committee's responses to the regular reports each State party must make on its implementation of the ICCPR, the Committee has called on states to amend their military jurisdiction laws to restrict the trial of military personnel to those who are accused of crimes of an exclusively military nature. For example, in Concluding Observations to Chile in 1999, the Committee recommended that Chile "restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature," and reasoned that wide jurisdiction of the military courts contributes "to the impunity which such personnel enjoy against punishment for serious human rights violations."[55]

53. Both the Yale Draft and ICCPR entail concerns that military justice contributes to impunity for military violations of human rights, which dictates that, where military tribunals exist, they should try only cases that have a direct and substantial connection to offenses of a strictly military nature.

54. The Inter-American Court has likewise been clear that the scope of military criminal justice should be restrictive and that the existence of military courts with jurisdiction over military acts by active members of the military cannot justify military-court jurisdiction over non-military crimes, which must be treated as ordinary crimes against civilians. In Ugarte v. Peru, the Court stated:

> In a democratic Government of Laws, the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military

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[54] *Id.*

[55] UN Human Rights Committee. Concluding Observations: Chile (30 March 1999) U.N. Doc. CCPR/C/79/Add.104 [9]; See also UN Human Rights Committee. Concluding Observations: Guatemala (27 August 2001) U.N. Doc. CCPR/CO/72/GTM [20]. ("The State party should amend the law to limit the jurisdiction of the military courts.")

> jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.
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> In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not.[56]

55. In Radilla Pacheco v. Mexico, the Inter-American Court reinforced its view that "only active soldiers shall be prosecuted within the military jurisdiction for the commission of crimes or offenses that based on their own nature threaten the juridical rights of the military order itself."[57] The Court further clarified that the mere fact that a crime is perpetrated by an active member of the armed forces does not confer a military nature upon the military member's crimes.[58] The crimes that fall within military jurisdiction must be "related to the tasks characteristic of the military forces."[59] The Court further stated:

> [I]f the criminal acts committed by a person who enjoys the classification of active soldier does not affect the juridical rights of the military sphere, ordinary courts should always prosecute said person. In this sense, *regarding situations that violate the human rights of civilians, the military jurisdiction cannot operate under any circumstance*. (emphasis added).[60]

56. The Court reaffirmed this view in Herzog et al. v. Brazil, where it reiterated that military jurisdiction should be exceptional and exercised only over strictly military offenses

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[56] IACtHR, *Durand Ugarte v. Peru*. [117-118].
[57] IACtHR. *Radilla Pacheco v. Mexico*. Op. Cit. [272].
[58] *Id.* at 286
[59] *Id.* at 272
[60] *Id.* at 274

committed by active members of the military. The Court also further emphasized that neither the accused's membership in the military nor the fact that a crime occurs on military premises turns the offense into one of a military nature.

> [T]he Court recalls its consistent case law on the restriction of the military jurisdiction's competence to examine facts that constitute human rights violations, in the sense that, under the democratic rule of law, the military criminal jurisdiction must have a restrictive and exceptional scope and be directed at the protection of special legal interests linked to the functions inherent to the armed forces. Consequently, the Court has indicated that the military jurisdiction should only try members of the military forces on active duty for the perpetration of crimes and misdemeanors that, owing to their nature, violate the specific legal interests of the military forces. The fact that the individuals involved are members of the armed forces or that the events occurred within a military establishment do not signify, *per se*, that military justice should intervene. This is because, owing to the nature of the crime and the legal interest violated, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if appropriate, prosecute and punish the authors of human rights violations; to the contrary, the prosecution of those responsible always corresponds to the common or ordinary system of justice.[61]

57. The African Commission has similarly articulated stringent standards that restrict the jurisdiction of military courts over civilians and military members to only military and not civil offenses.[62] In Marcel Wetsh'okonda Koso & Others v Democratic Republic of the Congo, the African Commission found that the "the trial of both civilian and militaries (sic) by a military

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[61] IACtHR. *Herzog et al. v. Brazil.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 15 March 2018. Series C No. 353 [247] (citing *Case of the La Rochela Massacre v. Colombia*. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 163 [200] and *Case of Ortiz Hernández et al. v. Venezuela*. Merits, reparations and costs. Judgment of August 22, 2017. Series C No. 338 [148]).

