

Colombia Peace Agreement

INTRODUCTORY TEXT: *The Government of Colombia and the Revolutionary Armed Forces of Colombia (FARC-EP) (an armed group) signed a Peace Agreement, concluded as a special agreement under Article 3 common to the four Geneva Conventions. As part of the Agreement, an Amnesty Law was adopted. The Constitutional Court of Colombia ruled on the legality of the plebiscite that determined the rejection of the first proposed text of the Peace Agreement, upholding it with a number of conditions.*

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

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A. FINAL AGREEMENT TO END THE ARMED CONFLICT AND BUILD A STABLE AND LASTING PEACE

[Source: ACUERDO FINAL PARA LA TERMINACIÓN DEL CONFLICTO Y LA CONSTRUCCIÓN DE UNA PAZ ESTABLE Y DURADERA, 24 November 2016, available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (footnotes omitted), unofficial translation]

PREAMBLE

[...]

[1] Accepting that the rules of customary international law continue to govern matters relating to fundamental rights that are not covered by the new Final Agreement, including the rule that “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”;

[...]

INTRODUCTION

[2] After a conflict lasting more than half a century, the Government of Colombia and the FARC-EP have agreed to put a definitive end to the internal armed conflict.

[...]

3. End of the conflict

3.1 Agreement between the Government of Colombia and the FARC-EP on a definitive bilateral ceasefire and cessation of hostilities and on disarmament

[3] The Government of the Republic of Colombia (Government of Colombia) and the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP) [...] hereby agree as follows:

[...]

3.1.1. Introduction

3.1.1.1. Definitions

Definitive bilateral ceasefire and cessation of hostilities (DBCCH)

[4] The definitive end of offensive operations and hostilities between Colombia’s State armed forces and police and the FARC-EP and any conduct not permitted under the Rules governing the DBCCH annexed hereto. The definitive bilateral ceasefire and cessation of hostilities will commence on day D at time H.

Disarmament

[5] A technical procedure with traceable and verifiable processes according to which all the weapons in the possession of the FARC-EP will be handed over to the United Nations (UN) and subsequently used to construct monuments.

3.1.1.2. Purpose

[6] The purpose of this DBCCH and Disarmament Agreement is to definitively end offensive operations between Colombia's State armed forces and police and the FARC-EP and, in general, all hostilities and conduct not permitted under the Rules governing the DBCCH annexed hereto, including any action harmful to the population, with a view to creating the conditions in which implementation of the Final Agreement and disarmament can commence and preparing the institutional environment and the country as a whole for the reintegration of FARC-EP members into civilian life.

[...]

3.1.1.6. Timetable

[7] The Government of Colombia and the FARC-EP have agreed to establish logical steps for the implementation of the DBCCH and disarmament measures. They will therefore comply with the schedule established in the timetable annexed hereto, which details the steps to be followed, taking day D and time H as the reference point.

[...]

3.1.2. Rules governing the DBCCH and disarmament

[8] [...] The Rules governing the DBCCH and disarmament set out conducts and actions that constitute a violation of the ceasefire [...].

3.1.3. Monitoring and verification

[9] For the purposes of implementing this Agreement, a Monitoring and Verification Mechanism (M&VM) shall be established to verify compliance [...] with the Rules governing the DBCCH and disarmament.

[...]

3.1.4. Redeployment of troops and establishment of demobilization zones

[10] For the purposes of implementing this DBCCH and Disarmament Agreement [...] the Government of Colombia and the FARC-EP agree to establish 20 transitional demobilization zones and seven transitional camps. From day D+1, the State armed forces shall redeploy their troops to facilitate the movement of FARC-EP units to these zones and to implement the DBCCH and Disarmament Agreement. From day D+5, all the missions, commissions and tactical combat units on FARC-EP fronts shall move to the agreed demobilization zones and transitional camps, following the routes established by mutual agreement between the Government of Colombia and the FARC-EP.

[...]

3.1.4.1. Transitional demobilization zones

[...]

[11] For as long as the demobilization zones are in operation, the FARC-EP shall be responsible for its combatants within these areas. When FARC-EP combatants leave the camps, they shall do so unarmed and in civilian clothes.

[12] The Government of Colombia shall revoke the order to capture FARC-EP members, once they have entered the demobilization zones and a list of the members present in each of the zones has been submitted. FARC-EP members released from prison under the Amnesty Law may enter a demobilization zone, if they so wish, and be included on the list, with a view to following the process for reintegration into civilian life. Accommodation will be provided within the demobilization zones but outside the camps for such people.

