

POSTSCRIPT TO SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND
INTERNATIONAL LAW

PLAYING WITH FIRE: INTERNATIONAL CRIMINAL LAW, TRANSITIONAL JUSTICE,
AND THE IMPLEMENTATION OF THE COLOMBIAN PEACE AGREEMENT

*René Urueña**

Introduction

On November 30, 2016, after much uncertainty, the Colombian Congress finally approved a historic peace deal between the Colombian government and the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), bringing to an end the country's fifty-year conflict. This peace deal was a historical achievement, and had important ramifications for international law, as discussed in a recent [AJIL Unbound symposium](#). But once the spotlights were off, the government was faced with the daunting challenge of implementing the complex, lengthy accord. In particular, the government had to draw up and pass through Congress the legal and constitutional framework for the transitional justice process—a key component of the peace deal. It is there, in the subtle details of domestic criminal law, where the balance between peace and justice must be achieved.

This essay explores the controversial choices made by both the executive and Congress when enacting the Colombian transitional justice system, in light of international law. Colombia is playing a high-stakes game. The state seems to be drawing on the good will that the peace process generated among allied governments and international institutions to push the limits of international law. While the framework established by the Peace Agreement is mostly in compliance with international legal standards, some of the laws surrounding its implementation are opening spaces that may allow impunity for international crimes.

The first section of this essay discusses the first of such spaces, the new Amnesty Law adopted by the Colombian Congress in December 2016. Section 2, in turn, turns to the constitutional amendment that established the Colombian transitional justice architecture, adopted in March 2017. As will be shown, both the law and the amendment make Colombia vulnerable to an eventual investigation by the International Criminal Court (ICC)—a risk that could offset the delicate balance achieved in the Havana negotiations.

Amnesties for the FARC and International Criminal Law in Colombia's Transitional Justice Regime

The FARC was weakened militarily when it agreed to enter negotiations with the Colombian government, but it was not defeated. Given this position of relative strength, it is naïve to think that the group could be forced to give up arms just to spend the rest of their lives in prison. Amnesties were, thus, a central theme in the negotiations, and a pillar of the Peace Agreement. However, international law imposes [severe limits](#) on granting amnesties for certain

* *Professor and Director of the International Law Program, Universidad de Los Andes (Bogotá, Colombia).*

kind of crimes.¹ Thus, the Agreement had to strike a delicate balance: it prohibited amnesties for crimes against humanity, genocide, and “grave crimes of war,”² but still promised an amnesty that was “as wide as possible,”³ and instructed Congress to enact legislation defining the details.

Congress followed through, and adopted Law 1820 of December 30, 2016, the “Amnesty Law.” In essence, the Law features two types of amnesties: de jure and de facto. De jure amnesties apply to political crimes (like rebellion), and to ordinary crimes connected to the latter (like seizure of aircrafts), defined as such by the Amnesty Law.⁴ Because belonging to a rebel armed group is, in itself, a political crime, de jure amnesties apply to all *guerrilleros*, even those with no criminal record. The President will have to issue a decree with a list of persons to whom de jure amnesty applies, including those not currently undergoing criminal prosecution; the list will not be disclosed to the public. The Prosecutor General, in turn, will terminate current criminal cases against *guerrilleros*, and judges will extinguish the cases of those who have been sentenced.⁵ In all, de jure amnesty will cover around [five thousand militants](#).⁶

De facto amnesty will be applied by a Special Peace Jurisdiction (SPJ), created by the Peace Agreement.⁷ It covers nonpolitical crimes whose connection to political crimes was not established expressly by the Amnesty Law. De facto amnesties will be granted on a case by case basis by the SPJ’s Chamber of Amnesty and Pardon⁸. The Amnesty Law provides that the Chamber should give amnesty for crimes that: i) were specifically related to the rebellion, and were committed during the armed conflict, such as deaths in combat compatible with international humanitarian law, or the detention of combatants during military operations; ii) were defined by the Criminal Code as affecting the constitutional order as a whole, and not a particular victim or group of victims; or, iii) were directed at supporting or financing the rebellion.⁹ Importantly for the Colombian context, the FARC’s drug-trafficking may end up being included in the latter category, and thus subject to amnesty. This point was intensely discussed in the renegotiation phase, but no agreement was reached, and the parties deferred this formidable problem to the Chamber.¹⁰