[62] In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the ACHPR reiterates that "[t]he only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel." Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), available at <https://www.achpr.org/legalinstruments/detail?id=38>.

tribunal presided over by a military officer on matters of a civilian nature constitutes an infringement of the requirements of a fair justice."[63] In this case, the accused were civilians and soldiers accused of "the theft of drums of gas oil," which the court characterized as "civilian offences."[64] In its reasoning, the Commission referred back to its Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, which states that "[t]he purpose of military courts is to determine offences of a pure[ly] military nature committed by military personnel."[65] The Commission found that the establishment of a military court with jurisdiction over civil acts perpetrated by both military members and civilians is therefore a violation of article 7 of the Banjul Charter.[66]

2. Human Rights Violations Are Excluded from Military Jurisdiction Because, by Definition, They Are Not Crimes of a Purely Military Nature

58. As the Decaux Principles observe, the Inter-American Court, Inter-American Commission, UN Human Rights Committee, and international experts are "unanimous: military tribunals are not competent to try military personnel responsible for serious human rights violations against civilians."[67] Regardless of the military status of the perpetrators, a human rights violation is per se not a strictly military crime; it is, as the Kholodova case affirmed, "manifestly and uncontestably" beyond any conception of "official duties."[68] The Inter-American Commission has explained this distinction:

> In order for an offense to come under the jurisdiction of the military criminal courts, there must be a clear link of origin between it and a

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[63] ACHPR. *Marcel Wetsh'okonda Koso & Others v Democratic Republic of the Congo* (2008). [87].
[64] Id. [85]
[65] Resolution on the Right to Fair Trial and Legal Assistance in Africa, ACHPR/Res.41(XXVI)99. (15 November 1999), available at <http://www.achpr.org/sessions/26th/resolutions/41/>.
[66] Banjul Charter, Article 7 ("Every individual shall have the right to have his cause heard. This comprises…The right to be tried within a reasonable time by an impartial court or tribunal.").
[67] Decaux Principles. [35].
[68] UN Human Rights Committee. *Kholodova v. Russian Federation (2012*). [10.5]. *See also* Colombia Const. Ct., *Sentence No. SU.1184/01 (2001)*.

> service-related activity . . .. The link between the criminal act and the service-related activity is broken down when the offense is unusually grave, as in the case of what are called crimes against humanity. In these circumstances, the case should come before the regular courts, given the total contradiction between the offense and the constitutional missions of the Armed Forces and National Police. . .. What the Court is indicating is that there are punishable forms of conduct that are so flagrantly contrary to the constitutional function of the Armed Forces and National Police that the mere commission of them breaks any functional nexus between the agent and the service.[69]

59. The 2006 Decaux Principles distill these human rights standards into the concise and unambiguous Principle 9: "In all circumstances, the jurisdiction of military courts should be set aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations."[70] The 2018 Yale Draft affirms this principle and clarifies that the jurisdiction of ordinary courts extends to the prosecution and trial of all persons accused of serious human rights violations.[71]

60. The Inter-American Court has repeatedly and consistently emphasized that military jurisdiction is never "competent to investigate and, if appropriate, prosecute and punish the authors of any violation of human rights."[72] The Court has decades of jurisprudence undergirding its insistence on the "restrictive and exceptional scope" of military jurisdiction, generally, and its prohibition of military involvement in the examination of human rights violations, particularly.[73]

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[69] Inter-American Commission, Mora Rubiano v. Colombia, Case 11.525, Report No.45/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999) [4, FN1], *citing* Constitutional Court of Colombia Judgment C-358 of August 5, 1997.
[70] Decaux Principles.
[71] Yale Draft at 16.
[72] IACtHR. *Herzog v. Brazil*. [247].
[73] *Ibid. See also Case of the La Rochela Massacre v. Colombia*. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 163, [200]; *Case of Ortiz Hernández et al. v. Venezuela*. Merits, reparations and costs. Judgment of August 22, 2017. Series C No. 338, [148]; *Case of Radilla Pacheco v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, [209]; *Case of Fernández Ortega et al. v. Mexico*. Preliminary objection, merits, reparations and costs. Judgment of August 30, 2010. Series C No. 215, [176]; *Case of Rosendo Cantú et al. v. Mexico*. Preliminary objection, merits, reparation and costs. Judgment of August 31, 2010. Series C No. 216, [160]; *Case of Escué Zapata v. Colombia*. Merits, reparations and costs. Judgment of July

For the Court, this restrictive and exceptional scope is foundational for democratic societies and the preservation of the rule of law.