[...]

[13] The FARC-EP members designated to perform tasks [associated with the implementation of the Agreement] must store their weapons in the containers provided for this purpose, subject to verification by the international component of the M&VM. This also applies to any FARC-EP members needing to leave the demobilization zones to receive emergency medical attention or specialist medical treatment not available in the zones.

[...]

[14] The social rule of law shall be fully guaranteed within the demobilization zones. To this end, the civilian authorities shall continue to operate without restriction. The (unarmed) civilian authorities present in the demobilization zones shall remain in place and continue to perform their duties, without prejudice to the provisions of the DBCCH Agreement. Political demonstrations are not permitted in the demobilization zones.

[15] Unarmed civilian authorities shall have unrestricted access to the demobilization zones at all times, except for the parts of the camps where the FARC-EP units are located. Each demobilization zone shall have a reception area to receive people wishing to enter it.

[16] Civilians are not permitted to enter or stay in the camps at any time.

[...]

3.1.4.2. Security zone

[17] A security zone shall be established around each demobilization zone. The presence of State armed forces, police and FARC-EP units shall not be permitted in these zones, with the exception of monitoring and verification teams with police escorts, which shall be allowed to enter when required.

[...]

3.2.2.4 Accreditation and transition to legal life

[18] Following the arrival of FARC-EP members at the demobilization zones and transitional camps, a FARC-EP representative shall be appointed to supply a list of the names of those present to the Government of Colombia. The list shall be accepted by the Government of Colombia in good faith and in accordance with the principle of legitimate expectations, notwithstanding any verifications that may be carried out. The FARC-EP shall be responsible for the veracity and accuracy of the information contained in these lists. The Government shall provide the facilities required to draw up lists in prisons and forward any relevant information available from government institutions.

For accreditation purposes, once the FARC-EP has submitted the list of all the members belonging to its organization, including militias, the Government of Colombia shall begin the process of reviewing and corroborating the information provided. It shall then submit any observations to the FARC-EP and, in the event of discrepancies, a joint resolution mechanism shall be established to review the cases concerned, as part of the Commission to Monitor, Advance and Verify Implementation of the Final Agreement. Such reviews shall not affect acceptance of other people on the list who were not subject to observations.

A fast-track procedure shall be established for the accreditation of FARC-EP members who have laid down their arms and for their transition to legal life. The legal status of those accredited shall be resolved by the granting of a pardon in accordance with applicable legislation until such time as the Amnesty Law is enacted. Those accused of crimes not subject to amnesty under the Amnesty Law agreed in the Final Agreement shall be conditionally released until the Special Jurisdiction for Peace determines their legal status. Any provisions of the Agreement of 20 August 2016 favourable to them shall be applied to facilitate implementation of the disarmament timetable set out in the Agreement of 23 June 2016.

[...]

3.2.2.5 Reintegration of minors leaving FARC-EP camps

[19] Minors who have left FARC-EP camps since the peace talks started and those who do so up to the end of the disarmament process shall be covered by special care and protection measures [...] to ensure that their rights are upheld, with the application of differential treatment that prioritizes their access to health care and education. Such minors shall be granted all the rights, benefits and allowances established for conflict victims and for reintegration in the terms specified in this Final Agreement. Priority shall also be given to reuniting families, wherever possible, and to facilitating the return of minors to their own or a similar community, putting the best interests of the child first at all times. [...] The National Reintegration Agency shall develop a special reintegration programme for children [...]. Once the programme has been approved, the Government of Colombia shall take any necessary legislative steps to ensure its implementation, giving primary consideration to the best interests of the child at all times and taking into account the provisions of international humanitarian law.

[...]

3.3. Obligations of former guerrilla commanders taking on leadership roles in the new political movement that emerges as a result of the FARC-EP's transition to legality to guarantee the successful and sustained implementation of the Final Peace Agreement

[20] The former guerrilla commanders taking on leadership roles in the new political movement that emerges as a result of the FARC-EP's transition to legality will be required, as one of their obligations under the Final Agreement, to actively contribute to ensuring the success of the process to fully reintegrate FARC-EP members into civilian life, by undertaking the task of explaining the Agreement and resolving any disputes that may arise between former FARC-EP members and members of the new political movement in any part of the country in connection with the implementation of the Final Agreement.

[...]

5.1. Comprehensive System for Truth, Justice, Reparation and Non-Recurrence

[...]

b. Components

[21] [...]