While open questions persist about the scope of the Amnesty Law, it appears to cover most of the FARC’s actions under domestic law. The crucial challenge, though, comes from international law. While the Peace Agreement’s general framework is that amnesties of international crimes are prohibited, the reality is that, after the failed referendum, language was included that may undermine that general commitment. The final language in the Peace Agreement merits quotation in full: “Crimes against humanity, genocide, grave crimes of war—*this means, any violation of international humanitarian law committed in a systematic form or as part of a plan or policy* ... should

¹ See Juana Acosta, *The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight against Impunity*, 110 AJIL UNBOUND 178 (2016); Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?*, 110 AJIL UNBOUND 172 (2016).

² Fuerzas Armadas Revolucionarias de Colombia, Ejército del Pueblo - FARC-EP & Gobierno de Colombia, [Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera](#), paras. 38, 30, 4 (Nov. 24, 2016).

³ *Id.* at para 23.

⁴ Law 1820 of 2016 art. 15 (Colom.).

⁵ Law 1820 of 2016 art. 19 (Colom.).

⁶ Tatiana Duque, *La ley de amnistía se aplicará a medias (por ahora)*, LA SILLA VACÍA (Dec. 29, 2016).

⁷ For background on the Special Peace Jurisdiction, see Sanchez Leon, [supra note 1](#).

⁸ Law 1820 of 2016 art. 21 (Colom.).

⁹ *Id.*

¹⁰ Peace Agreement 150.

not be object of amnesty, pardon or any equivalent benefit.”¹¹ The highlighted text was added in the negotiations that followed the referendum. The problem is that there is no such thing as “grave” war crimes under international law. Through this move, the parties created a new category of war crimes (those that are “grave,” meaning that they are “systematic”) that cannot be subject to amnesty. By implication, war crimes that are not “grave” (i.e., [nonsystematic](#)¹²) can be subject to amnesties. Granting such amnesties may contradict the prohibition under international law. And yet, the Amnesty Law adopted the wording of the Agreement, defining “grave war crimes” as all violations of international humanitarian law committed in a systematic fashion.¹³ This space for amnesties of non-systematic war crimes could run afoul of the ICC’s Office of the Prosecutor (OTP). Further, if the ICC did begin to prosecute, the FARC could withdraw its participation in the Peace Accord. Colombia is playing a risky game indeed.

The Constitution and Standards Applicable to State Agents

The Colombian amnesty regime is based on the principle of “differential, balanced, simultaneous and symmetric” treatment, which means that state agents (such as the military) receive a treatment that is different from, but “symmetric” to, the FARC’s treatment.¹⁴ State agents should also be entitled to the benefits of the transitional process. However, since state agents do not normally commit political crimes (acting, as they do, *for* the state), they would not be entitled to amnesties. The Peace Agreement and the Amnesty Law thus created a mechanism of special treatment for state agents. However, despite having a different name, the effect of this differentiated mechanism is equivalent to that of the amnesty regime, leading to the termination of criminal processes, criminal responsibility, and criminal sanctions.¹⁵

While the overall framework of the regime applicable to agents of the state seems to be in accordance with international law, once again, the details of its implementation create the risk of noncompliance and impunity. Two issues are particularly controversial: (a) the legal regime applicable by the SPJ to agents of the state; and, (b) the problem of command responsibility.

In March 2017, the Colombian Congress adopted a constitutional amendment setting the framework of the SPJ. Under Article 5 of the amendment, characterization of criminal conduct before the SPJ should be made on the basis of both the Colombian Criminal Code, *and* international criminal law. This is the legal standard applicable to FARC members. However, under Article 21 of the same amendment, characterization of criminal conduct undertaken by agents of the state should be based only on the Colombian Criminal Code, as it existed at the time of the commission of the crime. As a consequence, agents of the Colombian state will not be judged according to international criminal law standards. Neither will they be judged for conduct that was already considered to be criminal under international law, but was not yet incorporated into Colombian criminal law. How this plays out in an analysis of complementarity by the ICC’s OTP is anyone’s guess.

