

**Summary of *Amicus Curiae* Brief
presented by Media Legal Defence Initiative and Robert F. Kennedy Human Rights
before the Honorable Supreme Court of Justice of Colombia
In relation to the Tutela (Protection) Action filed by Franklin
Castañeda Villacob *et al*
File 2019-02527-0**

1. *Amici Curiae* Media Legal Defence Initiative¹ (MLDI) and Robert F. Kennedy Human Rights² (RFKHR) seek to contribute to the analysis of the Court on the right to social protest in light of international law standards, and the need for enhanced protection for journalists in Colombia who cover protests. This brief seeks to assist the Supreme Court of Justice and present information on the following matters: i) the right to social protest, ii) the positive and negative obligations of the State in this regard, as well as the iii) requirements established in international law for the restriction of rights; iv) applicable standards in relation to the use of force by security forces during social protests; v) the situation of journalists covering protests in Colombia and their right to enhanced protection in the performance of their work; vi) the special duty to protect journalists by covering protests or demonstrations against harassment and attacks, and vii) the strictest scrutiny to which interference with the right of journalists to cover protests should be subject to.
2. The tutela (protection) action³ referred to in this *amicus curiae* brief seeks to protect fundamental rights under the Colombian Constitution and under international human rights instruments that are affected by the systematic police practices implemented and executed against social protest in Colombia, which the plaintiffs summarize in the following patterns of

¹ MLDI is a non-governmental organisation that provides legal support and helps defend the rights of journalists, bloggers and independent media across the world. It is based in London and works closely with a world-wide network of experienced human rights lawyers, as well as local, national and international organisations, donors, foundations and advisors who are all concerned with defending freedom of expression. It has extensive experience in defending journalists and independent media against criminal and civil claims. As part of its mandate, it engages in strategic litigation to protect and promote freedom of expression and has intervened in cases before various national and international tribunals, including the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of the Economic Community of West African States and the East African Court of Justice.

² Robert F. Kennedy Human Rights (RFKHR) is a non-governmental organization founded in 1968 by the family and friends of former United States Attorney General Robert F. Kennedy to continue his legacy of fighting for a more just and peaceful world. The international advocacy and litigation team works to protect human rights across Africa, the Americas, and Asia, with a particular emphasis on protecting civic space. RFKHR directly participates directly in strategic litigation of emblematic cases at the international and regional level. An example of this is the case of the murdered Colombian journalist Nelson Carvajal Carvajal, whose family was represented by the RFKHR before the Inter-American Court of Human Rights and which led to a ruling that declared the Colombian State internationally responsible for the violation of the human rights of the victim and his family. RFKHR has also intervened in various cases before the inter-American human rights system and national courts as *amicus curiae*.

³ The tutela (protection) action was filed before the Superior Court of Bogotá, D.C. on December 16, 2019. Via a ruling dated April 23, 2020 and notified on the 28th of the same month and year, the Civil Chamber of Decision of the Court resolved to deny the protection requested. That decision was contested by all of the petitioners on April 30, 2020, the challenge admitted by the court by order of the same day and sent to fill the second procedure before the Civil Appeals Chamber of the Supreme Court of Justice

conduct: 1) the stigmatization of protest and of protesters by government officials and the National Police; 2) the systematic, arbitrary and unjustified dissolution of peaceful protests without any disrupting event; 3) the use of potentially lethal weapons by the Mobile Ant-Disturbance Squadron (ESMAD for its Spanish acronym) and the National Police to disperse crowds of protesters, some of which have caused death or serious damage to personal integrity; 4) the use of potentially lethal weapons such as tear gas and other irritating gases or chemical agents to prevent protesters from attending *en masse*; 5) the indiscriminate use of the transfer for protection (article 155 of the National Police Code) and the transfer for police proceedings (article 157 of the National Police Code) in order to detain and intimidate protestors and impede protest, and 6) the excessive use of the force and indiscriminate use of the transfer for protection and the transfer for a police proceeding specifically directed against journalists who attend demonstrations or protests in their professional capacity with the aim of informing citizens.

The Role of Social Protest and the Scope of Permissible Restrictions under International Law

3. Social protest plays an important role in the exercise of the human rights of citizens and in the preservation of democracy. Through protests, people can “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.”⁴ It also demonstrates the relationship between political rights and the freedoms of expression, assembly, and association and that these rights, taken together, make democratic order possible.⁵ The protests “play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States’ public policy.”⁶

4. Protests are “forms of expression” that have a “common purpose.” As such, they are comprehensively protected by interconnected rights to freedom of expression and freedom of peaceful assembly. They are also protected by the rights to freedom of association,⁷ the right to

⁴ Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par. 12.

⁵ Inter-American Court of Human Rights, *Case of López Lone et al vs. Honduras* Judgment of October 5, 2015, par. 160.

⁶ Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par 24.

