

The role of international humanitarian law in the search for peace: Lessons from Colombia

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Abstract

International humanitarian law (IHL) has traditionally been seen as a legal framework regulating armed hostilities, having little to do with peace. However, recent peacemaking and peacebuilding practice has consistently relied on IHL to frame peace efforts, mainly in non-international armed conflicts. This article explores the relationship between IHL and peace, looking at practice in Colombia, where IHL has been used in a creative way as a means to build trust, facilitate peace negotiations and enforce the resulting peace agreement. Looking at this case, the article offers general insights on how IHL can facilitate the end of conflict and reintegration, frame accountability and reparation, and shield peace deals under a framework in which both State and non-State actors can find a common bargaining zone in their search for peace.

Keywords: international humanitarian law, peace, reconciliation, Colombia, special agreements.

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Introduction

In 2019, the president of the International Committee of the Red Cross (ICRC) addressed the Stockholm Forum on Peace and Development, noting how some of the attendants “could be asking why a representative of a humanitarian organisation is offering introductory remarks to a conference in which the focus is on peace”.¹ This statement reflects how international humanitarian law (IHL), the promotion of which is led by the ICRC, has traditionally been seen as just a legal regime for regulating armed conflict, having little or nothing to do with peace.

Nevertheless, recent peacemaking and peacebuilding practice has consistently relied on IHL to frame peace efforts, particularly in non-international armed conflicts (NIACs), which have become the most common form of armed conflict in recent decades.² Additionally, and despite the lack of significant empirical evidence,³ literature suggests that compliance or non-compliance with IHL can have an impact on the success of peace negotiations and agreements, as well as on the chances for post-conflict reconciliation.⁴ Based on these elements, this paper aims to analyze the extent to which IHL can contribute in the search for peace, both in terms of looking to put an end to armed conflict and building conditions for sustainable reconciliation and respect for the rule of law,⁵ by looking at the Colombian case.

Colombia has not only faced one of the most protracted and complex armed conflicts in the world, but is also considered as one of the countries that has “contributed the most to the development and practical implementation of IHL”.⁶ The country has faced more than six decades of armed conflict, involving different rebel and paramilitary actors and its own armed forces, and has seen debates on the very existence of armed conflict and compliance with IHL, as well as several transitional mechanisms and peace efforts over the years. Additionally, Colombia has consistently relied on international law to understand and deal with its own conflict,⁷ in part because IHL and international human rights law (IHRL) treaties duly ratified by the State have the same normative level as the

- 1 Peter Maurer, “The Contribution of Humanitarian Action to Peace”, SIPRI Forum on Peace and Development, Stockholm, 14 May 2019, available at: www.icrc.org/en/document/where-humanitarian-action-meets-peace-building (all internet references were accessed in October 2021).
- 2 Jonathan Tonge, *Comparative Peace Processes*, Polity Press, Cambridge, 2014, pp. 5–6.
- 3 Huma Haider, *International Humanitarian Law and Peace Processes*, GSDRC Helpdesk Research Report 1399, University of Birmingham, 2016.
- 4 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, Vol. 1, ICRC, Geneva, 2003; Elizabeth Salmón, “Reflections on International Humanitarian Law and Transitional Justice: Lessons to Be Learnt from the Latin American Experience”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006; Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), *Rules of Engagement: Protecting Civilians through Dialogue with Non-State Actors*, Geneva, 2011.
- 5 This understanding is based on Galtung’s definition of negative and positive peace. Johan Galtung, “Violence, Peace, and Peace Research”, *Journal of Peace Research*, Vol. 6, No. 3, 1969.
- 6 Marcela Giraldo Muñoz and Jose Serralvo, “International Humanitarian Law in Colombia: Going a Step Beyond”, *International Review of the Red Cross*, Vol. 101, No. 912, 2006, p. 1118.
- 7 Lina Céspedes-Báez, “Gender Panic and the Failure of a Peace Agreement”, *AJIL Unbound*, Vol. 110, 2016, p. 183.

Colombian Constitution itself.⁸ In such a context, on 24 November 2016 the Colombian government and the guerrillas of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC)—at that time the largest and oldest armed group in the country—concluded an unprecedented peace agreement⁹ which is deeply grounded in international law.¹⁰

Having this background, the Colombian case offers various insightful elements for exploring the role of IHL in the search for peace. In particular, the role of the FARC in more than fifty years of armed conflict and the comprehensiveness of the 2016 Peace Agreement convey debates and mechanisms on how IHL can facilitate, shape and secure peace efforts.