The second issue is command responsibility, which emerged as one of the most controversial topics during both the negotiation and the implementation of the Agreement, for both the FARC and agents of the state. The issue has triggered some of the most dramatic shifts since September 2016, when the first Peace Agreement was signed.

The original version of the Peace Agreement stated that:

¹¹ Peace Agreement 151.

¹² International Committee for the Red Cross Customary IHL Database, [Rule 156](#).

¹³ Law 1820 of 2016 art. 23 (Colom.).

¹⁴ Peace Agreement 149; Law 1820 of 2016 art. 9 (Colom.).

¹⁵ Law 1820 of 2016 art. 9 (Colom.).

responsibility of members of the public forces for the acts of their subordinates should be based on the *effective control of the respective conduct*, in the *knowledge based on the information at their disposal* before, during and after the realization of the respective conduct, as in the means at their disposal to prevent, and in case of occurring, to promote the investigations.¹⁶

A similar wording is used to define the command responsibility of members of the FARC.¹⁷

That standard of command responsibility contradicted international legal standards. First, the original agreement required that, to attribute command responsibility, the SPJ had to demonstrate that the commander had “effective control” of the criminal conduct of his or her subordinates. In contrast, the general international standard is to prove effective command and control, predicated upon the [power of the superior](#) to control the acts of subordinates.¹⁸ Moreover, the original agreement diverged from both the Rome Statute and Protocol I to the Geneva Conventions in that it required a stricter burden of proof of the effective knowledge held by the commanding officer of the criminal offenses of the subordinates, thus making it harder to charge the former for command responsibility.

During the renegotiation after the referendum, the parties sought to adjust the original agreement, bringing it closer to international law. Regarding the first element discussed above, the new text on state agents established that “effective control of the respective conduct is understood as the real possibility that the superior had to exercise appropriate control over his subalterns, in relationship with the execution of the criminal conduct, as is indicated in article 28 of the Rome Statute.”¹⁹ The same paragraph was added regarding FARC commanders.²⁰

But then, in an amazing *volte-face*, and even though this text was made public as part of the new agreement, the government [unilaterally withdrew](#) it just hours before the official signing ceremony, perhaps as a response to the dissatisfaction of the military with the new standard.²¹ In the end, references to the standard of Article 28 of the Rome Statute were dropped. In its place, the more restrictive “effective control” and “effective knowledge” standards were adopted as the basis for the constitutional amendment that was ultimately enacted. The new language in the Colombian Constitution is notably narrow, tailor-made to impose an almost prohibitive threshold for proving command responsibility of agents of the state.²² The tone is revealing:

The responsibility of members of the Public Force for the acts committed by their subordinates should be grounded on the effective control over the respective conduct, on the knowledge based on the information at their disposal before, during and after the execution of the respective conduct, as well as on the means available to prevent the commitment or further execution of the criminal conduct, as long as the factual conditions allow it, and if it had already occurred, to conduct the appropriate investigations.

¹⁶ Original Peace Agreement 137 (emphasis added).

¹⁷ Original Peace Agreement 146.

¹⁸ See, for example, [Prosecutor v. Delalić](#), Case No. IT-96-21-T, Judgment, para. 377 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); [Prosecutor v. Orić](#), Case No. IT-03-68-T, Judgment, para. 307 (Int'l Crim. Trib. for the former Yugoslavia June 30, 2006).

¹⁹ Final Peace Agreement 152 (Nov. 12, 2016).

²⁰ Final Peace Agreement 164 (Nov. 12, 2016).

²¹ Human Rights Watch, [Carta sobre “responsabilidad de mando” en la legislación de implementación del acuerdo de paz](#) (Jan. 25, 2017); See also, Oficina del Alto Comisionado de las Naciones Unidas, [El ‘toque’ de los militares a la Jurisdicción Especial para la Paz](#) (Jan. 30, 2017).