⁷ Universal Declaration of Human Rights, Article 20; ICCPR, Article 22; American Convention on Human Rights, Article 16, and the American Declaration on the Rights and Duties of Man, Article XXII.

political participation,⁸ and serve as "an essential mechanism for guaranteeing economic, social, cultural and environmental rights."⁹

5. There is a general presumption in favor of exercising the right to protest for the imperative social interest that it has,¹⁰ and, accordingly, States have the positive obligations to "guarantee and facilitate the exercise of human rights at stake during demonstrations and protests, and to implement measures and mechanisms to ensure that those rights can be exercised in practice, rather than hindered."¹¹ These obligations apply "particularly where individuals may espouse minority or dissenting religious or political beliefs,"¹² and to minors, indigenous peoples, persons with disabilities, persons belonging to minority groups and other groups that are at risk.¹³

6. States also have a negative obligation to refrain from interfering with the right to social protest. Although the scope of the rights to freedom of peaceful assembly and association - integral to the right to social protest - are not absolute,¹⁴ freedom in their exercise should be the rule and restriction their exception.¹⁵ 27. In order for the restrictions to be permissible they must pass the following three-part test: they must (i) be prescribed in conformity with the law, (2) pursue a legitimate objective and (3) be necessary in a democratic society; which also means that the restriction "must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it."¹⁶

7. The systematic, arbitrary and unjustified dissolution of protests via the use of force violates international human rights law. While recourse to law enforcement can be an important element

⁸ See, e.g. IACHR, Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State, OEA/SER.L/V/II CIDH/RELE/INF.22, 19 September 2019, par. 23; Human Rights Council, Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, Report of the United Nations High Commissioner for Human Rights, January 21 2013, A/HRC/22/28, par. 4.

⁹ IACHR, Protest and human rights, par. 24; See also, Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par. 12. African Commission on Human and People's Rights, Guidelines for the Freedom of Assembly and Association in Africa, Guiding Principles, iii.

¹⁰ IACHR, Protest and human rights, par. 91.

¹¹ IACHR, Protest and human rights, par. 28.

¹² UN Human Rights Council, Resolution 15/21, The rights to freedom of peaceful assembly and association, October 6, 2010, A/HRC/RES/15/21, p. 2.

¹³ Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par.13.

¹⁴ Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par. 15.

¹⁵ Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par.15.

¹⁶ IACHR, Annual Report from the Rapporteurship on the Freedom of Expression 2002, Chapter IV, "Freedom of Expression and Poverty," para. 32. See, also Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, April 24, 2013, A/HRC/23/39, par. 59; Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, May 21, 2012, A/HRC/20/27, par. 40; ICCPR, Articles 19 and 21; American Convention, Articles 13(2), 15, y 16(2).

to guarantee the right to protest and protect the integrity of protesters, it may also constitute an impermissible restriction and a source of violations of the law when it pursues objectives other than protecting the peaceful demonstration and the use of force is abused.¹⁷ For the use of force to be justified, it must be characterized by exceptionality - that is, it must satisfy the principles of i) legality, ii) absolute necessity and iii) proportionality.¹⁸

8. Similarly, in the context of demonstrations, the use of detention should only serve a protective function "by allowing law enforcement officers to remove people who behave in a violent way."¹⁹ The deprivation of liberty during a demonstration "has the immediate effect of preventing the detainee from exercising his or her right to protest and generates an inhibitory effect regarding participation in public demonstrations."²⁰

The Specific Context of Journalists who Cover Protests in Colombia

9. The harassment of journalists in the present case is emblematic of the situation of journalists covering demonstrations in Colombia, which is labelled "one of the Western Hemisphere's most dangerous countries" -- and is ranked 129th out of 180 countries in its press freedom index.²¹ The Foundation for Press Freedom (FLIP) has recorded attacks to journalists during the coverage of protests in Colombia, noting that during the protests occurring in the 40 day long national strike in November 2019 which triggered the present tutela, 66 journalists were attacked; 35 of these attacks were allegedly perpetrated by the security forces. This is a significant increase when compared to data from 2018 (six attacks by security forces against journalists)²² and 2017 (44 journalists were attacked during protests, 33 of them by security forces).²³

10. The increased protection that is afforded to the press under international law²⁴ should extend to the wide range of actors who perform a journalistic function in collecting and disseminating

¹⁷ IACHR, Protest and human rights, par. 101.

¹⁸ IACHR, Protest and human rights, par. 85.

¹⁹ IACHR, Protest and human rights, par. 128; See, also, Human Rights Council, Joint Report of the Special Rapporteur on freedom of peaceful assembly and association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, February 4, 2016, par. 44.

²⁰ IACHR, Protest and human rights, par. 228.