This paper will be developed through four sections. First, it will discuss how the observance of IHL during hostilities can facilitate transitions to peace, reintegration and reconciliation at the end of armed conflict, and how reconciliation can be harder when, as happened in Colombia, IHL has been seriously and massively violated. Second, the paper will explore the role of humanitarian gestures of peace in building trust and advancing the discussion and conclusion of peace negotiations. Here, the paper will analyze how IHL usually frames those gestures and why compliance with IHL is more likely to occur when there is hope for peace in sight. Third, the paper will discuss the role of IHL within the normative framework for accountability and reparation for violations committed during the conflict, which are mandatory conditions for achieving sustainable peace. And fourth, the paper will assess how IHL was used by the parties to the 2016 Peace Agreement in Colombia as a framework to shield the peace deal, through the mechanism of special agreements enshrined by Article 3 common to the four Geneva Conventions. Finally, some general conclusions will be provided, looking for lessons from the Colombian case that could illustrate the still unexplored role of IHL in the search for peace.

IHL application can facilitate transition and reconciliation

As noted by Salmón, “[w]hile reconciliation is not a specific objective of IHL, it is an indirect result of [its] effective enforcement”.¹¹ Indeed, if the warring parties recognize themselves as parties to an armed conflict and conduct themselves in accordance with IHL, their cause will be fought within humanized limits, and abuses that then lead to further resentment can be avoided. It will also pave the

8 Political Constitution of Colombia, Arts 93, 214.2. On this point, see also Constitutional Court of Colombia, Judgment C-255, 1995.

9 Government of Colombia and FARC, *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, Bogotá, 24 November 2016 (2016 Peace Agreement).

10 In the preamble of the Agreement, the parties expressly state their strict respect for the Colombian Constitution and for the general principles of international law, IHRL, IHL and the Rome Statute of the International Criminal Court. *Ibid.*, p. 1. For a comprehensive analysis on the role of international law in the Colombian transition, see César Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice*, Brill Nijhoff, Leiden and Boston, MA, 2021.

11 E. Salmón, above note 4, pp. 329–330.

way for a transition to peace in which amnesties for criminal offences under domestic law can be applied, facilitating agreements and reintegration.¹²

However, the mere existence of IHL “is not enough to ensure that it is applied”.¹³ There are political, humanitarian and legal factors influencing its acceptance and respect by actors involved in an armed conflict,¹⁴ and the way in which IHL is accepted and observed will influence the chances of agreeing on peace or on how to reach a successful transition and reconciliation. Colombia offers mixed views on this matter.

While accepting the existence of an armed conflict or adhering to IHL is not a condition for its application, such an acceptance is a critical factor for increasing the possibilities for its effective respect and for improving the chances of reaching peace. The FARC, as the major armed group in Colombia, argued most of the time that IHL was an instrument adopted by States for their own convenience and that rather than humanizing war, the guerrillas’ goal was to end it.¹⁵ Additionally, this group “affirmed that although it was not specifically committed to all related IHL norms and did not use ‘the technical terms of IHL’, its own internal rules were adjusted to this legal framework”.¹⁶

On the other hand, and despite several decades of armed conflict, the 2002–10 Colombian government tried to deny the existence of a NIAC.¹⁷ Instead, rebel groups were considered as just a terrorist threat, to be dealt with under domestic criminal law.¹⁸ This governmental position made any effort to search for peace with rebel groups almost impossible because of their denial as actors in an armed conflict, even though this period recorded the highest number of victims.¹⁹

In 2011, a new government promoted a Law on Victims and Land Restitution, which departed from the previous administration by recognizing the existence of a NIAC in the country, invoking IHL as a framework to define the condition of millions of victims.²⁰ At the signing of the Law, the Colombian president described this step as a condition for building peace and called on

12 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 6.5; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 159, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

13 Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 357.

14 M. Sassóli, A. Bouvier and A. Quintin, above note 4, p. 89; Geneva Academy, above note 4, pp. 22–24.

15 Geneva Academy, *From Words to Deeds: A Research Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms: Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo (Revolutionary Armed Forces of Colombia–People’s Army, FARC-EP)*, Geneva, 2021, pp. 12–13.

16 *Ibid.*, p. 14.

17 M. Giraldo Muñoz and J. Serralvo, above note 6, pp. 1121–1122.

18 Hernando Salazar, “Colombia decide si reconoce la existencia de un conflicto armado”, *BBC Mundo*, 11 May 2011, available at: www.bbc.com/mundo/noticias/2011/05/110511_colombia_implicaciones_reconocimiento_conflicto_armado_jrg.

19 See the Single Registry of Victims website, available at: www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394.

20 Congress of the Republic of Colombia, Law No. 1448, 2011 (Law on Victims and Land Restitution), Art. 3.

armed groups to act accordingly at such a pivotal moment in history.²¹ This recognition of the armed conflict and its victims is considered to have played a facilitative role in opening the doors for the peace negotiations with the FARC that started in 2012.²²

In November 2012, just after the official debut of the peace talks, the FARC sent a letter to the ICRC expressing that although it did not subscribe to any IHL instrument, it had been committed to respecting IHL principles aimed at protecting civilians, as long as such principles were in accordance with the group's "precarious possibilities of resistance under the asymmetry of armed conflict".²³ In particular, the letter expressed the FARC's acknowledgment of the importance of the 1949 Geneva Conventions and their 1977 Additional Protocols. Then, the FARC asked the ICRC in this letter to serve as a channel to consider the very negotiation agenda as a special agreement under common Article 3.