²² One further problem is that the Constitutional amendment only speaks of command responsibility in the case of state agents, possibly excluding this form of criminal liability for FARC commanders. This oversight would be contrary to both Colombia's international obligations and the Peace Agreement itself. My interpretation is that command responsibility exists as a principle of criminal law, even if the constitutional amendment was silent. For FARC, though, the applicable standard would not be that of the Amendment (which is restricted to agents of the state), but less demanding principles of international law, discussed below.

The law then provides for four conditions, each of which has to be proved, for a finding of command responsibility. This is a strict standard that may contradict international law. The standards of “effective control over the respective conduct,” together with four “concurrent” requirements, create an unnecessarily high burden of proof. Specifically, the Colombian formula may contradict the standard put forward by the ICC in the *Bemba* judgement, which held that the demonstration of effective control should be approached on a case by case basis, and that one of the factors that indicate its existence is “the material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities.”²³

Moreover, the constitutional amendment seems to require demonstration of actual knowledge by the commander, which could exclude the possibility of attribution of responsibility based on inferred knowledge—a possibility accepted under international law. International humanitarian law is less demanding. Article 86 of the [1977 Protocol I Additional to the 1949 Geneva Conventions](#) establishes that command responsibility exists

if [commanders] knew, or had information which should have enabled them to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.²⁴

In applying this standard, the Appeals Chamber of the International Criminal Tribunal for Rwanda held in *Bagilishema* that “the reasons to know” standard merely requires that the Chamber be satisfied that the accused had “some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.”²⁵

International criminal law is stricter than international humanitarian law, but is still less demanding than the Colombian constitutional amendment. The Rome Statute requires in Article 28(b)(i) criminal responsibility when: “That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.” The ICC has held that actual knowledge on the part of the commander cannot be presumed, but it must be established through direct or indirect evidence.²⁶ However, even in this context, the ICC accepts proofs of the knowledge by inference, if that inference is the only reasonable conclusion available based on the evidence presented.²⁷ The ICC’s enhanced test would not be admissible under the Colombian system, where knowledge by inference seems to be completely excluded, thus limiting the possibility of finding responsibility of behalf of Colombian military commanders.

Once again, this interpretation put forward by Colombia endangers the legal certainty of the Peace Agreement. In its [last report](#) on the Colombia Peace Process, the ICC’s OTP predictably warned of the need for clarification regarding the content of command responsibility,²⁸ sending [the unmistakable message](#) that the OTP would intervene if the SPJ failed to effectively prosecute military commanders.²⁹ If the Colombian military are led to believe that, due to the Amendment, they cannot be held liable under command responsibility, and then are prosecuted by the ICC, a key pillar of support for the implementation of the Agreement may crumble. The Colombian military remains a powerful political force that could easily derail the implementation of the peace deal, in many different ways. Colombia’s interpretation of international law risks turning out to be too clever for its own good.

²³ [Prosecutor v. Jean-Pierre Bemba Gombo](#), ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, paras. 187–188 (Mar., 21, 2016).

²⁴ [1977 Protocol I Additional to the 1949 Geneva Conventions](#) art. 86(2), June 8, 1977, 1125 UNTS 3.

²⁵ [Prosecutor v. Bagilishema](#), Case No. ICTR-95-1A-A, Judgment (Reasons), para. 28 (July 3, 2002).

²⁶ [Prosecutor v. Jean-Pierre Bemba Gombo](#), *supra* note 23, at para. 191.

²⁷ *Id.* at para. 192.

²⁸ [Corte Penal Internacional ya examina el nuevo acuerdo de paz con Farc. Dice que es necesario tener más claridad en responsabilidad por línea de mando en crímenes graves](#), EL TIEMPO (Nov. 18, 2016).

²⁹ Christof Lehmann, [ICC Chief Prosecutor Bensouda Threatens With Intervention in Colombia](#), NSNBC INT’L (Jan. 27, 2017).