²¹ Reporters Without Borders, World Press Freedom Index, Colombia country profile. Available at: <https://rsf.org/en/colombia>

²² FLIP, Annual report 2019, available at:

<https://flip.org.co/index.php/es/publicaciones/informes-anales/item/2315-informe-anual-prensa-acorralada-un-juego-de-violentos-y-poderosos>

²³ FLIP, Annual report 2018, available at:

<https://flip.org.co/index.php/es/publicaciones/informes-anales/item/2188-informe-anual-2017-un-estado-depredador-de-la-libertad-de-prensa>

²⁴ See, e.g., IACtHR, *Case of Velez Restrepo and family v Colombia*, paras 194 and 209; Committee of Ministers of the Council of Europe, Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, Adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies, para 6.

information of public concern or interest. This includes but is not limited to everyone who discharges the function of informing, educating and making the public aware of events of public interest or that should be open to public scrutiny,²⁵ which comprises those who enhance the public's access to news and facilitate the dissemination of information, such as bloggers and popular users of social media.²⁶ The public also has a right to receive such information and ideas.²⁷

11. Given the vital role performed by the media in collecting and disseminating information about events of public concern, in particular its crucial role in providing information on the authorities' handling of public demonstrations and the containment of disorder, the strictest scrutiny must be applied to measures adopted against individuals performing this "public watchdog" function during protests or demonstrations.²⁸ In this context, the right to access information includes the right "to record the law enforcement operation" and States should protect this right.

12. In order for the press to perform its "public watchdog" role, it must not only be free to impart information and ideas of public interest, but it must also be free to gather, collect and assess such information and ideas. Therefore any measure that interferes with the newsgathering activities of individuals carrying out a "public watchdog" role will inevitably interfere with the right to freedom of expression. This role of journalists is particularly valuable in relation to protests or demonstrations, even more so in circumstances where the authorities adopt measures in response to such events. The guarantees of freedom of expression, according to the IACHR, create a State duty to protect journalists and other media actors against violence and entails a right not to be detained, harassed or attacked by law enforcement, as well as not to have their materials retained, confiscated or destroyed²⁹ or "limited in any manner in their rights as a result of practicing their profession."³⁰ Any measure imposed on an individual in relation to their carrying out of a journalistic function at the scene of a demonstration or protest must be subject

²⁵ ECtHR, *Bladet Tromsø and Stensaas v Norway*, App. No. 21980/93, para 59.

²⁶ ECtHR, *Magyar Helsinki Bizottság v Hungary*, App. No. 18030/11, para 164 to 168. See also Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership*, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies, para 3 (recognizes the essential role of the media "widely disseminating information, ideas, analysis and opinions, acting as public watchdogs and providing forums for public debate" is increasingly also carried out by "other media and non-media actors, from multinational corporations to non-governmental organisations and individuals.")

²⁷ IACtHR, *Case of "The Last Temptation of Christ" v. Chile*, Judgment of February 5, 2001, para 74; ECtHR, *The Sunday Times v the UK (no. 1)*, App. No. 6538/74, Judgment of 26 April 1979, para 65.

²⁸ According to the ECtHR, the "watchdog" role of the media in such contexts is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. See ECtHR, *Pentikäinen v Finland* [GC], Judgment of 20 October 2015, para 89.

²⁹ IACHR, Protest and human rights, para 356.

³⁰ IACHR, *IACHR Expresses Concern over Police Actions in Protests and Attacks on Journalists in Argentina* (December 2017), available at: <https://bit.ly/2qqcvlv>.

to “strict scrutiny,”³¹ including the use of force and prosecution of journalists in the context of protests.

13. Fear and insecurity arising from physical attacks and harassment by security forces, or threatened or potential criminal prosecution can have a “chilling effect” on journalists. This “chilling effect” presents an interference not only with a journalist’s right to freedom of expression, but also with the right of that journalist’s potential readership to freely receive the information that would otherwise have been published. As a consequence, public debate is impoverished, which is detrimental to society as a whole. Even short-term detention of members of the media presents a form of harassment and intimidation and a very real and serious risk to freedom of expression and the rights of the media and the wider public.³²

Conclusion

14. The *amici curiae* consider that the actions of the Colombian authorities regarding social protests have unreasonably limited the right to protest, and the rights related to freedom of expression, freedom of peaceful assembly, and the right to public participation under international law. Given that the Colombian Constitution recognizes international law and, more specifically, the conventions and treaties to which Colombia is a party, *amici* urge this Honourable Court to carry out an exhaustive and systematic evaluation of the provisions challenged before it, taking into account both the positive obligations of the State and the conditions for legitimate restrictions under international law as previously discussed.

15. *Amici* request the Court to order the Colombian State to ensure, in any measure it adopts in the context of social protests, the personal integrity of those who participate in them and / or are in the place where they take place, as well as journalists; combat impunity for perpetrators of human rights violations against protesters and journalists; and provide adequate training to the security forces, prosecutors and the judicial system on their obligations under national and international human rights law, and on the requirements to fully comply with those obligations. Such training should also focus on areas of particular risk to journalists, such as protests and public events, in accordance with international law standards. Finally, the Court should also clarify that the monitoring by human rights organisations or journalists of persons detained during demonstrations should be assessed under the same strict scrutiny process applied to interferences to journalistic work mentioned in this submission.

³¹ ECtHR, *Butkevich v Russia*, No. 5865/07, Judgment of 13 February 2008, para 130.

³² Office of the OSCE Representative on Freedom of the Media, *Safety of Journalists Guidebook*, Second Edition, available at: <https://bit.ly/2GRHV5L>.