Beyond the purpose of these statements, and the fact that the guerrillas' request did not have any clear effect at that point, recognizing armed conflict and expressing a specific commitment to IHL play a role in the way parties behave during their confrontations and regarding their chances of seeking peace. Labelling armed actors as terrorists or regular criminals can encourage their violation of IHL²⁴ and exclude them from peace negotiations.²⁵ Conversely, calling them actors in an armed conflict can increase the chances for them to commit to and respect IHL and to be open to peace dialogues.

A 2011 report by the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) on the rules of engagement by non-State armed groups suggests at least three kinds of motivations behind compliance with IHL by those actors, based on research focused on their own practice.²⁶ First, a legal motivation to respect IHL is given by the possibility of receiving amnesties at the end of the conflict for domestic crimes, eliminating the risk of being prosecuted for war crimes and other international crimes. Second, two humanitarian motivations can be found: reducing the humanitarian costs of armed conflict, and the hope of reciprocity in the expectation that respect of IHL norms by one party may encourage respect by the other. And third, there are political motivations based on broad interests such as recognition of the legitimacy of the group's cause, gaining public support, or the idea that better respect of IHL can facilitate peace efforts.²⁷

21 Office of the High Commissioner for Peace, *Biblioteca del proceso de paz con las FARC-EP*, Vol. 1, Bogotá, 2018, p. 67.

22 Sebastián Cortés, "Ley de Víctimas permitió que proceso de Paz prosperara: Expresidente Santos", *El Espectador*, 10 June 2021, available at: https://caracol.com.co/radio/2021/06/10/politica/1623357560_997561.html.

23 FARC, letter to the ICRC, 9 November 2012, available at: <https://prensarural.org/spip/spip.php?article9746>.

24 O. Bangerter, above note 13, p. 377.

25 Geneva Academy, above note 4, pp. 15–16.

26 *Ibid.*

27 *Ibid.*, pp. 22–23.

All these elements reveal a preventive role of IHL²⁸ in avoiding damages that could later make peace and reconciliation very difficult to achieve. In other words, “peace is much more readily restored if it is not also necessary to overcome the hatred between peoples invariably spawned and most certainly exacerbated by violations of IHL”.²⁹ Here, experience in Colombia shows how grave violations of IHL during the conflict are among the main factors challenging reconciliation after the 2016 Peace Agreement.

The high number of victims of armed conflict in Colombia – more than 9 million³⁰ people, representing around 18% of the total Colombian population³¹ – reveals the scale of the violations of IHL in the country, by all actors in the conflict. Building reconciliation in such an unfortunate scenario is a huge challenge.

As a result, one of the main reasons behind the rejection in a plebiscite of the first peace agreement reached by the Colombian government and the FARC in August 2016 was people’s belief that the sanctions included in the agreement were insufficient for the grave crimes committed during the conflict. The new agreement reached in November 2016 was more exigent in delimiting sanctions. However, in the development of cases before the Special Jurisdiction for Peace, the seriousness of violations committed by all actors during the conflict poses significant challenges for reconciliation.

For instance, regarding the war crime of hostage-taking by the FARC, which is tried before the Special Jurisdiction for Peace, evidence brought to the case showed how the guerrillas were aware of the suffering they were causing and the reputational costs that this practice incurred for them.³² They knew that taking civilians and demanding money for their release as a mean to finance their rebellion was a violation of IHL, amounting to a war crime, as they have already accepted.³³ Additionally, they acknowledged how such a practice affected their relationships with local communities and was repudiated by society as a whole. Accepting that at this point is, of course, a big step towards revealing the truth, serving justice and providing reparation. However, the images and stories of horror around hostage-taking, with people who were deprived of their liberty for periods up to fourteen years, under inhumane conditions, and who were subjected to various forms of violence during their captivity, will remain in the memory of victims and society for decades. This situation shows how violating IHL has long-term impacts regarding the chances of reaching peace and

28 E. Salmón, above note 4, p. 328

29 M. Sassòli, A. Bouvier and A. Quintin, above note 4, p. 90.

30 See above note 19.

31 The total population of Colombia is estimated at around 48,3 million people, according to the National Department of Statistics website, available at: www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos.

32 Special Jurisdiction for Peace, Chamber for the Acknowledgment of Truth and Responsibility, Auto No. 019 of 2021, 26 January 2021, paras 273, 282.