61. The Inter-American Commission has been equally clear, repeatedly condemning extensions and exercises of military jurisdiction over human rights violations. The Commission has said repeatedly that States have an obligation to ensure that military officers alleged to have committed human rights violations be investigated and tried by ordinary processes and courts, not military tribunals.[74]

62. In March 2021, in a report on the human rights situation in Brazil, the Commission reiterated its concerns about the use of military jurisdiction in Brazil.[75] It emphasized that the use of military jurisdiction is particularly inappropriate for the investigation, prosecution, and punishment of "perpetrators of human rights violations"; in fact, it should "never [be used] to investigate human rights violations."[76] Human rights violations alleged to have been committed by members of the military are abuses that threaten the social fabric, remediable only by the civilian courts.[77]

63. Several human rights bodies and treaties have reiterated the prohibition on the use of military jurisdiction for perpetrators of human rights violations in the context of specific crimes, including extrajudicial killings, torture, and forced disappearance. The Inter-American Commission, for example, bars military jurisdiction over extrajudicial killings.[78] And the

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4, 2007. Series C No. 165, [105]. *Case of the Santa Barbara Campesino Community v. Peru*, [245]; *Case of Quisplaya Vilcapoma v. Peru,* 2015 [146].

[74] Inter-American Commission, Annual Report 1992-1993, OEA/Ser.L/V/II.83 (Mar. 12, 1993); Inter-American Commission, Annual Report 1993, OEA/Ser.L/V.85 (Feb. 11, 1994); Inter-American Commission, Annual Report 1997, OEA/Ser.L/V/II.98 (Apr. 13, 1998); Inter-American Commission, Annual Report 1998, OEA/Ser.L/V/II.102 (Apr. 16, 1999); Inter-American Commission, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102 (Feb. 26, 1999); Inter-American Commission, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 (Apr. 24, 1997); Inter-American Commission, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II/106 (Jun. 2, 2000)

[75] Inter-American Commission, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II (Feb. 12, 2021).

[76] *Ibid.* [337]

[77] *Id*. [247].

[78] Inter-American Commission, *Masacre "Los Uvos" v. Colombia*, OEA/Ser.L/V/II.106 Doc. 3 (Apr. 13, 2000) [60]; Inter-American Commission, *Masacre "Caloto" v. Colombia*, OEA/Ser.L/V/II.106 Doc. 3 (Apr. 13, 2000) [55]; Inter-American Commission, *Santos Mendivelso Coconubo v. Colombia*, OEA/Ser.L/V/II.95 Doc. 7 (Apr. 13, 1999) [37-40]; Inter-American Commission, *Alvaro Moreno Moreno v. Colombia*, OEA/Ser.L/V/II.95 Doc. 7 (Apr.

Commission's jurisprudence on torture has repeatedly emphasized that alleged perpetrators of torture should be tried before ordinary, civilian courts, not military tribunals.[79] This determination is echoed in reports from the U.N. Special Rapporteur on Torture, both as a general standard and as a concern specifically about Brazil.[80] Finally, the Inter-American Convention on Forced Disappearance of Persons, ratified by Brazil, unequivocally prohibits military jurisdiction over forced disappearances.[81] Similarly, Principle 29 of the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity prohibits the exercise of military jurisdiction over human rights violations, which "shall come under the jurisdiction of the ordinary domestic courts."[82]

64. International and regional human rights standards explicitly require that states restrict their exercise of military jurisdiction to apply only to military crimes by military personnel. Serious human rights violations, including intentional killing, are, by definition, not crimes of a purely military nature. To comply with its obligations under international and regional law and, in turn, under the Constitution, and to ensure respect for the rule of law, Brazil must entrust the investigation and prosecution of intentional killings of civilians by military personnel in its ordinary domestic courts. Brazil may not permit military jurisdiction over such crimes.

7, 1998); Inter-American Commission, *Feldman et al. v. Colombia*, OEA/Ser.L/V/II.91 Doc. 7 (Sept. 13, 1995) [D.2-4].

[79] Inter-American Commission, *Fuentes Guerrero et al. v. Colombia*, OEA/Ser.L/V/II.95 Doc. 7 (Apr. 13, 1999).

[80] *See* Special Rapporteur on Torture re: Brazil, A/HRC/31/57/Add.4; Special Rapporteur on Torture re: Generally, A/56/156 (3 July 2001) [39].