- Special Missing Persons Unit responsible for searching for people reported missing in connection with or as a result of the conflict: the purpose of this high-level humanitarian, non-judicial unit is to direct, coordinate and contribute to the humanitarian work of tracing all the people who went missing during the conflict and are still alive and of locating and identifying the remains of those who have died and ensuring their dignified return to their families, wherever possible. The work of this Unit shall in no way replace or hinder the performance of judicial investigations by the State in fulfilment of its obligations.
- Special Jurisdiction for Peace: it shall comprise a number of judicial bodies, including the Amnesty and Pardons Chamber, and the Peace Tribunal. Its purpose is to administer justice and investigate, clarify, prosecute and punish serious human rights violations and serious violations of international humanitarian law. [...]

[...]

5.1.1. Truth: the Commission for Truth, Reconciliation and Non-Recurrence and the Special Missing Persons Unit responsible for searching for people reported missing in connection with or as a result of the conflict

[...]

5.1.1.1.2. Mandate

[22] The mandate of the Commission is to establish the facts about and promote acknowledgement of:

- practices and acts occurring during the conflict that constitute serious human rights violations and serious violations of international humanitarian law, in particular those revealing a consistent pattern or committed on a large scale, and the complex circumstances and territorial dynamics of the contexts in which they were perpetrated
- the collective responsibility of the State, including the Government and other public bodies, the FARC-EP, paramilitary forces and any other national or international group, organization or institution involved in the conflict in any way for the practices and acts referred to in the preceding paragraph.

[...]

5.1.1.2. Special Missing Persons Unit responsible for searching for people reported missing in connection with or as a result of the conflict

[23] The Government of Colombia and the FARC-EP agree that in order to determine the fate of people missing as a result of the acts of state agents, FARC-EP members or any other organization involved in the conflict [...] the Government of Colombia shall set up [...] a special high-level unit of a temporary and exceptional nature, with the close involvement of the victims, to search for people who have gone missing in connection with or as a result of the armed conflict (hereinafter the “Special Missing Persons Unit”). The work of this Unit shall be humanitarian in nature, and [...] it shall enjoy the independence necessary [...] to ensure the continued performance of its work.

[...]

[24] The Special Missing Persons Unit shall have the following functions:

- gather all the information required to establish the full list of people missing in connection with or as a result of the armed conflict.
- strengthen fast-track processes for identifying remains [...].
- coordinate and further processes to search for, locate and identify remains and ensure their dignified return to their families, which will involve:
 - actively seeking, corroborating and analysing all the information available from different sources, including voluntary, confidential interviews with people who participated directly or indirectly in the hostilities and may have information on the fate of those who went missing during the conflict and on the possible location of graves, cemeteries and sites containing the remains of missing people.

[...]

- ensure, wherever possible, that the remains of people who went missing in connection with or as a result of the armed conflict are returned to their families in a dignified manner, always respecting their ethnic and cultural traditions.
- ensure that the families of people who went missing in connection with or as a result of the armed conflict are involved in the processes undertaken to search for, locate and identify remains and arrange for their dignified return.
- provide families with an official report detailing the information that has been obtained on the fate of the missing person once the corresponding search procedures have been completed; remains that are unidentified or unclaimed by their families shall be preserved and remain available to the relevant authorities in order to guarantee the victims' rights.

[...]

- publish regular reports, at least once every six months, on the activities undertaken to search for, locate and identify remains and arrange for their dignified return, ensuring full respect for the victims' right to privacy at all times.
- plan, coordinate and direct the implementation of a national and regional tracing, search and identification plans, in cooperation with other relevant bodies and with the involvement of victims' organisations and human rights organisations.
- create and operate a national register of unidentified graves, illegal cemeteries and burial sites.
- in order to perform its functions, the Special Missing Persons Unit shall adopt procedures to cross-check the information gathered, verify its quality and reliability and identify false information.

[...]

[25] As part of steps to end the conflict, the Government of Colombia and the FARC-EP undertake to provide the Special Missing Persons Unit with all the information available to them that might contribute to determining the fate of persons who went missing in connection with or as a result of the armed conflict.

[...]

[26] [...] The Government of Colombia and the FARC-EP reiterate their commitment to continue providing the ICRC with the information available to them and to facilitate the implementation of these humanitarian measures.

5.1.2. Justice

[27] It has been agreed to establish a Special Jurisdiction for Peace.

SPECIAL JURISDICTION FOR PEACE

[...]

[28] [...] The Special Jurisdiction for Peace is a special system that discharges judicial functions independently and preferentially in relation to matters within its jurisdiction, particularly acts deemed to constitute serious violations of international humanitarian law or serious human rights violations. [...]