33 “JEP: Exsecretariado de las Farc acepta cargos por secuestro y otros crímenes de lesa humanidad”, *El Espectador*, 30 April 2021, available at: www.elespectador.com/colombia-20/jep-y-desaparecidos/jep-exsecretariado-de-las-farc-acepta-cargos-por-secuestro-y-otros-crimenes-de-lesa-humanidad-articulo/.

reconciliation after armed conflict,³⁴ even with a peace agreement and the submission of perpetrators to a system of criminal justice. Here, the quality of the judicial processes and the imposition of appropriate sanctions will play a decisive role in whether victims and society consider the damages caused to have been adequately redressed.

Conversely, observing IHL not only can avoid the horrific memories that affect the reconciliation goal, but it also facilitates the transitional process itself. For such a purpose, Article 6.5 of Additional Protocol II (AP II) provides that authorities in power shall endeavour to grant the broadest possible amnesty for conducts related to the conflict that despite being criminal offences under domestic law do not constitute violations of IHL amounting to war crimes. Here, amnesties play a role in facilitating reconciliation and reintegration, and their application helps both the conclusion and the implementation of a peace agreement.³⁵

In Colombia, the 2016 Peace Agreement explicitly invoked Article 6.5 of AP II, which provides for the granting of “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”. The Agreement explicitly states that this amnesty should be granted for politically motivated crimes, provided that they do not constitute war crimes or crimes against humanity.³⁶

To this end, a Law on Amnesty was adopted in December 2016 defining the conditions for granting amnesty to former FARC rebels. For the first time in the history of transitional processes, this is being decided through a judicial procedure before the Amnesty Chamber at the Special Jurisdiction for Peace. Nevertheless, here it is worth mentioning that at the conclusion of the Peace Agreement, the Colombian president granted an administrative amnesty for those former fighters who, at that moment, did not have a conviction or a judicial process under way before the ordinary justice system for acts related to the armed conflict. Also, ordinary judges granted amnesty to former fighters who were convicted or tried for rebellion and politically related crimes listed in the Law on Amnesty. Out of more than 13,000 FARC members who subscribed to the Peace Agreement,³⁷ about 7,000 received amnesty through one of these two channels.³⁸ Regarding people convicted or tried for other crimes who have applied for amnesty before the Special Jurisdiction for Peace, as of May 2021, 2,222 requests had been denied and only 377 amnesties had been granted.³⁹

All these figures show how amnesty remains a key component in the path to peace. They are a real incentive behind armed groups’ decision to agree on peace, because it is clear that fighters who know that they will unavoidably face criminal

34 O. Bangerter, above note 13, p. 366.

35 E. Salmón, above note 4, pp. 336–337.

36 2016 Peace Agreement, above note 9, p. 161.

37 Agency for Reincorporation and Normalization, *La ARN en cifras*, 2019, available at: <https://tinyurl.com/ejt7zxbx>.

38 Francesco Manetto, “Colombia ya ha concedido la amnistía a más de 7.000 miembros de las FARC”, *El País*, 11 July 2017, available at: https://elpais.com/internacional/2017/07/10/colombia/1499710434_528714.html.

39 Special Jurisdiction for Peace, *Principales estadísticas*, 28 May 2021, available at: <https://tinyurl.com/yc9nwkz6>.

retribution “will often consider that they have nothing to lose and fight to the end”.⁴⁰ It is doubtful to say that expecting to receive amnesty and not to be prosecuted for war crimes was among the considerations for former rebels in Colombia in their decision on whether to conform to IHL. Nevertheless, it is certain that ensuring the broadest possible amnesty played a role in facilitating the conclusion of the 2016 Peace Agreement and the subsequent process of reintegration of former fighters. Additionally, people are more open to accepting amnesties for political offences that do not constitute serious abuses, meaning that they were acts that respected IHL.⁴¹

Finally, an additional point regarding the example of hostage-taking as a war crime is provided by the fact that it was only when the FARC explicitly committed to IHL at the beginning of the peace talks in 2012⁴² that the practice started to decrease. In January 2021, the Special Jurisdiction for Peace issued its first indictment against top members of the FARC for this crime, where it was established that the group had renounced its policy of taking civilian hostages as a means to finance war since 2012.⁴³ It is true that the decision to renounce this practice was due to several reasons, including the FARC’s loss of military capacity. However, the indictment also refers to how many voices inside the FARC considered this practice to be unpopular.⁴⁴ Here, it can be concluded that reputational costs, the idea of gaining some recognition of their cause and the purpose of facilitating peace negotiations could have played a role in the FARC’s decision. In other words, better respect for IHL was observed once this armed group truly understood that this could have an effect on their ongoing peace efforts.

IHL can frame gestures of peace

Even though respect for humanitarian principles is an end in itself, discussions and agreements over humanitarian issues are often an entry point for opening dialogue for peace negotiations.⁴⁵ They can also be seen as gestures of goodwill and trust-building to facilitate the starting, development or conclusion of peace talks.