[81] Inter-American Convention on Forced Disappearance of Persons art. IX ("may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions"); see also Inter-American Commission, *Amparo Tordecilla v. Colombia*, OEA/Ser.L/V/II.106 Doc. 3 (Feb. 24, 2000). Similarly, the U.N. General Assembly's Declaration on the Protection of all Persons from Enforced Disappearance states that forced disappearances "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, *in particular military courts*." Resolution 47/133 of the General Assembly (18 December 1992), art. 16 (emphasis added).

[82] 2005 Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity. Principle 29.

IV) Conclusion

65. Permitting military jurisdiction over serious human rights violations, such as intentional killing, violates Brazil's obligations under international and regional human rights law and diverges from the trend away from military jurisdiction in democratic countries.[83] Military jurisdiction that includes military abuses of civilians' human rights violates principles of international human rights law and breeds a culture of impunity for human rights violations, erodes the rule of law, and jeopardizes the legitimacy of democratic regimes.

66. States that do not limit military jurisdiction to crimes of a strictly military nature frequently tolerate or cover up human rights abuses committed by military forces and fail to hold those in the military responsible for abuses to account.[84] The lack of independence and impartiality inherent in military courts fuels a lack of due diligence in investigations and a lack of due process in trials.[85]

67. Article 5(2) and 5(3) of Brazil's Constitution require Brazil to protect the rights and guarantees established by international treaties and provide that human rights treaties ratified by the State are "equivalent to constitutional amendments."[86] Brazil is therefore obligated to respond to grave crimes against civilians through a system of justice that upholds the international human rights standards set out in those treaties, including the right to due process and the right to independent and impartial courts. In light of the above, amici respectfully urge this Court to find that Law 13,491 violates Brazil's obligations under international human rights law and is unconstitutional.

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[83] Eugene R. Fidell, *A Worldwide Perspective on Change in Military Justice*, *in* EUGENE FIDELL ET AL., MILITARY JUSTICE: CASES AND MATERIALS 870 (3d ed. 2020) (citing, e.g., developments in U.K., Canada, and South Africa).
[84] Inter-American Commission, 1997 Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97 Doc. 29 (Sept. 29, 1997); Inter-American Commission, 1985 Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66 Doc. 17 (Sept. 9, 1985); Inter-American Commission, 2001 Third Report on the Situation of Human Rights in Paraguay, OEA/Ser.L/V/II.110 Doc. 52 (Mar. 9, 2001); Inter-American Commission, 2000 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106 Doc. 59 (Jun. 2, 2000).
[85] Inter-American Commission, 1993 Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84 Doc. 39 (Oct. 14, 1993); Inter-American Commission, 1985 Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66 Doc. 17. (Sept. 9, 1985); Inter-American Commission, 1983 Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.61 Doc. 47 (Oct. 5, 1983); Inter-American Commission, *Maclean v. Suriname*, OEA/Ser.L/V/II.76 Doc. 10 (Sept. 27, 1989)
[86] Federal Constitution of Brazil (1988), 5(2)-5(3)

V) Requests

68. In view of the arguments set out above, the legal requirements to admit petitioner Conectas Direitos Humanos as amicus curiae in this case are fulfilled; such admission is an important instrument to democratize and pluralize jurisdictional debate.

69. Given the relevance of the matter, the social repercussions of the dispute, and the demonstrated legitimacy to act as amicus curiae in the present case, as proven by its historical actions, as well as the invaluable technical support offered by the collaboration of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School, the international human rights attorney Masha Lisitsyna and Professor Eugene R. Fidell, the petitioner Conectas comes before Your Honor to request:

a) For it to be **admitted in the case as amicus curiae**, as provided in article 138 of the Civil Procedure Code and by article 323, §3 of the Internal Regiment of the Federal Supreme Court, enabling it to exercise the options inherent to this function, particularly the presentation of complementary arguments, written statements and memoranda, as well as the participation in hearings on the subject discussed in the case and the oral exposure of arguments in the Court;

b) Alternatively, in the remote hypothesis in which Your Honor does not understand the condition of amicus curiae to be applicable, the associations and experts request that **this paper be received as brief** to be added to the record of ADI No. 5901;

c) For it to be **informed, through its attorneys**, of all acts of procedure.

In such terms,

We request your acceptance.

From São Paulo and New Haven to Brasilia, April 29th, 2021.

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