[...]

[29] Crimes considered to have been committed as a result of, in the course of or directly or indirectly in connection with the armed conflict are those punishable acts in which the existence of the armed conflict was causal to the commission of the crime or played a substantial part in the perpetrator's ability to commit the crime, the decision to commit it, the manner in which it was committed or the purpose for which it was committed.

[...]

II. AMNESTY, PARDONS AND OTHER SPECIAL TREATMENT: CONTENT, SCOPE AND LIMITS

[...]

[30] [...] For the purposes of the Comprehensive System for Truth, Justice, Reparation and Non-Recurrence, the legal frameworks to be applied are primarily international human rights law and international humanitarian law. When adopting their judgments or rulings, the divisions of the Peace Tribunal, the Chambers and the Investigation and Indictment Unit shall make the system's own legal characterization of the actions in question, based on the Colombian Penal Code and/or the provisions of international human rights law, international humanitarian law or international criminal law, with the mandatory application of the most-favourable-law principle.

[...]

[31] [...] All those who participated directly or indirectly in the armed conflict shall come under the jurisdiction of the judicial component of the Comprehensive System for Truth, Justice, Reparation and Non-Recurrence, as shall all those under investigation for or convicted of rebellion or other crimes related to the conflict, even if they do not belong to an armed rebel organization.

[32] Combatants belonging to unlawful armed groups shall only come under the jurisdiction of the judicial component of the Comprehensive System if their organization signs a final peace agreement with the Government of Colombia.

[...]

[33] [...] Article 6(5) of Protocol II additional to the Geneva Conventions, to which Colombia is a party, shall apply. It states the following: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

[34] [...] In accordance with the provisions of the Final Agreement and this document, the rules on amnesty shall clearly and precisely determine which crimes are subject to amnesty and pardons and the criteria for determining which crimes are related to the armed conflict. [...] Political and related crimes shall include, for example, rebellion, sedition, rioting, illegal carrying of weapons, deaths resulting from lawful acts of war, as defined under international humanitarian law, criminal conspiracy to commit rebellion and other related crimes. [...] The same criteria shall apply to the granting of amnesty or pardons to people who do not declare themselves to be members of a rebel group and are under investigation for or convicted of rebellion or related crimes.

[...]

[35] [...] Two criteria, one inclusive and the other restrictive, shall be used to determine whether an unlawful act is related to a political crime. The first criterion includes as related crimes: 1) unlawful acts specifically related to the conduct of the rebellion and committed in the course of the armed conflict, such as capturing combatants during military operations; 2) crimes directed against the government and the constitutional order; and 3) crimes committed to facilitate, support, conceal or finance the rebellion. Each of the above actions must be defined. Crimes committed to finance the rebellion are deemed to be related crimes when they do not result in any personal gain for the rebels and are not deemed to be a crime against humanity, a serious war crime or genocide.

[...]

[36] The second criterion, which is restrictive in nature, excludes international crimes [...] as established in international law under the Rome Statute.

[...]

[37] [...] Amnesty, pardons or equivalent benefits shall not be granted for crimes against humanity, genocide, serious war crimes (violations of international humanitarian law committed in a systematic manner) kidnapping and other severe deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of child soldiers, as established in the Rome Statute.

[...]

[38] [...] [S]pecial treatment that is simultaneous, balanced and fair shall be established for State agents, based on international humanitarian law. This differentiated treatment shall take into account provisions established in the operational rules of the Colombian armed forces in relation to international humanitarian

law. Command responsibility shall, on no account, be determined on the basis of rank, position or scope of authority alone. For members of the Colombian armed forces to be held responsible for unlawful acts committed by their subordinates, they must have effective control over the subordinate committing the act in question, knowledge of the act based on information available to them before, during and after it was committed and the means to prevent it or to take appropriate steps after it has been committed.

[...]

[39] [...] The legal principles to be applied in determining the responsibility of FARC-EP members are those established in international humanitarian law, international human rights law and international criminal law. [...] For FARC-EP commanders to be held responsible for unlawful acts committed by their subordinates, they must have effective control over the subordinate committing the act in question, knowledge of the act based on information available to them before, during and after it was committed and the means to prevent it or to take appropriate steps after it has been committed. Command responsibility shall not be determined on the basis of rank or position alone.

[40] “Effective control” means the material ability of the superior to exercise proper control over subordinates and prevent or punish the unlawful conduct, as established in international law.

[...]