Three examples illustrate this role of IHL and humanitarian action as a way to frame gestures of peace in Colombia. First, in the course of the peace talks

40 Charles Garraway, “The Relevance of *Jus Post Bellum*: A Practitioner’s Perspective”, in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, T. M. C. Asser Press, The Hague, 2008, p. 159.

41 On this point, even the opponents of the peace agreement who participated in the renegotiation that followed the plebiscite in which the first agreement was rejected on 2 October 2016 included among their proposals a general amnesty for former FARC members who were not involved in international crimes or drug trafficking. See “Propuestas renegociación Acuerdo de Paz”, *Dejusticia*, available at: www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_872.pdf.

42 FARC, above note 23.

43 Special Jurisdiction for Peace, above note 32, paras 283–284.

44 *Ibid.*, paras 273, 282.

45 David Petrasek, *Vive la Différence? Humanitarian and Political Approaches to Engaging Armed Groups*, Centre for Humanitarian Dialogue, 2005, available at: www.hdcentre.org/wp-content/uploads/2016/07/ViveLaDifference-October-2005.pdf.

between the government and the FARC in Havana, the parties issued a joint communiqué on March 2015 announcing a pilot project on demining, as a gesture of de-escalation and as a way to “move forward in building trust” and to “create [better] security conditions for the inhabitants of risk zones”.⁴⁶ This project was named “Gestos de Paz” (“Gestures of Peace”), and it allowed for the removal of landmines from more than 19,000 square metres of land in order to protect more than 560 civilians living in that rural area, and for the implementation of other development projects.⁴⁷ This measure was adopted after three years of negotiation; later, the 2016 Peace Agreement included specific measures on demining. It was even included within the set of restorative sanctions that can be imposed on former guerrillas tried before the Special Jurisdiction for Peace.⁴⁸ In addition to its contribution to de-escalating the armed confrontation, this initiative also responded to the obligation envisaged by customary IHL Rule 83, according to which, “[a]t the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal”.

The second example is related to the search for people reported missing as a result of armed conflict. On this matter, during the peace talks in Havana, the parties issued a joint communiqué on 17 October 2015 announcing two agreements. The first was

to set in motion some initial and immediate humanitarian measures for the search, location, identification and respectable delivery of the remains of persons deemed as missing within the context and due to the internal armed conflict, which will start before the signature of the Final Agreement.

The second involved “the creation of a special Unit to search for persons deemed as missing within the context and due to the armed conflict”.⁴⁹ This agreement was referred to by the parties as being adopted within “the framework of the trust-building measures” that were taking place during the negotiation process. In addition, this communiqué explicitly asked for the ICRC’s support in the design and implementation of special humanitarian plans related to the measures to be adopted before the signature of the final Peace Agreement.

Even though this communiqué did not explicitly invoke IHL, it clearly responded to humanitarian obligations on the part of both the State and the guerrillas. Conventional and customary IHL protects people from the risk of going missing, as well as providing for the search for those who do.⁵⁰ Most explicitly, customary IHL Rule 117, applicable to both international armed

46 Government of Colombia and FARC, Joint Communiqué No. 52, Havana, 7 March 2015, available at: www.peaceagreements.org/viewmasterdocument/1395.

47 President of the Republic of Colombia, *Áreas intervenidas en la Vereda Orejón declaradas libres de minas antipersonal*, 21 December 2016, available at: <http://es.presidencia.gov.co/noticia/161221-Areas-intervenidas-en-la-Vereda-Orejon-declaradas-libres-de-minas-antipersonal>.

48 2016 Peace Agreement, above note 9, p. 174.

49 Government of Colombia and FARC, Joint Communiqué No. 62, Havana, 17 October 2015, available at: www.peaceagreements.org/viewmasterdocument/1368.

conflicts (IACs) and NIACs, establishes that “[e]ach party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.⁵¹ In this sense, the joint communiqué reflects the content of this IHL obligation, for which the parties requested the ICRC’s support in order to move forward with the Peace Agreement that was finally signed in 2016. The search unit announced in the communiqué was also created under the Peace Agreement.

The third example also took place during the peace negotiations. In May 2016, when the government and the FARC were close to reaching a final agreement, they announced an accord to release children under 15 years of age from the camps of the FARC, through the ICRC, as well as the guerrillas’ commitment to no longer recruit persons under 18 years of age.⁵² This was specifically referred to as a trust-building measure aimed at restoring children’s rights and as having “a strictly humanitarian nature”. This measure was described by UNICEF as a “historic accord that contributes significantly to peace in Colombia”.⁵³ Here, even if it is not mentioned in the communiqué, it is clear that the decision to release children under 15 years of age responds to the IHL prohibition on recruiting people under that age, as enshrined in Article 4(3)(c) of AP II.

All these humanitarian gestures were ultimately implementing the IHL duties of both parties to the conflict as a means to build trust in the ongoing peace negotiations. Although the implementation of these duties is a permanent obligation of the parties to the conflict, assuming an express commitment of this kind in the wake of a peace agreement reflects a consideration for the victims and contributes to the transition to peace. In turn, it could be said that non-State armed groups could potentially be more aware of and willing to comply with their obligations under IHL when they can see peace on the horizon than during a protracted armed conflict.

IHL provides a framework for accountability and reparation

In addition to the preventive dimension of the role of IHL in facilitating the search for peace, as seen in the first section of this paper, there is also a punitive dimension, involving the duty to prosecute violations of IHL amounting to war crimes, as well as the duty for reparation. These duties also play a role in the transition to peace.⁵⁴

50 Ximena Londoño and Alexandra Ortiz, “Implementing International Law: An Avenue for Preventing Disappearances, Resolving Cases of Missing Persons and Addressing the Needs of Their Families”, *International Review of the Red Cross*, Vol. 99, No. 905, 2017, p. 549.

51 ICRC Customary Law Study, above note 12, Rule 117.

52 Government of Colombia and FARC, Joint Communiqué No. 70, Havana, 15 May 2016, available at: https://alemania.embajada.gov.co/sites/default/files/news/attachments/version_ingles_-_joint_comuniquete.pdf.

53 UNICEF, *Niños que salgan de las Farc tienen acompañamiento de UNICEF*, 17 May 2016, available at: www.unicef.org/colombia/comunicados-prensa/ninos-que-salgan-de-las-farc-tienen-acompanamiento-de-unicef.

Kant affirmed that “the very concept of peace entails the idea of amnesty”.⁵⁵ Based on this reasoning, amnesties have been the most common formula for negotiated ends of armed conflict around the world. As previously seen, however, IHL enshrines both amnesty and prosecution as normative parameters to be observed at the end of armed conflict, and these, in turn, are conditions to facilitate and ensure an effective transition to peace.

Indeed, according to the 1987 ICRC Commentary on AP II, the provision on amnesty contained in its Article 6.5 is aimed at encouraging “gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided”.⁵⁶ This provision is considered a customary rule of IHL.⁵⁷ At the same time, however, IHL establishes the duty to bring to justice people responsible for war crimes, making explicit that the customary rule on amnesty must be interpreted “with the exception of persons suspected of, accused of or sentenced for war crimes”.⁵⁸ Prosecution of people responsible for those crimes is also considered a customary rule of IHL.⁵⁹

The 2016 Peace Agreement in Colombia developed provisions on both matters under IHL. As discussed above, amnesties were adopted invoking Article 6.5 of AP II for political crimes, excluding international crimes. Amnesty for crimes other than domestic politically related crimes is submitted to judicial decision at the Special Jurisdiction for Peace, where IHL has served as the main parameter to determine whether a conduct can receive amnesty or not.⁶⁰ Up to May 2021, out of 2,222 amnesty requests denied by the Amnesty Chamber of the Special Jurisdiction for Peace, 515 correspond to conducts that have been qualified as war crimes or other international crimes that are excluded from such a benefit.⁶¹

In turn, regarding crimes for which amnesty is not possible, the Peace Agreement adopted a framework on criminal responsibility based on IHL, IHRL and international criminal law.⁶² On this matter, the Special Jurisdiction for Peace is working under a mechanism of macro cases, prosecuting those most responsible for the most serious crimes, and prioritizing certain types of crimes or the territories where they have occurred. Up to now, seven macro cases are ongoing. The most advanced one is the so-called Case 01 on hostage-taking and other serious deprivations of liberty by the FARC. The first indictment on this

54 E. Salmón, above note 4, p. 328.

55 Immanuel Kant, *The Metaphysics of Morals*, 1797, § 58, quoted in Kai Ambos, “The Legal Framework of Transitional Justice”, in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice*, Springer, Berlin, 2009, p. 27.

56 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4618.

57 ICRC Customary Law Study, above note 12, Rule 159.

58 *Ibid.*, Rule 159

59 *Ibid.*, Rule 158.

60 See, for instance, Special Jurisdiction for Peace, Chamber for Amnesty or Pardon, Resolutions SAI-AOI-010-2019, SAI-AOI-D-ASM-051-2019, SAI-AOI-D-003-2020.