AGREEMENT ON THE IMPLEMENTATION OF PARAGRAPH 23 OF THE AGREEMENT ON THE CREATION OF A SPECIAL JURISDICTION FOR PEACE

[41] When the rules on amnesty come into force [...] rebels belonging to organisations that have signed a final peace agreement and those charged with or convicted of political or related crimes under the criminal justice system shall be released from prison. These rules shall also determine the authority under which their release is ordered. Those released from prison shall be required to declare that they submit to the authority of the Special Jurisdiction for Peace and remain under its supervision on conditional release, by decision of the latter and in accordance with the conditions established under the Comprehensive System for Truth, Justice, Reparation and Non-Recurrence and verified by the Special Jurisdiction for Peace when it comes into operation.

[...]

[42] Those charged with or convicted of crimes covered by the amnesty who are released, including both FARC-EP members and those who do not acknowledge membership of the FARC-EP, shall remain on conditional release under the authority of the Special Jurisdiction for Peace.

[43] When the Special Jurisdiction for Peace has come into operation, all those released shall be required to appear before it so that the Amnesty and Pardons Chamber, the Truth and Responsibility Chamber, the Legal Status Chamber, the Review Division of the Tribunal for Peace or any other court with jurisdiction can resolve their situation. Their release does not grant them relief from criminal responsibility until their status has been resolved through the Special Jurisdiction for Peace on a case-by-case basis.

[...]

6.1.8. Start of implementation of the Final Agreement

[44] As established in the Agreement of 7 November 2016, the Final Agreement is to be signed as a special agreement under Article 3 common to the Geneva Conventions and deposited, once signed, with the Swiss Federal Council in Bern. The President of the Republic will then make a unilateral State declaration to the United Nations, reporting the Final Agreement to it and requesting its incorporation in a document of the United Nations Security Council under the terms established in the Agreement of 7 November 2016.

[...]

6.6 Agreement on a referendum

[45] The new Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace shall be put to a referendum [...].

[...]

PROTOCOLS AND ANNEXES TO THE AGREEMENT BETWEEN THE GOVERNMENT OF COLOMBIA AND THE FARC-EP ON A DEFINITIVE BILATERAL CEASEFIRE AND CESSATION OF HOSTILITIES AND ON DISARMAMENT

[...]

Protocol on the RULES GOVERNING THE DEFINITIVE BILATERAL CEASEFIRE AND CESSATION OF HOSTILITIES AND DISARMAMENT

[...]

[46] The Government of Colombia and the FARC-EP hereby undertake NOT to:

1. engage in armed combat.
2. prevent or obstruct the work of the M&VM.
3. conceal information that may be relevant to the operation of the M&VM and the implementation of the DBCCH and Disarmament Agreement.
4. deploy armed units or unauthorized personnel in the transitional demobilization zones, the transitional camps or the security zones, as established in the DBCCH and Disarmament Agreement.
5. take action that impedes humanitarian protection or assistance.

[...]

7. carry out acts of violence or make threats that could endanger the lives and physical safety of civilians, especially gender-based violence.

8. take action that could adversely affect the physical wellbeing or moral integrity of people belonging to the other side.

[...]

11. use the established routes, the adjusted field deployments, the demobilization zones, the transitional camps or the security zones for any purpose other than those agreed under the DBCCH and Disarmament Agreement.

[...]

15. infringe the rights or liberties of civilians.

16. The State armed forces and police [...] and [...] the FARC-EP shall not recruit any new men or women into its ranks (guerrillas and militias).

[47] The Government of Colombia hereby undertakes NOT to:

1. treat the people covered by this Agreement in a discriminatory manner.

2. design, plan or carry out operations involving the flight of military aircraft below an altitude of 5,000 feet.

3. design, plan or carry out offensive operations against FARC-EP members (guerrillas, militias) who are complying with the DBCCH and Disarmament Agreement.

4. control the supply of food and medicines to the areas designated as demobilization zones and transitional camps.

5. affect or damage facilities in the demobilization zones and transitional camps.

6. enter the demobilization zones, transitional camps or security zones without first informing and liaising with the M&VM.

7. engage in hostile propaganda against the FARC-EP.

8. obstruct the movement of FARC-EP members to the demobilization zones and transitional camps.

9. prevent FARC-EP members from receiving medical attention.

[48] The FARC-EP hereby undertakes NOT to:

1. show an armed and uniformed presence in any place outside the camps.

[...]

3. acquire, manufacture, carry or transport unauthorized weapons, ammunition or explosives, as defined in the DBCCH and Disarmament Agreement.

[...]