61 Special Jurisdiction for Peace, above note 39.

62 2016 Peace Agreement, above note 9, pp. 2, 129.

case was made for war crimes and crimes against humanity, and the grave violations of the FARC's IHL duties were largely proven and reproached in this regard.⁶³

In addition to prosecution and punishment, reparations are a fundamental condition for ensuring conditions for redress and reconciliation.⁶⁴ Even though the right to reparation has been mainly developed under IHRL, since the 1907 Hague Convention IV, IHL has enshrined a right to compensation.⁶⁵ This provision is contained in Article 91 of Additional Protocol I and is implicit in the four Geneva Conventions, which establish that no Contracting Party shall be allowed to absolve itself or any other party of any liability incurred in relation to grave breaches of the Conventions.⁶⁶ All those norms are referred to as compensation and are addressed to IACs. However, the ICRC Customary Law Study considers reparations (in general, not just compensation) as a customary rule in both IACs and NIACs.⁶⁷

Based on human rights treaties and international practice, in 2005 the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,⁶⁸ which identified the existing legal obligations on the matter.⁶⁹ According to these Basic Principles, "victims are persons who individually or collectively suffered harm ..., through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law".⁷⁰ The same year, the Updated Set of Principles to Combat Impunity considered the right to reparation for serious crimes under international law as part of the global commitment to combating impunity.⁷¹

63 Special Jurisdiction for Peace, above note 32.

64 E. Salmón, above note 4, p. 340.

65 Hague Convention (IV) with Respect to the Laws and Customs of War on Land, 18 October 1907, Art. 3.

66 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 51; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 52; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 131; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 148.

67 ICRC Customary Law Study, above note 12, Rule 150.

68 UNGA Res. 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 16 December 2005 (Basic Principles on Reparation).

69 In their preamble, the Basic Principles on Reparation stress that they "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms". It is also important to mention the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, which embody the obligation of reparation and its modalities and conditions (see Articles 30–31 and 34–36).

70 Basic Principles on Reparation, above note 68, para. 8.

71 UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

Following this approach, the 2011 Law on Victims and Land Restitution⁷² established a comprehensive system of administrative reparation addressed to all victims of armed conflict since 1985. The Law is largely inspired by international law. Its Article 3 defines victims as people who individually or collectively have suffered damage as a consequence of a violation of IHL or IHRL within the armed conflict. Then, a set of comprehensive measures of reparations involving restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence were adopted. On this point, the 2016 Peace Agreement did not create a new system on reparations but called for the 2011 Law on Victims to be reinforced in a participatory manner and envisaged other reparation measures to be carried out by persons who are tried before the Special Jurisdiction for Peace and as part of the restorative component of the sanctions imposed on them.

In this way, practice in Colombia shows how IHL has served as a legal regime for framing transitional efforts on criminal accountability and reparation, even before the Peace Agreement was negotiated. Those formulas for redressing victims, granting amnesties and ensuring effective prosecution and sanction for war crimes and other international crimes are fundamental steps to make the transition to peace possible and sustainable. In addition, framing the discussion on IHL, combining both amnesties and criminal accountability through judicial mechanisms before a tribunal created within the Agreement, offered to the parties a bargaining zone in which they were able to find common ground and to ensure a formula conciliating the practical needs of peace with the legal standards required by international law.

IHL can help to legally shield peace agreements

Perhaps the most ambitious use of IHL in the search for peace in Colombia relates to the appeal to the mechanism of special agreements enshrined in common Article 3 as a way to legally shield and enforce the 2016 Peace Agreement.⁷³ This idea came from the FARC since the beginning of the negotiations, when it expressed through a letter to the ICRC its intention to consider the very agenda of negotiation as a special agreement under common Article 3,⁷⁴ as mentioned above in the first section of this paper.

Peace agreements are fundamentally political documents to be enforced through domestic legal instruments.⁷⁵ In the Colombian case, however, both the guerrillas and the government were concerned about the risks that the final agreement could face if a new government that was opposed to it should come to power, amid an environment of strong political hostility towards the peace

72 Law on Victims and Land Restitution, above note 20. The implementation period of this law, initially foreseen as ten years, was extended for ten more years by Law No. 2078 of 2021.

73 For a detailed analysis on the international legal status of the 2016 Peace Agreement, see C. Rojas-Orozco, above note 10, Chap. 2.1.

74 FARC, above note 23.

75 Colin Harvey, "On Law, Politics and Contemporary Constitutionalism", *Fordham International Law Journal*, Vol. 26, No. 4, 2002, p. 999.

negotiations. After refusing the option of translating the Peace Agreement into a new Constitution, the parties relied on IHL to give a sort of international legal status to the agreement, envisaging that this would be a way to avoid eventual modifications in the process of its domestic development and implementation.