5. destroy or damage the facilities, works, infrastructure or installations of the government or the State armed forces.

[...]

7. increase its fighting capacity.

[...]

Protocol to the Agreement on a definitive bilateral ceasefire and cessation of hostilities and on disarmament concerning security for FARC-EP MEMBERS

[49] [...]

1. FARC-EP commanders are responsible for the safety and security of their personnel inside the demobilization zones and transitional camps.
2. FARC-EP members shall go unarmed and in civilian clothes when outside the camps.

[...]

OTHER AGREEMENTS AND BILL ON AMNESTY, PARDONS AND SPECIAL TREATMENT WITH REGARD TO CRIMINAL PROSECUTION

AGREEMENT OF 7 NOVEMBER 2016

[...]

[50] [...] The Government of Colombia and the FARC-EP agree that the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace shall be signed as a special agreement within the meaning of Article 3 common to the Geneva Conventions of 1949 and shall be deposited with the Swiss Federal Council in Bern or any other such body as may replace it in the future as the depositary of the Geneva Conventions, superseding the previously deposited agreement in its entirety and having the scope defined by the International Committee of the Red Cross in commentary No. 850, which reads:

A peace agreement, ceasefire or other accord may also constitute a special agreement for the purposes of common Article 3, or a means to implement common Article 3, if it contains clauses that bring into existence further obligations drawn from the Geneva Conventions and/or their Additional Protocols. In this respect, it should be recalled that 'peace agreements' concluded with a view to bringing an end to hostilities may contain provisions drawn from other humanitarian law treaties, such as the granting of an amnesty for fighters who have carried out their operations in accordance with the laws and customs of war, the release of all captured persons, or a commitment to search for the missing. If they contain provisions drawn from humanitarian law, or if they implement humanitarian law obligations already incumbent on the Parties, such agreements, or the relevant provisions as the case may be, may constitute special agreements under common Article 3. This is particularly important given that hostilities do not always come to an end with the conclusion of a peace agreement.

[51] [...] The Government of Colombia and the FARC-EP also agree that, once the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace has been approved, a presidential statement shall be submitted, in the form of a unilateral declaration by the Colombian State, to the Secretary-General of the United Nations, citing the United Nations Security Council Resolution of 25 January 2016 and asking the Secretary-General to welcome the Final Agreement and relate it to Security Council Resolution 2261 of 25 January 2016, generating an official Security Council document and attaching as an annex to Resolution 2261 the complete text of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace.

[...]

B. LAW 1820 OF 30 DECEMBER 2016 ON AMNESTY, PARDONS AND SPECIAL TREATMENT WITH REGARD TO CRIMINAL PROSECUTION AND OTHER MEASURES

[Source: LEY 1820 DEL 30 DE DICIEMBRE DE 2016 POR MEDIO DE LA CUAL SE DICTAN DISPOSICIONES SOBRE AMNISTÍA, INDULTO Y TRATAMIENTOS PENALES ESPECIALES Y OTRAS DISPOSICIONES, 30 December 2016, available at: <http://es.presidencia.gov.co/normativa/normativa/LEY%201820%20DEL%2030%20DE%20DICIEMBRE%20DE%202016.pdf> (footnotes omitted), unofficial translation]

[...]

SECTION II

PURPOSE AND PRINCIPLES

CHAPTER II

Applicable principles

[...]

[52] Article 8. Recognition of political crimes. Pursuant to recognition of political crimes and in accordance with international humanitarian law, at the end of the hostilities, the Colombian State shall grant the broadest possible amnesty. [...]

[53] Article 9. Special symmetrical, simultaneous, balanced and fair criminal treatment. State agents shall not be granted amnesty or pardons. State agents who have committed crimes in the course of, as a result of or directly or indirectly in connection with the armed conflict before the Final Peace Agreement came into force shall receive special symmetrical, simultaneous, balanced and fair criminal treatment in accordance with the provisions hereof.

[54] Article 10. Duty to investigate, establish the facts, prosecute and punish. The provisions hereof do not relieve the Colombian State of its duty to investigate, establish the facts of, prosecute and punish serious human rights violations and serious violations of international humanitarian law, as provided in the Agreement on the Creation of a Special Jurisdiction for Peace.

[...]

SECTION III

AMNESTY, PARDONS AND OTHER SPECIAL TREATMENT WITH REGARD TO CRIMINAL

PROSECUTION

CHAPTER I

De jure amnesty

[...]

[55] Article 18. Disarmament. [...] In the case of FARC-EP members who have no arms in their possession because they are in prison, the amnesty shall apply to each of them individually once they have signed a statement in which they undertake to refrain from taking up arms in the future against the legal and constitutional order.

[...]

CHAPTER II

Amnesty and pardons granted by the Amnesty and Pardons Chamber

[...]

[56] Article 23. The Amnesty and Pardons Chamber shall grant amnesty for political and related crimes, which are unlawful acts that meet one or more of the following criteria:

- a) crimes specifically related to the conduct of the rebellion and committed in the course of the armed conflict, such as killing in combat in keeping with international humanitarian law and the capture of combatants during military operations, or
- b) crimes directed against the government and the constitutional order, or
- c) crimes committed to facilitate, support, conceal or finance the rebellion.

The Amnesty and Pardons Chamber shall determine whether the unlawful act in question is related to a political crime on a case-by-case basis.

[57] Paragraph. In no case shall amnesty be granted for the following crimes:

- a) Crimes against humanity, genocide, war crimes, kidnapping and other severe deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of child soldiers, as established in the Rome Statute. (If the terms “vicious” or “heinous” or any other such term with an equivalent meaning are used in the sentencing judgement, the bar on amnesty and pardons shall only apply to unlawful acts listed here as not eligible for amnesty). Unlawful acts that are considered to be common crimes without any relation to the rebellion are those that are not committed in connection with or as a result of the armed conflict and that are motivated by personal gain for oneself or others. Notwithstanding the provisions of this article, unlawful acts that have been independently classified as common crimes shall be considered related crimes when they are committed in connection with a political crime or the rebellion.

[58] The term “serious war crime” means any violation of international humanitarian law committed in a systematic manner.

[...]

CHAPTER III

Jurisdiction and operation of the Legal Status Chamber

[59] Article 28. Legal Status Chamber. The Chamber responsible for determining legal status has the following functions:

[...]

4. Determine, in order to discharge its functions, whether an unlawful act is related to the armed conflict.

[...]

10. Decide whether to grant freedom from prosecution to those who were minors taking a direct or indirect part in the armed conflict when they committed unlawful acts that fall under the jurisdiction of the Special Jurisdiction for Peace and are not subject to amnesty, in keeping with the principles adopted by the United Nations on this subject.

[...]

[60] Article 30. Criteria used by the Legal Status Chamber. The measures referred to in this chapter can be applied to the cases of those charged with crimes committed in connection with or as a result of the armed conflict, provided that they are not:

1. cases in which the accused played a determining role in any of the following: crimes against humanity, genocide, serious war crimes, kidnapping and other severe deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of child soldiers, as established in the Rome Statute, without prejudice to the power provided for in Article 28(2) hereof.
2. common crimes that were not committed in connection with or as a result of the armed conflict or were motivated by personal gain for oneself or others.

[...]

CHAPTER IV

Release

[61] Article 34. Release resulting from application of the amnesty or immunity from prosecution. The granting of amnesty or freedom from prosecution hereunder shall result in the immediate and definitive release of those deprived of their liberty and benefitting from these measures.

[...]

CHAPTER V

Effect of the amnesty

[62] Article 41. Effect of the amnesty. The effect of the amnesty is relief from all primary and accessorial criminal liability and the granting of immunity from prosecution and punishment, action to seek compensation in connection with unlawful conduct and liability in an action for indemnity when the person granted amnesty has held public office. [...]

[...]

Discussion

I. Classification of the Conflict and Applicable Law

1. (*Document A, paras 1, 44, 50*)

- a. How would you classify the situation between the armed forces of Colombia and the FARC-EP?
- b. What is the applicable law?
- c. What is the effect of a special agreement in the sense of GC I – IV, Art. 3? Does the absence of a special agreement reduce the obligations incumbent upon the parties to the conflict, with respect to the applicable treaty and customary IHL rules? (GC I – IV, Art. 3; GC I – III, Art. 6; GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 7 and 158; GC I – IV; P I; P II; CIHL)
- d. When can an agreement between the parties to the conflict be considered a “special agreement”? Can it be considered as such if it merely repeats already existing obligations of the parties to the conflict?
- e. Is the agreement between the Government of Colombia and the armed group FARC-EP a special agreement in the sense of GC I – IV, Art. 3? Which provisions implement IHL? Which do not? What is the risk of mixing political provisions and humanitarian provisions in the same agreement? Does the quote from the ICRC Commentary in *Document A, para. 50* imply that entire peace agreements may constitute special agreements according to common Article 3? (GC I – IV, Art. 3)
- f. Does IHL foresee that Common Article 3 special agreements may or must be deposited with the Swiss federal Council?
- g. Is the peace agreement binding on the Government of Colombia and the armed group FARC-EP? Are the parties to the NIAC bound by the whole of IHL, even if they included in the special agreement only specific IAC rules? Why? According to GC I – IV, Art. 3(4), does the fact that the FARC-EP are able to conclude a special agreement imply a recognition of belligerency or of international legal personality of the group? (GC I – IV, Art. 3)