To this end, the final Peace Agreement included a formula according to which it was signed “as a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions, as per its international standing”.⁷⁶ As such, after its signing, the Agreement was sent to the Swiss Federal Council in Bern,⁷⁷ as depositary of the Geneva Conventions. To support this formula, the text explicitly invoked and quoted the 2016 ICRC Commentary on Geneva Convention I, stating that the Agreement was given

the scope defined by the ICRC in its commentary ..., which is reproduced below:

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.⁷⁸

The concrete effects of this formula are contested. Even though the ICRC Commentary opened the door for considering peace agreements as special agreements under common Article 3 because of the IHL provisions contained therein, it is not clear if all the political and socio-economic provisions included in a peace agreement could reach the same status as the humanitarian ones, in terms of such an article. In addition, the constitutional norms adopted to implement the Peace Agreement in Colombia relied basically on domestic law to provide the legal security pursued by the parties. In particular, a constitutional amendment stated that all the provisions of the Peace Agreement related to IHL and IHRL should be used as a parameter for the interpretation of all the norms

76 2016 Peace Agreement, above note 9, p. 5.

77 *Ibid.*, p. 213.

78 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, para. 850, quoted in 2016 Peace Agreement, above note 9, p. 290.

adopted to develop the Agreement, and that the Agreement could not be modified in any way during the three presidential terms following its adoption.

Nevertheless, this formula shows the deep faith that the parties placed in IHL to secure their peace effort. Despite the reluctance of the FARC to explicitly recognize their commitment to IHL during their fight,⁷⁹ the function attributed to the mechanism of special agreements was a key factor in their decision to express their commitment to IHL from the beginning of the Peace Agreement negotiations. At the time, IHL offered to the parties a framework that they could both trust, building confidence around their mutual respect for what was agreed upon. Here, the shielding function attributed by the parties to IHL helped to build confidence, mainly on the part of the guerrilla group, which, as a non-State actor, was inclined to be more sceptical towards a formula exclusively based on the domestic legal order that it was fighting against for decades.

Additionally, the parties' aim of having a peace deal grounded in international law influenced the quality of the Agreement both in procedural and substantial terms. First, as long as IHL offers a neutral language, beyond the qualification of conducts and actors under domestic law, it can be considered as a condition facilitating negotiations. This is connected to the element discussed in the first section of this paper, related to the very acceptance of the existence of an armed conflict. Using IHL as a main legal framework during the peace talks helped the parties to reach a common bargaining zone in which agreements were easier to achieve.

Second, for the Agreement to be accepted as an international deal under IHL, it was not enough to include a statement declaring itself a special agreement under common Article 3. The substantive terms of the Agreement had to be in accordance with international legal standards, mainly regarding the limitation of amnesties and effective accountability mechanisms for war crimes and other international crimes. Provisions on both matters were included and developed under IHL, IHRL and international criminal law, as discussed in the third section of this paper.

In this way, this case shows a creative use of IHL in Colombia that truly contributed to facilitating the conclusion of the Peace Agreement, as well as its substantial conformity to applicable international legal standards. Even though it is clear that parties to conflict cannot make peace efforts a condition of their compliance with IHL, this case shows that the guerrillas came to express their specific commitment to IHL only when they were involved in a peace process and used IHL as a way to frame both the negotiations and the resulting agreement.

79 The FARC largely maintained that IHL was an instrument created by States for their own benefit, and thus never took part in it. However, the group considered its own internal rules as embodying the same humanitarian principles, without labelling them as IHL rules. Geneva Academy, above note 15, p. 13.

Conclusions

The use given to IHL in the Colombian path to peace has opened new venues for exploring the potential of this normative framework to facilitate and enforce peace efforts, even though it was not originally seen as having such a purpose. The literature has not explored in an empirical way how observing IHL or not during armed conflict influences the chances of achieving peace. However, as seen in this paper, when IHL is observed, it is easier to conclude and implement peace agreements through the mechanism of amnesty. Violations of IHL demand more sophisticated mechanisms of transition, ensuring effective accountability and reparations but implying harder challenges for peace and reconciliation.

The Colombian case shows how compliance with IHL is less likely to be ensured during a protracted armed conflict than when peace is in sight. In particular, the statements and trust-building gestures by the FARC at the beginning of the peace negotiations and during the process, when it specifically recognized and expressed commitment to IHL, show how the idea that such compliance will have an impact on the success or failure of the peace efforts plays a role in engaging non-State armed groups with IHL. It is clear that IHL is an end in itself and must be respected anyway, but it is interesting to see how the prospects of peace can influence armed actors' commitment to IHL.

Finally, the use of IHL as a regime for framing peace talks and the role attributed to it in Colombia as a means to legally enforce the final Peace Agreement suggest a promising role for this framework in facilitating peace negotiations and the conclusion and implementation of peace agreements. It seems that the ICRC's interpretation of the mechanism of special agreements as including peace agreements helped the negotiating parties in Colombia to see this instrument as a way to legally shield their peace result. As discussed in this paper, it is not clear what the concrete effects of this formula are in terms of protecting the 2016 Peace Agreement from domestic modifications through its claimed international legal status. However, the faith in IHL shown by the parties on this matter influenced the Agreement in both procedural and substantial terms, offering a language and a common frame of reference in which both parties felt confident, and pushing them to build a peace agreement whose content was compatible with applicable international legal standards.