II. Temporal Scope of Application of IHL

2. (*Document A*, para. 50) What is the temporal scope of application of IHL of non-international armed conflicts? What is the meaning of the statement cited in *Document A*, para. 50 that “hostilities do not always come to an end with the conclusion of a peace agreement”? Do some IHL provisions continue to apply, even after the end of an armed conflict? Under IHL, is there any obligation upon States during peacetime? (See ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Decision, 1995, para. 70; P II, Arts 2 and 19; GC I, Arts 5, 47 and 48; GC II, Arts 48 and 49; GC III, Arts 5, 127 and 128; GC IV, Arts 6, 144 and 145; P I, Arts 3 and 83)

3. (*Document A*, para. 22) What are the responsibilities of the “Commission for Truth, Reconciliation and Non-Recurrence? Under IHL, is there a right to truth for the families of the victims? (CIHL, Rule 117; GC I, Art. 16; GC II, Art. 19)

4. (*Document A*, paras 23 – 26) What IHL obligations do the Government of Colombia and the FARC-EP maintain after the conclusion of the Peace Agreement? What are the obligations towards the dead and the missing? Does the agreement provide for a mechanism for the identification of the dead and the search for the missing as required by IHL? What are the responsibilities of the “Special Missing Persons Unit responsible for searching for people reported missing in connection with or as a result of the conflict”? Must this unit equally inform the family about who is responsible for the death of their relative? Are the IHL rules on treatment of human remains adequately reflected in the Peace Agreement? What is the role of the ICRC in this process? (CIHL, Rules 112, 113, 114, 115 and 116; GC I, Art. 16 and 17; P I, Arts 33 and 34)

III. Amnesties

5. (*Document A*, paras 27 – 37; *Document B*, paras 56 – 61) What is the Special Jurisdiction for Peace, established by the Agreement? What are its objectives? Over which crimes does it have jurisdiction?

6. (*Document A*, para. 29; *Document B*, para. 57) How are the “crimes committed as a result of, in the course of or directly or indirectly in connection with the armed conflict” defined in *Document A*, para. 29? Would you suggest that this is an adequate definition of the nexus required for IHL to apply to conduct in an armed conflict?

7. (*Document A*, paras 37, 41 – 42; *Document B*, paras 52 – 54, 58, 62) Who can benefit from the amnesty provided by the Law 1820/16? What are the effects of the amnesty? Which crimes are amnestiable under the Amnesty Law? Which crimes are excluded? Do you agree with the definition of war crimes provided by the Law in *Document B*, para. 58 as “any violation of international humanitarian law committed in a systematic manner”? Why? Why not? May war crimes be covered by such an amnesty if they were not committed systematically? Is this compatible with the customary obligations of States regarding war crimes? Does the Amnesty Law relieve the State of Colombia from its obligations to investigate and prosecute war crimes if they were not committed systematically? (P II, Art. 6(5); CIHL, Rules 158 and 159)

8. (*Document A, paras 18, 49, 53, 57 – 58*) How does the Agreement regulate the identification of members of the FARC-EP? How is the identification linked with the grant of the amnesty? Is there any procedural guarantee secured to the members of the FARC-EP deprived of their liberty as a consequence of the delivery of the lists to the governmental authorities?

9. (*Document A, paras 38 – 40; Document B, para. 60*)

a. How does IHL address the responsibility of commanders and other superiors for war crimes committed by their subordinates?

b. What rules does the Agreement provide to govern the criminal prosecution of agents of the Colombian State? Is the different treatment for members of State armed forces and for members of armed opposition groups justified? For what kind of conduct listed in *Document A, paras 34 and 35* would State agents need and deserve an amnesty? Or at least the special treatment foreseen in *Document B, para. 53*?

c. What criterion does the Agreement establish to determine the command responsibility of members of the armed forces for crimes committed by their subordinates? Is the same criterion valid for leaders of the FARC-EP? Is the difference justified? Is it foreseen in IHL? Is it compatible with IHL? How does the agreement define “effective control” in *Document A, para. 40*? (P I, Art. 86 and 87; CIHL, Rule 153)